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The Enforcement Methodology of Non-Domestic Arbitral Awards Rendered in the United States & Foreign-Related Arbitral Awards Rendered in the People's Republic of China pursuant to Domestic Law and the New York Convention

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People’s Republic of
China pursuant to
Domestic Law and the
New York Convention**

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TABLE OF CONTENTS

I.	Introduction.....	239
II.	Enforcing Non-Domestic Arbitral Awards Rendered in the United States	240
	<i>A. The Federal Arbitration Act.....</i>	<i>240</i>
	<i>B. The New York Convention</i>	<i>241</i>
	1. Defining “Non-Domestic”	242
	2. Refusal to Recognize or Enforce Non-Domestic Awards Pursuant to the New York Convention	247
	3. Grounds for Vacatur of both Domestic FAA and Non- Domestic Awards pursuant to the FAA.....	248
	<i>a. Violation of Public Policy.....</i>	<i>251</i>
	<i>C. Reconciling the FAA and the New York Convention</i>	<i>253</i>
III.	Enforcing Foreign-Related Arbitral Awards Rendered in the People’s Republic of China.....	255
	<i>A. CIETAC and CMAC: The International Arbitration Institutions of the PRC.....</i>	<i>255</i>
	<i>B. Legal Authority for Enforcement of Foreign-Related Awards .</i>	<i>256</i>
	1. Defining “Foreign-Related”	257
	2. Grounds for the Setting Aside or Non-Enforcement of a Foreign-Related Award	257
	<i>C. Reconciling the Civil Procedure Law and the Arbitration Law of 1994 with the New York Convention</i>	<i>259</i>
IV.	Conclusion.....	263

I. Introduction

“The arbitrator’s decision should be the end, not the beginning of the dispute.”¹ Arbitrators possess a great deal of authority in terms of their latitude to fashion and grant an arbitration award. Yet, after having spent a significant amount of time, effort, and money in (1) deciding to arbitrate rather than litigate; (2) choosing between private, ad hoc arbitration and institutional arbitration; (3) selecting an arbitrator or panel of arbitrators; and (4) obtaining a favorable arbitration award, the prevailing party must also confront the challenge of enforcing the hard-sought-after award, where the arbitration may “contemplate[] a binding decision with the legal effect of a final judgment of a court.”²

An arbitrator lacks *imperium*—the power to command the force of the state to enforce the law as a judge sitting in court is able to do.³ In other words, even if an arbitrator possesses relatively free reign vis-à-vis the authority vested in him or her by the parties to create an arbitral award by formulating all of its terms and conditions embodied therein, the arbitrator does not share the corresponding authority to breathe life into, or transform the words documenting the judgment, into a tangible, material award that the prevailing party actually wants and needs to procure. The document that captures the award penned onto it is merely that—a piece of paper. The prevailing party may carry this piece of paper around with him because it declares that he is indeed the “winner,” but other than that, it is essentially worthless. The arbitration process does not conclude upon the rendering of an award by the arbitrator(s), but rather when the losing party (or both parties, depending on the terms) carries out and fulfills the terms and conditions specified therein. Thus, a meaningful arbitral award, or one that is or will be brought to fruition, is absolutely contingent upon an effectively and reliably functioning mechanism that grants the authority to enforce.⁴

The enforcement of arbitral awards involving foreign parties and/or awards rendered in foreign countries becomes even more complex than that of an exclusively domestic judgment rendered within a domestic jurisdiction as the former are vulnerable, exposed to the uncertainties of conflicting laws. The manner of and authority for enforcement may depend upon a number of different considerations, such as the law governing the arbitration agreement, the place of arbitration, or the place where the arbitral award is to be enforced. Yet, compared to a foreign court judgment, the enforcement of arbitral awards involving foreign aspects is much more straightforward and efficient due to the New York Convention.⁵

The New York Convention provides an influential mechanism for enforcing both arbitration agreements and arbitral awards among its 148 (as of December 2012) contracting

