

# Washington International Law Journal

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Volume 15 | Number 2

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6-1-2006

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Jian Zhou

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### Recommended Citation

Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 Pac. Rim L & Pol'y J. 403 (2006).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol15/iss2/3>

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# JUDICIAL INTERVENTION IN INTERNATIONAL ARBITRATION: A COMPARATIVE STUDY OF THE SCOPE OF THE NEW YORK CONVENTION IN U.S. AND CHINESE COURTS

Jian Zhou<sup>†</sup>

*Abstract:* The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been praised as one of the most efficient and powerful multilateral legal instruments in promoting international commercial arbitration. The implementation of the Convention, however, depends heavily on the domestic legal mechanisms of contracting states. By strategically adjusting its scope, local courts may expand or limit the benefits of the Convention in a significant way. The comparison between the practices of United States and Chinese courts present two extreme examples of this scope issue. There is considerable room to improve the domestic implementation of the Convention in both countries. Comparison of the two countries also reveals that appropriate domestic judicial intervention on the scope of application is required in order to secure the benefits offered by the Convention.

## I. INTRODUCTION

Arbitration has become a popular alternative dispute resolution avenue, both domestically and globally. Arbitration is praised for its speed, the autonomy it provides to parties, the arbitrators' technical expertise, the confidentiality of proceedings, and its relatively low cost.<sup>1</sup> When the setting for commercial dispute resolution is international, arbitration precludes the uncertainty of procedures in foreign courts. This is especially attractive for Western investors in commercial disputes involving developing countries of different cultures and conflicting political ideologies, such as Communist

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<sup>†</sup> Jian "Joe" Zhou, S.J.D. 2004, LL.M. 1999, M.L.I. 1998 Lecturer of Law, 1999-2000, University of Wisconsin Law School; LL.B. 1995, LL.M. Candidate 1995-1997, East China University of Politics & Law. Dr. Zhou is a member of New York State Bar and is currently a co-managing attorney at Zhang & Associates, PC (Houston, TX, New York, NY, and Chicago, IL). This article is based on part of the author's S.J.D. dissertation. The author would like to express his gratitude to many who offered assistance and encouragement through his S.J.D. The author would like to especially extend his thanks to Prof. Charles R. Irish of the University of Wisconsin Law School for his inspiration and guidance through the research project; to Mr. Chenglin Liu, International Law Librarian at the University of Houston Law Center, for his kind assistance and generous support; to Dr. Ellen H. Steury for her continuous encouragement on the author's academic endeavor; and, to his wife, Xixue Mei, his son, Dean, and his daughter, Ellen, for their love and patience. The author may be reached at joejianzhou@gmail.com.

<sup>1</sup> See generally Welber Barral & Frederico Cardoso, *Global Developments: The New Brazilian Arbitration Act: A Firm Step Forward*, 5 CROAT. ARBIT. Y.B. 81 (1998).

China.<sup>2</sup> Enforcing arbitral awards in a foreign country is also much more practical than enforcing a court judgment due in large part due to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention” or “Convention”).<sup>3</sup>

The New York Convention offers a powerful instrument for enforcing arbitration agreements and arbitral awards among its 130 plus contracting parties.<sup>4</sup> It requires each contracting state to recognize and enforce arbitral awards entered in the territory of another state, as well as those awards that a contracting state considers non-domestic awards.<sup>5</sup> It also requires contracting states to recognize written arbitration agreements.<sup>6</sup> To benefit from the Convention, an arbitration proceeding must fall within the Convention’s scope. Although the Convention’s drafters strove for an unambiguous compromise among different legal systems, the implementation of the Convention in domestic courts differs dramatically from one country to another and, in some cases, from one court to another within the same country.<sup>7</sup>

In recognizing and enforcing awards that fall under the scope of the Convention, contracting states are required to apply the criteria set forth therein.<sup>8</sup> Unfortunately, as a result of compromises among nations, the scope of the Convention is not clearly defined. Ambiguity of language in the Convention, discrepancies in legal concepts, and judicial discretion give

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<sup>2</sup> See generally Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 ASIAN-PAC. L. & POL’Y J. 13 (2000) (discussing the legal cultural differences between East Asian countries and the West, and introducing traditional Chinese legal culture).

<sup>3</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. As of January 2004, the New York Convention had 136 contracting members, including all major economies in the world. A list of the members is available at U.N. Commission on International Trade Law, *Status: 1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited June 1, 2006). For a historical background of the New York Convention, see JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KROLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 20-22 (2003). Due to the lack of an effective multilateral judicial assistance treaty, enforceability of a judgment in a foreign country is very limited. For example, there is no binding international judicial assistance treaty that commonly applies to both China and the United States. A judgment from a foreign court will be considered as factual evidence in evaluating the entire case in a U.S. court if there is no binding judicial assistance agreement on judgment enforcement between the foreign country and the United States.

<sup>4</sup> A list of the members is available at U.N. Commission on International Trade Law, *Status: 1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 3.

<sup>5</sup> New York Convention, *supra* note 3, art. I.

<sup>6</sup> *Id.* art. II.

<sup>7</sup> See, e.g., *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983). To illustrate the difficulty in reaching a uniform understanding of the Convention, the *Bergesen* court wrote: “The family of nations has endlessly—some say since the Tower of Babel—sought to breach the barrier of language.” *Id.* at 929; see also discussion *infra* Parts IV-V.

<sup>8</sup> New York Convention, *supra* note 3, art. I(1).

rise to complexity in the Convention's coverage. Moreover, because it is impossible to require universal procedural protections in different legal systems, each contracting state must determine the implementation procedures of the Convention within its jurisdiction. In order to understand its application, one must put the Convention in the context of each contracting state's legal system.

Both China and the United States are members of the New York Convention.<sup>9</sup> However, because of differences in court systems, sources of law, and legal methodology, the Convention's application differs dramatically between the two countries.

This article compares the effects of domestic court interventions on the scope of the New York Convention, in both China and in the United States. Most significantly, if a claim is not within the scope of the Convention, the purported substantive benefits provided in the Convention become meaningless to the claiming party. Local court interpretations are therefore crucial to achieving the Convention's goals. In general, China and the United States both support the New York Convention. However, the two countries stand apart in legal approach and analytical methodology in implementing the New York Convention. Through case law, this article uncovers the impact and consequences of local court intervention on the scope of the Convention. This article also proposes appropriate approaches that local courts in China and the United States should adopt.

Part II introduces the basic arbitration legal framework in both China and the United States. Part III offers a theoretical analysis of the Convention's scope of application. Part IV closely examines leading cases in the United States on the scope of application issues and criticizes the inconsistencies of court practice. Part V focuses on leading Chinese case studies regarding the Convention's scope of application and its related impact on foreign businesses in China. The Conclusion argues that inappropriate court intervention on the application of the Convention jeopardizes its goals, and offers suggestions for improvement to judiciaries in both China and the United States.

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<sup>9</sup> The Convention became effective in the United States on December 29, 1970. 21 U.S.T. 2517. See also DECISIONS ON CHINA'S ACCESSION TO THE CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, adopted by the 18th Meeting of the 6th Session of the Standing Committee of the NPC on December 2, 1986.

## II. ARBITRATION LEGAL FRAMEWORK IN CHINA AND THE UNITED STATES

Both China and the United States are members of the New York Convention. However, common membership does not necessarily guarantee a unified application of the terms of the Convention. Domestic courts and implementing laws play critical roles in enforcing arbitral awards under the New York Convention. As a result, different approaches in interpreting the Convention by different local courts may result in striking discrepancies in legal consequences. An understanding of domestic legal sources and court systems in the United States and China is essential to conducting a comparative study on the application of the New York Convention in the two countries.

### A. *Features of the Arbitration Legal Framework in China*

Chinese law treats international arbitration cases differently from domestic ones. In general, parties to international arbitration cases have more autonomy and greater freedom from government interference: judicial review of international arbitration is limited to procedural issues, while review of domestic arbitration looks at substantive issues. Moreover, arbitration institutes in China are separated into international and domestic bodies. Though the jurisdiction of domestic and international arbitration commissions overlap, international arbitration institutes handle most international arbitrations. Furthermore, Chinese arbitral institutes offer different procedural rules for international arbitration and usually provide participating parties in international arbitration cases with broader autonomy than in domestic arbitration cases. Finally, the New York Convention is ultimately implemented in China through a unitary court system that has less judicial independence.

#### 1. *The Chinese Court System*

China has four levels of courts, corresponding to the central level and the three local levels of government.<sup>10</sup> Unlike the separate court systems

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<sup>10</sup> XIAN FA [Constitution] art. 128 (1982) (P.R.C.). The central people's government in Beijing has ultimate power over the entire country. It consists of the National People's Congress, the State Council, the Supreme People's Court, and the Supreme People's Procuratorate. Below this, there are thirty-one provincial governing bodies. Within these provincial jurisdictions, there are three major lower levels of governance: municipal, county and district, and township. Each lower level is subordinate to the higher level with authority covering the geographical area. The governmental structure at each level mirrors that of the central government, except that the township level does not have a standing committee for the people's congresses. *See id.* ch. 5, Local People's Congresses and Local People's Governments.

under the federalist system in the United States, however, these several levels of courts form a unitary system. The Supreme People's Court has highest authority.<sup>11</sup> Beneath it, there are three levels of local courts: the high people's courts at the provincial level, the intermediate people's courts at the prefecture or major municipality levels, and the basic people's courts at the county or municipal district levels.<sup>12</sup> Each court is organized by and responsible to a people's congress at the corresponding level.<sup>13</sup> The president of each court is elected by the people's congress at that level, and other judges are appointed by the standing committee of the people's congress.<sup>14</sup> Unlike the independent operation of court systems in the United States, a lower level court in China is subject to supervision from the higher level courts of proper jurisdiction.<sup>15</sup> This supervision is in addition to appellate review, and a higher court may intervene in a lower court's trial proceedings. The Supreme People's Court also has the authority and duty to interpret laws, administer the judiciary of all levels, and perform quasi-legislative activities.<sup>16</sup>

Within a Chinese court, judicial duties are usually divided into five branches: criminal, administrative, economic, civil, and enforcement.<sup>17</sup> In order to meet special needs, several higher-level courts also have specialty divisions, such as an intellectual property branch.<sup>18</sup> Furthermore, case assignments in a court are determined by how the disputes are classified. For example, commercial arbitration disputes are classified as economic cases and are usually handled by the economic division in a court.<sup>19</sup> Unlike

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<sup>11</sup> *Id.* art. 127.

<sup>12</sup> See Organic Law of the People's Court of PRC, art. 18, 23, 26, adopted at the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Second Meeting of the Sixth National People's Congress on September 2, 1983 (available in LEXIS' Chinalawinfo library, PRCLEG 44).

<sup>13</sup> XIAN FA art. 128.

<sup>14</sup> Organic Law of the People's Court, *supra* note 12, art. 35. Some exceptions exist for intermediate prefectural, provincial and municipal courts directly under the central government. *Id.*

<sup>15</sup> XIAN FA art. 127.

<sup>16</sup> RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 283 (2002); see also Organic Law of the People's Court, *supra* note 12, arts. 30, 33.

<sup>17</sup> Chinese national law provides that each court should have at least three functional branches, namely, criminal, civil and economic branches. Intermediate or higher level courts have discretionary power to set up "such other divisions as are deemed necessary." The enforcement branch is not a division adjudicating cases but it was offered status equivalent to the other branches. See Organic Law of the People's Court of PRC, *supra* note 12, arts. 24, 27, 31.

<sup>18</sup> DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 201 (2003).

<sup>19</sup> Economic cases are those involving a sector of the economy, such as machinery, consumer products, and individual enterprise. Contractual disputes are assigned to the economic division, except for real estate contracts. In general, the civil division handles disputes which involve individuals, family

court practice in the United States, where the assigned judge or a bench of judges decides cases independently, each Chinese court has a committee which adjudicates major and complicated cases.<sup>20</sup> This committee has final authority, and its members, appointed by the people's congress at the same level, are selected from the senior judges of the court.<sup>21</sup>

Any level court may be a trial court in China. The nature and importance of a case are considered in determining original jurisdiction.<sup>22</sup> County or district level basic courts are courts of general original jurisdiction for civil litigation, but there are many exceptions. For example, intermediate courts have original jurisdiction over significant foreign-related cases, cases that have "major impact" in their respective jurisdictions, and cases that are designated by the Supreme People's Court from time to time.<sup>23</sup> The Supreme People's and High People's Courts may also preside over the trial in cases of major impact, and a higher level court always has discretionary authority to remove a case from a lower court.<sup>24</sup> The "major impact" criteria in civil cases are usually the monetary amount in dispute, the potential impact of the outcome, and the geographical coverage of the dispute.<sup>25</sup> Intermediate and higher courts are also courts of appeal for decisions from the immediate lower level courts in their jurisdiction.<sup>26</sup> Unlike the legal review function of an appellate court in the United States, an appellate court in China also investigates and determines facts.<sup>27</sup>

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relationships, or personal and family property (e.g., housing, labor disputes, inheritance, tort, defamation, and divorce).

<sup>20</sup> Organic Law of People's Court, *supra* note 12, art. 11; *see also* PEERENBOOM, *supra* note 16, at 284.

<sup>21</sup> The judicative committee consists of the president, the vice president, the chief judge for divisions, and senior judges, appointed by the standing committee of the people's congress at the corresponding level. Organic Law of People's Court, *supra* note 12, art. 11.

<sup>22</sup> *See* Civil Procedure Law of PRC, art. 18-21, adopted on April 9, 1991 at the Fourth Session of the Seventh National People's Congress (available in LEXIS' Chinalawinfo library, PRCLEG 19) [hereinafter 1991 Civil Procedure Law].

<sup>23</sup> *Id.* art. 19.

<sup>24</sup> *Id.* art. 21.

<sup>25</sup> *See* CHOW, *supra* note 18, at 205-08 (laying out the framework for the jurisdiction of Chinese courts in both civil and criminal cases, and noting that all criminal cases involving foreigners are to be tried in the first instance by an intermediate people's court).

<sup>26</sup> 1991 Civil Procedure Law, *supra* note 22, arts. 147-159 (ch. 14, Second Instance Procedures).

<sup>27</sup> *See* Lingyun Gao, Comment, *What Makes a Lawyer in China? The Chinese Legal Education System After China's Entry into the WTO*, 10 WILLAMETTE J. INT'L L. & DISPUTE RES. 197, 210 (discussing generally Chinese court systems and pointing out differences in appellate procedures between the United States and China).

## 2. *Arbitration Related Legal Sources in China*

### a. *International Treaties*

According to Chinese rules on conflict of laws, international conventions (or treaties) of which China is a member or a signatory apply in Chinese courts directly. In cases of conflict between international conventions and Chinese domestic laws, international conventions or treaties prevail.<sup>28</sup> Thus, arbitration related conventions of which China is a member, such as the New York Convention, apply to cases in Chinese courts directly and prevail over any conflicting domestic laws.

### b. *1994 Arbitration Law*

The adoption of the 1994 Arbitration Law<sup>29</sup> was a significant milestone in Chinese legislative history. Though the main focus of the law was to reorganize the domestic arbitration system, it impacted international commercial arbitration in China as well.<sup>30</sup> The seventh of its eight chapters contains special provisions for foreign-related arbitration.<sup>31</sup> The other chapters also apply to foreign-related arbitration as long as they do not conflict with these special provisions.<sup>32</sup> The law does not, however, cover foreign arbitration that is not administrated in Chinese territory.

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<sup>28</sup> If any international treaty concluded or acceded to by China "contains provisions differing from those in the laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations." GENERAL PRINCIPLES OF THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA art. 142, adopted at the Fourth Session of the Sixth National People's Congress, promulgated by Presidential Order No. 37, Apr. 12, 1986, effective Jan. 1, 1987, (available in LEXIS' Chinalawinfo library, PRCLEG 1165); see also Sheng Chang Wang, *The Impact of New Contract on Arbitration*, ARB. & L. NEWSL, June 1999, at 5 (in Chinese).

<sup>29</sup> Arbitration Law of PRC, adopted by ninth session of the Standing Committee of eighth NPC on Aug. 31, 1994, effective on Sept. 1, 1995 (available in LEXIS' Chinalawinfo library, PRCLEG 710) [hereinafter 1994 Arbitration Law].

<sup>30</sup> Before the 1994 Arbitration Law became effective, domestic arbitration bodies were mainly administrative organs of the Chinese government, with commissions set up to govern different types of disputes (such as the economic contract arbitration commission, labor dispute arbitration commission, and the technology contact arbitration commission). By adopting the 1994 Arbitration Law, the Chinese domestic system was unified, and relatively independent arbitration commissions were set up in more than 140 municipalities around the country. Newly established arbitration commissions have broad jurisdiction over contractual or property disputes, except for labor and farming contract disputes. Katherine L. Lynch, *Chinese Law: The New Arbitration Law*, 26 HONG KONG L.J. 104, 105.

