

THE (AB)USE OF THE PUBLIC POLICY GROUND IN THE NEW YORK CONVENTION IN THE JUDICIAL REVIEW OF FOREIGN ARBITRAL AWARDS: RECENT DEVELOPMENTS IN CHINA

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ABSTRACT

The ‘pro-arbitration’ approach is widely accepted in worldwide judicial practice in supporting the development of international commercial arbitration and in the application of the New York Convention. It has been promoted that the Chinese courts are making progresses in supporting the development of arbitration in China and adopting a ‘pro-arbitration’ approach generally. Nonetheless, in the last a few years, the Chinese courts have refused the enforcement of foreign arbitral awards on the ground of public policy on various occasions, including the most recent Palmer Case in 2018 and the Gate Case in 2019. Moreover, on multiple occasions the Chinese courts dealt with the public policy issue when an award was made by a foreign tribunal while the arbitration agreement was declared invalid by the Chinese court—resulting in seemingly conflicting outcomes under identical circumstances. To address the concerns as to whether the Chinese judicial system really adopts a ‘pro-arbitration’ approach in dealing with these legal issues and concepts, this article examines a series of recent cases and evaluates the Chinese courts’ approach in applying the public policy ground and

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in deciding the validity of arbitration agreement in the context of the international consensus represented by the New York Convention, the UNCITRAL Model Law, the ILA Final Report on Public Policy. It further suggests possible reforms for China if a truly pro-arbitration approach is to be adopted.

Keywords:

Public policy, China, validity, arbitration agreement, pro-arbitration, Supreme People's Court, New York Convention, arbitration law, arbitral awards.

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INTRODUCTION

The New York Convention, which has celebrated its 60 year anniversary in 2018, stimulated the rapid growth of the international commercial arbitration around the world and the wide acceptance of this dispute resolution method across almost all jurisdictions.¹ The contribution of the narrowly defined exhaustive list of grounds for the refusal of the recognition and enforcement of international arbitral awards in Art. V of the New York Convention are observed and appreciated by scholars and practitioners.² The concept of public policy in Art. V(2)(b), however, has long been considered a loose end of this list, as the term is ambiguous and even arbitrary as an “unruly horse.”³ Fortunately, consistent international practice evidenced that a restrictive and ‘pro-arbitration’ approach has been adopted in

1. *Contracting States - List of Contracting States*, N.Y. ARBITRATION CONVENTION <https://www.newyorkconvention.org/list-of-contracting-states> (last visited Feb. 24, 2021) (listing 166 contracting states and additional territories).

2. See generally ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, 283, 296 (Kluwer Law & Taxation Publishers 1981); HERBERT KRONKE ET AL., *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION* 206–16 (Kluwer Law Int'l, 2010); U.N. COMM'N ON INT'L TRADE L., *UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS* (NEW YORK 1958), at 132–37, U.N. Sales No. E.16.V.7 (2016).

3. *Richardson v. Mellish* (1924) 130 Eng. Rep. 303; 2 Bing. 252.

most jurisdictions in the application of the New York Convention, and in particular, the interpretation and application of the public policy concept. International consensus of favoring the enforcement of arbitral awards and restricting the application of public policy is clearly observed.⁴

It is reported in the *Wicor* case (2016),⁵ the *Palmer* case (2018)⁶ and the *Gate* case (2019)⁷, however, that the Chinese courts refused the enforcement of foreign arbitral awards on the grounds of public policy repeatedly in dealing with conflicting arbitral awards and the Chinese court's ruling on the validity of arbitral agreements.⁸ It is therefore questionable whether the Chinese courts' approach to the judicial review on foreign arbitral awards and, in particular, invoking the public policy ground, is actually following the general international trend of "pro-arbitration."

China's arbitration industry attracts the attention of the whole international commercial arbitration industry, not only because of its unique law, practices, and legal culture, but also

4. Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L 249, 251 (2003) [hereinafter *Final ILA Report*].

5. Zuigao Renmin Fayuan Guanyu Bu Yu Zhixing Guoji Shanghui Zhongcai Yuan Di 18295/CYK Hao Zhongcai Caijue Yi An Qingshi De Fuhan (最高人民法院关于不予执行国际商会仲裁院第18295/CYK号仲裁裁决一案请示的复函) [Reply of the Supreme People's Court on the Case of Non-Enforcement of the International Chamber of Commerce Arbitration Court No. 18295/CYK Arbitration Award], 2016 Zui Gao Fa Min Ta No. 8 (Sup. People's Ct., March 22, 2016) [hereinafter *Wicor*].

6. See generally Paermo Haiyun Gongsu Yu Zhongmu Shiye Gufen Youxian Gongsu Shenqing Chengren He Zhixing Lundun Zhongcai Caijue An (帕尔默海运公司与中牧实业股份有限公司申请承认和执行伦敦仲裁裁决案) [Palmer Mar. Inc. v. China Animal Husbandry Co.], 2017 Jin 72 Xie Wai Ren No. 1 (Tianjin Mar. Ct. July 11, 2018) (discussing refusal to enforce a foreign arbitral award due to public policy and the validity of the arbitral agreement) [hereinafter *Palmer*].

7. See generally Gaite Qiche Ziyoumaoyiqu Gongsu Deng Yu Hebei Zhongxing Qiche Zhizao Youxian Gongsu Shenqing Chengren He Zhixing Xianggang Tebie Xingzhengqu Zhongcai Caijue An (盖特汽车自由贸易区公司等与河北中兴汽车制造有限公司申请承认和执行香港特别行政区仲裁裁决案) [Auto. Gate FZ Co. v. Hebei Zhongxing Auto. Mfg. Co.], 2015 E Yichang Zhong Min Huan Zi No. 00002 (Yichang Int. People's Ct. Aug. 15, 2019) (discussing refusal to enforce a foreign arbitral award due to public policy and the validity of the arbitral agreement) [hereinafter *Gate*].

8. *Wicor*, 2016 Zui Gao Fa Min Ta No. 8 (2016); *Palmer*, 2017 Jin 72 Xie Wai Ren No. 1 (2018); *Gate*, 2015 E Yi Chang Zhong Min Huan Zi No. 00002 (2019).

the great market potential and China's economic growth. Chinese parties are actively engaged in international arbitration practices around the world.⁹ The most reputable arbitration institution in China, the Chinese International Economic and Trade Arbitration Commission (CIETAC), reported its caseload in 2018 as 2962 cases in total, including 522 foreign-related cases.¹⁰ The total disputed amounts reached RMB 101.59 billion (USD 15.16 billion).¹¹ In 2017, the Hong Kong International Arbitration Centre (HKIAC) reported Chinese parties (excluding Hong Kong) as the second-most frequent users of their services with over 100 cases,¹² while the International Chamber of Commerce Court of Arbitration (ICC) reported China (including Hong Kong) as the seventh most frequent nationality among parties.¹³

However, it is noted that, the legal environment provided by the Chinese legal system in supporting arbitration, and particularly, regarding the recognition and enforcement of international arbitral awards, remains a major concern of foreign parties and practitioners.¹⁴ A long standing criticism is that the Chinese courts appear to exhibit 'local protectionism' and the process of enforcing a foreign arbitral award in China is not transparent.¹⁵ To change this impression, the Chinese courts have implemented changes, such as the establishment of the prior

9. See CHINA INT'L ECON. TRADE & ARB. COMM'N, *2018 Business Work Summary and 2019 Business Work Plan of China International Economic and Trade Arbitration Commission* (last visited Jan. 28, 2020), translated at <http://www.cietac.org/index.php?m=Article&a=show&id=15803> (discussing CIETAC's involvement in 522 arbitration cases where one or both parties are abroad).

10. *Id.*

11. *See id.*

12. See HONG KONG INT'L ARB. CENTER, *HKIAC Annual Report: 2017 Reflections* (last visited Jan. 28, 2021) http://www.hkiac.org/sites/default/files/annual_report/2017%20HKIAC%20Annual%20Report%203469-5010-8172%20v.1.pdf.

13. INT'L CHAMBER OF COMMERCE, *2017 ICC Dispute Resolution Statistics*, ICC DISP. RESOL. BULL., July 2018, at 51 (discussing 69 cases that involve 49 parties from Mainland China and 20 parties from Hong Kong, while the number of cases solely from Mainland China ranked 12 on the list of most frequent nationalities among parties).

14. See Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 249 (2001) (discussing the lack of reliable evidence on enforcement of arbitral awards shapes perception, influencing foreign investment and dealings in China and with Chinese companies).

15. *Id.* at 256.

reporting system and the publication of important judicial interpretations and case-decisions in relation to the review of arbitral awards.¹⁶ There are assertions that the Chinese courts are now progressing towards a more ‘pro-arbitration’ approach.¹⁷ The third and fourth cases in line denying the enforceability of a foreign award on the grounds of public policy, however, would raise doubts about such a proposition.

This article aims to address the question whether the Chinese courts have really adopted a “pro-arbitration” approach in its judicial review on foreign arbitral awards in the context of the highlighted cases: *Castel* (2013),¹⁸ *Wicor* (2016),¹⁹ *Palmer* (2018),²⁰ and *Gate* (2019).²¹ All of these cases sought enforcement of an arbitral award before the Chinese courts, when the foreign tribunal upheld the validity of the arbitration agreement but the Chinese courts held the opposite.²² This article addresses this situation in the following sequence; Part I briefly discusses the legal framework governing the Chinese courts’ judicial review of foreign arbitral awards, and in particular, the application of public policy in this context. Part II discusses the three highlighted cases, evaluating how the concepts such as “judicial sovereignty” and “res judicata” are understood by the Chinese courts in applying the public policy ground. Part III further examines the Chinese courts’ approach in negating the validity of

16. *See id.*

17. *See, e.g.,* Teresa Cheng & Joe Liu, *Enforcement of Foreign Awards in Mainland China: Current Practices and Future Trends*, 31 J. INT’L ARB. 651, 654 (2014).

18. Guanyu Shenqingren Castel Electronics Pty. Ltd. Shenqing Chengren He Zhixing Waiguo Zhongcai Caijue Yi An De Qingshi (关于申请人Castel Electronics Pty Ltd. 申请承认和执行外国仲裁裁决一案的请示)[Concerning Petitioner Castel Electronics Pty Ltd. Request for Instructions on the Application for Recognition and Enforcement of Foreign Arbitral Awards], 2013 Min Si Ta Zi No. 46 (Sup. People’s Ct. July 10, 2013) [hereinafter *Castel II*].

19. *Wicor*, 2016 Zui Gao Fa Min Ta No. 8 (2016).

20. *Palmer*, 2017 Jin 72 Xie Wai Ren No. 1 (2018).

21. *Gate*, 2015 E Yi Chang Zhong Min Huan Zi No. 00002 (2019).