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1. ARTHUR J. GEMMELL, WESTERN AND CHINESE ARBITRATION: THE ARBITRAL CHAIN 17 (2008) (quoting *Moncharsh v. Heily & Blasé*, 3 Cal. 4th 1, 10 (1992)).
 2. *Id.* (citing Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 47 (1982)).
 3. FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 414 (Emmanuel Gaillard & John Savage, eds., 1999).
 4. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 460 (1994).
 5. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention or Convention].

states.⁶ It requires each contracting state to recognize and enforce arbitral awards entered in the territory of another state, as well as those awards that a contracting state considers non-domestic.⁷ Nevertheless, although the Convention was drafted with the purpose of affecting cooperation and uniformity, the implementation of the Convention within domestic courts inevitably differs from one contracting state to another and even among the courts within a contracting state.⁸ Since it would be practically impossible to institute a universally uniform procedure for 148 different legal systems, each contracting state must determine its own implementation of the Convention accordingly, pursuant to the respective state's legal system.⁹

Article I(1) of the Convention states that it applies to both arbitral awards “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought” and those “not considered as domestic awards in the State where their recognition and enforcement are sought.”¹⁰ First, this Comment will focus only on the latter part of Article I(1), or the methodology of enforcing non-domestic arbitral awards rendered in the United States. Second, this Comment will introduce and compare the enforcement methodology of Chinese courts with respect to “foreign-related” arbitral awards rendered within the People's Republic of China, pursuant to the Convention.

II. Enforcing Non-Domestic Arbitral Awards Rendered in the United States

A. *The Federal Arbitration Act*

The United States Arbitration Act—also called the Federal Arbitration Act (FAA)—was passed in 1925.¹¹ It was modeled after 1920 New York legislation and “designed to reverse the prevailing judicial attitude that had been antagonistic to contracts ‘ousting’ or depriving courts of jurisdiction to hear disputes.”¹² The FAA is composed of three chapters: Chapter 1, or the Domestic FAA, articulates the rules for recognizing and enforcing arbitration agreements and awards in both domestic and international contexts;¹³ Chapter 2, enacted in

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6. Status of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Dec. 4, 2012).
 7. New York Convention, *supra* note 5, art. I.
 8. See *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 929 (2d Cir. 1983) (explaining the difficulty of construing the New York Convention, the *Bergesen* court wrote: “The family of nations has endlessly—some say since the Tower of Babel—sought to breach the barrier of language. As illustrated by the proceedings at this conference, the delegates had to comprehend concepts familiar in one state that had no counterpart in others and to compromise entrenched and differing national commercial interests. Concededly, 45 nations cannot be expected to produce a document with the clear precision of a mathematical formula. Faced with the formidable obstacles to agreement, the wonder is that there is a Convention at all, much less one that is serviceable and enforceable.”).
 9. *Id.*
 10. New York Convention, *supra* note 5, art. I(1).
 11. EDWARD BRUNET ET AL., *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 447 (3d ed. 2006).
 12. *Id.*
 13. 9 U.S.C. §§ 1–16 (2006).

1970, incorporates and implements the New York Convention;¹⁴ and Chapter 3, enacted in 1990, encompasses the Inter-American Convention on International Commercial Arbitration.¹⁵ Chapter 1 applies to all arbitration cases.¹⁶ In fact, the legislation enacting the New York Convention expressly articulates that Chapter 1 of the FAA “applies to actions and proceedings brought under [it] to the extent that chapter [1] is not in conflict with” the respective Chapters or the Conventions themselves.¹⁷

In terms of enforcing arbitral awards, an award is of little value and will affect minimal impact if it lacks a means of easy enforcement.¹⁸ The drafters of the FAA thereby provided that courts “must grant . . . an order” confirming an arbitral award “[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award.”¹⁹ In the United States, an application for court enforcement of awards must be made within one year after the award is rendered.²⁰ The combined impact of the FAA and standard arbitration practice, where arbitration clauses generally provide that parties agree the awards will be entered as civil judgments, is that U.S. arbitration awards then become the equivalent of enforceable court judgments.²¹

The issue of enforcing arbitral awards within the international context is of particular significance due to the modern needs of international trade that demand an efficiently operating dispute resolution system.²² By adopting the New York Convention, a party to an international or foreign-related arbitration may apply to a U.S. court for an order confirming the award.²³