<sup>31</sup> 1994 Arbitration Law, *supra* note 29, ch. 7, arts. 65-73.

<sup>32</sup> *Id.* art. 65 ("Matters not covered by this chapter shall be handled according to other relevant provisions of this law").



c. *1991 Civil Procedure Law*

Enacted in 1991, the Civil Procedure Law of the PRC is another significant piece of arbitration-related legislation.<sup>33</sup> It separates arbitral awards into domestic, foreign-related, and foreign awards,<sup>34</sup> with each receiving a different standard of judicial review. For domestic awards, courts may conduct a substantive review of evidentiary issues, application of law, and corruption of arbitrators.<sup>35</sup> However, foreign-related awards entered by a Chinese arbitration tribunal invite only procedural review of such matters as whether the arbitration process followed the procedural rules and whether parties were given proper notice for hearings.<sup>36</sup> The law also requires that Chinese courts recognize and enforce foreign arbitral awards in accordance with the New York Convention.<sup>37</sup> When an award is entered in a foreign country that is not a member of the Convention, Chinese courts will recognize and enforce the award according to the principle of reciprocity.<sup>38</sup> The provisions setting the standards for judicial review of arbitration awards are incorporated into the 1994 Arbitration Law by direct reference.<sup>39</sup> It is significant that a court's ruling on a denial of a request for enforcing an arbitral award is not eligible for appeal, while a ruling on the validity of an arbitration agreement may be appealed.<sup>40</sup>

d. *State Council Administrative Regulations and Interpretations*

The State Council, as the top level of the executive branch, has constitutional authority to both enact administrative regulations and implement laws.<sup>41</sup> In addition, ministries and commissions under the State Council have issued numerous implementation guidelines and administrative interpretations of laws.<sup>42</sup>

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<sup>33</sup> 1991 Civil Procedure Law, *supra* note 22.

<sup>34</sup> *Id.* arts. 217, 260, 269.

<sup>35</sup> *Id.* art. 217.

<sup>36</sup> *Id.* art. 260.

<sup>37</sup> *Id.* art. 269.

<sup>38</sup> *Id.*

<sup>39</sup> 1994 Arbitration Law, *supra* note 29, art. 63 (referring to article 217 of the 1991 Civil Procedure Law as ground for denying enforcement of domestic arbitration awards); *see also* 1994 Arbitration Law, *supra* note 29, art. 71 (referring to article 260(1) of the 1991 Civil Procedure Law as ground for denying recognition or enforcement of arbitral awards).

<sup>40</sup> 1991 Civil Procedure Law, *supra* note 22, arts. 140(1)(b)(i), 140(2).

<sup>41</sup> XIAN FA arts. 85, 89, 90.

<sup>42</sup> The Chinese system of legal interpretation is unique. The Standing Committee of the NPC has legislative interpretative power; the State Council has administrative interpretative power; and, the SPC has judicial interpretative power. CHOW, *supra* note 18, at 168-71.

By adopting administrative orders and interpretations, the State Council has played a key role in the interpretation of the 1994 Arbitration Law. During the transitional period when the domestic arbitration system was being reorganized under the 1994 Law, the State Council issued several administrative guidelines of significant impact. They covered the organizational structure of arbitration commissions, administrative registration of the commissions, sample arbitration procedural rules, fee-charging schedules, and gave detailed rules for a smooth transition of operations of the old system into the new system.<sup>43</sup>

Additionally, the State Council aggressively intervened in a jurisdictional dispute between the local arbitration commissions and the foreign-related arbitration commissions.<sup>44</sup> Prior to the adoption of the 1994 Arbitration Law, foreign-related arbitration institutes, namely China International Economic and Trade Arbitration Commission (CIETAC) and China Maritime Arbitration Commission (CMAC), enjoyed exclusive jurisdiction over foreign-related cases.<sup>45</sup> The 1994 law ambiguously provides that “foreign-related arbitration commissions *may* be established by the China International Chamber of Commerce.”<sup>46</sup> The newly established local arbitration commissions took the position that the law was not intended to confer exclusive jurisdiction over foreign-related cases to foreign-related arbitration commissions, but rather that jurisdiction was meant to be concurrent.<sup>47</sup> When the debate heated up, the State Council, through its sub-agency, issued a notice that gave local arbitration commissions the concurrent jurisdiction they desired.<sup>48</sup> Many criticized the State Council for

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<sup>43</sup> See, e.g., Notice of Bureau of Administrative Affairs of the State Council on Preparation Work for Re-establishing Arbitration Institution and Establishing Chinese Arbitration Association, issued on Nov. 13, 1994 (designating seven municipalities as trial cities for establishing arbitration commissions under the new law and providing guidelines for several organs under the State Council to work on regulations for establishing arbitration institutions) (on file with Pacific Rim Law & Policy Journal); see also Notice of Bureau of Administrative Affairs of the State Council on Further Efforts on Re-Establishing Arbitration Institutes, issued May 26, 1995 (on file with Pacific Rim Law & Policy Journal); see also Notice of Bureau of Administrative Affairs of the State Council on Publishing Plan for Re-Establishing Arbitration Institutes, Registration Method for Arbitration Commissions, and Method on Fee Charging Standards for Arbitration Institutes, issued July 28, 1995 (on file with Pacific Rim Law & Policy Journal).

<sup>44</sup> China International Economic and Trade Arbitration Commission (CIETAC) and China Maritime Arbitration Commission (CMAC) have been China’s primary international arbitration institutes since the 1950’s.

<sup>45</sup> See *infra*, note 275 and accompanying text.

<sup>46</sup> 1994 Arbitration Law art. 66 (emphasis added).

<sup>47</sup> Challengers argued that the law would have used “shall” instead of “may” if it intended to reserve jurisdiction on foreign-related cases exclusively to foreign arbitration commission. ZHIDONG CHEN, 《国际商事仲裁法》 [INTERNATIONAL COMMERCIAL ARBITRATION] (in Chinese) 61 (Law Press, 1998).

<sup>48</sup> See BUREAU OF ADMINISTRATIVE AFFAIRS, STATE COUNCIL, NOTICE ON SEVERAL PROBLEMS TO BE CLARIFIED CONCERNING THE THOROUGH IMPLEMENTATION OF THE PRC ARBITRATION LAW (June 8, 1996) (“[T]he main duties of the re-organized arbitration commissions shall be to accept domestic

going beyond its authority and expanding local commissions' jurisdiction in conflict with the 1994 Arbitration Law.<sup>49</sup>

*e. Judicial Interpretation by the Supreme People's Court and Leading Cases of Higher Courts*

Through the Organic Law of the People's Courts, the National People's Congress delegated to the Supreme People's Court the authority to interpret laws and issue practical rules.<sup>50</sup> A narrow view of judicial interpretation in China is that it is limited to explanations, provisions, and replies of the Supreme People's Court, that are adopted through a quasi-lawmaking procedure.<sup>51</sup> A judicial interpretation will not be effective until approved by the judicial committee of the Court and published in the People's Court Daily (*renmin fayuan bao*).<sup>52</sup> Once adopted, a judicial interpretation is a binding legal source to which all courts may cite as a legal basis in their decisions or rulings.<sup>53</sup> However, the Court's judicial interpretations cannot conflict with the laws of the National People's Congress or State Council regulations, nor are they binding upon either of these two bodies.<sup>54</sup>

A broader concept of judicial interpretation is that it not only includes decisions of the Supreme People's Court ("SPC"), but also some decisions of the high people's courts ("HPC") and the intermediate people's courts ("IPC"). In theory, unlike the American common law system, Chinese courts do not adopt the doctrine of *stare decisis* and precedents therefore do not have binding authority in lower courts.<sup>55</sup> In practice, however, the SPC

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arbitration cases. Where the parties to a foreign-related arbitration case voluntarily select arbitration by a reorganized arbitration commission, such commission may accept the case.").

<sup>49</sup> See, e.g., CHEN, *supra* note 47, at 61-64 (criticizing both the State Council's inappropriate expansion and the NPC drafter's looseness with legislative language).

<sup>50</sup> Organic Law of the People's Courts, *supra* note 12, art. 33. According to the Chinese Constitution, the Standing Committee of the NPC is the appropriate organ to interpret the Constitution and laws. XIAN FA art. 67(1), (4).

<sup>51</sup> SUPREME PEOPLE'S COURT [SPC], VARIOUS PROVISIONS CONCERNING JUDICIAL INTERPRETATION (June 23, 1997) (Chinese version on file with Pacific Rim Law & Policy Journal).

<sup>52</sup> *Id.* arts. 3, 8, 11.

<sup>53</sup> *Id.* art. 4.

<sup>54</sup> See Li fa fa [Legislation Law] art. 88(1)(a), (b) (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15 2000, effective July 1, 2000) 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 112 (P.R.C.). Chinese courts do not have the power of judicial review to overrule statutes or regulations enacted by the NPC or the State Council. According to the Legislation Law, the Standing Committee of the NPC is the appropriate body to review whether an administrative regulation conflicts with the Constitution or national law. The State Council has the right to review administrative orders or regulations entered by its sub-agencies.

<sup>55</sup> See generally CHOW, *supra* note 18, at 169 (comparing U.S. and Chinese legal precedent and interpretations).

selects leading cases from its own decisions and decisions of lower courts, and publishes them in its SPC Gazette and on its official website.<sup>56</sup> Legal principles and rules endorsed by the SPC through these published cases have significant influence over courts nationwide. Lower courts are most likely to follow these rules and principles since the failure to observe *de facto* precedent may result in a future reversal from the higher courts. In fact, many SPC formal judicial interpretations are largely restatements and summaries of the rules and principles embodied in previously published leading cases.<sup>57</sup>

The Supreme People's Court has issued more than a dozen judicial interpretations concerning international arbitration that offer either clarifications to ambiguous legislative provisions or new rules for legal issues not addressed by laws and regulations.<sup>58</sup> The SPC's legal interpretations are also major sources of practice guidelines for the New York Convention.<sup>59</sup>

Complementing the SPC, the HPCs and IPCs frequently present "legal opinions" on issues that the SPC has not interpreted. Although these "legal opinions" are not binding legal sources, lower courts in the jurisdiction of the HPC or IPC usually follow them.<sup>60</sup> In several instances, HPC's and IPC's local implementation of "legal opinions" have offered valuable and practical experience to the SPC, and some local "legal opinions" have been ratified by the SPC in later judicial interpretations.<sup>61</sup> Most recently, adopting local HPC and IPC "legal opinions" on international arbitration, the SPC published a proposed version of the Provisions on Handling Foreign-Related Arbitrations and Arbitrations Adjudicated Abroad by People's Courts (2003 SPC Provisions (draft)).<sup>62</sup> The Provisions collectively incorporate the "legal

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<sup>56</sup> Supreme People's Court website, <http://www.court.gov.cn> (last visited April 23, 2006).

<sup>57</sup> Yuwu Liu, *Arbitration Agreement: The Chinese Practice and Future Trends*, 16-8 MEALEY'S INTL. ARB. REP. 16 (2001).

<sup>58</sup> See JOHN MO, *ARBITRATION LAW IN CHINA*, app. 7, nos. 1-34 (2001) (containing "Selected Major Judicial Interpretations of the NSC Concerning Arbitration" in English).

<sup>59</sup> SUPREME PEOPLE'S COURT, NOTICE CONCERNING THE IMPLEMENTATION OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (Apr. 10, 1997), reprinted in MO, *supra* note 58, app. 7; SUPREME PEOPLE'S COURT, NOTICE CONCERNING THE HANDLING OF FOREIGN RELATED ARBITRATION AND FOREIGN ARBITRATIONS (Aug. 28, 1995), reprinted in MO, *supra* note 58, app. 7.

<sup>60</sup> Lower courts will follow the legal opinions of the higher courts in the same jurisdiction. In addition, higher courts have influence on the promotion of judges in lower courts.

<sup>61</sup> For example, the Shanghai HPC, the Beijing HPC, and the Shenzhen IPC issued their respective legal opinions on implementing arbitration-related issues, including such topics as the validity of arbitration agreements, jurisdiction and venue of courts, interim measures and re-arbitration, and enforcement.

<sup>62</sup> See Draft for Public Comment Version of SPC Provisions on Handling by People's Court of Foreign-Related Arbitrations and Arbitrations Adjudicated Abroad (《最高人民法院关于人民法院处理涉外仲裁

opinions” of the Shanghai HPC and the Beijing HPC, and is intended for nationwide application upon finalization of the public comments and review.<sup>63</sup>

*f. Other Laws and Regulations*

Provisions related to arbitration are also seen in other legislation. For example, the Contract Law of the PRC has several articles incidentally stipulating arbitration related issues.<sup>64</sup>

*B. The United States Legal Arbitration System*

The law in the United States does not clearly differentiate between international and domestic arbitration. Arbitration disputes involving foreign elements may be heard in both state and federal courts. In addition, arbitration is regulated at both federal and state levels,<sup>65</sup> and both federal and state laws may be applicable to international arbitration cases. On the application of the New York Convention, the Federal Arbitration Act (“FAA”) contains a special implementation chapter with a broader scope than that of the Convention.<sup>66</sup> Moreover, FAA provisions govern the areas not covered by the special implementation chapter. Furthermore, neither the FAA nor the Convention excludes the application of state laws. As a result, application of the New York Convention involves puzzling conflicts in choice of law rules.

*1. Applicable Law: Federal Law v. State Law*

Until the U.S. Congress enacted the FAA in 1925,<sup>67</sup> state laws were applicable to all arbitration cases in both federal and state courts.<sup>68</sup> As decided in *Erie R. Co. v Tompkins*, federal courts must apply both statutes and common laws of the state in diversity cases, except in matters governed

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及外国仲裁案件的若干规定(征求意见稿》) (published in PEOPLE’S COURT DAILY, Dec. 31, 2003, at 1, 3) (on file with Pacific Rim Law & Policy Journal).

<sup>63</sup> *Id.* at 1. The public comment period ended on February 20, 2004.

<sup>64</sup> Contract Law, art. 54, 128, 129, adopted by the Ninth NPC on Mar. 15, 1999 (P.R.C.).

<sup>65</sup> See Sebastien Besson, *The Utility of State Laws Regulating International Commercial Arbitration and Their Compatibility with the FAA*, 11 AM. REV. INT’L ARB. 211, 212 (2000) (noting that “like virtually all fields of law in the United States,” arbitration is regulated at federal and state levels).

<sup>66</sup> 9 U.S.C. §§ 201-208.

<sup>67</sup> Federal Arbitration Act (FAA), ch. 213, §§ 1-5, 43 Stat. 883-86 (1925) (current version at 9 U.S.C. § 1 et seq. (2004)).

<sup>68</sup> Besson, *supra* note 65, at 212.

by the United States Constitution or by federal statutes.<sup>69</sup> Therefore, state laws and federal statutes may concurrently apply to arbitration cases.

The FAA created federal substantive and procedural laws to be enforced both in federal and state courts.<sup>70</sup> The FAA was enacted under authority of the Interstate Commerce Clause;<sup>71</sup> federal courts, therefore, are not bound to follow state law or state public policies in determining arbitration cases arising from the FAA.<sup>72</sup> Fully respecting the rule set forth in *Erie*, the United States Supreme Court, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* and *Allied-Bruce Terminix Cos. v. Dobson*, held that the FAA applies in diversity cases in federal courts “because Congress had so intended.”<sup>73</sup> In addition, Congress intended for the FAA to preempt state law in certain areas. In those areas neither federal nor state courts may apply state statutes in conflict with the FAA.<sup>74</sup>

However, preemption by the FAA is limited, and the scope of its application has been controversial since the enactment of the FAA. Under the supremacy clause of the Constitution, federal law supersedes conflicting state laws.<sup>75</sup> Usually, the criteria used to decide preemption are the intent of Congress,<sup>76</sup> and the general constitutional issue of whether state law

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<sup>69</sup> The U.S. Constitution recognizes and preserves the autonomy and independence of the states in their legislative and judicial departments, and the federal courts should enforce controlling laws regardless of their format in statute or in common law. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956); *see also Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938). The Tenth Amendment to the U.S. Constitution states “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.” U.S. CONST. amend. X.

<sup>70</sup> *See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (stating in dicta that the FAA governs in “either state or federal court”); *see also Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (reaffirming that the FAA creates substantive federal law governing both federal and state courts); *Romnes v. Bache & Co.*, 439 F. Supp. 833 (W.D. Wis. 1977).

<sup>71</sup> *Southland Corp.*, 465 U.S. at 14-15 (defining the FAA’s reach expansively and as coinciding with that of the Commerce Clause (U.S. CONST. art. 1, § 8, cl. 3)); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271 (1995) (giving detailed reasons why the FAA’s scope can be said to have expanded along with Congress’ commerce power over the years).

<sup>72</sup> *See Allied-Bruce*, 513 U.S. at 838 (distinguishing the application of *Erie*); *see also Robert Lawrence Co. v. Devonshire Fabrics, Inc.* 271 F.2d 402 (2d Cir. 1959).