22. *See Castel II*, 2013 Min Si Ta Zi 46 (2013) (discussing the invalidity of foreign arbitration agreements); *Wicor*, 2016 Zui Gao Fa Min Ta No. 8 (2016) (discussing the invalidity of foreign arbitration agreements); *Palmer*, 2017 Jin 72 Xie Wai Ren No. 1 (2018) (discussing the invalidity of foreign arbitration agreements); *Gate*, 2015 E Yichang Zhong Min Huan Zi No. 00002 (2019) (discussing the invalidity of foreign arbitration agreements).

arbitration agreements, which also contributes to the scenario of conflicting rulings between foreign arbitral awards and Chinese judgments, as indicated in the cases discussed in Part II. It is proposed by the authors that both China's legislative framework and their judicial practice on the validity and scope of arbitration agreements are restrictive and rigid, while the court's power to intervene on this matter is expansive, which is unusual in worldwide practice regarding similar matters. The final part concludes with the evaluation of the Chinese approach in relation to this matter in the context of the international practice and suggests further improvements that must be considered by Chinese legislators and courts to meet the standard of 'pro-arbitration' showcased by the leading jurisdictions.

I. BACKGROUND FOR JUDICIAL REVIEW OF FOREIGN ARBITRAL AWARDS IN CHINA

A. Overview

For the arbitral awards made outside China, the Chinese Civil Procedure Law provides that the recognition and enforcement of awards should be decided in accordance with "the international treaties concluded or acceded to by the People's Republic of China or in accordance with the principle of reciprocity."²³ The most predominant international treaty is the New York Convention,²⁴ of which China has been a member since 1987.²⁵ In addition, China also has its own arrangement for the mutual recognition and enforcement of arbitral awards with

23. *Zhonghua Renmin Gongheguo Minshi Susong Fa* (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, most recently amended by the Standing Comm. Nat'l People's Cong., Jun. 27, 2017), Art. 283.

24. *See generally* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 330 U.N.T.S. 38 (entered into force June. 7, 1959) [hereinafter *New York Convention*].

25. *Zuigao Renmin Fayuan Guanyu Zhixing Woguo Jiaru De Chengren Ji Zhixing Waiguo Zhongcai Caijue Gongyue de Tongzhi* (最高人民法院关于执行我国加入的〈承认及执行外国仲裁裁决公约〉的通知) [Notice of the Supreme People's Court on Enforcing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards] (Sup. People's Ct., effective Apr. 10, 1987), *Fa Jing Fa* (1987) No.5 (China).

Hong Kong SAR and Macau SAR.²⁶ The grounds used in the judicial review on arbitral awards in these arrangements mirror the New York Convention except minor changes of words, e.g., “social public interest” as the equivalence of public policy.²⁷ The court handling the application for recognition and enforcement of foreign arbitral awards should be “the intermediate people’s court of the place where the party subject to the execution is domiciles or where his property is located.”²⁸

Even with the legal framework established, initially, China’s judicial practice on reviewing foreign arbitral awards was mysterious and even arbitrary. In the early case of *Dongfeng*,²⁹ the local court denied the enforcement of a foreign award simply because the enforcement would harm the interests of the local economy.³⁰ This outcome was severely criticized and eventually overturned by the Supreme People’s Court (SPC).³¹ The incident in *Dongfeng* was not uncommon; early research reports demonstrate that the enforcement rate of foreign awards in China was relatively low.³² Critics focused on the uncertainties of the court proceedings, the low rate of recovery of losses, and severe

26. Zuigao Renmin Fayuan Guanyu Neide Yu Xianggang Tebie Xingzhengqu Xianghu Zhixing Zhongcai Caijue De Anpai (最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排) [Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong Special Administrative Region] (Sup. People’s Ct., effective June 18, 1999), Fa Shi (2000) No.3 [hereinafter *The Hong Kong-Mainland Arrangement*]; Zuigao Renmin Fayuan Guanyu Neidi Yu Aomen Tebie Xingzhengqu Xianghu Renke He Zhixing Zhongcai Caijue De Anpai (最高人民法院关于内地与澳门特别行政区相互认可和执行仲裁裁决的安排) [Arrangement of the Supreme People’s Court on the Mutual Recognition and Enforcement of Arbitral Awards between the Mainland and the Macao Special Administrative Region] (Sup. People’s Ct., effective Oct. 30, 2007), Fa Shi (2007) No. 17.

27. Compare *New York Convention*, *supra* note 24, Art. V, with *The Hong Kong-Mainland Arrangement*, *supra* note 26 Art. 7, ¶ 7.

28. Civil Procedure Law of the People’s Republic of China (中华人民共和国民事诉讼法) (promulgated by the Nat’l People’s Cong., Apr. 9, 1991, most recently amended by the Standing Comm. Nat’l People’s Cong., Jun. 27, 2017), Art. 283.

29. Yongping Xiao & Zhengxin Huo, *Ordre Public in China’s Private International Law*, 53 AM J. COMP. L. 653, 668 (2005).

30. *Id.* at 669.

31. *Id.*

32. Peerenboom, *supra* note 14, at 254 (discussing an enforcement rate of 52% for foreign awards).

delays of the enforcement process.³³ Local protectionism is also one of the major concerns raised by the foreign parties and practitioners.³⁴

To improve the quality and increase the consistency of decision-making in judicial reviews on foreign arbitral awards, the SPC established the “Prior Reporting System.”³⁵ This system requires that, if an Intermediate People’s Court (IPC) was contemplating setting aside or refusing the enforcement of an award, then that court must report the case to the High People’s Court (HPC) in the same jurisdiction for review, and if it too agrees with the IPC, then the matter must be reported to the SPC.³⁶ Only the SPC has the final say regarding the proposed decision to set aside an award or to refuse the enforcement of an award.³⁷ This scheme also applies to a judicial review of the validity of an arbitration agreement,³⁸ as further discussed in Part III. It is widely accepted that the Prior Reporting System is a significant improvement in China’s judicial practice in reviewing foreign arbitral awards, because it maintains a consistent approach promoted by the SPC and reduces the possibility of an award being refused enforcement.³⁹ However, the Prior Reporting System draws criticism because it is an internal process that operates within the judicial system and is still

33. *Id.* at 250, 254-55; Jinzhou Tao, *Arbitration Law and Practice in China* 202 (Kluwer International, 2012).

34. Peerenboom, *supra* note 14, at 258-59, 269; Anne-Marie Loong, *Steps toward an International Arbitration Culture? A Dissenting View from the People’s Republic of China* (2007) 1(5) *WORLD ARB. & MEDIATION REV.* 665, 675 (citing Michael H. Moser, *China and the Enforcement of Arbitral Awards* 61(1) *ARB.* 132,134 (1995)).

35. Zuigao Renmin Fayuan Guanyu Renmin Fayuan Chuli Yu Shewai Zhongcai Ji Waiguo Zhongcai Shixiang Youguan Wenti De Tongzhi (最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知)[Notice of the Supreme People’s Court on the People’s Courts Handling Issues Related to Foreign-related Arbitration and Foreign Arbitration Matters] (Sup. People’s Ct., effective Aug. 28, 1995), Fa Fa (1995) No. 18.

36. *Id.*

37. *Id.*

38. *Id.*

39. JINZHOU TAO, *ARBITRATION LAW AND PRACTICE IN CHINA* 205 (Kluwer Int’l, 3d ed. 2012); WEI SUN & MELANIE WILLEMS, *ARBITRATION IN CHINA* 345 (Kluwer Law Int’l, 3d ed. 2015).

lacking transparency, rather than a formal appeal proceeding in which a party can present its own case to the higher courts.⁴⁰

Many Chinese scholars, judges and practitioners propose that the current approach adopted is pro-arbitration and follows the general trends around the world.⁴¹ It is argued that China's judicial system provides a "minimal judicial intervention" scheme, as it will not intervene for any reason beyond the judicial review on arbitration agreements and awards.⁴² Some empirical study also presents a low rate of refusing the enforcement of arbitral awards in recent years.⁴³ It is also reported that the legal reasoning by the Chinese courts is also improving, and the judges dealing with issues arising from these types of cases are getting more experience, which are all laudable achievements.⁴⁴

B. *The Restrictive Approach in Applying Public Policy*

It is stated that the Chinese courts apply the public policy ground narrowly and restrictively despite following a "pro-arbitration" approach.⁴⁵ Prior to 2016, *Hemofarm* (2008) was the only case where the court invoked the public policy ground to refuse enforcement of a foreign award.⁴⁶ The low rate of the application of public policy might support the previous statement. Furthermore, on various occasions, the SPC denied reports from lower courts proposing the application of public policy,⁴⁷ which

40. Teresa Cheng & Joe Liu, *Enforcement of Foreign Awards in Mainland China: Current Practices and Future Trends*, 31 J. INT'L ARB. 651, 671 (2014).

41. Tietie Zhang, *Judicial Sovereignty and Public Policy Under Chinese Arbitration Law*, 28 AM. REV. INT'L ARB. 369, 383–84 (2017).

42. Wang Sheng Chang, *CIETAC's Perspective on Arbitration and Conciliation Concerning China*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND, ICCA CONGR. SERIES VOL.12, 34 (Albert Jan van den Berg ed., 2005).

43. Cheng & Liu, *supra* note 40, at 654–55. (reporting the outcomes of three different studies, which showed that the SPC refused to enforce 6.8% of cases between 2002 and 2006; 37.5%, or 21 out of 56 cases, via the Prior Reporting System between 2000 and 2011; and 25.9%, or 7 out of 27 cases, between 2010 and 2012).

44. *Id.* at 655.

45. *See id.*; Qisheng He, *Public Policy in Enforcement of Foreign Arbitral Awards in the Supreme People's Court of China*, 43 HONG KONG L. J. 1037, 1059 (2013).

46. He, *supra* note 45, at 1043.

47. *See id.* at 1053–54.

provides additional evidence of reluctance to refuse enforcement based on this discretionary basis.

In cases such as *ED&F Mans* (2003), the SPC made clear that the violation of mandatory laws of China is not itself a breach of China's public policy.⁴⁸ In *Western Bulk* (2012), the SPC also stated that it should not evaluate the substantive fairness of the underlying disputes in deciding whether China's public policy was violated.⁴⁹ It is argued that all these rulings are consistent with the international consent on the narrow construction of public policy, as represented by The ILA Report.⁵⁰

C. *The Hemofarm Case: Public Policy and China's 'Judicial Sovereignty'*

In the *Hemofarm* case (2008), the SPC applied public policy grounds to refuse enforcement of an ICC award.⁵¹ In the underlying dispute, foreign parties and the Chinese party established a joint venture, Jinan Hemofarm, and an ICC arbitration clause was included in the joint venture contract.⁵² Later, the Chinese party sued the joint venture on the basis of property disputes.⁵³ The foreign parties brought jurisdictional objections based on the arbitration clause to Chinese courts but were rejected on the ground that the joint venture was not a party of the arbitration clause.⁵⁴ The Jinan IPC then granted a property reservation measure towards the joint venture and later rendered its judgments favoring the Chinese party.⁵⁵ This judgment was confirmed by the Shandong HPC on appeal.⁵⁶ At the same time,

48. *China Sugar & Liquor Grp. Corp. v. ED F& Mans (Hong Kong) Co. Ltd.*, 2003 Min Si Ta Zi No. 3 (Sup. People's Ct. July 1, 2003).