B. The New York Convention

The New York Convention is one of the most important international treaties on the enforcement of arbitral awards. It was drafted under the close observation and guidance of the United Nations, and ratified on December 29, 1970.²⁴ It is important to note that in the United States, ratified treaties—alongside the U.S. Constitution and federal statutes—are considered the supreme law of the land, which judges in every state are bound to uphold.²⁵ The Convention, however, does not apply directly to federal or state courts in the United States. Rather, it is implemented through domestic legislation as provided in § 201 of the FAA.²⁶ With respect to enforcing awards, Article I of the New York Convention states that it applies to both arbitral awards “made in the territory of a State other than the State where

14. 9 U.S.C. §§ 201–08 (2006) (codifying the eight articles of the New York Convention).

15. 9 U.S.C. §§ 301–07 (2006).

16. *Productos Mercantiles e Industriales, S.A. v. Faberge U.S.A., Inc.*, 23 F.3d 41, 45 (2d Cir. 1994).

17. 9 U.S.C. § 208.

18. BRUNET ET AL., *supra* note 11, at 665.

19. 9 U.S.C. § 9.

20. *Id.*

21. BRUNET ET AL., *supra* note 11, at 665.

22. *Id.*

23. *Id.*

24. JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 20–22 (2003).

25. U.S. CONST. art. VI, cl. 2.

26. *See* 9 U.S.C. § 201 (2006) (providing that the New York Convention “shall be enforced in United States courts in accordance with [Chapter 2 of the Convention Act]”).

the recognition and enforcement of such awards are sought” and those “not considered as domestic awards in the State where their recognition and enforcement are sought.”²⁷ Section 202 of the FAA, on the other hand, provides that the New York Convention applies generally to any arbitration agreement or award arising out of a legal relationship, whether contractual or not, that is considered commercial, i.e. a transaction, contract, or agreement.²⁸ Section 202 further states that the Convention would not apply if the relationship is composed entirely of U.S. citizens “unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”²⁹

The scope of New York Convention awards, as defined under U.S. legislation, appears to be inconsistent with the scope as provided under Article I of the Convention. This slight disconnect is likely due to the fact that the Convention does not expressly define a “non-domestic award.” In turn, this silence extends to each member state the liberty to set forth its own respective criterion for consideration of “non-domestic” awards. The relevant section of Article I(1) stipulates only that: “[The Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”³⁰ Its failure to elaborate, or even articulate any specific elements or factors that would constitute or facilitate the determination of a “non-domestic” award is therefore construed as inviting each member state to interpret such criterion for implementation within its own jurisdiction. Thus, in order to ascertain if an award appropriately qualifies as “non-domestic,” one should defer to the law of the member state where recognition and enforcement are being sought. With respect to how Article I(1) of the Convention is implemented in the United States, it appears, judging by the language of § 202, that Congress took advantage of the Convention’s general provision by enacting an equally, if not broader definition for a “non-domestic” award, where an award is considered “non-domestic” if it involves any foreign-related aspects, even if both parties are U.S. citizens.

1. Defining “Non-Domestic”

In terms of a “non-domestic” arbitration agreement, § 202 imposes a “somewhat more restrictive” requirement on the application of the Convention than the Convention’s own corresponding provision.³¹ Article II only requires each Contracting State to recognize an arbitration agreement in writing, whereas § 202 excludes arbitration agreements entirely between U.S. citizens, unless that relationship involves “property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”³²

27. New York Convention, *supra* note 5, art. I(1).

28. 9 U.S.C. § 202 (2006).