<sup>73</sup> *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (characterizing the FAA as federal substantive law enacted pursuant to Congress’ powers over interstate commerce and admiralty and noting that “Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate”); *see also Allied-Bruce*, 513 U.S. at 271.

<sup>74</sup> *See Southland Corp.*, 465 U.S. at 16 (holding that the FAA pre-empts state law and that state courts cannot apply state statutes to invalidate arbitration agreements); *see also Allied-Bruce*, 513 U.S. 265.

<sup>75</sup> *Besson*, *supra* note 65, at 220.

<sup>76</sup> *See Securities Indus. Ass’n v. Connolly*, 703 F. Supp. 146, 150 (D. Mass. 1988) (“In confronting a preemption claim, the ‘sole task’ of the court is to determine the intent of Congress.”) (quoting *Mass. Medical Soc’y v. Dukakis*, 815 F.2d 790, 791 (1st Cir. 1987)).

undermines the goals and policies of the federal arbitration law.<sup>77</sup> However, the FAA neither contains any express preemptive provision nor clearly reflects a congressional intent to cover all issues of arbitration.<sup>78</sup> In addition, the general constitutional principle requires the application of state law unless it “undermine[s] the goals and policies” of the federal arbitration law.<sup>79</sup>

In general, the scope of preemption may be divided into three major categories: (1) the validity of the arbitration agreement; (2) the arbitrability of the dispute; and (3) other aspects of the arbitral process.<sup>80</sup> In the first category, the Supreme Court held that federal law governing the validity of arbitration agreements is binding on state courts.<sup>81</sup> However, state law is not preempted in this category. For example, the “saving clause” of § 2 of the FAA provides that an arbitration clause may be invalidated “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>82</sup> Since each state has the power to regulate contracts, including arbitration agreements, state law will apply to determine the validity of the arbitration agreement (or clause) on the same grounds that state law applies to other contracts.<sup>83</sup> Meanwhile, in applying state contract law to arbitration agreements, a state court cannot treat arbitration agreements less favorably than any other contract.<sup>84</sup> The FAA makes a state policy unlawful if it places arbitration clauses on unequal footing with other contracts. Such a policy would be in direct contrast with the intent of Congress as expressed in the language of the FAA.<sup>85</sup> In addition, parties are free to choose the applicable law for their arbitration because the FAA intends to enforce arbitration agreements according to their own terms.<sup>86</sup> It is clear that the FAA preempts

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<sup>77</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); see also Besson, *supra* note 65, at 220 (discussing the criteria).

<sup>78</sup> See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956) (upholding application of state arbitration law to arbitration provision in contract not covered by the FAA).

<sup>79</sup> *Volt Info. Scis., Inc.*, 489 U.S. 468.

<sup>80</sup> Besson, *supra* note 65, at 221.

<sup>81</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

<sup>82</sup> 9 U.S.C. § 2 (2004); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

<sup>83</sup> Besson, *supra* note 65, at 221.

<sup>84</sup> *Allied-Bruce*, 513 U.S. at 281; see also Besson, *supra* note 65, at 221. *But see* *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (ambiguously stating, “Courts generally should apply ordinary state-law principles governing contract formation in deciding whether” an agreement exists.).

<sup>85</sup> See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989) (citing authority that due regard must be given to the federal policy favoring arbitration when applying general state law contract principles to interpretation of arbitration agreements).

<sup>86</sup> See 9 U.S.C. § 3 (2004) (providing that arbitration be “in accordance with the terms of the agreement”); see also *Volt Info. Scis., Inc.*, 489 U.S. at 479 (holding that enforcement of state rules of

state laws dictating the format of arbitration agreements because the writing requirement provision in the FAA has exclusive application in both state and federal courts.<sup>87</sup>

In the second category of arbitrability, § 2 of the FAA is of greatest relevance,<sup>88</sup> providing that any maritime transaction or contract involving commerce is to be arbitrable.<sup>89</sup> This amounts to “a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”<sup>90</sup> The Supreme Court in *Moses H. Cone Memorial Hospital* stated that the issue of arbitrability must be addressed with a “healthy regard for the federal policy favoring arbitration.”<sup>91</sup> Supported by decisions from courts of appeal, the Supreme Court further concluded that the FAA had established the rule that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.<sup>92</sup>

Finally, as to the remaining aspects of the arbitral process, there are no settled rules on whether federal law preempts state law.<sup>93</sup> The state courts’ approach to the application of the FAA has been significantly different than the approach taken by the federal courts.<sup>94</sup> The Supreme Court has yet to offer any guidance on applicable law issues, and the state courts are left with wide discretion as long their decisions do not conflict with the FAA and federal case law. Interestingly, a substantial number of state courts have held that they are bound to apply the FAA.<sup>95</sup> However, some state courts

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arbitration chosen by parties in their agreements is fully consistent with the goals of the FAA, even if the results differ completely from those obtained from application of the FAA).

<sup>87</sup> See Besson, *supra* note 65, at 225 (citing *Erickson v. Aetna Health Plans of Cal., Inc.*, 71 Cal. App. 4th 646 (1999) (holding that 9 U.S.C. § 2 preempts California state law on formal arbitration agreements)).

<sup>88</sup> See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (holding that 9 U.S.C. § 2 governs arbitrability in both state and federal courts).

<sup>89</sup> 9 U.S.C. § 2 (2004) provides:

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.

<sup>90</sup> *Moses H. Cone Mem’l Hospital*, 460 U.S. at 24.

<sup>91</sup> *Id.*

<sup>92</sup> See *id.* at 25 (holding that such policy should apply “whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability”).

<sup>93</sup> Besson, *supra* note 65, at 221.

<sup>94</sup> See *id.* at 222-23 (detailing examples of state courts’ different approaches).

<sup>95</sup> See Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1325-7 (1985) (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *McEntire v. Monarch Feed Mills*, 631 S.W.2d 307 (Ark. 1982); *Keating v. Super. Ct.*, 645 P.2d 1192 (Cal. 1982),



decline to apply the FAA, claiming that it created substantive law only applicable in federal court.<sup>96</sup>

In a positive approach to unifying state and federal practice, over twenty-five states have, since 1955, adopted the Uniform Arbitration Act ("UAA"), the content of which largely parallels that of the FAA.<sup>97</sup> In responding to the increased importance of international commercial arbitration, five states have enacted new laws on international arbitration by adopting, with modifications, the UNCITRAL Model Law on International Commercial Arbitration.<sup>98</sup> Meanwhile, several states introduced new laws favoring international arbitration, although they differ in approach from the UNCITRAL Model Law.<sup>99</sup>

In summary, both federal and state law may apply to arbitration cases in state and federal courts. As a general principal, state arbitration laws apply to arbitration disputes except on issues that the Supreme Court has clearly declared to be preempted by the FAA.

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*appeal dismissed in part and rev'd in part sub nom; Merrill Lynch Pierce Fenner & Smith Inc. v. Melamed*, 405 So. 2d 790 (Fla. Dist. Ct. App. 1981); *West Point-Pepperell v. Multi-Line Indus.*, 201 S.E.2d 452 (Ga. 1973); *Hecla Mining Co. v. Bunker Hill Co.*, 617 P.2d 861 (Idaho 1980); *Pathman Constr. Co. v. Knox County Hosp. Ass'n*, 326 N.E.2d 844 (Ind. App. Ct. 1975); *R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127 (Kan. App. 1982); *Fite & Warmath Constr. Co. v. MYS Corp.*, 559 S.W.2d 729 (Ky. 1977); *State ex rel. St. Joseph Light & Power Co. v. Donelson*, 631 S.W.2d 887 (Mo. Ct. App. 1982); *Burke County Pub. School Bd. of Educ. v. Shaver P'ship*, 279 S.E.2d 816 (N.C.1981); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 239 S.E.2d 647 (S.C. 1977); *Tenn. River Pulp & Paper Co. v. Eichleay Corp.*, 637 S.W.2d 853 (Tenn. 1982); *Miller v. Puritan Fashions Corp.*, 516 S.W.2d 234 (Tex. Civ. App. 1974); *Allison v. Medicab Int'l*, 597 P.2d 380 (Wash.1979)).

<sup>96</sup> Most state courts so ruled after *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959). In *Robert Lawrence*, the court held that the body of law created under the U.S. Arbitration Act is substantive in character, not procedural, and it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability. Such questions are to be adjudicated by the federal courts whenever they have subject matter jurisdiction, including diversity jurisdiction. *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A.2d 334 (Del. Super. Ct. 1973); *Kress Corp. v. Edward C. Levy Co.*, 430 N.E.2d 593 (Ill. App. Ct. 1981); *Thayer v. Am. Fin. Advisors*, 322 N.W.2d 599 (Minn. 1982); *Withers Busby Group v. Surety Indus.*, 538 S.W.2d 198 (Tex. Civ. App. 1976)).

<sup>97</sup> Besson, *supra* note 65, at 212.

<sup>98</sup> Besson so concluded in his 2000 article. *Id.* at 217. California, Connecticut, Illinois, Oregon, and Texas have adopted the UNCITRAL Model Law in some form. U.N. Commission on International Trade Law, *Status: 1985-UNCITRAL Model Law on International Commercial Arbitration*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (last visited Apr. 23, 2006). In 1988 California enacted legislation entitled Arbitration and Conciliation of International Commercial Disputes. CAL. CIV. PROC. CODE §§ 1297.11-.432. In 1989, Connecticut enacted the UNCITRAL Model Law on International Commercial Arbitration. CONN. GEN. STAT. ANN. §§ 50a-100 to -136. Also in 1989, Texas enacted the Arbitration and Conciliation of International Disputes Act. TEX. CIV. PRAC. & REM. CODE ANN. §§ 172.001 - 172.175. In 1991, North Carolina enacted the International Commercial Arbitration Act. N.C. GEN. STAT. §§ 1-567.30 to 1-567.68. Also in 1997, Ohio enacted the International Commercial Arbitration Act, OHIO REV. CODE ANN. §§ 2712.01-.91, and Oregon enacted the International Commercial Arbitration and Conciliation Act, OR. REV. STAT. §§ 36.450-.558.

<sup>99</sup> See Besson *supra* note 65, at 217 (noting that Florida, Hawaii, Georgia, Maryland, and Colorado enacted laws regulating international arbitration, all of which strongly favor international arbitration).

## 2. *The Federal Arbitration Act*

The Federal Arbitration Act contains three chapters: Chapter 1, enacted in 1925, commonly referred to as the Domestic FAA, establishes the rules for recognizing and enforcing arbitration agreements and awards in both domestic and international contexts;<sup>100</sup> Chapter 2, enacted in 1970 and commonly referred to as the Convention Act of the implementing legislation, incorporates and implements the New York Convention;<sup>101</sup> and, Chapter 3, enacted in 1990, incorporates and implements the Inter-American Convention on International Commercial Arbitration (“Panama Convention Act”).<sup>102</sup>

The Domestic FAA offers comprehensive enforcement procedures for arbitration agreements and awards, and it applies to all arbitration cases.<sup>103</sup> In fact, both the Convention Act and the Panama Convention Act clearly provide that the Domestic FAA (Chapter 1 of FAA) applies to actions and proceedings brought under the Convention Acts to the extent that “Chapter 1 is not in conflict with” the Convention Acts or the Conventions themselves.<sup>104</sup>

The Convention Act, codified as Chapter 2 of FAA, was adopted to implement the New York Convention. Although an original participating member in the United Nations Conference that produced the 1958 New York Convention, the United States did not accede to the New York Convention until 1970.<sup>105</sup> The U.S. delegation to the 1958 New York Convention Conference recommended that the United States not accede because of the conflict between the implementation of the Convention and the state anti-arbitration laws, as well as the United States’ lack of a sufficient domestic legal basis for accepting the Convention.<sup>106</sup> The delegation suggested that

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<sup>100</sup> 9 U.S.C. § 1 *et seq.*; see also Besson, *supra* note 65, at 19-20 (noting the use of the short titles, Domestic FAA and Convention Act, for Chapters One and Two, respectively).

<sup>101</sup> 9 U.S.C. § 201 (2004).

<sup>102</sup> See generally Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT’L L. REV. 17, 25-43 (2002) (discussing the relationship between the three chapters of the FAA and their short names); see also 9 U.S.C. § 301 (2004). The Inter-American Convention on International Commercial Arbitration (Panama Convention) was concluded on January 30, 1975. 1438 U.N.T.S. 245, O.A.S.T.S. 42 (*entered into force* June 16, 1976). “The Panama Convention incorporates the FAA’s terms unless they are in conflict with the Inter-American Convention’s terms.” *Productos Mercantiles e Industriales, S.A. v. Faberge U.S.A., Inc.*, 23 F.3d 41, 45 (2d Cir. 1994) (citing 9 U.S.C. § 307 (Supp. IV 1992)). Further elaboration on the scope of the Panama Convention is beyond the scope of this article.

<sup>103</sup> *Productos Mercantiles*, 23 F.3d at 45.

<sup>104</sup> 9 U.S.C. §§ 208, 307.

<sup>105</sup> New York Convention, *supra* note 3.

<sup>106</sup> See Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1074-75 (citing Office

the Convention would override state anti-arbitration laws and would require changes in state, and possibly federal, court procedural rules.<sup>107</sup> With the dramatic change of domestic attitudes toward the New York Convention in the following decade,<sup>108</sup> the Senate granted accession to the Convention in 1970, conditioned on the enactment of proper implementing legislation—Chapter 2 of the FAA (the Convention Act).<sup>109</sup> The Convention then became effective in the United States on December 29, 1970.<sup>110</sup>

One of the major purposes of the United States' accession to the convention was to “encourage the recognition and enforcement of international arbitral awards” and to relieve the courts of heavy caseloads.<sup>111</sup> In addition, it also offered parties an alternative method for resolving disputes that was “speedier and less costly than litigation.”<sup>112</sup> Furthermore, the enforcement of the Convention through the FAA has provided American businesses with “a widely used system to obtain domestic enforcement of international commercial arbitration awards, subject only to minimal standards of domestic judicial review.”<sup>113</sup>

Structurally, the New York Convention was incorporated into federal law by the Convention Act which governs the enforcement of arbitration agreements and arbitral awards in federal and state courts.<sup>114</sup> The Convention was published as a note following § 201 of the Convention Act.<sup>115</sup>

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Report of the United States Delegation to the United Nations Conference on Commercial Arbitration 2, 15 (1958)).

<sup>107</sup> S. Exec. Rep. No. 90-10, at 1, 4.

<sup>108</sup> See Besson, *supra* note 65, at 230-31 (noting that as U.S. courts became familiar with the arbitration, American lawyers and the business community started to rally around the Convention in the decade since its inception). The U.S. signals its efforts to unify private law activities by participating in multinational negotiations. *Id.*

<sup>109</sup> Congress caused the delay in United States' membership in the New York Convention by its actions in enacting the implementing legislation. The Senate created the new chapter based on the recommendations of the Secretary of State's Advisory Committee on Private International Law. The new chapter would eliminate confusion by allowing for a distinction between cases under the Domestic FAA and those under the Convention. See Besson, *supra* note 65, at 31, n. 89 (citing S. REP. NO. 91-702, at 8-9; John P. McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735, 737 (1970 - 1971).

<sup>110</sup> 9 U.S.C. § 201.

<sup>111</sup> *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983); *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981).

<sup>112</sup> *Id.*

<sup>113</sup> G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 888 (1995).

<sup>114</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269-73 (1995); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1490 (11th Cir. 1998).

<sup>115</sup> See 9 U.S.C. §§ 201-208 (codifying the eight articles of the Convention Act).

As a result, the New York Convention does not apply directly in federal or state courts in the United States. As provided in § 201 of the Convention Act, the New York Convention is implemented through the mechanism set out in the Convention Act.<sup>116</sup> Article I of the New York Convention stipulates that it applies to arbitral awards “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought” and to awards “not considered as domestic awards in the State where their recognition and enforcement are sought.”<sup>117</sup> Section 202 of the Convention Act however, offers a different scope of application. The Act provides that the Convention applies generally to any arbitration agreement or award arising out of a commercial legal relationship (excluding those that are entirely between U.S. citizens and do not involve property abroad), seeking performance, enforcement, or having some other reasonable relation with one or more foreign states.<sup>118</sup> It appears that the scope of the Convention awards defined in the U.S. legislation is broader than that provided in Article I of the Convention. The plain reading of § 202 of the Convention Act indicates that any foreign connection may bring an award under the Convention.<sup>119</sup> U.S. legislation, therefore, abandoned the territory criteria set forth in the Convention and expanded the scope to include many domestic awards.<sup>120</sup>

### III. THEORETICAL ANALYSIS OF THE SCOPE OF APPLICATION OF THE NEW YORK CONVENTION

As a compromise between negotiating parties to the New York Convention, the Convention applies both to awards entered in foreign territories and to awards to contracting states that are not considered domestic (non-domestic awards).<sup>121</sup> The Convention does not further define non-domestic awards and leaves each contracting state to interpret the criteria. In addition, the Convention allows each contracting state to make a reciprocity reservation and to apply the Convention to awards entered in another contracting state.<sup>122</sup> A review of the Convention negotiation history reveals that the reciprocity reservation was not intended to exclude those awards entered in the territory in which enforcement was sought. Differing

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<sup>116</sup> See 9 U.S.C. § 201 (providing that the New York Convention “shall be enforced in United States courts in accordance with [Chapter 2 of the Convention Act]”).