49. He, *supra* note 45, at 1044 (noting that fairness was an aspect of the *Western* opinion).

50. Lanfang Fei, *Public Policy as a Bar to Enforcement of International Arbitral Awards: A review of the Chinese Approach*, 26 ARB. INT'L 301, 310 (2010).

51. *Hemofarm DD, MAG Inter'l Trade Holding DD, Suram Media Ltd. v. Jinan Yongning Pharm.Co. Ltd.*, 2008 Min Si Ta Zi No. 11 (Sup. People's Ct. June 2, 2008) [hereinafter *Hemofarm*].

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

the foreign parties started an ICC arbitration based on the joint venture agreement for the same property dispute.⁵⁷ The ICC tribunal decided that the application of the property reservation in the Chinese court breached the arbitration agreement, and the decision to grant such a property reservation could not be justified in either a legal or a commercial sense; the failure of the joint venture was a direct consequence of the property reservation order, for which the foreign parties were rendered damages.⁵⁸

In deciding whether to enforce the ICC award, the Jinan IPC and the Shandong HPC proposed to refuse the enforcement and reported it to the SPC.⁵⁹ The SPC confirmed the refusal, holding that: first, the ICC ruling on the dispute between the joint venture and the foreign parties exceeded the scope of the arbitration agreement (New York Convention Article V(1)(c)), and second, the ICC ruling dealt with the property dispute, which was already under the Chinese court's preservation order and judgment, and, if enforced, would infringe both the jurisdiction and the judicial sovereignty of China.⁶⁰

It was the first time the Chinese court referred to the public policy ground of the New York Convention.⁶¹ It was generally understood that violation of public policy referred to dealing with a scenario of conflicting rulings by the arbitral tribunal and Chinese courts on the merits of the case and, in particular, regarding the same property involved.⁶² However, the reasoning given by the Chinese courts, such as "infringing China's judicial sovereignty" was not a concept commonly used in international practice.⁶³ Some authors argued that it merely means the "res judicata" effect of the Chinese courts' decisions,⁶⁴ but others suspected that it might be broader than the res judicata principle,

57. *Id.*

58. *Id.*

59. Zhang, *supra* note 41, at 390–91.

60. *Hemofarm*, 2008 Min Si Ta Zi No. 11 (2008).

61. He, *supra* note 45, at 1046.

62. *Id.* at 1047.

63. *See generally*, Mo Zhang, *Enforceability: Foreign Arbitral Awards in Chinese Courts*, 21 SAN DIEGO INT'L L. J. 1, 59, 67 (2018) [hereinafter *Enforceability*] (suggesting that China has not applied the New York Convention in a way that is consistent with international norms).

64. *See* He, *supra* note 45, at 1055.

and might relate to political concerns and ideology.⁶⁵ On other occasions the SPC also held that “*res judicata*” was a rule provided by law and arbitration rules, rather than falling within the scope of public policy,⁶⁶ which was also distinctive from the general understanding of *res judicata* as an element of public policy, as reported in the ILA Report.⁶⁷ Following *Hemofarm*, the conflicts between a court ruling and an arbitral award were further discussed in the four cases regarding the particular matter of the validity of arbitration agreement, as discussed in Part II.

II. CASES DEALING WITH CONFLICTING AWARDS AND JUDGMENTS ON THE VALIDITY OF ARBITRATION AGREEMENTS

From 2013 to 2019, in dealing with the conflicts between a Chinese court’s ruling negating the validity of an arbitration agreement and a foreign award made on the basis of the validity of the same agreement, the SPC adopted *prima facie* contradictory reasoning or rationale in the following cases.⁶⁸ It is then worthwhile to examine these cases in more detail and search for the underlying rationale on the Chinese courts’ approach in interpreting and applying the public policy ground.

A. *The Castel Case (2013)*

TCL, a Chinese company, and Castel Electronics Pty Ltd, an Australian company, had a sales agreement which contained an arbitration clause referring to *ad hoc* arbitration in a “territory” not further defined in the contract.⁶⁹ Disputes subsequently arose

65. See generally Zhang, *supra* note 41 (describing the historical roots of Chinese ideology and its impact on the judicial system in enforcing arbitration awards).

66. See generally He, *supra* note 45, at 1053–54 (explaining that in China *res judicata* falls outside of the realm of public policy).

67. *Final ILA Report*, *supra* note 4, at 256.

68. See generally Zhang, *supra* note 41, at 396–97 (noting the discrepancies in how particular Chinese jurisdictions address this issue).

69. Guanyu Shenqingren Castel Electronics Pty. Ltd. Shenqing Chengren He Zhixing Waiguo Zhongcai Caijue Yi An De Qingshi (关于申请人Castel Electronics Pty Ltd.申请承认和执行外国仲裁裁决一案的请示)[Concerning Petitioner Castel Electronics Pty Ltd. Request for Instructions on the Application for Recognition and Enforcement of

in the performance of the sales agreement.⁷⁰ In July 2008, Castel submitted the case to arbitration in Australia.⁷¹ TCL participated in the arbitration proceedings and made counterclaim(s).⁷² In January 2009, TCL sought a decision to negate the validity of the arbitration clause before the Zhongshan IPC.⁷³ Before the Zhongshan IPC made a decision denying the validity of the arbitration agreement in December 2011, two arbitral awards had been made in December 2010 and January 2011 in favor of Castel, which consequently had sought recognition and enforcement of those arbitral awards before the Zhongshan IPC in April 2011.⁷⁴ The Zhongshan IPC intended to refuse recognition and enforcement of those arbitral awards and reported the case to Guangdong HPC.⁷⁵ The Guangdong HPC preferred not to enforce those awards on the basis of violation of public policy on the grounds that such awards were in conflict with the Chinese court's decision and would violate *res judicata*.⁷⁶ In October 2013, the SPC in its reply to Guangdong HPC stated that:

... the arbitral awards regarding this case were made on 23 December 2010 and 27 January 2011, but the decision of the Chinese court invalidating the arbitration agreement was made on 20 December 2011, the dates on which the arbitral awards were made were obviously prior to the date on which the decision of the Chinese court was made. Also, TCL did not argue the invalidity of this arbitration agreement during the arbitration proceedings, on the contrary TCL submitted its counterclaim, based on this, the arbitral tribunal confirmed the validity of the arbitration agreement

Foreign Arbitral Awards], 2012 Yue Gao Fa Zhong Fu Zi No. 7 (Guangdong High People's Ct. July 10, 2013) [hereinafter *Castel I*].

70. Zhang, *supra* note 41, at 392.

71. *Castel I*, 2012 Yue Gao Fa Zhong Fu Zi No. 7 (2013).

72. *Id.*

73. *Id.*

74. *Castel II*, 2013 Min Si Ta Zi No. 46 (2013).

75. *Castel I*, 2012 Yue Gao Fa Zhong Fu Zi No. 7 (2013).

76. *Id.*

and its jurisdiction, **it was in accordance with *lex loci arbitri* and the arbitration rules and was not contrary to China's judicial sovereignty.** Situations, which are contrary to public policy stipulated in article V(2)(b) of the New York Convention, should be understood as those that the recognition and enforcement of a foreign arbitral award will sufficiently endanger China's fundamental social public interests, including but not limited to, violation of China's basic principles of law, infringement of China's national sovereignty, endangerment of social public security and violation of good morals. In this case, although there is a conflict between the foreign arbitral awards and the Chinese court's effective decision on the validity of the same arbitral agreement, it is not sufficient of being contrary to China's public policy. . .⁷⁷

Judge Gao Xiaoli of the SPC further clarified the rationale in this ruling.⁷⁸ She provided that Article V(1)(a) of the New York Convention should not be applied in this scenario because the law applicable to the validity issue should be the *lex arbitri*, not the *lex fori* of the enforcement proceeding, and that the public policy was not violated because the Chinese court's decision negating the validity of the arbitration agreement was made after the arbitral award was rendered.⁷⁹ Therefore, the arbitral award did not violate China's public policy.⁸⁰

B. *The Wicor Case (2016)*

Wicor, a Swiss company, and Haopu, a Chinese company signed a joint venture contract containing an arbitration clause referring to ICC arbitration but without a designation of the place

77. *Castel II*, 2013 Min Si Ta Zi No. 46 (2013) (emphasis added).

78. See generally Gao Xiaoli (高晓力), *Thoughts on the Chinese Courts' Positive Practice on the Recognition and Enforcement of Foreign Arbitral Awards* (谈中国法院承认和执行外国仲裁裁决的积极实践), APPLICABLE L.(法律适用) (2018).

79. *Id.*

80. *Id.*

of arbitration.⁸¹ In July 2011, Haopu sued Wicor for breach of contract before the Taizhou IPC.⁸² In responding to the jurisdictional objection raised by Wicor by reference to the arbitration clause, the Taizhou IPC opined that the arbitration clause was invalid.⁸³ The Jiangsu HPC agreed with the Taizhou IPC and reported it to the SPC for further confirmation.⁸⁴ On March 1, 2012, the SPC replied to this matter and confirmed that the arbitration clause was invalid.⁸⁵ On March 30, 2012 Taizhou IPC made its decision in accordance with SPC's reply, which was further confirmed by Jiangsu HPC in December 2012.⁸⁶

In a parallel proceeding, Wicor brought a claim against Haopu in accordance with the arbitration clause to the ICC International Court of Arbitration in November 2011.⁸⁷ Despite the fact that Haopu explicitly argued that the arbitration clause was invalid and that the Taizhou IPC informed the ICC that the arbitration clause had been deemed invalid, an interim arbitral award confirming the validity of the arbitration clause was made in November 2012.⁸⁸ Subsequently, a final award and a supplementary award were made in July 2014 and November 2014, respectively.⁸⁹ Wicor then sought enforcement of those awards before the Taizhou IPC in December 2014.⁹⁰ The Taizhou IPC reported the case to the Jiangsu HPC, which further reported it to the SPC.⁹¹ In March 2016, the SPC in its reply to the Jiangsu HPC stated that:

... your court [Jiangsu HPC] ... on 11 December 2012... decided that the arbitration agreement in

81. *Wicor*, 2016 Zui Gao Fa Min Ta No. 8 (2016).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Jane Wessel, *Refusal to Enforce Arbitration Awards on Grounds of Public Policy in China: A Question of Timing*, LEXOLOGY (Dec. 6, 2016), <https://www.lexology.com/library/detail.aspx?g=1e0f9969-61e4-4cad-9108-9f30607bb3b8>.