<sup>117</sup> New York Convention, *supra* note 3, art. I(1).

<sup>118</sup> 9 U.S.C. §§ 2, 202.

<sup>119</sup> 9 U.S.C. § 202.

<sup>120</sup> *Id.*

<sup>121</sup> New York Convention, *supra* note 3, art. I(1).

<sup>122</sup> *Id.* art. I(3).

interpretations of the reciprocity reservation in the courts, however, has resulted in variable application of the Convention.<sup>123</sup>

A. *Foreign Awards vs. Non-Domestic Awards*

Article I of the New York Convention provides that the Convention applies to two types of arbitral awards in recognition and enforcement proceedings: (1) those awards made in a state other than the one where the recognition and enforcement of such awards are sought, or so-called “foreign awards”; and (2) those awards that are not considered domestic in the state where their recognition and enforcement are sought, or so-called “non-domestic awards.”<sup>124</sup> The first category is easily understood as it is defined by a clear criterion: the location of the arbitral award. The second, more controversial category refers to awards entered locally but for some reason considered “international” by the contracting state.

The two types of arbitral awards in Article I were the product of unforeseen compromises between civil law and common law countries. However, they failed to achieve any of the originally intended goals. The initial draft of the 1958 Convention stated that the Convention applied only to the enforcement of foreign arbitral awards made in a state other than the one wherein recognition and enforcement were sought.<sup>125</sup> Therefore, the draft included only “foreign arbitral awards” as determined by territorial criterion.

Civil law countries such as France, Italy, and West Germany strongly objected to this scope of application.<sup>126</sup> They maintained that nationality of parties, subject of dispute, and rules of arbitral procedure were all factors that should be taken into account when determining whether an award has a substantial foreign connection.<sup>127</sup> Technically, an arbitral award entered in a foreign territory may or may not be a foreign award in civil law countries. For example, applying French procedural law to an award entered in Germany may render such an award domestic to France. Conversely, an arbitration award entered locally may, under certain circumstances, be considered foreign. For example, applying German procedural law to an

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<sup>123</sup> See *infra* note 147 and related text.

<sup>124</sup> New York Convention, *supra* note 3, art. I(1).

<sup>125</sup> Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 PACE L. REV., 25, 33 (1985); see also U.N. Econ. & Soc. Council [ECOSOC], Committee on the Enforcement of International Arbitral Awards, *Report of the Committee on the Enforcement of International Arbitral Awards*, U.N. Docs. E/2704 and E/AC.42/4/Rev.1, (Mar. 28, 1955).

<sup>126</sup> G. HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 1 (1958); see also *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 931 (2d Cir.1983).

<sup>127</sup> van den Berg, *supra* note 125, at 33-34.

award entered in France may render such an award foreign to French courts. Major civil law countries strongly objected to the single territory criterion in the Convention draft. Consequently, eight European civil law countries proposed an alternative provision stating that “the Convention applies to the recognition and enforcement of arbitral awards other than those considered domestic in the country in which they are relied upon.”<sup>128</sup> This was intended to remove territory as a criterion in the determination of whether an award is a foreign award.<sup>129</sup> The real value of the proposed non-domestic criterion was that civil law countries could avoid applying the Convention to some foreign rendered awards because their national laws consider them domestic. This can occur in situations such as when the procedural law governing the arbitration is the domestic law of the enforcing country.<sup>130</sup>

Delegates from the United States, the United Kingdom, Israel, and Guatemala, however, argued that such an amendment would create an obstacle for common law countries that rely on the location of arbitration to determine a foreign award.<sup>131</sup> These common law countries pressed for the territory criterion in the Convention. Additional countries also pointed out that the non-domestic criterion created ambiguities in definition.<sup>132</sup> As each country has its own rules for determining non-domestic awards, one signatory state would encounter difficulty in predicting which awards would be considered non-domestic in another.<sup>133</sup> Furthermore, the Colombian delegate emphasized that it was essential for the Convention to include an unequivocal criterion to ensure that each signatory state would “know exactly what the other States were undertaking to do.”<sup>134</sup>

A Working Group of delegates from both civil law and common law countries was assigned to select a unanimous criterion. The Working Group proposed a version similar to that of Article I(1) of today’s Convention. At the time, the Working Group had an understanding that civil law countries could reserve the right to exclude “certain categories of arbitral awards from

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<sup>128</sup> *Id.* at 34.

<sup>129</sup> The French delegate opined that “the draft—tended to attach an exaggerated importance to the place where the award was rendered. Practice had shown that the place of pronouncement was often an insignificant factor, and the prominence given to it in the draft tended to obscure the strictly private nature of the arbitration operation.” *Id.* at 33.

<sup>130</sup> To this end, Italian delegates observed that “[t]he mere fact that an award had been made in a country other than that in which it was sought to be relied upon was not enough to make it a foreign award from the point of view of the country of enforcement.” *Id.* at 33.

<sup>131</sup> *Id.* at 34.

<sup>132</sup> Turkey, El Salvador, Argentina, and Colombia shared the complaint. *Id.* at 35-36.

<sup>133</sup> The Colombian delegate argued at length about the importance of certainty in determining the scope of application of the Convention. *Id.* at 36-37.

<sup>134</sup> *Id.*

the application of the Convention.”<sup>135</sup> Surprisingly, although the proposed text was voted on and adopted unanimously,<sup>136</sup> the proposed exclusion reservation was omitted.

The territory criterion was wholeheartedly incorporated into the final, combined criteria. Application of this criterion became absolute: all arbitration awards entered in a foreign territory are foreign awards to which the Convention shall apply.<sup>137</sup> Meanwhile, the Convention also applies to any awards that were entered in the enforcing state if the domestic law considers the awards non-domestic.<sup>138</sup> Inclusion of the non-domestic criterion, however, kept civil law countries from achieving their main goal of excluding certain awards that were entered in a foreign territory yet deemed domestic by the municipal laws of the country where enforcement was sought. Furthermore, the criterion imposed a treaty obligation on both common law and civil law countries to apply the Convention to locally rendered arbitral awards that the enforcing country does not consider domestic.<sup>139</sup> For example, German courts are compelled to apply the Convention to locally entered awards administered under French procedural laws. In the real world, however, these requirements are rather abstract and amount “to little more than a hypothetical academic construct.”<sup>140</sup>

It became clear that the compromise in Article 1 was in favor of common law countries having a territorial criterion.<sup>141</sup> The Convention always applied to the recognition and enforcement of an arbitral award made in another state. Because common law countries traditionally lacked a non-domestic concept, the Convention’s non-domestic criterion did not increase any obligation on them.<sup>142</sup> One scholar alleged that civil law countries “may

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<sup>135</sup> The Working Group submitted the final text of Article I “on the understanding that . . . the scope of application of the Convention may be qualified by such provisions as the Conference may adopt, enabling Contracting States to exclude certain categories of arbitral awards from the application of the Convention.” ECOSOC, *Report of Working Party No. 1 on Art. I, par. 1 and Art. II of the Draft Convention*, U.N. Doc. E/CONF.26/L.42 (June 2, 1958). Both Italian and German delegates proposed that individual states be permitted to ratify the Convention with a reservation to the effect that they would not apply it to certain awards rendered abroad but considered by them to be “domestic.”

<sup>136</sup> van den Berg, *supra* note 125, at 38.

<sup>137</sup> New York Convention, *supra* note 3, art. I(3).

<sup>138</sup> See Mark B. Feldman, *An Award Made in New York Can Be a Foreign Arbitral Award*, 39 ARB. J. 14, 17 (1984).

<sup>139</sup> *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983) (noting that the non-domestic criterion was desired by some countries “to preclude the enforcement of certain awards rendered abroad, not to enhance enforcement of awards rendered domestically”).

<sup>140</sup> See Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT’L ARB. 213, 223 (1996).

<sup>141</sup> van den Berg, *supra* note 125, at 39.

<sup>142</sup> For example, Chapter II of the FAA in the U.S. broke with common law tradition. See 9 U.S.C. § 202 (2004).

well have been sandbagged” in the final version of the Convention.<sup>143</sup> Ironically, years later, the United States, a traditionally common law country without any non-domestic award concept, aggressively advocated recognizing non-domestic awards in the context of applying the Convention.<sup>144</sup>

### B. *Reciprocity Reservation*

Paragraph 3 of Article I of the Convention offers, *inter alia*, a reservation option to contracting states that allows them, on the basis of reciprocity, to limit the Convention’s application in awards recognition and enforcement proceedings to those awards made “in the territory of another Contracting State.”<sup>145</sup> More than half of the 134 contracting states of the Convention declared the “reciprocity reservation” at the time of accession to the Convention.<sup>146</sup> The language, “on the basis of the reciprocity,” indicates that the purpose of the reservation is to allow a contracting state to limit Convention benefits to the group of contracting states. The reservation is applicable to the entire Convention, rather than just any isolated article.<sup>147</sup> The ambiguity in the phrase, however, has led courts in certain contracting states to adopt an entirely different interpretation. These states have understood the reservation to limit the application of the Convention to awards made “in the territory of *another* Contracting State,”<sup>148</sup> rather than awards made within the contracting state where recognition and enforcement were sought.<sup>149</sup> In this light, the “Reciprocity Reservation” allows a contracting state to preclude the Convention from applying to those awards that are entered locally yet considered non-domestic by municipal law.

The latter interpretation is neither logical nor supported by legislative history. The New York Convention was made to replace the Geneva Convention on the Execution of Foreign Arbitral Awards, a 1927 treaty insufficient in fulfilling the purposes of recognition and enforcement of

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<sup>143</sup> Rau, *supra* note 140, at 223.

<sup>144</sup> See *Bergesen*, 710 F.2d 928; see also *infra* Part IV.B.

<sup>145</sup> See New York Convention, *supra* note 3, art. I(3) (stating that it is “[w]hen signing, ratifying or acceding to this Convention[,] . . . 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”). Another reservation option is offered for limiting the application of the Convention to commercial arbitration. See *id.*

<sup>146</sup> As of July 14, 2004, approximately 70 contracting states out of a total of 135 had declared the reciprocity reservation. See U.N. Commission on International Trade Law website, Status of Text, <http://www.uncitral.org/en-index.htm> (last visited May 7, 2004).

<sup>147</sup> See New York Convention, *supra* note 3, art I(3).

<sup>148</sup> *Id.* (emphasis added); see also *Lander Co. v. MMP Inv.*, 927 F. Supp. 1078, 1080 (N.D. Ill. 1996).

<sup>149</sup> Rau, *supra* note 140, at 225.



foreign arbitral awards.<sup>150</sup> The Geneva Convention provided a reciprocity principle, not a reservation, that an arbitral award must be enforced if the “said award has been made in a territory of *one* of the High Contracting Parties” and “between persons who are subject to the jurisdiction of *one* of the High Contracting Parties.”<sup>151</sup> The New York Convention was believed to further advance this by expanding its application to all foreign and non-domestic awards regardless of whether they were entered in a contracting state.<sup>152</sup> The Convention included the “reciprocity reservation” to address certain countries’ unwillingness to extend their obligation to those non-contracting states that do not enforce awards from contracting states.<sup>153</sup> Legislative history revealed that the “reciprocity reservation” was offered as an option to limit the application of the Convention to foreign awards entered in non-contracting states. This “if they won’t enforce our awards, we won’t enforce theirs” understanding has been generally accepted as the reason for the adoption of the “reciprocity reservation” under the Convention.<sup>154</sup>

The major advocates for the non-domestic criterion (Germany, France, the Netherlands, and Belgium) all declared the “reciprocity reservation” in their accession to the New York Convention.<sup>155</sup> These civil law countries had aggressively advocated making the non-domestic criterion the only rule for the Convention.<sup>156</sup> Therefore, it would seem implausible that these countries would declare a reservation to avoid applying the Convention to non-domestic awards. Their declaration, therefore, can only be explained by their intent to limit Convention treatment to member countries.

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<sup>150</sup> *Id.* at 226.

<sup>151</sup> Geneva Convention on the Execution of Foreign Arbitral Awards, 92 L.N.T.S. 301, art. 1 (1927), reprinted in W.M. REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES, DOCUMENTARY SUPPLEMENT 36 (1997) (emphases added).

<sup>152</sup> Rau, *supra* note 140, at 226-28.

<sup>153</sup> Comments by Governments on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. E/2822, reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION, at III.A.2.36-37, III.A.2.54 (Giorgio Gaja ed., 1985) (Netherlands); *id.* at III.A.2.39 (United Kingdom); *id.* at III.A.2.49-51 (Yugoslavia).

<sup>154</sup> Rau, *supra* note 140, at 226-27.

<sup>155</sup> U.N. Commission on International Trade Law, *Status: 1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited June 1, 2006).

<sup>156</sup> See U.N. Doc. E/CONF.26/SR.3, reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION, *supra* note 153, at III C.4.

### C. *Definition of Non-Domestic Awards*

The Convention concluded with an inclusion of the non-domestic criterion but without a definition of “non-domestic awards.” Standards for determining the non-domestic awards vary from one country to another. Among them, European civil law scholars hold a prevailing theory that whether an award is non-domestic is determined by the applicable arbitration law.<sup>157</sup> Under this theory, a locally entered award is considered non-domestic if, as a result of the parties’ choice of law, it is governed by the arbitration law of another country.<sup>158</sup> Advocates of the theory rely on the following reasoning to support their position. First, the legislative history of the New York Convention indicates that a non-domestic award is primarily determined by the applicable arbitration law.<sup>159</sup> Second, implementation legislation for the New York Convention in civil law countries, such as Germany, has confirmed this method.<sup>160</sup> Third, Convention text, such as that in Article V, indicates that non-domestic awards are those entered locally under the law of another state.<sup>161</sup> Therefore, as a leading European scholar claims, the appropriate conventional interpretation should be that “the arbitration procedural law determines non-domestic awards.”<sup>162</sup>

Even so, the language of the Convention does not limit non-domestic awards to those entered locally under foreign procedural laws. Instead, the Convention offers each contracting state the authority to define non-domestic awards. The second sentence of Article I(1) of the Convention reads, “[The Convention] shall also apply to arbitral awards *not considered as domestic awards in the State where their recognition and enforcement are sought*”<sup>163</sup> (emphases added). Therefore, to properly determine whether an award is non-domestic, one must look to the municipal law of the state where recognition and enforcement are sought. The language plainly implies that the Convention allows variations in the non-domestic definition

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<sup>157</sup> van den Berg, *supra* note 125, at 42-43.

<sup>158</sup> *Id.* at 43

<sup>159</sup> For records of the participating delegates’ discussions and statements on the non-domestic criterion issue, please see documents for the Conference reprinted in 1 INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK CONVENTION, *supra* note 153, at III.

<sup>160</sup> See van den Berg, *supra* note 125, at 42-43 (pointing out that German law would consider a local award entered under foreign procedural law a non-domestic award, and the New York Convention would apply to such an award in Germany).

<sup>161</sup> See *id.* at 43 (claiming that Article V of the New York Convention indicates the *applicable law chosen by parties* is foreign law and different from the law of the country where the award was made); see also New York Convention, *supra* note 3, art. V.

<sup>162</sup> van den Berg, *supra* note 125, at 43.

<sup>163</sup> New York Convention, *supra* note 3, art. I(1).

across different countries. As a result of this flexibility in interpretation, controversies have broken out in courtrooms around the world.

#### IV. APPLICATION OF THE NEW YORK CONVENTION IN THE U.S. COURTS

##### A. *The Convention Act and the Convention*

The United States has been a member of the New York Convention since 1970.<sup>164</sup> The provisions of the Convention, however, do not apply directly to the U.S. courts, but rather through domestic legislation—the Convention Act.<sup>165</sup> Adopted as a condition during accession to the Convention, the Convention Act was meant not only to implement the Convention provisions in U.S. Courts, but also to incorporate domestic substantive and procedural rules for enforcing the Convention.<sup>166</sup>

The scope of application of the New York Convention, set forth in the Convention Act, takes a different approach from Article I(1) of the New York Convention. The Convention Act adopted neither the territory nor the non-domestic criterion.<sup>167</sup> Instead, Section 202 of the act assumed a broader scope that applies the Convention to all commercial arbitration awards and agreements except those arising from an exclusive legal relationship among citizens of the United States without reasonable relations to a foreign state.<sup>168</sup>

By merging their implementing legislation with the Convention, the U.S. courts apply the Convention to two major categories: (1) arbitration awards entered in a foreign territory except those falling within the “reciprocity reservation”;<sup>169</sup> and, (2) all arbitration awards entered in the United States, except for those between two United States citizens without any foreign connection. Little problem has existed when applying the

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<sup>164</sup> The Convention became effective in the United States on December 29, 1970. The United States was an original participating member in the United Nations’ Conference that produced the 1958 New York Convention. Upon the conclusion of the New York Convention in 1958, the U.S. delegation to the Conference recommended the United States not accede to the Convention. The delegation’s concerns were that implementation of the Convention would conflict with state anti-arbitration laws, and the United States lacked a sufficient domestic legal basis for accepting the Convention. See Quigley, *supra* note 106, at 1074-75.