91. *Id.*

this case was invalid. The decision took legal effect afterwards. The arbitral award in this case is made on the basis of the fact that the arbitrator confirmed that validity of the arbitration agreement. To enforce this arbitral award in China will be in conflict with the decision made by the People's court [Jiangsu HPC] and violate China's social public interest...Your court's opinion on not to enforce the arbitral award is agreed to.⁹²

In June 2016, the Taizhou IPC refused enforcement of those awards based on the SPC's reply.⁹³ It seems that this case follows the rationale in both Hemofarm and Castel. In particular, regarding the validity of the arbitration agreement, the negative decision in Wicor was made by the Chinese court in 2012 before the final arbitral award in 2014 and the public policy ground is applied.⁹⁴

C. *The Palmer Case (2018)*

The third case, dealing with a similar scenario, arose between Palmer, a company based in the Marshall Islands, and Zhongmu, a Chinese company.⁹⁵ The dispute arose from a bill of lading and a series of contracts regarding the carriage of goods by sea.⁹⁶ In March 2016, Zhongmu sued Palmer for damages.⁹⁷ One of the core issues was whether the arbitration clause on the back of the bill of lading was valid and covered Zhongmu, the endorsee of the bill of lading.⁹⁸ The Guangzhou Maritime Court (Guangzhou MC) held the arbitration agreement invalid in October 2017, and the Guangdong HPC confirmed in January 2018.⁹⁹

92. *Id.*

93. Keith M. Brandt & Michael K.H. Kan, *Chapter 10: China*, in *INTERNATIONAL ARBITRATION REVIEW* 119, 120 (James H. Carter ed., 8th ed. 2017).

94. *Id.*

95. *Palmer*, 2017 Jin 72 Xie Wai Ren No.1 (2018).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

Palmer brought a parallel arbitration proceeding against Zhongmu in London.¹⁰⁰ Zhongmu refused to participate in the arbitration.¹⁰¹ The tribunal rendered an award favoring Palmer in September 2016.¹⁰² Palmer subsequently sought recognition and enforcement of that award before the Tianjin Maritime Court (Tianjin MC) in January 2017.¹⁰³ The Tianjin MC was aware that Zhongmu and Palmer had a case pending in the Guangzhou MC and eventually delivered its decision refusing recognition and enforcement of the arbitral award in July 2018 after the proceedings were concluded before the Guangdong HPC.¹⁰⁴ The Tianjin MC held that:

In consideration of People's courts' [Guangzhou MC and Guangdong HPC] decisions on the validity of the arbitration clause in this case, to recognize and enforce the arbitration award according to the New York Convention will imply that the court of the place where the arbitral award to be enforced has a confirmative attitude towards the existence and validity of the arbitration clause on which the arbitration award is based. Chinese courts have made negative decisions on the existence and validity of the arbitration clause between the parties, recognition and enforcement of the arbitral award based on the above-mentioned arbitration clause will result in two opposite judicial conclusions on the same facts in the same jurisdiction, and this self-contradictory situation of judicial conclusions violates the unity and consistency of national legal values. Therefore, no matter how restrictive the interpretation of the 'public policy' under the New York Convention is, the unity and consistency of the national legal values and judicial conclusions should not be excluded from the scope of 'public policy'.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

Therefore, recognition and enforcement of the arbitral award in this case falls in the scope of Article V(2)(b) of the New York Convention, this arbitral award should not be recognized and enforced.¹⁰⁵

It is presumed that this ruling is confirmed by the SPC in accordance with the Prior Reporting System.¹⁰⁶ Similarly, the decision on the invalidity of the arbitration agreement directly contradicts the logic provided by *Castel* and *Wicor*: even the Chinese court's decision to negate the arbitration agreement was made (July 2018) long after the award was rendered (September 2016), the Chinese court may still refuse enforcement of the award on the grounds of public policy.¹⁰⁷

D. *The Gate Case (2019)*

A similar ruling was observed in a 2019 case between foreign parties from United Arab Emirates and Egypt and the Chinese party on agency and cooperation matters.¹⁰⁸ The dispute resolution clause provides that the settlement of dispute should be by arbitration in China "as per ICC" with its Chinese translation referring to the ICC Rules.¹⁰⁹ When the dispute arose,

105. *Id.*

106. Although such information is not provided, the presumption is made on the general understanding that all courts in China are expected to follow the practice requested by the Prior Reporting System. See Supreme People's Court Monitor, *How the Supreme People's Court Guides the Court System Through Its Judicial Documents (2)* (July 3, 2019), <https://supremepeoplescourtmonitor.com/2019/07/03/how-the-supreme-peoples-court-guides-the-court-system-through-its-judicial-documents-2/> (explaining the Prior Reporting System procedures as regulated mostly by custom before issuing a decision). Also, it takes one year and six months for the Taizhou IPC to hand out its final decision, which is quite long; however, this period of time is reasonable if it includes a report-and-reply process via the Prior Reporting System. Yves Hu & Clarisse von Wunscheim, *Reforms on the "Prior Reporting System"—a Praiseworthy Effort by the PRC Supreme People's Court, or Not?*, Kluwer Arbitration Blog (Jan. 8, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/01/08/reforms-prior-reporting-system-praiseworthy-effort-prc-supreme-peoples-court-not/> (explaining efficiency and delays from the Prior Reporting System from a statistical analysis of published court decisions).

107. *Palmer*, 2017 Jin 72 Xie Wai Ren No.1 (2018).

108. *Gate*, 2015 E Yi Chang Zhong Min Huan Zi No. 00002 (2019).

109. *Id.*

the Chinese party brought the arbitration clause to the Shijiazhuang IPC for a declaration of its invalidity in May 2011, while the foreign parties brought the claim to the ICC in Oct 2011.¹¹⁰ The Chinese party objected to the ICC tribunal's jurisdiction and made their lawsuit before the Shejiazhuang IPC known to the ICC and the tribunal established in Hong Kong.¹¹¹ The tribunal made a partial award in 2013 to proceed with the substance of the dispute and eventually ruled in favor of the foreign party in 2015.¹¹² The foreign party then sought enforcement of the ICC award made in Hong Kong before the Yichang IPC in 2015, but the proceeding was postponed pending the Shijiazhuang IPC's decision.¹¹³ After the Shijiazhuang IPC decided on the invalidity of the arbitral clause in July 2018, the Yichang IPC resumed the enforcement proceeding and decided to refuse the enforcement of the ICC award in Aug 2019.¹¹⁴

The Yichang IPC's ruling reads:

The Final Award was made by the arbitrator on the basis of the validity of the arbitration clauses in [both Agreements]. However, the Order (2011) Shi Min Li Cai Zi No.00002 made by the Shijiazhuang Intermediate People's Court, Hebei Province, on 6 July 2018, found the arbitration clauses in [both Agreements] invalid. The Order has been legally effective now. On the condition that the People's Court has already negated the validity of the arbitration agreements between the parties, the recognition and enforcement of any arbitral award made on the basis of those arbitration agreements would be conflicted with those legally effective orders made by the People's Court and violated the social public interest of the Mainland. According to Art. 7, para 3 of the SPC's Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

Special Administrative Region, ‘the enforcement of the award may be refused if the court of the Mainland holds that the enforcement of the arbitral award in the Mainland would be contrary to the public interests of the Mainland, or if the court of the HKSAR decides that the enforcement of the arbitral award in Hong Kong would be contrary to the public policy of the HKSAR’. Thus, the Court is in the opinion that the ICC Award No.18228/CYK shall not be recognized and enforced.¹¹⁵

Again, the Chinese court’s decision to negate the arbitration agreement was made in July 2018 long after the award was rendered in September 2015, although the court highlighted that the fact that the dispute on the validity of arbitration agreement was raised in May 2011 before the Shijiazhuang IPC before the initiation of the arbitration proceeding in Oct 2011, and that the tribunal was well aware of and proceeded with the pending lawsuit on the validity matter.¹¹⁶ It might imply that the timing of the submission of the validity issue to the court, which was earlier than its submission to the tribunal, might give the Chinese court a reason to follow the Shijiazhuang IPC’s decision on the validity issue rather than the arbitral tribunal’s.

E. *A Critical Analysis of the Chinese Court’s Rationale in this Series of Cases*

1. Factors Taken into Consideration by the Chinese Courts

The prima facie conflicts between *Palmer* and *Gate* on one hand, and *Castel* and *Wicor* on the other, illustrate the key point made by the Chinese court: the time of the conflicting decisions on the validity of arbitration agreement by courts and arbitral tribunals, or the res judicata effect, is not the sole consideration in applying the public policy ground. It also considers other factors in determining whether China’s public policy was breached. In comparing the factual scenarios of these cases, the

115. *Id.*

116. *Id.*

authors suggest the following elements might also affect the application of the ground of public policy.

On the surface, the scenarios in *Castel*, *Wicor* and *Gate* are identical: all involve an early arbitral award on the basis of a valid arbitration agreement, and a later Chinese judicial decision negating the validity of the same arbitration agreement. However, an examination of the facts provides one key difference between these cases: in *Castel*, the Chinese party did not object the jurisdiction of the tribunal and actively participated in the arbitration proceedings, raising its counterclaims against the foreign party.¹¹⁷ The SPC also made note of this point in its reply to the Guangdong HPC.¹¹⁸ Conversely, in *Palmer*, the Chinese party never accepted the jurisdiction of the tribunal and refused to participate in the arbitration proceedings,¹¹⁹ and in *Gate*, the Chinese party also objected to the jurisdiction and alerted the tribunal of the existence of the lawsuit on the validity matters.¹²⁰ Although the validity of the arbitration agreement itself, especially under Article V(1)(a), should not be established on whether a party participates in the arbitration proceedings, it may be given some weight by the Chinese courts in applying the public policy ground. It might be argued that the Chinese party in *Palmer* and *Gate* never submitted its case to the arbitral tribunal, so the jurisdiction should be reserved to the Chinese court. Thus, following the logic in *Hemofarm*, the award infringes on the Chinese courts' jurisdiction or "judicial sovereignty" on this matter.¹²¹

Also, in *Castel* and *Wicor*, the Chinese courts negating the validity of the arbitration agreement and the courts dealing with the enforcement of arbitral awards are the same. In *Castel*, it was the Zhongshan IPC (reporting to the Guangdong HPC and then

117. See *Castel II*, 2013 Min Si Ta Zi No. 46 (2013) (noting the Chinese respondent's involvement through its appointment of an arbitrator, participation in the arbitration proceedings, and filing of a counterclaim with the Australian arbitration tribunal).

118. See *id.* (noting that the Chinese party "did not object to the validity of arbitration clause during the arbitration proceedings, instead filing a counterclaim with the arbitration tribunal").

119. *Palmer*, 2017 Jin 72 Xie Wai Ren No. 1 (2018).

120. *Gate*, 2015 E Yi Chang Zhong Min Huan Zi No. 00002 (2019).

121. See *Hemofarm*, 2008 Min Si Ta Zi No. 11 (2008).

the SPC);¹²² in *Wicor*, the Taizhou IPC (reporting to the Jiangsu HPC and then the SPC).¹²³ While, in *Palmer*, the court dealing with the validity of the arbitration agreement, as well as the substantive dispute, was the Guangzhou MC (reporting to the Guangdong IPC and the SPC) and then the Guangdong HPC on appeal; while the application for enforcement was before the Tianjin MC.¹²⁴ In *Gate*, it was the Shijiazhuang IPC in the Hebei Province dealing with the validity matter, while the Yichang IPC in the Hubei Province dealing with the enforcement proceeding.¹²⁵ As no clearly identified mechanism is designed to solve the conflicts between different local courts affecting the same or related dispute, it might be impossible to resolve the conflict between different courts in China. This arguably magnifies the public policy concern that the enforcement of this award would infringe on the Chinese judicial system, or as said in the *Palmer* case, “violates the unity and consistency of national legal values.”¹²⁶

These cases indicated that the Chinese courts’ understanding on public policy, in dealing with conflicting arbitral awards and court decisions on arbitration agreements is discretionary and even self-contradictory. The factors taken into consideration may include the parties’ consent, the jurisdiction, and the operation of the whole judicial system.¹²⁷ From this perspective, this

122. *Castel II*, 2013 Min Si Ta Zi No. 46 (2013).

123. *Wicor*, 2016 Zui Gao Fa Min Ta No. 8 (2016).

124. *Palmer*, 2017 Jin 72 Xie Wai Ren No. 1 (2018).

125. *Gate*, 2015 E Yi Chang Zhong Min Huan Zi No. 00002 (2019).

126. *Palmer*, 2017 Jin 72 Xie Wai Ren No. 1 (2018).

127. *See id.* (considering jurisdiction and the “unification of national legal concepts”); *see also Gate*, 2015 E Yi Chang Zhong Min Huan Zi No. 00002 (2019) (considering the parties’ consent in selecting an arbitrator, jurisdiction, and damage to China’s judicial sovereignty); *see also Wicor*, 2016 Zui Gao Fa Min Ta No. 8 (considering whether an arbitration clause was invalid due to the parties’ inability to agree and ruling that an arbitration award violated Chinese jurisdiction); *see also Castel II*, 2013 Min Si Ta Zi No. 46 (2013) (considering whether the parties consented to an area of arbitration, whether Chinese jurisdiction applies to certain arbitral awards, and whether an Australian tribunal violated China’s judicial sovereignty); *see also Hemofarm*, 2008 Min Si Ta Zi No. 11 (2008) (considering the parties’ consent to arbitrated based on Chinese law, whether there was assent to Chinese jurisdiction, whether China’s judicial system was undermined, and the fundamental legal rights of Chinese citizens within the civil procedural system).

understanding of public policy is expansive and distinct from the international consensuses, as discussed below.

2. Comparison with the International Consensuses

One significant impact of this approach is that it is inconsistent with the other grounds for non-enforcement of arbitral awards provided by the New York Convention. For one thing, this expansive reading of the public policy concept derogates from the international consensus on a narrow application of public policy and goes beyond established categories of possible public policy elements listed in the ILA Final Report.¹²⁸

In 2002, the ILA Final Report summarized the international consensus on the interpretation and application of the public policy concept in the judicial review of international arbitral awards, including: the key notion that public policy should be a well-rounded legal concept that includes both procedural and substantial public policies;¹²⁹ the meaning of the term “public policy” used in common law jurisdictions and “*ordre public*” used in continental civil law jurisdictions should be considered synonymous;¹³⁰ the term of public policy should be narrowly construed;¹³¹ and the public policy should be “international” instead of local.¹³² The ILA Report further categorized possible public policy elements such as:

- (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;
- (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as ‘lois de police’ or ‘public policy rules’; and

128. See *Final ILA Report*, *supra* note 4, at 251–53, 255 (discussing a narrow interpretation of public policy as well as identifying the relevant public policy elements).

129. *Id.* at 253.

130. *Id.* at 250–51, n.7.

131. *Id.* at 251–53.

132. *Id.* at 251–52.

(iii) the duty of the State to respect its obligations towards other States or international organizations.¹³³

Arguably, the rationale in *Hemofarm* to uphold the Chinese court's decision made earlier than the foreign arbitral awards can be categorized as the principle of *res judicata*, a concept falling within the scope of procedural fundamental principles,¹³⁴ although whether the *res judicata* effect can be extended to the decision on *validity* of an arbitration agreement instead of the *substance* of the dispute remains controversial.¹³⁵ On the contrary, *Wicor* and *Gate* go even beyond an absolute *res judicata* effect of a court ruling invalidating an arbitral award, which itself is not fully determined.¹³⁶ In these cases, the retrospective effect of the Chinese courts' decision on the validity issue are upheld.¹³⁷ From a pro-arbitration point of view, the expansive use of public policy in this scenario would be problematic.

In addition, notwithstanding the distinctiveness of the Chinese test on validity,¹³⁸ it is difficult to argue that the rules governing the validity of arbitration agreements in China would be essential and even critical as a "public policy rule" that prevails the *lex arbitri* on the same matter. It is well-established in international practice that the exhaustive list provided by the

133. *Id.* at 255; *see generally id.* at 258-63 (recommending in Parts II-IV methods to address the identified public policy elements).

134. *Compare id.* at 256, with *Hemofarm*, 2008 Min Si Ta Zi No. 11 (2008).

135. There is no uniformity in the applicability of *res judicata* principles across different jurisdictions, and there are different views and approaches as to whether the *res judicata* effect should be restricted to decisions on the substantive issues or merits of a dispute. *See, e.g.,* *Desert Sun Loan Corp. v Hill* (1996) 2 All ER 847, 847-48 (holding that deciding on a jurisdictional issue may give rise to issue estoppel in the United Kingdom); *but see* PETER R. BARNETT, *RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS* § 2.46, at 54 (2001) (noting that dismissals for want of jurisdiction may not have the same *res judicata* effect).

136. *See* Filip de Ly & Audley Sheppard, *ILA Final Report on Res Judicata and Arbitration*, 25 ARB. INT'L 67, 69 (2009) (noting that "res judicata notions differ significantly as between jurisdictions").

137. *See Gate*, 2015 E Yi Chang Zhong Min Huan Zi No. 00002 (2019) (upholding the decision of the lower court); *see also Wicor*, 2016 Zui Gao Fa Min Ta No. 8 (2016) (upholding successive lower court decisions).

138. *See infra* Part III.

New York Convention, and resembled by almost all other legal regimes on the enforcement matters (eg., the Model Law), should be read as a whole.¹³⁹ Therefore, there should be only one test for the validity of arbitration agreement at the enforcement stage: the law chosen by the parties or the *lex arbitri*.¹⁴⁰

The Chinese courts have already correctly acknowledged that Chinese Law should not rely upon Article V(1)(a) in deciding the validity when handling *Castel*.¹⁴¹ Nevertheless, the Chinese courts still relied on the Chinese test, instead of the *lex arbitri*, in the judgments negating the validity of arbitral awards, and then relied upon these judgments to deny the enforcement of the arbitral award.¹⁴² It actually imposes a dual standard on the validity issue: if an award is to be enforced before a Chinese court, the arbitration agreement should be (1) valid under the law indicated by Article V(1)(a), and (2) consistent with a Chinese court's ruling on the validity issue.¹⁴³ It provides the Chinese court the magnificent discretion to negate an award already made, which would create significant uncertainties in practice.¹⁴⁴ This approach is clearly not consistent with the legislative purpose of Article V(1)(a) and the general international practice to limit the power of the enforcing court in reviewing the arbitration agreement within the scope of Article V(1).¹⁴⁵

To sum up, the Chinese courts seems to hold the position that its own courts have a final say on the validity of arbitration agreement and their decision would have retrospective effect against foreign arbitral awards, particularly in the ignorance of

139. JAN VAN DEN BERG, *supra* note 2 at 283, 296

140. *See id.* at 293–94.

141. Gao, *supra* note 78.

142. *See id.*; *see also Castel II*, 2013 Min Si Ta Zi No. 46 (2013) (considering whether an international arbitration award violated Chinese law and public policy).

143. *See* Gao, *supra* note 78.

144. *See id.* (noting inconsistencies between the New York Convention and its application under Chinese law and identifying circumstances and examples in which Chinese courts refuse to uphold foreign arbitration awards).

145. *See* JAN VAN DEN BERG, *supra* note 139, at 275–79, 282–83, 296 (outlining art. V(1)(a)'s legislative history and the Convention's enforcement rationale); *see also* Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18(2) ICC INT'L CT. OF ARB. BULL. 1, 3–6 (noting that art. V(1)(a) is rarely used, and, when used, most cases turned on strict interpretations of writing requirements).

the international consensus on this matter, including: the competence-competence principle that allows the tribunal to decide on the validity matter;¹⁴⁶ the test on validity of arbitration agreement provided by Article V(1)(a) of the New York Convention,¹⁴⁷ as indicated above; and the generally adopted “pro-arbitration” approach in restrictively interpreting and applying the public policy concept in the enforcement review. From this perspective, it is hard to conclude that the Chinese practice in the cases discussed above is in accordance with international practice.

III. THE VALIDITY OF ARBITRATION AGREEMENT: THE CHINESE APPROACH ANALYZED

Another factor contributing to the uncertainty of enforcing a foreign award in China and the possible application of public policy ground is the frequent rulings by the Chinese courts invalidating the arbitration agreements.¹⁴⁸ As introduced in Part I, decisions to negate the validity of international arbitration agreements are also subject to the Prior Reporting System, and therefore are in fact made by the SPC.¹⁴⁹ With a focus on the four decisions negating the arbitration agreements in the cases above, this section discusses the relevant law, SPC judicial interpretations and decisions, and evaluates whether the Chinese approach on the validity of arbitration agreements meets the requirement of “pro-arbitration”.

A. *The Jurisdiction and Time for a Court to Review the Validity of Arbitration Agreements*

In international practice, judicial review of the validity of an arbitration agreement usually arises at two stages: at the

146. See, e.g., U.N. Comm’n on Int’l Trade Law (UNCITRAL) Model Law on Int’l Com. Arb. art. 16, U.N. Doc. A/40/17 (June 21, 1985); UNCITRAL Arb. Rules art. 23, U.N. Doc. A/68/462 (Dec. 16, 2013); Int’l Chamber of Com. (ICC) Arb. Rules art. 6.4 (Mar. 1, 2017).

147. See, e.g., *Castel II*, 2013 Min Si Ta Zi No. 46 (2013) (refusing to enforce an arbitration award notwithstanding art. V(1)(a)).

148. Peerenboom, *supra* note 14, at 310 (indicating that only in 40% of cases, do applicants recover at least half or the arbitration award).