<sup>165</sup> 9 U.S.C. § 201 (the Convention Act became Part II of the FAA, §§ 201-208).

<sup>166</sup> 9 U.S.C. §§ 201-208.

<sup>167</sup> New York Convention, *supra* note 3, art. I; see 9 U.S.C. § 202.

<sup>168</sup> 9 U.S.C. § 202.

<sup>169</sup> When consenting to adoption of the Convention, the U.S. Senate declared, “The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.” 21 U.S.T. 2517.

Convention to awards in the first category.<sup>170</sup> Application to awards in the second category, on the other hand, has sparked controversial debate both within U.S. courtrooms and among international commentators.

It appears that the qualified Convention *awards*, as defined in the U.S. legislation, are broader than those defined in Article I of the Convention. A basic reading of Section 202 of the Convention Act indicates that any foreign involvement may bring an award under the Convention.<sup>171</sup> The scope of application of the New York Convention is specifically and clearly defined. Unsurprisingly, the expansion of the scope in the Convention Act brought an onslaught of criticism.<sup>172</sup>

For an arbitration *agreement*, on the other hand, § 202 imposes a “somewhat more restrictive” requirement on the application of the Convention.<sup>173</sup> Article II of the Convention simply requires “each Contracting State” to recognize an arbitration agreement in writing without restricting it to foreign-related or international agreements.<sup>174</sup> However, Section 202 excludes arbitration agreements made solely between two U.S. citizens who have no foreign connections.<sup>175</sup> Furthermore, the Convention Act authorizes original jurisdiction in federal courts over actions and proceedings arising under the Convention.<sup>176</sup>

## B. *Bergesen v. Joseph Muller Corp.: The First Attempt to Define Non-Domestic Awards*

### 1. *The Bergesen Decision*

No U.S. court addressed in detail the non-domestic concept or the scope of application of the Convention until the Second Circuit Court of Appeals decision in *Bergesen v. Joseph Muller Corp.* in 1983.<sup>177</sup> The widely

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<sup>170</sup> *But see* Jones v. Sea Tow Services, 30 F.3d 360, 365-66 (2d Cir. 1994) (challenging the territory criterion); discussion *infra* Part IV.D.

<sup>171</sup> See 9 U.S.C. § 202.

<sup>172</sup> See discussion *infra* Part IV.

<sup>173</sup> McMahon, *supra* note 109, at 739.

<sup>174</sup> 21 U.S.T. 2517, art. II(1).

<sup>175</sup> 9 U.S.C. § 202 (2004) (corporations are U.S. citizens if they are incorporated or have their principal places of business in the U.S.).

<sup>176</sup> See 9 U.S.C. § 203 (providing federal courts with original jurisdiction regardless of the amount in controversy).

<sup>177</sup> *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983). In various instances, the Second Circuit Court of Appeals and other district courts in that circuit have touched on the issue of application of the Convention to locally entered awards, but none of them has fully discussed the issue. See, e.g., *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691 (2d Cir. 1978) (noting the issue of application of the Convention to local arbitration awards was “intriguing,” but did not need to

cited *Bergesen* case involved a dispute between a Norwegian ship owner, Bergesen, and a Swiss company, Joseph Muller Corp., which arose from issues of performance of international transportation contracts. The dispute was arbitrated in New York City according to the arbitration clauses contained in the contracts, and the arbitral award was entered in favor of Bergesen.<sup>178</sup> After Bergesen tried unsuccessfully to enforce the award in Switzerland, he petitioned the United States District Court for the Southern District of New York to confirm the arbitration award. The district court confirmed the award, holding that the Convention applied to an award rendered in the United States involving foreign interests. Joseph Muller Corp. appealed, and the circuit court affirmed the district court's decision with elaborate analyses of the non-domestic concept and the scope of the Convention's application.<sup>179</sup>

In determining the issue of what qualifies for a non-domestic award under the Convention, the court declared that the definition of a non-domestic award "appears to have been left out deliberately in order to cover as wide a variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of 'non-domestic' in conformity with its own national law."<sup>180</sup> Furthermore, the court decided that a non-domestic award is an award "made within the legal framework of another country." The Court gave two examples that fall within the definition: (1) those awards made in accordance with a foreign law; and, (2) those awards involving parties domiciled or having their principal place of business outside the enforcement jurisdiction.<sup>181</sup> The Court reasoned that this broader construction was preferred because "it [was] more in line with the intended purpose" of the Convention: to encourage the recognition and enforcement of international arbitration awards.<sup>182</sup>

Muller argued that the "reciprocity reservation" adopted by the United States should be considered, and that the Convention should be interpreted narrowly.<sup>183</sup> The district court did not adopt Muller's argument; rather, it held that the treaty language "should be interpreted broadly to effectuate its

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be decided in the case since the application of the Domestic FAA sufficiently resolved the issue); *see also*, *Transmarine Seaways Corp. v. Marc Rich & Co. A. G.*, 480 F. Supp. 352 (S.D.N.Y. 1979) (holding that § 202 of the Convention applied to the award entered in New York City since the two parties were foreign companies).

<sup>178</sup> *Bergesen*, 710 F.2d at 928.

<sup>179</sup> *Id.* at 929-30.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 932.

<sup>182</sup> *See id.* at 932 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) in supporting the policy argument).

<sup>183</sup> *Id.*

recognition and enforcement purpose.”<sup>184</sup> The circuit court failed, however, to elaborate the reciprocity reservation.<sup>185</sup>

The court further examined the issue of whether § 202 of the Convention Act covered the disputed award. After reviewing the legislative history, the court dictated that § 202 was intended to ensure the enforcement of arbitral awards with reasonable foreign relationships.<sup>186</sup> The court further concluded that in enacting § 202, Congress did not desire to exclude application of the New York Convention to an arbitral award entered in the United States between two foreign parties.<sup>187</sup>

## 2. *Criticisms of the Bergesen Decision*

The *Bergesen* decision profoundly influenced “non-domestic awards” in U.S. courts.<sup>188</sup> Thus far, the Second Circuit has followed the decision in jurisdictions where *Bergesen* is binding legal authority. In several other circuits, *Bergesen* is also considered influential authority.<sup>189</sup> Not surprisingly, the *Bergesen* decision triggered complex responses in the United States and other countries. American commentators generally believed that the broader application of the Convention, as set forth in *Bergesen*, was a positive approach that would promote U.S. cities as seats of international commercial arbitration.<sup>190</sup> The decision was also praised for promoting the enforcement of foreign arbitral awards by encouraging

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<sup>184</sup> *Id.* at 933.

<sup>185</sup> *Id.*

<sup>186</sup> *See id.* (citing legislative history at H.R. Rep. No. 91-1181 (1970), as reprinted in 1970 U.S.C.C.A.N. 3601, 3602).

<sup>187</sup> *See id.* The court stated that if Congress had desired to exclude arbitral awards rendered in the United States and involving foreign parties, it would have done so. It also analyzed other sections to support its conclusion. The Court noted that § 203 had been held to provide jurisdiction for disputes involving two noncitizens, and that § 206 had been interpreted as applying to arbitration occurring in places “within or without the United States.” *See id.*

<sup>188</sup> *Bergesen* has been cited in fifty-five cases in U.S. district courts and circuit courts of appeal in the Second, Fifth, Sixth, Seventh, and Ninth circuits, and has been cited forty-nine times in law review articles. Shepard’s Summary at LexisNexis, *Bergesen*, 710 F.2d 928.

<sup>189</sup> As of May 2004, seven cases followed *Bergesen*’s rule. *Productos Mercantiles e Industriales, S.A. v. Faberge U.S.A.*, 23 F.3d 41 (2d Cir. 1994); *Dworkin-Cosell Interair Courier Servs., Inc. v. Avraham*, 728 F. Supp. 156 (S.D.N.Y. 1989); *Trans Chem., Ltd. v. China Nat’l Mach. Import & Export Corp.*, 978 F. Supp. 266 (S.D. Tex. 1997); *Jacada (Europe), Ltd. v. Int’l Mktg. Strategies, Inc.*, 255 F. Supp. 2d 744 (W.D. Mich. 2003); *Lander Co. v. MMP Invs.*, 107 F.3d 476 (7th Cir. 1997); *Lloyd’s, London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926 (N.D. Cal. 2003).

<sup>190</sup> *See, e.g.,* Feldman, *supra* note 138, at 16 (claiming that the *Bergesen* decision has “strengthened New York City’s potential to become a major center of international commercial arbitration”); *see also* William Phillips, Case Comment, *Recognition of Foreign Arbitral Awards: The Second Circuit Provides a Hospitable Forum*, 10 BROOKLYN J. INT’L L. 489 (1984); Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629, 643-44 (1989) (referring to *Bergesen* as an “enlightened example” applauded by most because it “properly recognizes the need to provide the broadest possible recognition to arbitral awards”).

arbitrations as an alternative to litigation, and for enabling American businessmen to demand enforcement under the Convention in a foreign country when U.S. law was chosen as the applicable law for the arbitration.<sup>191</sup>

European commentators criticized the *Bergesen* decision however, for reaching beyond the boundaries of the Convention, and argued that such an approach threatened the implementation of the Convention.<sup>192</sup> Their challenges were based on the legislative history of both the Convention and the U.S. Convention Act. Commentators have also claimed that the legislative history of the Convention indicates that non-domestic awards are those entered in arbitrations governed by foreign law,<sup>193</sup> and that the nationality of the parties does not impact the scope of the application of the Convention.<sup>194</sup> In addition, critics claim that the legislative history of the U.S. Convention Act reveals that the drafters did not intend the Convention to include locally rendered awards between two foreign parties.<sup>195</sup>

The real concern of the critics was that application of the Convention to locally entered awards involving two foreign parties would make U.S. enforcement of the awards more cumbersome. First, the enforcement of such awards might be subject to challenges from a losing party under both the Domestic FAA and the Convention.<sup>196</sup> Second, application of the Convention could impose a higher standard for written agreements than the lesser requirements in the U.S. Domestic FAA.<sup>197</sup> Finally, the expansive interpretation would make it more difficult for foreign courts to determine

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<sup>191</sup> Susan P. Brown, Recent Development, *Enforcement of Foreign Arbitral Awards—The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards*, 14 GA. J. INT'L & COMP. L. 217, 230-33 (1984). The claim was based on the observation that the legal regime applicable to domestic arbitration in many contracting states to the New York Convention is significantly less liberal than the regime applicable to the enforcement under the Convention. Feldman, *supra* note 138, at 18.

<sup>192</sup> The most serious challenge was from Dr. Albert Jan van den Berg, Secretary of Netherlands Arbitration Institute and General Editor for Year Book Commercial Arbitration. See van den Berg, *supra* note 125; see also Filip de Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT'L L. & BUS. 48, 77 (1991). de Ly, an Associate Professor at University of Utrecht, criticized *Bergesen* as a case inspired by U.S. law and one which may pose a threat to the New York Convention-based system, characterized by judicial review of the award in the home country and by relatively limited control in the enforcing country. *Id.*

<sup>193</sup> van den Berg, *supra* note 125, at 43.

<sup>194</sup> *Id.* at 47.

<sup>195</sup> *Id.* at 50.

<sup>196</sup> A losing party may defend itself in recognition and enforcement proceedings according to the Convention Act and the Convention. In addition, a losing party may petition to set aside the award under either Chapter I of the Domestic FAA, or state arbitration law. *Id.* at 55.

<sup>197</sup> The New York Convention requires a more stringent written form than do the Domestic FAA or the arbitration laws of most U.S. states. *Id.* at 56; see also New York Convention, *supra* note 3, art. II(2).

the applicability of the Convention to an award that was entered through application of the New York law.<sup>198</sup>

European commentators admitted, however, that the *Bergesen* decision “makes the United States a more hospitable forum for foreign parties intending to arbitrate within the United States.”<sup>199</sup> Applying the Convention to an award between two foreign parties grants federal jurisdiction to U.S. courts in enforcing the award which they would not otherwise have due to a lack of the required diversity elements.<sup>200</sup>

Overall, the benefits of the *Bergesen* rule outweigh its shortcomings. When a party appropriately cites the Convention as a basis for the enforcement of an award, the Convention becomes an independent basis for enforcement and a losing party cannot challenge it based on the domestic FAA. Moreover, a foreign court’s difficulty in predicting U.S. law is an occasional occurrence and is outweighed by the benefits obtained by the high volume of non-domestic awards enforced in the United States. Furthermore, the written format required by the Convention is generally not an issue in such a highly commercialized business world.

### C. *Lander Co. v. MMP Investments: “Reciprocity Reservation” Clarified*

#### 1. *Unresolved Issues in Bergesen and the Facts of Lander*

While *Bergesen* only represents an initial attempt to expand the application of the Convention in U.S. Courts, *Lander Co. v. MMP Investments* is a leading case in defining non-domestic awards in the United States.<sup>201</sup> The *Bergesen* Court used a specific factor, the nationalities of the parties, as a basis for claiming that the award was made within the legal framework of another country.<sup>202</sup> However, the court neither addressed the relationship between the Convention Act and the Convention, nor did it

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<sup>198</sup> The critics presented the case of a German court asked to enforce an award between Swiss and German parties by applying the New York law. The German court was uncertain whether the New York law expanded the application of the Convention. *van den Berg*, *supra* note 125, at 57.

<sup>199</sup> *Id.* at 50.

<sup>200</sup> Chapter One of the FAA (the Domestic FAA) does not create independent jurisdiction. Two foreign parties are not qualified for diversity jurisdiction. See 28 U.S.C. §1331 (federal question jurisdiction) and 28 U.S.C. §1332 (diversity jurisdiction).

<sup>201</sup> *Lander Co. v. MMP Invs.*, 927 F. Supp. 1078 (N. D. Ill. 1996) (*Lander I*); *Lander Co. v. MMP Invs.*, 107 F.3d 476 (7th Cir. 1997) (*Lander II*).

<sup>202</sup> *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983).



clarify whether the “reciprocity reservation” impacts “non-domestic” awards.<sup>203</sup> Such issues were first examined and clarified in *Lander*.

The facts of *Lander* are not complicated. In February 1993, Lander Co., a New Jersey company, and MMP Investment, an Illinois company, entered into two contracts for Lander’s shampoo and other products to be distributed by MMP Investment in Poland.<sup>204</sup> The contracts provided that any disputes would be settled by binding arbitration pursuant to the Rules of Conciliation and Arbitration of the International Chamber of Commerce (“ICC”). The contracts further stipulated that the arbitration would be conducted in New York City and the agreement would be construed in accordance with New York state law.<sup>205</sup> When both parties’ performance fell short, MMP Investment initiated an arbitration proceeding. The arbitration was structured in accordance with the ICC Rules in New York City and an award was entered in favor of Lander in October 1995.<sup>206</sup> Lander petitioned the U.S. District Court for the Northern District of Illinois to confirm the arbitration award under the Convention. Though Lander alleged that there was federal jurisdiction under the FAA, the Convention Act and on the basis of diversity, the district court dismissed the case for want of jurisdiction.<sup>207</sup> The appellate court however, reversed the decision and elaborated on several previously unresolved issues pertinent to non-domestic awards.<sup>208</sup>

## 2. *Reciprocity Reservation*

The *Bergesen* court deferred ruling on whether the United States’ reciprocity reservation limits the recognition of non-domestic awards.<sup>209</sup> In *Lander*, the district court offered a bold but unsupported interpretation of the reciprocity reservation. Without examining its context and legislative history, the district court jumped to a conclusion that the reciprocity reservation, by its express terms, limits “the enforcement and recognition of arbitral awards on a territorial basis, to those made in a *country other than the United States.*”<sup>210</sup>

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<sup>203</sup> See *Bergesen*, 710 F. 2d at 932-33 (responding to the argument that the court should interpret the Convention narrowly based on the reciprocity reservation the U.S. adopted, the court did not address whether the reciprocity reservation prevents the Convention from applying to awards entered in the United States).

<sup>204</sup> *Lander II*, 107 F.3d at 478.

<sup>205</sup> *Id.*

<sup>206</sup> *Lander I*, 927 F. Supp. at 1079.

<sup>207</sup> *Id.* at 1078, 1081-82.

<sup>208</sup> *Lander II*, 107 F.3d at 482.

<sup>209</sup> See *Bergesen*, 710 F.2d at 932-33 (stating vaguely that the treaty language should be interpreted broadly on the issue of reciprocity reservation).

<sup>210</sup> *Lander I*, 927 F. Supp. at 1081-82 (emphasis added).

The district court, citing *Bergesen*, further stated that the definition of non-domestic awards in § 202 of the U.S. Convention Act did not affect the court's interpretation.<sup>211</sup> The court viewed § 202 as a limitation created by Congress to exclude awards entered in foreign territories between two U.S. parties without any other foreign connection.<sup>212</sup> The court concluded that because the "reciprocity reservation" made by the United States "effectively negates the non-domestic award option of Article I(1)" of the Convention, there would have been no need for the U.S. Convention Act to define non-domestic awards.<sup>213</sup>

The appellate court reversed in whole the lower court's decision concerning the impact of the "reciprocity reservation" on non-domestic awards.<sup>214</sup> The Court of Appeals for the Seventh Circuit reasoned that the "reciprocity reservation" declaration should be understood to mean that the United States would only enforce arbitral awards made by contracting parties that adhere to the Convention.<sup>215</sup> Creatively, the court stated that the reservation was intended to limit the United States to applying the Convention to arbitral awards made in the territory of "*another signatory of the Convention, like the United States, as opposed to non-signatories.*"<sup>216</sup> Such a liberal interpretation has generally been accepted in academia and by U.S. federal courts.<sup>217</sup>

### 3. *Overlap Between the Convention and the Convention Act*

In *Lander*, the appellate court went further than *Bergesen* by analyzing the relationship between the Convention and § 202 of the Convention Act. It determined that § 202 was broader than the Convention<sup>218</sup> and that a broader application of the New York Convention under § 202 was valid because Congress has appropriate commerce power to expand § 202 beyond the Convention.<sup>219</sup>

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<sup>211</sup> *Id.* at 1081.

<sup>212</sup> *See id.* at 1081 (asserting that the language of § 202 is "cast in terms of exclusion rather than inclusion").

<sup>213</sup> *Id.* (citing van den Berg's article, the court asserted that if Congress had intended to define non-domestic awards, Congress should have done so in the legislation).

<sup>214</sup> *Lander II*, 107 F.3d at 482.

<sup>215</sup> *Id.* at 481-82.

<sup>216</sup> *Id.* at 482 (emphases added).

<sup>217</sup> *See, e.g.,* Rau, *supra* note 140, at 226 (stating that the interpretation in the *Lander* case of the reciprocity reservation is abundantly supported both by history and common sense); *see also* Trans Chem., Ltd. v. China Nat'l Mach. Import & Export Corp., 978 F. Supp. 266, 294 (S.D. Tex. 1997).

<sup>218</sup> *Lander II*, 107 F.3d at 482.

<sup>219</sup> *Id.* (stating that "the statute is comfortably within Congress's commerce power").

In determining the scope of § 202, the circuit court read the statute to exclude only those arbitration awards or agreements arising from a relationship entirely between U.S. citizens and without any foreign factor.<sup>220</sup> The court offered three possible legislative incentives for this interpretation of § 202: (1) to broaden the scope of the application of the Convention with the goal of attracting arbitration business to New York; (2) to secure for American businesses the benefits of judicial enforcement of awards entered on the basis of reciprocity in the country where the enforcement is sought; and (3) to simplify procedures governing the foreign activities of American firms, regardless of the nationality of the parties.<sup>221</sup>

The court also explored the issue of overlap between the Convention and the U.S. Convention Act. When a party chooses to enforce a qualified award under the Convention, the party's other legal remedies are not correspondingly eliminated.<sup>222</sup> After examining the legislative history of both the Convention and the Convention Act, the court claimed that it could not find any suggestion that the Convention is exclusive.<sup>223</sup> On the contrary, Article VII of the Convention provides that it will 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."<sup>224</sup> Therefore, parties have discretion to choose Article I, § 202, or both, in seeking to enforce arbitral awards.<sup>225</sup>

#### 4. Comments

The Court's narrow interpretation of the "reciprocity reservation" significantly alters the application of the Convention.<sup>226</sup> The interpretation

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<sup>220</sup> *Id.*

<sup>221</sup> *See id.* (noting that "[w]hatever Congress's precise thinking on the matter, it spoke clearly [in the statute itself]").

<sup>222</sup> *Id.* at 481 ("Article VII of the Convention provides that the 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.'")

<sup>223</sup> *Id.*

<sup>224</sup> New York Convention, *supra* note 3, art. VII; *Lander II*, 107 F.3d at 481 ("[T]here is 'no reason to assume that Congress did not intend to provide overlapping coverage between the Convention and the Federal Arbitration Act.'") (citing *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 934 (2d Cir. 1983)).

<sup>225</sup> *Lander II*, 107 F.3d at 481-82.

<sup>226</sup> *See* Jennifer Dawn Nicholson, *Recent Development: Lander Co., Inc. v. MMP Investments, Inc.*, 13 OHIO ST. J. ON DISP. RESOL. 287, 296, 298 (1997) (noting "if the holding in *Lander* is adopted universally it could significantly enlarge the number of domestic arbitral awards which will be enforced under the New York Convention," and predicting that "[i]ncreased use of the New York Convention may lead to the greater enforcement of arbitral awards and agreements in the U.S. in terms of international commerce").

qualifies many domestically entered awards as Convention awards and makes it less likely that they will be vacated under the Domestic FAA.<sup>227</sup> Under § 208, the Convention Act will prevail over the Domestic FAA in the enforcement of foreign awards.<sup>228</sup> Once characterized as a Convention award, only seven enumerated grounds in the Convention may be cited for the denial of enforcement; the scrutiny of the Domestic FAA does not apply.<sup>229</sup> Such a "pro-enforcement" policy for foreign arbitral awards has been long established in case law.<sup>230</sup> If an award is both qualified for enforcement under the Domestic FAA and the Convention Act, a winning party is likely to choose the latter as a legal basis.

The *Lander* rule has been followed by the Fifth Circuit.<sup>231</sup> Such a favorable ruling is certain to make foreign parties feel more comfortable in seeking legal protection under the Convention rather than being forced to rely on domestic laws.

Applying the Convention to a broader scope of non-domestic awards has significant consequences.<sup>232</sup> First, it offers independent federal jurisdiction.<sup>233</sup> Second, Convention awardees enjoy a three-year statute of limitations to initiate proceedings rather than the one-year statute of limitations under the Domestic FAA.<sup>234</sup> Third, the Convention Act allows a court to compel parties to arbitrate in or outside the United States,<sup>235</sup> while the Domestic FAA limits a court to compelling parties to arbitrate "within the district."<sup>236</sup> The broader application of the New York Convention will undoubtedly provide more legal options for American businesses, both domestically and abroad, and will make the United States more attractive for arbitration and foreign investment.<sup>237</sup>

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

<sup>228</sup> 9 U.S.C. § 208.

<sup>229</sup> New York Convention, *supra* note 3, art. V.

<sup>230</sup> *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974).

<sup>231</sup> *Trans Chem., Ltd. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 294 (S.D. Tex. 1997).

<sup>232</sup> See Rau, *supra* note 140, at 215-17 (detailing the significant impact of the application of the Convention to an arbitration agreement or an arbitration award).

<sup>233</sup> The implementing legislation, the Convention Act, offers independent federal jurisdiction for arbitration awards or agreements under the Convention. See 9 U.S.C. §203.

<sup>234</sup> See Domestic FAA, 9 U.S.C. §9 (providing one-year of statute of limitation for confirming an award); see also The Convention Act, 9 U.S.C. §207 (providing three-year statute of limitations to confirm an award under the Convention).

<sup>235</sup> 9 U.S.C. § 206.

<sup>236</sup> 9 U.S.C. § 4.

<sup>237</sup> See Feldman, *supra* note 138, at 21.

D. *Jones v. Sea Tow Services: A Drawback on the Territory Criterion*

There is little confusion about the territory criterion, requiring that the Convention shall apply to “arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.”<sup>238</sup> It is clear that when an award is made in a foreign nation, it is considered a foreign award in a contracting state and the Convention applies.<sup>239</sup> However, the territory criterion was challenged in a U.S. court as a result of the ambiguity in the language of § 201 of the U.S. implementation legislation. *Jones v. Sea Tow Services* offers a good illustration of the amplified conflicts between the U.S. domestic legislation and the New York Convention.<sup>240</sup>

1. *A Brief Summary of the Case*

On a stormy night in 1991, Mr. and Mrs. Jones were on their thirty-three-foot pleasure boat when the boat capsized near the shore. A local salvage firm named Sea Tow Services was contacted, and its representatives arrived in a land vehicle. Mr. Jones then signed a Lloyd's Standard Form of Salvage Agreement, commonly known as LOF, handed over by the captain of the land vehicle. The LOF contained statements throughout the document that any disputes under the agreement were subject to arbitration in London, England, and that English law would apply. Sea Tow Services' representatives towed the boat to a marina and sought payment of \$15,000 for their services.<sup>241</sup> After encountering difficulty collecting, Sea Tow Services initiated an arbitration proceeding against the Joneses in London. The Joneses filed a lawsuit in the United States District Court for the Eastern District of New York and requested a declaration that the LOF was unenforceable based on fraud. A stay of the arbitration proceedings commenced in London. The Joneses argued that the New York Convention did not apply to the agreement because both parties were American citizens and the event occurred in U.S. waters. Sea Tow Services responded that the LOF arbitration clause deprived the court of jurisdiction over the dispute and that Sea Tow Services was entitled to an order compelling arbitration.<sup>242</sup> The District Court ruled that the Convention was applicable and ordered the

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<sup>238</sup> New York Convention, *supra* note 3, art. I(1).

<sup>239</sup> van den Berg, *supra* note 125, at 39.

<sup>240</sup> *Jones v. Sea Tow Servs.*, 30 F.3d 360 (2d Cir. 1994) (*Jones II*).

<sup>241</sup> *Jones v. Sea Tow Servs.*, 828 F. Supp. 1002, 1005 (E.D.N.Y. 1993) (*Jones I*).

<sup>242</sup> *Id.* at 1006.

dispute resolved in London per the arbitration clause.<sup>243</sup> The Second Circuit Court of Appeals reversed the decision and denied the application of the New York Convention to the dispute.<sup>244</sup>

## 2. *The “Foreign Connection” Under Section 202*

U.S. courts have developed a four-question formula to determine whether an agreement or an award qualifies for application of the Convention under § 202 of the Convention Act.<sup>245</sup> The formula requires affirmative answers to all of the following four questions to secure application of the Convention: (1) whether there is an agreement in writing to arbitrate the subject of the dispute; (2) whether the agreement provides for arbitration in the territory of a signatory of the Convention; (3) whether the agreement arises out of a legal relationship, contractual or not, which is considered commercial; and (4) whether a party to the agreement is a foreign citizen or the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation to one or more foreign states.<sup>246</sup> Upon reaching affirmative answers to all of these questions, a court must order arbitration unless it finds the agreement “null and void.”<sup>247</sup> The district court in *Jones* adopted this four-question formula and reached affirmative answers to the first three questions.<sup>248</sup> After a careful analysis of, and comparison to, previous decisions, the trial court ruled that the selection of English law and its designation of London as the location of arbitration “constitute[s] a reasonable commercial relationship with the United Kingdom or indicates that the parties envisaged enforcement abroad.” The Convention was, therefore, applicable to the dispute.<sup>249</sup>

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<sup>243</sup> See *id.* at 1018 (holding that “[P]laintiff’s motion for summary judgment is denied insofar as it requests a declaration that [the Convention] does not apply to the LOF”).

<sup>244</sup> *Jones II*, 30 F.3d at 366.

<sup>245</sup> The court cited multiple cases (e.g., *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982), and *Cargill Int’l S.A. v. M/T Pav Dybenko*, 991 F.2d 1012 (2d Cir. 1993)).

<sup>246</sup> *Jones I*, 828 F. Supp. at 1015.

<sup>247</sup> *Id.*; see also *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 959 (10th Cir. 1992); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982).

<sup>248</sup> *Jones I*, 828 F. Supp. at 1015.

<sup>249</sup> In examining the fourth question, the Court recognized that there were previous non-authoritative cases ruling that LOF connections to a foreign forum and applicable foreign law did not sufficiently establish the relationship with a foreign nation as provided in § 202. The court refused, however, to follow this reasoning. See *Reinholtz v. Retriever Marine Towing & Salvage*, No. CV-92-14141, 1993 WL 414719 (S.D. Fla. May 21, 1993); see also *Brier v. Northstar Marine, Inc.*, No. 91-597(JFG), 1992 U.S. Dist. LEXIS 20931 (D.N.J. 1992); *Jones II*, 30 F.3d at 1015-18 (in reaching its conclusion, the court also analyzed the forum selection, and the policy of construing the Convention broadly so as to effect its purpose in furthering arbitration agreements on an international scale).

The Second Circuit Court of Appeals reversed the decision of the district court. The appellate court found that the designation of London as the forum for arbitration, and the selection of English law did not satisfy the requirement of a reasonable foreign connection under § 202.<sup>250</sup> Moreover, the appellate court found that the selection of British law was not appropriate because no significant portion of the performance occurred or was to occur in England.<sup>251</sup> Furthermore, the Court found that the district court lacked jurisdiction to compel the arbitration in London since § 206 does not apply to an arbitral agreement outside the scope of the Convention.<sup>252</sup>

Isolated from the Convention, both the district and circuit courts analyzed § 202 on legitimate grounds. However, it seems that both courts mistakenly targeted § 202 and missed the interplay between § 202 and the Convention.

### 3. *Does Section 202 Conflict with the New York Convention?*

The adoption of the territory criterion for the application of the Convention is unconditional among contracting parties.<sup>253</sup> The one single determining element is the location of the arbitral award; a contracting state should apply the Convention to an award entered in another contracting state.<sup>254</sup> This straightforward rule set forth by the Convention means that neither the nationality of the parties, the applicable law, the location for performance, nor the location of agreement executed impacts the application of the Convention to foreign awards.

It is noteworthy that the *Jones* case deals with an agreement to arbitrate in a foreign country rather than with a foreign award. However, by analogizing to Article I, the Convention should be read as requiring the enforcement of agreements that would in turn lead to foreign awards or non-domestic awards.<sup>255</sup> If a court has a Convention obligation to honor foreign awards but not to compel parties to arbitrate according to the agreement, the purpose of the Convention will be substantially undermined. In fact, Article II of the Convention requires each contracting state to recognize arbitration

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<sup>250</sup> See *Jones II*, 30 F.3d at 365-66.

<sup>251</sup> See *id.* at 366 (analogizing the testimony of an expert, Mr. Kearney, to the U.S. choice of law rule that “ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs”).

<sup>252</sup> See *id.*; see also 9 U.S.C. § 206 (providing order to compel arbitration and appointment of arbitrators by a court having jurisdiction).

<sup>253</sup> See New York Convention, *supra* note 3, art. I.

<sup>254</sup> See *id.*

<sup>255</sup> See Rau, *supra* note 140, at 233.

agreements in very general terms and without territorial conditions.<sup>256</sup> This understanding is also supported by § 206 of the U.S. Convention Act, which requires courts to compel arbitration in any place as provided in the agreement, regardless of whether the location is within the United States.<sup>257</sup>

In *Jones*, both the trial and appellate courts reasoned that the foreign connection criteria in § 202 was intended to restrict the application of the Convention. The two courts reached different conclusions as to whether the facts in the case qualified as a foreign connection under § 202. Such an approach however, was incorrect from the beginning. If § 202 restricts foreign awards under the Convention, then it conflicts with Article I of the Convention. Under Article I, enforcing foreign awards from contracting states is unconditional. Restricting enforcement of foreign awards violates Convention rules.

There is a reasonable alternative interpretation of § 202 that is consistent with Article I: the foreign connection condition was intended to restrict non-domestic awards made in the United States or agreements that would lead to such non-domestic awards.<sup>258</sup> So far, however, U.S. courts have not taken this approach. Several lower courts have adopted the reasoning of *Jones*,<sup>259</sup> which is binding authority in the Second Circuit and influential authority around the country.

Confused by ambiguities unanticipated by the drafters of the implementing legislation, experts have called for a legislative clarification of § 202 and an official definition of international arbitration.<sup>260</sup> Legislative clarification may resolve this issue, but one fundamental problem remains: the international Convention does not take precedence over domestic legislation in American courts. Furthermore, a particular court's incapacity or unwillingness to understand the purpose and intention of the Convention undermines its implementation. Although most judges in U.S. courts are highly qualified, not all of them have an international vision, nor do all

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<sup>256</sup> See New York Convention, *supra* note 3, art. II.

<sup>257</sup> See 9 U.S.C. § 206.

<sup>258</sup> See *id.* (noting that if the function of § 202 is not to flout the Convention, then it must be interpreted as defining how far the Convention can be expanded, even as to awards rendered within the United States).

<sup>259</sup> See, e.g., *Reinholtz v. Retriever Marine Towing & Salvage*, No. CV-92-14141 (S.D. Fla. May 21, 1993); see also *Brier v. Northstar Marine, Inc.*, 1992 U.S. Dist. LEXIS 20931, 1993 A.M.C. 1194 (D.N.J. 1992).