149. See *supra* Part I.

beginning of the dispute resolution process or after the rendering of a final award.¹⁵⁰ This article focuses on the former because it is likely the conflicts between a court ruling and an arbitration proceeding would arise at this stage, as illustrated by the cases above, where a claim is brought before either a tribunal or a court on the basis of a contract containing a disputable arbitration agreement.¹⁵¹ In international practice, if the claim is before the tribunal, the party might only be authorized to bring the claim to court after the tribunal ruled on its own jurisdiction under the competence-competence principle.¹⁵² If the claim is before the court, the courts should stay the proceeding on the basis of the existence of the arbitration agreement unless the arbitration agreement is “null and void, inoperative or incapable of being performed.”¹⁵³

The Chinese practice, however, departs from the common practice dictated by the Model Law and the New York Convention in many ways. First, in the arbitration proceedings, a party need not wait for a decision on the validity by the tribunal, because the Chinese law does not recognize the competence-competence principle.¹⁵⁴ Under Article 20(1) of the Chinese Arbitration Law, parties can bring a challenge to the validity of an arbitration agreement either to an arbitration commission or the court; and

150. See, e.g., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 8, 34(2)(a)(i) (amended 2006) (https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf) [hereinafter UNCITRAL MODEL LAW] (illustrating judicial review at the beginning of the dispute resolution process and the latter stage after an arbitral award has been granted, respectively), see also *New York Convention*, *supra* note 24, art. II(3), V(1)(a) (exemplifying the first stage of judicial review, pre-award and the latter stage of review post-award).

151. See *supra* Part II.

152. See, e.g. UNCITRAL MODEL LAW, *supra* note 150, at art 16(3) (providing that an arbitral tribunal may rule as a preliminary question that it has jurisdiction, thus illustrating the *competence-competence* principle).

153. UNCITRAL MODEL LAW, *supra* note 150, at art. 8(1).

154. João Ribeiro & Stephanie Teh, *The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law*, 34(3) J. OF INT'L ARBITRATION 459, 483; see also Zhonghua Renmin Gongheguo Zhongcai Fa (中华人民共和国仲裁法) [Arbitration Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Congress, Aug. 31, 1994), art. 19, 20 St. Council (http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474983043668.htm) [hereinafter Arbitration Law of the PCR] (where there is no provision implementing the *competence-competence* principle).

if one party refers to the arbitration commission while the other refers to the court, the court has the final say.¹⁵⁵ The absence of the tribunal's power to decide on its own jurisdiction is one of the most frequently criticized features of the Chinese arbitration system.¹⁵⁶

Furthermore, it is notable that, a party can bring a challenge to an arbitration agreement even before a specific dispute on the merits actually arise.¹⁵⁷ According to the SPC's Regulations on Cause of Actions in Civil Cases, "application on the confirmation of the validity of the arbitration agreement" is a separate cause of action subject to special procedural rules.¹⁵⁸ It is generally

155. Arbitration Law of the PCR, *supra* note 154, at art. 20. Only under the following situations court cannot accept a claim of challenge on the validity of arbitration agreement: if the parties fail to bring the claim before the first hearing in the arbitration proceeding, or only bring the claim after a decision on the validity is made by the arbitration institution. See Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Zhongcai Fa Ruogan Wenti De Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释) [Interpretation of the Supreme People's Court Concerning Matters on Application of the Arbitration Law of the People's Republic of China] (Sup. People's Ct., Aug. 23, 2006) Fa Shi [2006] No. 7, Art. 13 (<http://www.asianlii.org/cn/legis/cen/laws/iotsppccsmoaotalotproc1305/>) [hereinafter Interpretation of the SPC Concerning Matters on the Application of Arbitration Law].

156. Jingzhou Tao, *Salient Issues in Arbitration in China*, 27 AM. INT'L L. REV. 807, 813–14 (2012).

157. See generally *Enforceability*, *supra* note 63 (explaining that the underlying contract and the arbitration agreement are independent, one can be challenged and considered invalid without affecting the validity of the other; thus, an arbitration agreement can be challenged as invalid when no issue has yet arisen with the underlying contract).

158. Zuigao Renmin Fayuan Guanyu Yinfa Xiugai Hou De Minshi Anjian Anyou Guiding De Tongzhi (最高人民法院关于印发修改后的《民事案件案由规定》的通知) [Provisions on the Cause of Action of Civil Cases] Fa No. 42 (Sup. People's Ct., Feb 18, 2011, implemented Apr. 4, 2011), (<https://pkulaw.com/chl/d1ef3dde0bc0f1e1bdfb.html?keyword=民事案由规定>); see also Chenyang Zhang, *Cause of Action: Index List of Chinese Case Classification*, CHINA JUSTICE OBSERVER, (Jul. 5, 2019) <https://www.chinajusticeobserver.com/a/cause-of-action-index-list-of-chinese-case-classification> (explaining that the Provisions on the Cause of Action of Civil Cases contains an indexed lists of all Chinese causes of action); Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingshi Susongfa De Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China] 2015 Zu Shi No. 5 (Sup. People's Ct., Jan. 30, 2015, implemented Feb. 4, 2015) art. 215–16, <https://ipkey.eu/sites/default/files/legacy-ipkey-docs/interpretations-of-the-spc-on-applicability-of-the-civil-procedure-law-of-the-prc-2.pdf>.

understood that this cause of action is independent from a dispute on merits; such an understanding is confirmed by a series of cases brought by parties just to challenge or confirm the validity of arbitration agreements without an actual contractual dispute.¹⁵⁹ Arguably, this scheme gives the parties an expansive opportunity to challenge the validity of arbitration agreements and the courts enormous discretion to negate the arbitration agreements at any time. Arguably, this type of litigation derogates from the general principle of limited court intervention in the context of international arbitration practice.¹⁶⁰

In addition, the SPC's judicial interpretation provides that the court should advise the arbitration institution to stay the arbitration proceeding while the court deals with the challenge to the validity of an arbitration agreement, in stark contrast to the common international practice of commencing and continuing arbitration proceedings pending the court decision.¹⁶¹ It is uncertain whether this interpretation would apply to the situation of a parallel arbitration proceeding with a foreign tribunal, and if so, whether a Chinese court's notice would bind the foreign tribunal or institution.

To summarize, under the Chinese arbitration law framework, the court's power to decide the validity of an arbitration agreement at the early stage of dispute resolution is expansive. This might contribute to a more proactive approach of court intervention in practice, as indicated in the cases discussed above. It is urged by some scholars that such category of cases should be diminished at the legislative level. Before that legislative change

159. See, e.g., *Zuigao Renmin Fayuan Guanyu Shenqingren Ningbo Ningxing Guomao Shiye Youxian Gongsi Yu Beishenqingren Dayou Fazhan Youxian Gongsi Shenqing Queren Haishi Zhongcai Xieyi Xiaoli Yi An Qingshi De Fuhuan* (最高人民法院关于申请人宁波宁兴国贸实业有限公司与被申请人大发发展有限公司申请确认海事仲裁协议效力一案请示的复函) [*Ningbo Ningxing Guomao Industrial Co Ltd v Dayou Development Co Ltd*], 2013 Min Si Ta Zi No. 52 (Sup. People's Ct. Nov. 4, 2013).

160. See UNCITRAL MODEL LAW, *supra* note 150, at art 4 (exemplifying the principle of non-intervention by stating that "no court shall intervene [in arbitration agreements] except where so provided by this Law").

161. Compare *Zuigao Renmin Fayuan Guanyu Queren Zhongcai Xieyi Xiaoli Jige Wenti De Pifu* (最高人民法院关于确认仲裁协议效力几个问题的批复) [Reply to Several Issues Relating the Validity of Arbitration Agreements] 1998 Fa Shi No. 27 (Sup. People's Ct. Oct. 12, 1998), art. 4 (cicc.court.gov.cn/html/1/219/199/201/708.html 2/3); with UNCITRAL MODEL LAW, *supra* note 150, at art 8(2).

takes place, a more restrictive approach should be adopted by the court in such judicial review; e.g., if the place of arbitration is not in China or is uncertain, the adjudication on the validity issue should be left to the arbitral tribunal in accordance with the competence-competence principle.¹⁶²

B. *The Applicable Law in Deciding the Validity of Arbitration Agreements*

Determining the governing law has been a long-standing controversy when deciding the validity of arbitration agreements, especially in the absence of an express choice of law provision by the parties.¹⁶³ In international practice, two approaches are usually adopted.¹⁶⁴ Following the ultimate principle of party autonomy, an implicit agreement might be inferred from either the choice of the place of arbitration, or the choice of the governing law on the substance of the contract.¹⁶⁵ Alternatively, the “closest connection test” is also frequently referred to in deciding the applicable law.¹⁶⁶ More recently, a pro-arbitration approach is promoted in the context of international arbitration practice, which suggests that, among all possible applicable laws, the law favoring the validity of the arbitration agreements should be applied.¹⁶⁷

Apart from international debates and practices, the Chinese law and Judicial Interpretations gives a clear answer to this

162. Zhu Weidong, *Determining the Validity of Arbitration Agreements in China: Towards a New Approach*, 6 ASIAN INT'L ARBITRATION J. 44, 62–63.

163. See Peter Tzeng, *Favoring Validity: The Hidden Choice of Law Rule for Arbitration Agreements*, 27 AM. REV. INT'L ARB. 327, 327–28 (2016).

164. See *Id.* at 328.

165. See *Sulamérica CIA Nacional de Seguros S.A. v. Enesa Engenharia S.A.* [2012] EWCA Civ 638 [11] (Eng.) (representing the position that unless the parties agree otherwise, the choice of law governing the arbitration agreement shall be the law governing the underlying contract); see also *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd*, [2014] SGHC 13–14 (Sing.) (exemplifying the opposing opinion that the applicable law to an arbitration agreement is that of the seat of arbitration).

166. Fan Yang, *The Proper Law of the Arbitration Agreement: Mainland Chinese and English Law Compared* 33 ARBITRATION INT'L 121, 126–28 (2017) (citing: *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep. 446 at 453; *Sulamérica CIA Nacional de Seguros S.A. v. Enesa Engenharia S.A.* [2012] EWCA Civ 638 [11]).

167. See Tzeng, *supra* note 163, at 357–58; see also Yang, *supra* note 166, at 135.

question. Article 18 of the Chinese Law on Choice of Law in Foreign-related Civil Relationships provides that, in the absence of an express choice by the parties, the law applicable to the arbitration agreement should be the law of the place where the arbitration institution locates, or the law of the place of arbitration.¹⁶⁸ The SPC's judicial interpretation further provides that the court can apply Chinese law on validity in the absence of: an express choice of law, choice of arbitration institution, or place of arbitration.¹⁶⁹ In addition, this approach denies the possibility of implied choice of law by the parties, as some foreign parties may rely on.¹⁷⁰

It is notable, however, that the standard of a "clear" choice of arbitration institution or place of arbitration under Chinese law is very high, as discussed further below. This gives rise to an expansive opportunity for the Chinese court to apply Chinese law in deciding the validity of an arbitration agreement, as seen in cases discussed above. The surprisingly broad application of Chinese law in deciding the validity of arbitration agreements is severely criticized by scholars and practitioners as it would result in an outcome contrary to the "pro-arbitration" ethos.¹⁷¹

C. *Requirement of a Clear Choice of Arbitration Institution and the Place of Arbitration*

The test for a valid arbitration agreement under the Chinese law is distinctive and rigid. Unlike most arbitration legislation

168. Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falu Shiyong Fa (中华人民共和国涉外民事关系法律适用法) [Law on the Laws Applicable to Foreign-Related Civil Relations] (promulgated by STANDING COMM. NAT'L PEOPLE'S CONG Oct. 28, 2010 effective Apr. 1, 2011), art. 18 (<https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn173en.pdf>).