<sup>260</sup> See, e.g., Richard W. Hulbert, *REPORT: Comment on a Proposed New Statute for International Arbitration*, 13 AM. REV. INT'L ARB. 153 (2002).



judges have extensive knowledge of international law.<sup>261</sup> Convinced that the implementing legislation is specifically tailored to better serve U.S. interests, some judges simply ignore the original provisions in the Convention.

The New York Convention was adopted to provide predictable procedural and substantive rules for enforcing arbitration awards and agreements. The standards set to classify Convention agreements or awards are mandatory rules with which contracting states have an obligation to comply. A contracting state's domestic legislation or judicial interpretation jeopardizing convention provisions is a violation of the Convention. In the *Jones* decision, the court went beyond reasonable limitation and created U.S. case law that is in conflict with the New York Convention. Such an approach damages the reputation of U.S. courts in enforcing Convention awards or agreements. U.S. courts should restrain from walking away from the guidelines set by the international community and uphold the goal of the Convention Act.<sup>262</sup>

## V. CHINA'S APPLICATION OF THE NEW YORK CONVENTION

### A. *Narrow Interpretation of the Territory Reciprocity Reservation*

China became a member of the New York Convention on April 22, 1987.<sup>263</sup> In its accession document, China declared both a "reciprocity reservation" and a "commercial reservation."<sup>264</sup> The English version of the "reciprocity reservation" in China's declaration copies the language from the

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<sup>261</sup> See, e.g., Rau, *supra* note 140, at 229 (using taunting language to criticize the trial court's decision in *Lander* for its misinterpretation of the "reciprocity reservation": "once one starts with a foolish premise, a foolish conclusion cannot be far behind").

<sup>262</sup> The purposes of the United States' accession to the convention were: (1) to "encourage the recognition and enforcement of international arbitral awards;" (2) to relieve the courts of heavy caseloads; (3) to offer parties an alternative method for resolving disputes, which is "speedier and less costly than litigation;" (4) to provide American businesses with "a widely used system to obtain domestic enforcement of international commercial arbitration awards, subject only to minimal standards of domestic judicial review." *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983); see also *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 888 (1995).

<sup>263</sup> See Decisions on China's Accession to the Convention on Recognition and Enforcement of Foreign Arbitral Award, adopted by the 18th Meeting of the 6th Session of the Standing Committee of the NPC on Dec. 2, 1986; see also Notice of the SPC Concerning the Implementation of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, issued by the SPC of China on Apr. 10, 1987, *Fa (Jing) Fa* [1987] No. 5, SUPREME COURT GAZETTE, June 20, 1987, at 40 [hereinafter SPC Notice Concerning the Convention].

<sup>264</sup> See Decisions on China's Accession to the Convention on Recognition and Enforcement of Foreign Arbitral Award, *supra* note 263.

Convention.<sup>265</sup> However, the Chinese language version of the declaration contains a clear limitation that only applies the Convention to awards from “another” contracting country, other than China. In its implementing notice, the SPC explicitly emphasized in several places that the reciprocity reservation confines China’s application of the Convention only to arbitral awards made “within the territory of *another* contracting country,” not including China.<sup>266</sup> This tight and clear Chinese language in the declaration and in the SPC’s notice does not offer any space for an alternative interpretation such as the one made by the U.S. court in *Lander*.<sup>267</sup> Chinese courts and scholars have accepted the understanding that the “reciprocity reservation” is meant to exclude any domestically entered awards, regardless of their classification under Chinese law; therefore, China’s obligation under the Convention is limited to the recognition and enforcement of arbitral awards rendered within the territory of another contracting party, not including China.<sup>268</sup>

## B. *Non-Domestic Awards in China*

### 1. *The Concept of “Foreign-Related Awards”*

In the Chinese legal system, the term “non-domestic award” is not clearly defined. Instead, the concept of “foreign-related awards” has been developed for arbitration awards that are entered in the territory of China but which are not considered to be regular domestic awards under Chinese

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<sup>265</sup> See U.N. Commission on International Trade Law, *Status: 1958-Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited June 1, 2006) (listing the declarations and reservations of various countries, including China).

<sup>266</sup> See SPC Notice Concerning the Convention, *supra* note 263, art.1.

<sup>267</sup> See *Lander Co. v. MMP Invs.*, 107 F.3d 476, 482 (7th Cir. 1997) (concluding that “another Contracting State” in the reciprocity reservation was intended to mean “another signatory of the Convention, like the United States, as opposed to non-signatories”); see also New York Convention, *supra* note 3, art. I(1).

<sup>268</sup> See Xiaowen Qiu, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China*, 11 AM. REV. INT’L ARB. 607, 615 (2000) (noting that China foreclosed the possibility of applying the Convention to arbitral awards entered by CIETAC and CMAC at the time of its ratification of the Convention by the reservation; further commenting that China’s narrow interpretation language made in the reservation is allowed by the Convention); see also HANG SONG, 《国际商事仲裁裁决的承认与执行》(RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION) (in Chinese) 243, (2000); JIAN HAN, 《现代国际商事仲裁法的理论与实践》THEORY AND PRACTICE OF MODERN INTERNATIONAL COMMERCIAL ARBITRATION (in Chinese) 475-6 (rev. ed. 2000) (citing the SPC’s Notice and also trying to define “made in a territory of another country”).

law.<sup>269</sup> In other words, foreign-related awards in China are the equivalent of the non-domestic awards defined in the Convention. However, as China intends to avoid disputes over the “reciprocity reservation,” the Chinese legislature and the courts do not use the term “non-domestic awards.”

The concept of “foreign-related arbitral awards” first appeared in the 1991 Civil Procedural Law of China.<sup>270</sup> However, the law does not offer a clear definition of foreign-related arbitral awards. Instead, the law stipulates the substantive procedures for the enforcement of awards entered by a “foreign-related arbitration institute.”<sup>271</sup> The Civil Procedure Law implies that all awards entered by Chinese foreign-related arbitration institutions are “foreign-related awards.” Such a mechanism is unusual, but it was practical before the implementation of the 1994 Arbitration Law, when the Chinese government authorized only two institutions, CIETAC and CMAC, to have jurisdiction over foreign-related arbitration.<sup>272</sup> After the implementation of the 1994 Arbitration Law however, local arbitration commissions became eligible to take foreign-related cases and international arbitration institutes were eligible to take domestic cases.<sup>273</sup> The nature of the institute therefore, is no longer a critical factor in defining “foreign-related awards.”

In practice, Chinese courts have adopted a new definition of foreign-related arbitration: arbitration for foreign-related cases.<sup>274</sup> The definition of foreign-related cases has been pronounced in SPC’s legal interpretations.<sup>275</sup> According to a 1992 SPC interpretation implementing the 1991 Civil Procedure Law, a case is a “foreign-related case” if: (1) one or both parties are foreign nationals, stateless persons, or foreign companies or organizations; (2) the legal actions leading to formation, change, or

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<sup>269</sup> See generally XIANGSHU LIU, A JURISPRUDENTIAL STUDY ON THE INTERNATIONAL COMMERCIAL ARBITRAL AWARD SYSTEM OF CHINA (in Chinese) 1-22 (2001) (detailing the concept and definition of “foreign-related arbitration” in China and pointing out it serves to differentiate domestic arbitration).

<sup>270</sup> See 1991 Civil Procedure Law, *supra* note 22, art. 257-261. Chapter 28, Arbitration (art. 257-261) was structured under Part Four, Special Stipulations for Civil Procedures Involving Foreign Interest.

<sup>271</sup> See 1991 Civil Procedure Law, *supra* note 22, arts. 258-260; see also The Chinese SPC, Opinions Regarding to Various Issues Arising From the Application of the Civil Procedure Law of 1991 (《最高人民法院关于〈中华人民共和国民事诉讼法〉若干问题的规定》, art. 304 (issued July 14, 1992) (Chinese version on file with Pacific Rim Law & Policy Journal).

<sup>272</sup> See ZHIDONG CHEN, *supra* note 47, 65-68.

<sup>273</sup> See *supra* note 48 and accompanying text.

<sup>274</sup> See JIAN HANG, *supra* note 268, at 469; see also XIANGSHU LIU, *supra* note 269, at 11-22 (citing more related sources as evidence that the rules defining foreign-related arbitration are based on the legal relationship).

<sup>275</sup> See, e.g., Opinions on Several Issues Concerning the Implementation of the General Principles of Civil Law of People’s Republic of China (trial version), promulgated by SPC on Jan. 26, 1988 and published on Apr. 2, 1988, art. 178.

termination of the legal relationship occurred in a foreign country; or, (3) the subject matter of the dispute is located in a foreign country.<sup>276</sup>

Although Chinese courts do not apply the New York Convention to foreign-related arbitral agreements or awards, the Chinese legal system does offer more favorable treatment to foreign-related arbitral awards than regular domestic awards. The qualification of a dispute as a “foreign-related arbitration” therefore, has a significant legal consequence in China.

## 2. *Special Treatment for Foreign-Related Arbitration*

The narrow interpretation of the reciprocity reservation in China excludes the application of the New York Convention to the recognition and enforcement of any awards rendered in China. However, China offers favorable treatment to foreign-related arbitration for the purpose of attracting foreign business.<sup>277</sup> While Western countries have been very suspicious of the competence and fairness of the Chinese court system, arbitration has become a primary choice for foreign businesses resolving disputes in China. In addition, the Chinese government has striven to attract more foreign-related arbitration cases for Chinese arbitration institutes. As a result, China adopted a special legal system for foreign-related arbitration, which imitates the New York Convention.

### a. *Grounds for Refusing Recognition and Enforcement of Foreign Related Awards*

#### i. *The New York Convention*

The core benefit of the Convention is that it limits the ability of courts to refuse to recognize and enforce arbitral awards; thus, making arbitration and arbitral awards more authoritative. Article V of the Convention spelled out five grounds on which a party may invoke a request for a court to deny

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<sup>276</sup> See Opinions Regarding Various Issues Arising From the Application of the Civil Procedure Law of 1991, *supra* note 271, art. 304, issued by the Chinese SPC on July 14, 1992.

<sup>277</sup> In fact, not long after Communist China was established, then Primer Minister Zhou En Lai requested the establishment of an arbitration system and Chinese arbitration institutes. An open door policy was later established in order to allow foreign business to enter China after the cultural revolution, but before this policy came into effect, arbitration was the only available dispute resolution forum for foreign-related business. This was because the Chinese courts were either not functional or did not accept foreign-related disputes. See Houzhi Tang, *The Road of Arbitration: A Commemorating Article for the 50th Anniversary of the China Council for Promotion of International Trade*, available at [www.cietac.org.cn](http://www.cietac.org.cn) (last visited Aug. 2, 2003) (Chinese version on file with Pacific Rim Law & Policy Journal).

recognition and enforcement of an arbitral award.<sup>278</sup> Those five grounds can be summarized as follows: (1) incapacity of parties or invalidity of the agreement; (2) insufficient notice or unfair deprivation of procedural rights; (3) disputed issues beyond the agreed scope of submission; (4) improper arbitral procedures or tribunal; and (5) non-binding awards.<sup>279</sup> In addition, the Convention offers enforcing courts the discretionary power to refuse recognition and enforcement based on either of two grounds: the subject matter “is not capable of settlement by arbitration,” or the enforcement would be against public policy.<sup>280</sup>

*ii. Foreign-Related Awards in China*

Article 260 of China’s 1991 Civil Procedure Law offered four independent legal grounds a defendant may invoke against a petition for recognition and enforcement of a foreign-related arbitral award.<sup>281</sup> Those four criteria are: (1) no written arbitration agreement exists; (2) notice was insufficient or procedural rights were unfairly deprived; (3) the arbitral procedure or tribunal was improper; and, (4) the disputed issues were beyond the agreed upon scope of arbitration or the subject matter was not capable of settlement by arbitration.<sup>282</sup> In addition, Article 260 provides that Chinese courts may deny the recognition and enforcement of foreign-related arbitral awards based upon “public interest.”<sup>283</sup> The 1994 Arbitration Law cited above discussed Article 260(1) as grounds for refusing recognition or enforcement of a foreign-related award.<sup>284</sup> For reasons unknown, the “public interest” ground was not included in the 1994 Arbitration Law. As Article 260(2) of the Civil Procedure Law is still a valid legal source however, public interest remains a legal basis that a court may cite to refuse enforcement or recognition of a foreign-related award.

*b. Grounds for Refusing Enforcement of Domestic Awards*

Grounds for refusing enforcement of domestic awards are regulated in article 217(2)-(3) of the 1991 Civil Procedure Law.<sup>285</sup> A party may cite the following reasons to defend a non-enforcement request: (1) no arbitration

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<sup>278</sup> See New York Convention, *supra* note 3, art. V(1).

<sup>279</sup> *Id.*

<sup>280</sup> See *id.* art. V(2).

<sup>281</sup> See 1991 Civil Procedure Law, *supra* note 22, art. 260.

<sup>282</sup> See *id.*

<sup>283</sup> See *id.* art. 260(2).

<sup>284</sup> See 1994 Arbitration Law, *supra* note 29, art. 71.

<sup>285</sup> See 1991 Civil Procedure Law, *supra* note 22, art. 217(2), (3).

agreement exists; (2) disputed issues are beyond the scope of the agreement or the arbitral institute is not an authorized one; (3) the arbitral tribunal or proceeding is improper; (4) major evidence for fact determination is lacking; (5) there was an error “in the application of the law”; or (6) the arbitrator was corrupt or “perverted the law”.<sup>286</sup> In addition, a court may cite “social public interest” as grounds for refusing to enforce an award.<sup>287</sup>

*c. Comparison of the Grounds for Refusal of Enforcement*

A close-up comparison reveals that the Chinese law offers more favorable treatment than the Convention to the recognition and enforcement of a “foreign-related award.” The grounds a party may invoke for refusing recognition and enforcement of an award are substantially narrower than under the Convention. The first ground in Article 260(1) of the Chinese Civil Procedure Law (no written arbitration agreement exists) is actually required as a prerequisite for the application of the Convention.<sup>288</sup> The first ground of Article V(1) of the Convention (incapacity of parties or invalidity of the agreement) and the last ground (non-binding award) are not found in Chinese law.

Under current Chinese law, parties are offered opportunities to challenge the validity of an arbitration agreement, based on the incapacity of a party, either at an arbitration commission or in court at an earlier stage of the arbitral proceeding.<sup>289</sup> If a party does not challenge the validity of the arbitration agreement before the first hearing of an arbitral proceeding, the party will be considered to have waived the right and will not be allowed to raise the issue during the enforcement stage.<sup>290</sup> Such a structure increases the system’s efficiency and avoids procedural abuse at the enforcement stage by a losing party.

Apparently, judicial review is more stringent for domestic awards than for foreign-related awards. Chinese courts may review the substantive issues on domestic awards, such as the evidence and application of the

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> See New York Convention, *supra* note 3, art. II(1), (2) (requiring arbitration agreement to be in writing to apply the Convention).

<sup>289</sup> See 1994 Arbitration Law, *supra* note 29, art. 17 (providing that arbitration agreement entered by an individual of limited civil capacity or no civil capacity is invalid); see also *id.* art. 20 (providing that a party may have the court of arbitral commission determine the validity of arbitration agreement).

<sup>290</sup> See *id.* art. 20(2) (providing that a party should raise the challenge to the validity of the arbitration agreement prior to the first hearing of the arbitral proceeding).

law.<sup>291</sup> It is critical, therefore, that parties ensure that their arbitration is considered to be a “foreign-related award” in order to limit the scope of judicial review and the possible defenses.

*d. Public Interest v. Public Policy*

The “public interest” defense<sup>292</sup> for the enforcement of foreign-related awards in Chinese law has brought intense criticism. The term “public interest” is unique in Chinese law, and it is different from “public policy” in Article V(2)(b) of the Convention or traditional international law. Legal experts have been striving to reach a universal definition for public policy but have found “it is difficult, if not impossible” to define the concept.<sup>293</sup> However, it is generally agreed that, for the purpose of the Convention, public policy should be construed narrowly and limited to the violation of a state’s “international public policy or *ordre public international*.”<sup>294</sup> U.S. courts have held that the public policy defense under the Convention applies only when “enforcement would violate the forum state’s most basic notions of morality and justice.”<sup>295</sup> Widely accepted factors that may be invoked as violations of international public policy include, but are not limited to: biased arbitrators, lack of reasons for the award, serious irregularities in the arbitration procedure, allegations of illegality, corruption or fraud, the award of punitive damages and the breach of competition law.<sup>296</sup>

The term “public interest” is different from the term “public policy,” and the former appears to be broader than “basic notions of morality and

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<sup>291</sup> See *id.* art. 58 (providing grounds that a court may revoke a domestic arbitral award). Cf. *id.* art. 70 (providing the grounds that a court may revoke a foreign-related award).

<sup>292</sup> See 1991 Civil Procedure Law, *supra* note 22, art. 260(2).

<sup>293</sup> See LEW, *supra* note 3, at 722-23 (listing definitions offered by courts from different countries).

<sup>294</sup> International public policy is different from domestic public policy. French NCPC Articles 1498 and 1502 regulated the international public policy and has been influential around the world. See *id.* at 721 & n. 173.

<sup>295</sup> See *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974) (finding that allowing the “public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility” and “national policy” does not equate to public); see also *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004) (reaching narrow reading of the public policy defense and finding that “[e]rroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.”).

<sup>296</sup> See LEW, *supra* note 3, at 722-23. Efforts to unify the definition of public policy were made by the International Law Association Committee on International Commercial Arbitration. A report and a resolution on public policy as a bar to the enforcement of foreign arbitration awards were published containing a guideline for the classification of public policy grounds. See ILA Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to the Enforcement of International Arbitral Awards*, in LONDON CONFERENCE REPORT 4-5 (2000) (on file with Pacific Rim Law & Policy Journal).

justice.” Public interest may include any financial, cultural, environmental, or other interest as long as it is public, and not isolated to a small group.<sup>297</sup> Technically, any enforcement may have a substantial impact on the financial situation of an interest group, and the public interest defense may therefore be abused as a ground for defending arbitral awards. This wide-open ground offered a convenient channel for local protectionists in China.<sup>298</sup>

The concern is more than a hypothetical discussion; rather it has become a real threat: a Chinese court refused to enforce a CIETAC foreign-related award on public interest grounds because the court believed that enforcement would severely impact the national economy, damage social public interest, and impact the nation’s foreign trade order.<sup>299</sup> Although the decision was eventually reversed by the SPC, the SPC ruling addressed only the particular situation in the case and did not offer a general definition of “public interest.”<sup>300</sup> Although the 1994 Arbitration Law does not include public interest as a ground that a court can cite to deny enforcement of a foreign-related award, the law does not overwrite the public interest grounds provided in the 1991 Civil Procedure Law. Public interest, therefore, remains a legal ground that courts may cite to refuse an enforcement request.<sup>301</sup>

### 3. *Reporting System for Foreign-Related Awards and Convention Awards*

In many respects, China has attempted to treat foreign-related awards as quasi-Convention awards. To promote international arbitration, China has offered foreign-related arbitration treatment that is more favorable than treatment under the New York Convention. Exercising its implementing power, the SPC established a reporting/approval system for both foreign-related arbitral awards and foreign arbitral awards (including Convention Awards).<sup>302</sup> The reporting system requires that a lower court’s decision

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<sup>297</sup> See HU LI, 《国际商事仲裁裁决的强制执行: 特别述及仲裁裁决在中国的强制执行》 [ENFORCEMENT OF THE INTERNATIONAL COMMERCIAL ARBITRATION AWARD: WITH SPECIAL REFERENCE TO THE ENFORCEMENT OF THE ARBITRAL AWARD IN THE P. R. CHINA] 148 (2000) (citing the violation of sovereignty, damage to natural resources, serious contamination to the environment, threat to public health or safety, or corruption of morality as possible violations of social public interest and resulting in the refusal of enforcing an arbitral award).

<sup>298</sup> See *id.* at 148 (citing Kaifen Dongfeng Clothing Factory v. Henan Clothing Import & Export (Group) Co.).

<sup>299</sup> *Id.*

<sup>300</sup> See *id.* The case was also reported in Michael J. Moser, *China and the Enforcement of Arbitral Awards*, 61 ARB. 50-51 (1995).

<sup>301</sup> 1991 Civil Procedure Law, *supra* note 22, art. 260(2).

<sup>302</sup> See [SPC], Notice of the SPC Concerning the Handling of Foreign-Related Arbitration and Foreign Arbitration, (Aug. 28, 1995) (Chinese version on file with Pacific Rim Law & Policy Journal).



denying enforcement of a foreign-related award or a foreign award must be approved by the SPC.<sup>303</sup> In detail, an IPC must report to an appropriate HPC for approval when the IPC intends to refuse enforcement of a foreign-related award or a foreign award.<sup>304</sup> If the HPC agrees with the lower court's refusal opinion, the HPC must report to the SPC for a final review and approval. The IPC cannot enter a decision to refuse enforcement unless and until the SPC approves the opinion.<sup>305</sup>

Though the reporting system has been criticized for its ineffective procedure and limited application,<sup>306</sup> the new system clearly reflects the SPC's positive attitude towards foreign-related arbitration: a standard that is equal to or more favorable than the Convention.

### C. *Foreign Invested Companies and the Convention*

#### 1. *Legal Status of Foreign Invested Companies in China*

The majority of foreign direct investments ("FDI") in China are in the form of joint venture companies ("JVCs") or wholly foreign owned enterprise ("WFOE") companies, both of which are considered to be entities of Chinese nationality according to Chinese law.<sup>307</sup> A JVC or a WFOE is not considered a foreign party in litigation; thus, the case is not considered a foreign-related case if no other independent foreign factors are involved.<sup>308</sup> Therefore, disputes between two foreign invested companies or between a

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<sup>303</sup> *Id.*

<sup>304</sup> *See id.* In China, IPCs are the courts of jurisdiction for enforcing foreign-related awards and intermediate courts are the courts of jurisdiction for enforcing Convention awards or other foreign awards in China. *See* 1991 Civil Procedure Law, *supra* note 22, art. 258, 269.

<sup>305</sup> *See* Notice of SPC Concerning the Handling of Foreign Awards, *supra* note 302.

<sup>306</sup> *See* Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People's Republic of China*, 1 *ASIAN-PAC. L. & POL'Y J.* 12, 28-30 (2000) (reporting that the SPC "denied 80% of the requests to refuse enforcement" and criticizing the system's exclusion of foreign ad hoc arbitration, the lack of a procedure to supervise non-reported but not enforced cases, and limited application to foreign invested companies).

<sup>307</sup> *See* Regulations for the Implementation of the Equity Joint Venture Law of the People's Republic of China, promulgated by the State Council on Sept. 20, 1983. Article 100 was amended by the State Council on January 15, 1986, 1 *CHINA L. FOR FOREIGN BUS.: BUS. REG.* ¶ 6-550 (CCH), art. 2; *see also* Wholly Foreign Owned Enterprise Law of the People's Republic of China, adopted by the Fourth Session of the Sixth NPC and promulgated by the President of China on Apr. 12, 1986, 2 *CHINA L. FOR FOREIGN BUS.: BUS. REG.* ¶ 13-506 (CCH), art. 8; Company Law of PRC, art. 18; General Principles of Civil Law of People's Republic of China (also known as Civil Principle Code of People's Republic China) (adopted by Fourth Session of the Sixth People's Congress of China on Apr. 2, 1986 and published on Apr. 12, 1986 by the No. 37 President Order with effective date set on Jan. 1, 1987) art. 37, 41(2), *available at* <http://en.chinacourt.org/public/detail.php?id=2696> (last visited February, 18 2006)

<sup>308</sup> *See supra* note 276 and accompanying text.

foreign invested company and a Chinese domestic company, without other foreign connections, are considered domestic cases.

## 2. *Foreign Investment Companies in Arbitration Proceedings*

In terms of arbitration, Chinese courts follow the “company’s nationality rule”: a JVC or a WFOE is not considered a foreign party but a Chinese company; arbitration involving JVCs or WFOEs, if no other qualified foreign connection exists, will not be considered foreign-related.<sup>309</sup> In a widely cited 1992 enforcement case, *China International Engineering v. Lido*, the Beijing IPC ruled that a JVC established under Chinese law was a Chinese legal entity and the fact that the JVC was a party in an arbitration proceeding did not qualify the case as “foreign-related.”<sup>310</sup> The court found that the parties in *Lido* were both legal Chinese entities and no other foreign element was involved. The court further determined that CIETAC, which then only handled foreign arbitration cases, did not have jurisdiction over any domestic cases and thus refused to enforce the CIETAC award.<sup>311</sup>

Though entirely controlled by foreign investors, WFOEs, like JVCs, are not considered foreign legal parties in Chinese arbitration proceedings. In 2001, Beijing No. 2 IPC ruled in *Amcor v. China* that a dispute involving a WFOE and a Chinese domestic company did not qualify as foreign-related arbitration.<sup>312</sup> In *Amcor*, the WFOE (Amcor) challenged the Beijing Arbitration Commission’s award on the ground that the commission failed to apply foreign-related procedure to the arbitration.<sup>313</sup> The Court found that

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<sup>309</sup> *China Int’l Eng’g Consultancy Co. v. Lido Hotel of Beijing* (1992, Beijing Intermediate People’s Court). The case was to enforce a CIETAC arbitral award against Lido Hotel, a joint venture company invested by a Hong Kong company and a Chinese company. The Lido case triggered the CIETAC to amend its arbitration rules in 1998 to expand its jurisdiction to cover foreign joint venture disputes, even when the foreign joint venture is a Chinese legal person. Reported and recited in Hu Li, *supra* note 297, at 146-47; see also MO, *supra* note 58, at 59-60; Randall Peerenboom, *Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 280 (2001) (discussing the *Lido* case and its impact).

<sup>310</sup> HU LI, *supra* note 297, at 146-147.

<sup>311</sup> See *id.* at 147; see also 1988 Arbitration Rules of CIETAC (Chinese version on file with Pacific Rim Law & Policy Journal).

<sup>312</sup> *Amcor Flexible Packing (Beijing) Co. (安姆科包装北京有限公司) v. China No. 22nd Metallurgy Constr. Co. (中国第二十二冶金建设公司)* (Beijing No. 2 Intermediate Court Civil Order, docket No. (2001) Erzongjinzhongzi No. 1640), available at <http://www.bjac.org.cn> (last visited on Nov. 9, 2003).

<sup>313</sup> Amcor challenged on the grounds that Amcor is a foreign invested company and contains a foreign element, and so the dispute should be arbitrated by qualified arbitrators for foreign-related cases and not by a general arbitrator. See *id.* The Beijing Arbitration Commission maintains different lists of arbitrators for domestic disputes and foreign-related disputes. For foreign-related cases, the commission should deliver a list of eligible arbitrators to the parties. The 1999 version is applicable to Amcor. See Beijing Arbitration Commission Arbitration Rules (1999 Version), art. 72, available at <http://www.bjac.org.cn> (last visited Jan. 8, 2004).

Amcor was a Chinese legal entity and the arbitration proceeding did not qualify as a foreign-related arbitration. Thus, the arbitration tribunal's application of domestic procedure complied with the 1994 Arbitration Law and the Procedure Rules of the Beijing Arbitration Commission.<sup>314</sup>

### 3. *Criticism and Comment*

Preventing foreign invested companies from applying favorable foreign-related arbitration procedures and rules exposes foreign investors to risk. Domestic arbitration awards in China are subject to stricter scrutiny and broader review in the courts. When foreign investors choose arbitration with the intention of skipping the uncertainty of Chinese courts, excluding foreign invested companies from applying foreign-related rules and laws upsets the foreign investors' major goal. This drawback discounts the value of arbitration to foreign investors in China and disables a dispute resolution channel that is valuable to foreign business. The drawback will not only negatively impact the investment environment in China, but will also paint China in a less favorable light for the purpose of international arbitration.

## VI. CONCLUSION

Case studies and theoretical analyses demonstrate that intervention from domestic courts has significantly impacted the application of the New York Convention. While appropriate and positive intervention promotes arbitration and international business, inappropriate court intervention damages international arbitration, and in turn, negatively impacts international business. Striking an appropriate balance of intervention in international arbitration is a challenging task for domestic courts. In offering universal rules for domestic courts, the New York Convention has achieved unprecedented success. However, achieving the goals set by the Convention depends heavily on the implementation process in domestic courts. As a result of the ambiguity of the original Convention language and the variation between domestic implementation systems and judicial discretion, achievement of a universal application of the New York Convention is far from a reality.

Studies have shown that domestic courts could effectively diminish or expand the benefits of the New York Convention by strategically limiting or expanding the scope of its application. Though originally purporting to implement a set of universal rules, the New York Convention leaves

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<sup>314</sup> See Notice of SPC Concerning the Handling of Foreign Awards, *supra* note 302, art. 1.

contracting states with broad discretion over domestic implementation procedures. The substantive standards and legal grounds set in the Convention are clear, and there is little room for domestic courts to exercise interpretation. However, domestic courts have broad discretion in determining the application and scope of the Convention.

In general, the discretion of local courts can be classified into two categories: macro, and micro level discretion. At the macro level, domestic courts interpret reciprocal rules, Convention wording, and domestic implementation rules. Examples of decisions from courts with macro discretion are the U.S. court's ruling in *Lander* and the Chinese SPC's exclusion of non-domestic awards category from the application of New York Convention. At the micro level, individual courts may use a single factor to distort legislative intention, as illustrated in *Jones*.

Theoretically, U.S. courts have greater discretion at the micro level on the application and scope of the Convention than do Chinese courts. This is because the New York Convention does not apply directly in U.S. courts but through domestic legislation. The domestic implementation legislation, the Convention Act, takes a different approach than the Convention to classify qualified awards, leaving domestic courts room to manipulate ambiguous language in the legislation. In addition, U.S. courts that maintain high levels of judicial independence have some ability to formulate their own rules on certain issues. Furthermore, the United States Supreme Court is generally reluctant to unify international treaty issues involving interests of different domestic private groups.

Unlike the law in the United States, in China, international conventions are directly applicable and are superior to any conflicting domestic laws or regulations. In addition, the Chinese SPC has frequently offered judicial interpretations, applicable in all courts nationwide, concerning the New York Convention. Furthermore, the Chinese SPC has established a pre-approval system that requires any denial of the application of the New York Convention to be reviewed by the SPC.

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.

To improve predictability and comply with the Convention obligation, two immediate remedial options are available to the United States. First, Congress could pass clarifying legislation on § 202 that clearly states that the foreign connection requirement limits only non-domestic awards, and that the Convention is applicable to any award entered in the territory of a foreign contracting state. Alternatively, the Supreme Court could grant certiorari on a case in order to overrule *Jones* and clarify that § 202 is consistent with the New York Convention.

New, clarifying legislation is the most practical option because a U.S. Supreme Court ruling on the issue is unlikely unless there is a significant change in the economy, such as surge of international disputes in the United States. Of course, individual circuit courts may take initiative to abandon the *Jones* rule, but it would be hard to reach a national consensus in this way.

There is little doubt that the Chinese judicial commitment to implement the New York Convention is strong, especially in the SPC and the HPCs. The SPC's active intervention on international commercial arbitration however, has not always been positive. Several judicial interpretations have significantly impacted international commercial arbitration in a negative manner. For example, the SPC does not consider foreign invested companies in China to be foreign actors in arbitration cases and they are therefore treated as domestic companies in such proceedings. U.S. businesses have been very concerned with this issue.<sup>315</sup> If foreign invested companies are treated as domestic companies in arbitration proceedings, arbitration in China will lose most of its value to foreign invested enterprises. Domestic arbitral awards are subject to the Chinese courts' substantive review during enforcement. Even worse, in the most recently published draft version of the 2003 SPC Provisions, the SPC attempted to prohibit domestically incorporated companies (including foreign invested companies) from arbitrating abroad without a foreign-related factor.<sup>316</sup> Thus, foreign invested enterprises may be denied access to the New York Convention through arbitration in a foreign country.<sup>317</sup>

To solve this issue, the Chinese SPC should reclassify foreign invested companies as foreign companies, rather than as domestic

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<sup>315</sup> See American Chamber of Commerce-China, Chinese Version [Commentary on the Draft SPC Provisions on Handling by People's Court of Foreign-Related Arbitrations and Arbitrations Adjudicated Abroad], available at [www.AmCham-China.org.cn](http://www.AmCham-China.org.cn) (last visited May 15, 2006).

<sup>316</sup> See 2003 SPC Provisions (draft), *supra* note 62, art. 20.

<sup>317</sup> See American Chamber of Commerce-China, *supra* note 315, art. 27 (comments).

companies, using its power of judicial interpretation. Such special treatment would not offer foreign invested companies a more favored position than domestic companies, because foreign businesses are disadvantaged in accessing unfamiliar Chinese domestic rules. In addition, such special treatment is necessary because the Chinese SPC has excluded domestically entered awards from the application of the New York Convention.

Finally, the Chinese legislature should amend and unify its rules for the recognition and enforcement of foreign-related awards. The current discrepancies between the Civil Procedure Law and the 1994 Arbitration Law, and between Chinese rules and the Convention standards, cause unnecessary complication and yield no significant benefit. Comparative analyses have shown that the standards set for recognition and enforcement of foreign-related awards in China do not substantively differ from the rules of the New York Convention. The only issue of significance is the special term of “public interest” in Article 260(2) of the Civil Procedure Law, which is considered to be different from the term “public policy” in the Convention. However, the later enacted 1994 Arbitration Law has abandoned the “public interest” provision. Though the 1994 Arbitration Law does not necessarily invalidate Article 260(2), it is clearly indicative of legislative intention. It is time therefore, for the Chinese legislature to amend Article 260 in order to fully incorporate the New York Convention’s standards.