169. Interpretation of the SPC Concerning Matters on the Application of Arbitration Law, *supra* note 155, at art. 16.

170. Yang, *supra* note 166, at 134; *see also* Helena H. C. Chen, *China: Surprise to the Parties – Unanticipated Application of PRC Law in the Determination of the Effectiveness of an Arbitration Clause* 13 INT'L ARBITRATION L. R. 42, 43 (2010) (explaining that under PRC law when an arbitration clause lacks foreign-related elements, the parties "can neither choose to arbitrate outside of China nor specify a foreign law as the governing law for the arbitration clause").

171. Chen, *supra* note 170, at 43 (explaining how the broad application of PRC law can render arbitration clauses invalid); *see* Tzeng, *supra* note 163, at 358; *see also* Weidong, *supra* note 162, at 63 (complaining that the PRC has not adopted an "arbitration-friendly attitude" when it comes to the validify of agreements).

worldwide which requires only an agreement be “operative,” “capable of being performed,” not “null and void,” or sometimes contain some formality requirements,¹⁷² Chinese Arbitration Law relies heavily on the proper designation of arbitration institutions.¹⁷³ One fact is that ad hoc arbitration is not allowed under the current legislative framework in China.¹⁷⁴ The entire framework on arbitration is established on the basis of arbitration institutions, or “arbitration commissions” in Article 10 of the Chinese Arbitration Law.¹⁷⁵ The status of the key concept of the place of arbitration in international practice was only developed later and is less important in the regulatory framework.

Articles 16 and 18 of the Chinese Arbitration Law require a clear choice of “arbitration commission” for a valid arbitration agreement.¹⁷⁶ It is also provided that, if the name of the arbitration institution is incorrect or not precise, the arbitration agreement is invalid unless the information provided clearly points to only one arbitration institution.¹⁷⁷ In its judicial interpretations, the SPC further provides that the selection of a set of arbitration rules cannot be treated as the choice of the arbitration institution, unless one set of arbitration rules specifically dictates only one arbitration institution.¹⁷⁸ If the parties choose more than one arbitration institution in the agreement and fail to agree on one of them later, the agreement is also invalid.¹⁷⁹ Similarly, if the agreement refers to an institution at a particular place, city, or geographic area, the

172. See, e.g. UNCITRAL MODEL LAW, *supra* note 150, at art 7–8.

173. Tao, *supra* note 156, at 810.

174. *Id.* at 812.

175. See Arbitration Law of the PCR, *supra* note 154, at art. 10.

176. See Arbitration Law of the PCR, *supra* note 154, at art. 16, 18; see also Jingzhou Tao & Clarisse Von Wunschheim, *Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions*, 23 ARBITRATION INT'L 309, 311 (2007). It is understood now that foreign arbitration institutions would satisfy the requirement of a designated ‘arbitration commission,’ but there are also doubts as to whether a foreign institution would actually fit the definition of an ‘arbitration commission’ in Art 10 of the Chinese Arbitration Law. Ribeiro & Teh, *supra* note 154, at 481 (discussing *Longlide Packaging Co. Ltd. v. BP Agnati S.R.L.*).

177. Interpretation of the SPC Concerning Matters on the Application of Arbitration Law, *supra* note 155, art. 3.

178. *Id.* at 4.

179. *Id.* at 5.

arbitration agreement is invalid unless there is only one arbitration institution in that place.¹⁸⁰ Compared with international practice with a strong pro-arbitration bias that favors the validity of arbitration agreement, this approach is very restrictive and rigid. It prohibits any uncertainty regarding the choice of arbitration institution in the arbitration agreement because any uncertainty would render it invalid.

Various cases in China support the view that the Chinese courts adopt a very rigid approach in reviewing the choice of arbitration institutions. For example, in *Züblin* (2004) and *Xiaxin* (2009), arbitration clauses referring to “ICC Rules” were held invalid for failing to designate an arbitration institution.¹⁸¹ Similarly, agreements referring to “Beijing Arbitration” were also held invalid because there was more than one arbitration institution in Beijing.¹⁸² A similar decision is also observed in *Gate* (2019), where the Chinese court decided that the arbitration agreements only referred to the ICC rules instead of the institution and were, therefore, invalid.¹⁸³ Scholars and practitioners frequently criticize this rigid requirement as overly conservative and problematic in practice.¹⁸⁴

180. *Id.* at 6.

181. See *Zuigao Renmin Fayuan Guanyu Deguo Xu Pu Lin Guoji Youxian Zeren Gongsì Yu Wuxi Woke Tongyong Gongcheng Xiangjiao Youxian Gongsì Shenqing Queren Zhongcai Xieyi Xiaoli Yi An De Qingshi De Fuhan* (最高人民法院关于德国旭普林国际有限责任公司与无锡沃可通用工程橡胶有限公司申请确认仲裁协议效力一案的请示的复函) [Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case concerning the Application of *Züblin International GmbH v. Wuxi Woke General Engineering Rubber Co., Ltd.* for Determining the Validity of the Arbitration Agreement] 2003 Min Si Ta Zi No. 23 (Sup. People's Ct. Jul. 8, 2004); *Guanyu Xia Xin Dianzi Gufenyouxian Gongsì Yu Bilishi Chanpin Youxian Gongsì Queren Jingxiao Xieyi Zhongcai Tiaokuan Xiaoli De Qingshi De Fuhan* (关于夏新电子股份有限公司与比利时产品有限公司确认经销协议仲裁条款效力的请示的复函) [Reply to the Request for Confirmation of the Validity of the Arbitration Clause of the Distribution Agreement Between *Amoi Electronics Co., Ltd.* and *Weilisy Products Co., Ltd.*] 2009 Min Si Ta Zi No. 5 (Sup. People's Ct. 2009).

182. *Fanyu Zhujiang Steels Co. v. Shenzhen Fanbang International Freight Forwarding Co.* [2009] Min Si Ta Zi No.7, (Sup. People's Ct. May 5, 2009).

183. *Gate*, 2015 E Yi Chang Zhong Min Huan Zi No. 00002 (2019).

184. Tao & Von Wunschheim, *supra* note 176, at 324 (criticizing the strict rule declaring arbitration agreements invalid when an arbitration institution is unnamed or if the designation is ambiguous in the agreement).

On the surface of the Chinese law, the concept of the place of arbitration is not significant because it was designed with the idea that all arbitration cases are administered by an institution, and supervised by the court of the place of the institution.¹⁸⁵ Therefore, there is no independent concept of place of arbitration—at least not on the surface of Chinese arbitration law. When the law was made, the place of arbitration was deemed the same as the place of the arbitration institution.¹⁸⁶ In an early case, an award made in Hong Kong by an ICC tribunal was considered as a French award rather than a Hong Kong one.¹⁸⁷ Recently, the SPC expressed the possibility of a distinction between the location of the institution and the place of arbitration.¹⁸⁸ In 2018, the SPC decided that when the law of the place of arbitration institution and the law of the place of arbitration conflict, courts should choose the law favoring the validity of the arbitration agreement.¹⁸⁹ The enforceability of ad hoc awards made outside mainland China is also confirmed.¹⁹⁰

The insignificance of the place of arbitration on the surface of the Chinese Arbitration Law, however, does not mean that a clear

185. Fan Kun, *Prospects of Foreign Arbitration Institutions Administering Arbitration in China*, 28 J. INT'L ARB. 343, 351 (2011).

186. *Id.* (describing that the seat of arbitration is not a defined concept under Chinese law and that courts usually use the arbitration institution when classifying awards).

187. *Shanxi Tianli Industrial Co Ltd v Weimao International (Hong Kong) Co Ltd*, [2004] Min Si Ta Zi No.6 (Sup. People's Ct. Jul. 5, 2004) ("Since ICC Arbitration Court is an arbitration institution established in France, both China and France are the member states of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also called New York Convention), we shall apply the provisions of this Convention for reviewing the recognition and execution of the award to this Case.").

188. *Zuigao Renmin Fayuan Guanyu Shenli Zhongcai Sifa Anjian Ruogan Wenti De Guiding* (最高人民法院于审理仲裁司法审查案件若干问题的规定)[The SPC, Provisions on Several Issues concerning Trying Cases of Arbitration-Related Judicial Review], *Fa Shi* [2017] No.22, (Sup. People's Ct., Dec. 26, 2017, implemented Jan. 1, 2018), art 14.

189. *Id.* It is uncertain, however, if there is more than one institution in the clause but no place of arbitration, the validity can still be upheld according to the location of (any) institution that favors the validity of arbitration agreement.

190. *Zuigao Renmin Fayuan Guanyu Xianggang Zhongcai Caijue Zai Neidi Zhixing De Youguan Wenti De Tongzhi* (最高人民法院于香港仲裁裁决在内地执行的有关问题的通知) [The Superior People's Court, Notice on Issues in Relation to the Enforcement of Hong Kong Arbitral Awards in Mainland China], [2009] Fa No.415 (Sup. People's Ct. Dec. 30, 2009).

selection of the place of arbitration is not crucial for a valid arbitration agreement, because it would impact the law applicable to the validity issue as discussed above, especially in the context of an agreement on ad hoc arbitration or where an agreement fails the Chinese standard of “a clear designation of arbitration institution,” which would be held invalid if the Chinese law applied.¹⁹¹

Unfortunately, the SPC also adopts a very rigid approach in reading the place of arbitration as well, whilst any uncertainty in the designation of the place of arbitration would be read negatively and result in the application of Chinese law. For example, in *Xiaxin*,¹⁹² the arbitration clause provided for “ICC Rules, Xiamen or Brussels,” and the court applied Chinese law due to the suggestion of a Chinese city. In that case, the court decided that the arbitration clause was invalid for lacking the designation of an arbitration institution despite the possibility that the clause would be valid under Belgian law if decided by a court in Brussels.¹⁹³ A failure of designating a place of arbitration, subsequently, would result in the application of the Chinese law in deciding the validity of the arbitration agreement.¹⁹⁴ Similarly, the place of arbitration is considered uncertain even if a mechanism to decide the place is provided by the ICC Arbitration Rules selected by the party as in *Wicor*, or is decided by the arbitrator as in *Castel*.¹⁹⁵

D. *Evaluation of the SPC's Approach in the Judicial Review of the Validity of Arbitration Agreements*

In summary, SPC's approach concerning the issue of validity is an expansive opportunity for the court to rule on the issue without an actual dispute on the merits—a rigid approach in

191. Fan Yang, *Applicable Laws to Arbitration Agreements under Current Arbitration Law and Practice in Mainland China*, 63 INT'L & COMP. L.Q. 741, 744 (2014).

192. *Xiaxin Electronics Co v Belgian Product Co Ltd*, [2009] Min Si Ta Zi No.5 (Sup. People's Ct. Mar. 20, 2009) [hereinafter *Xiaxin*].

193. *Id.* (failing to discuss the potential applicability of Belgian law).

194. See *Xiaxin*, [2009] Min Si Ta Zi No.5 (2019) (deciding to use Chinese law when the definitive place of arbitration was ambiguous).

195. *Castel II*, 2013 Min Si Ta Zi No. 46 (2013); *Wicor*, 2016 Zui Gao Fa Min Ta No. 8 (2016).

deciding the applicable law. The SPC requires a clear designation of place of arbitration or arbitration institution, which increases the chance of the application of Chinese law, and it demands the strict adherence to the requirement of a designated arbitration institution in determining validity. All these aspects are significantly distinct from international practice and the trend of 'pro-arbitration' by requiring an extremely high standard of certainty in drafting the arbitration agreement.

In the context of international arbitration, the test on the validity of arbitration agreement is very lenient. The UNCITRAL Model Law requires the arbitration proceeding to proceed unless the agreement is "null and void, inoperative or incapable of being performed."¹⁹⁶ Consistent case law provides that there is a very strong public policy concern favoring the validity of arbitration agreement, upholding the parties' intention to arbitrate and providing predictability in international trade.¹⁹⁷

In practice, only significant matters, such as the non-existence of an arbitration institution, the failure of the designated institution or appointing authority, may amount to being "inoperative" or "incapable of being performed."¹⁹⁸ Even in those situations, some courts would adopt a more proactive approach to uphold the validity of arbitration agreement if it can still be performed in alternative ways.¹⁹⁹ It is common that an arbitration agreement would still be operative and capable of being performed even if some elements are left open either for flexibility reasons or because of the parties' inexperience in contract drafting.²⁰⁰ This might include a place of arbitration to be chosen or designated, or a choice between two arbitration

196. UNCITRAL MODEL LAW, *supra* note 150.

197. UNCITRAL DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 34–5 (UNCITRAL 2012), <https://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf>.

198. *Dalimplex Ltd. v. Janicki* (2003), 64 O.R. 3d 737 (Can. Ont. C.A.); *Chung Siu Hong Celment v. Primequine Corp.*, [1999] HKCFI 1472 (holding the arbitration agreements incapable of being enforced due to the lack of designated institutions in the agreements in both cases).

199. *Lucky-Goldstar Int'l v. Ng Moo Kee Eng'g*, [1993] HKCFI 14.

200. *Id.*

institutions.²⁰¹ The choices are to be made by the parties only when an actual dispute arises (as in *Palmer*),²⁰² or decided in accordance with a specific mechanism (as in *Wicor*, to be decided by the ICC Court of Arbitration),²⁰³ or filled by the institution or the arbitrators (as in *Castel* and *Gate*).²⁰⁴ It is when the arbitration agreement is crystallized and all components are properly addressed. Alternatively, a gap-filling scheme can be either provided by other agreements between the parties, the arbitration rules, or the discretionary power enjoyed by the arbitrators.²⁰⁵ This approach of clause-drafting, however, is peculiarly problematic in the context of Chinese law because the court can rule on the validity of the arbitration agreement before an actual dispute arises and can attempt to read it narrowly.²⁰⁶ It is highly likely that the Chinese law would apply, and the arbitration agreement would fail the Chinese standards for validity. Even if in a later dispute the arbitration agreements are crystallized or the gap is filled by the arbitration institutions or the tribunal, the Chinese courts' declaration on the invalidity of the arbitration agreement still stands and would jeopardize the parties' chance of enforcing the arbitral awards, as in *Castel*, *Wicor*, and *Palmer*.²⁰⁷

The rigid approach adopted by the Chinese courts in recognizing the validity of arbitration agreement is severely criticized by scholars and practitioners.²⁰⁸ It is urged that an approach favoring the validity should be applied in the first place, so the conflicting decisions by the arbitral tribunal and the

201. *Xiaxin*, [2009] Min Si Ta Zi No.5 (2019) (concerning an arbitration agreement giving the choice between Brussels and Xiaxin law).

202. See *Palmer*, 2017 Jin 72 Xie Wai Ren No. 1 (2018).

203. *Wicor*, 2016 Zui Gao Fa Min Ta No. 8 (2016).

204. *Castel II*, 2013 Min Si Ta Zi No. 46 (2013); *Gate*, 2015 E Yi Chang Zhong Min Huan Zi No. 00002 (2019).

205. See *Castel II*, 2013 Min Si Ta Zi No. 46 (2013); *Gate*, 2015 E Yi Chang Zhong Min Huan Zi No. 00002 (2019).

206. Fan Yang, *How Long Have You Got?: Towards a Transparent and Streamlined System for Enforcing Foreign Arbitral Awards in China*, 34 J INT'L ARB. 489, 508 (2017).

207. *Supra* Part II A–C.

208. Yang, *supra* note 206, at 508.

Chinese courts, as illustrated in the previous cases, would not occur.²⁰⁹

IV. CONCLUSION

In concluding the discussions above, the Chinese courts' refusal to enforce the arbitral award in the series of cases reflects two major aspects of the Chinese courts' practice failing the standard of "pro-arbitration" promoted by the international commercial arbitration community.

First, they adopt a very expansive approach in applying public policy when dealing with a conflict between the tribunal and the court on deciding the validity of arbitration agreements. Rather than respecting the foreign tribunal's decision on the validity of an arbitration agreement or applying the law of the place of arbitration as required by Article V(1)(a) of the New York Convention, the Chinese courts give significant weight to their own decisions on invalidity, public policy, and take into considerations other than the *res judicata* effect of these decisions.²¹⁰ This approach is not only expansive, as opposed to the commonly-accepted narrow approach in applying public policy, but also disrespects the intention of Article V(1)(a) to limit the applicable law to the listed scenarios. It fails to recognize the competence-competence principle in international practice and leaves no room for international comity to foreign arbitral tribunals. This approach also increases the uncertainty in the enforcement of foreign awards in China, because even in an award that has already been made in accordance with the *lex arbitri*, the arbitration agreement it is based on may still be declared as invalid following the Chinese approach, and this negatively affects its enforceability.

Second, the Chinese courts' rigid and mechanical approach in deciding the validity of arbitration agreements contributes to the difficult situation of potential conflicting decisions between tribunals and courts. The Chinese practice sets a very high standard in requiring certainty in the language of the arbitration agreement, so any uncertainty in relation to concepts such as the

209. Yang, *supra* note 166, at 135; Tzeng, *supra* note 163 at 327.

210. Tao, *supra* note 156, at 219–20.

law specifically applicable to the validity issue, as well as the place of arbitration, might lead to the automatic application of Chinese law. While Chinese law requires a clear designation of arbitration institution, the courts also strictly adhere to the certainty of arbitration institution.²¹¹ Any uncertainty, such as selecting institutional rules rather than the institution, nominating more than one institution, or nominating a place where there are more than one institution, would negate the validity of the arbitration agreement. This approach weighs any uncertainty toward the conclusion of invalidity and does not favor arbitration.

In sum, the approach adopted by the Chinese courts in dealing with the issues arising from arbitration agreements in the enforcement of foreign arbitral awards departs from the “pro-arbitration” trend in the international practice in many ways. The most significant effect of this approach is a deviation from the uniform practice of judicial review of international arbitral awards as promoted by the New York Convention:²¹² the Chinese approach bypasses Art. V(1)(a)’s requirement to limit the ground of the invalidity of arbitration agreement only under the law chosen by the parties or the *lex arbitri*, and is contrary to the international consensus of a narrow application of public policy under Art. V(2)(b).²¹³ It also undervalued the key principles underpinning the international arbitration practice, such as the principles of party autonomy and competence-competence as well as the tribunal’s discretionary power to maintain the arbitration proceeding. Lastly, the Chinese law imposes an additional burden on the parties, their counsels, the arbitration tribunals, and the institutions to understand the distinctive and disadvantageous rules to achieve an enforceable award.

From an international perspective, this approach demonstrates enormous uncertainties and even hostility in the Chinese legal environment. The rigid rules and practices would significantly terrify the foreign parties seeking enforcement of their arbitral award in China. Moreover, it would negatively

211. *Shenzhen Grain Group Co.*, 2010 Min Si Ta Zi No. 22 (June 9, 2010).

212. Yang, *supra* note 166, at 135.

213. *Final ILA Report*, *supra* note 4, at 250–51.

impact the development of international commercial arbitration in China-related trade activities. Despite a preference toward international arbitration among business professionals and legal practitioners,²¹⁴ parties trading with Chinese individuals and businesses may be reluctant to choose arbitration given the uncertainties.

China is an active player in the current world arbitration market.²¹⁵ In order to reassure foreign parties and practitioners that arbitration remains an effective and favorable method of dispute resolution in China, more is to be done. The authors urge the Chinese legislature and judiciary to adopt an actual “pro-arbitration” practice promoted by the leading legal instruments and adopted by most of the jurisdictions in the following aspects. First, the requirement of a “clear arbitration institution” should be removed as a precondition of a valid arbitration agreement under Chinese law. Second, before that legislative process occurs, the Chinese court should adopt a more flexible approach in determining the validity of an arbitration agreement, including but not limited to: respecting the implied consent to a choice of law; applying an international standard of the validity such as Article II of the New York Convention;²¹⁶ and allowing certain degrees of uncertainty in the arbitration agreement if the uncertainty can be properly addressed by the parties or the tribunal. Similarly, a more flexible and favorable approach should also be adopted in dealing with other matters in relation to the arbitration agreement. Third, the ground of public policy should be applied narrowly and should not be used to uphold all decisions of the Chinese courts in negating the validity of arbitration agreements, especially when an opposite ruling has already been made by a tribunal under the *lex arbitri*.

214. See QUEEN-MARY INTERNATIONAL ARBITRATION SURVEY 2, 7 (White & Case 2018), [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF) (reporting that 97% of the respondents to this survey considered international arbitration as the preferred method of dispute resolution, while the enforceability of the arbitral awards is the most prevailing advantage of the international arbitration—confirmed by 64% of the respondents).

215. Tietie Zhang, *Enforceability of Ad Hoc Arbitration Agreements in China: China's Incomplete Ad Hoc Arbitration System*, 46 CORNELL INT'L L.J. 361, 362 (2013).

216. Yang, *supra* note 166 at 135.

Before these suggestions are addressed, the authors remind foreign parties and practitioners of the risk of choosing arbitration as the dispute resolution method when dealing with Chinese parties, and suggests that a clear and unambiguous arbitration clause satisfying all legal requirements imposed by the Chinese law should be drafted to avoid the difficult situation seen in the cases highlighted above.