29. *Id.*

30. New York Convention, *supra* note 5, art. I(1).

31. John P. McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735, 739 (1971).

32. New York Convention, *supra* note 5, art. II; 9 U.S.C. § 202. For the purposes of this statute, a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States. *Id.*

The Seventh Circuit determined, in *Jain v. de Méré*, that a written arbitration agreement between foreign nationals was “non-domestic.”³³ Jain, an Indian citizen, entered into a marketing contract with de Méré, a French patentee, and Jain subsequently sought to compel arbitration over a percentage of royalties paid to de Méré by an Illinois company.³⁴ de Méré objected because the contract was silent as to the arbitration location.³⁵ The court nevertheless applied the FAA, which governs the enforcement, validity, and interpretation of arbitration clauses in commercial contracts in both state and federal courts.³⁶

Since Chapter 2 of the FAA implements the Convention, the dispute between Jain and de Méré fell accordingly within the Convention’s domain. The agreement satisfied Article II(1) because it was written, and the court interpreted § 202 to indicate that an arbitral agreement is “not domestic” if it is not between two United States citizens. Additionally, § 203 stipulates that “[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States . . . [where t]he district courts of the United States . . . shall have original jurisdiction over such an action or proceeding.”³⁷ Since both parties were not United States citizens—Jain being an Indian national and de Méré a French national—and the relationship between them was commercial—breach of contract over royalties for a patent—the court had original jurisdiction and held the dispute “non-domestic,” which appropriately came under the Convention.³⁸

Because the Convention creates such a strong presumption in favor of arbitration, federal courts, in their implementation of the Convention, have applied the underlying congressional intent rather than abiding strictly to the technical letter.³⁹ For example, the Court required the parties in *Scherk v. Alberto-Culver* to arbitrate a fraud claim brought under federal securities laws because the underlying contract between the parties was “truly international.”⁴⁰ In *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, the Court required arbitration for an international antitrust dispute, even though most U.S. courts had generally found antitrust claims not to be arbitrable.⁴¹ *Scherk* and *Mitsubishi* thereby emphasize the “hospitable reception toward international arbitration by the Supreme Court.”⁴²

The question of what constitutes a “non-domestic award” is one of the most complicated issues posed by the Convention.⁴³ The Second Circuit was the first court to address the concept and attempt to define the scope of its application under the Convention in the

33. *Jain v. de Méré*, 51 F.3d 686, 689 (7th Cir. 1995).

34. *Id.* at 688.

35. *Id.*

36. *Id.* (citing *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995)).

37. *Id.* at 689 (citing 9 U.S.C. § 203) (first alteration in original).

38. *Id.*

39. *Id.* at 688–89.

40. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515 (1974).

41. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

42. BRUNET ET AL., *supra* note 11, at 442.

43. Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 PACE L. REV. 25, 26 (1985).

Bergesen case.⁴⁴ *Bergesen v. Joseph Muller Corp.* involved a dispute between a Norwegian owner of cargo vessels (*Bergesen*) and a Swiss charterer of the vessels (*Joseph Muller Corp.*) concerning the performance of international transportation contracts.⁴⁵ The arbitration took place in New York, where the arbitrators rendered an award in favor of *Bergesen*.⁴⁶ The District Court for the Southern District of New York confirmed the award, holding that the Convention applied to an award rendered in the United States involving foreign interests.⁴⁷ The circuit court affirmed.⁴⁸

In its discussion of what qualifies as a “non-domestic” award under the Convention, the Second Circuit observed that the definition for it “appears to have been left out deliberately in order to cover as wide a variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of ‘non-domestic’ in conformity with its own national law.”⁴⁹ Furthermore, the court decided that a non-domestic award is an award “made within the legal framework of another country” and provided two examples: those awards that are (1) made in accordance with a foreign law; and (2) involve parties domiciled or having their principal place of business outside the enforcement jurisdiction.⁵⁰ The court reasoned that this broader construction was “more in line with the intended purpose of the [Convention], which was entered into to encourage the recognition and enforcement of international arbitration awards.”⁵¹

The court also concluded that § 202 intended to ensure the enforcement of arbitral awards with reasonable foreign relationships.⁵² To this end, *Bergesen* fell appropriately under § 202 because the case did not exclusively involve U.S. citizens. The relationship between the two parties, based entirely upon international transportation contracts, is also considered sufficiently “commercial” according to the court’s broad interpretation.⁵³

44. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983). *See also* *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 699 n.11 (2d Cir. 1978) (observing the application of the Convention to local arbitration awards as “intriguing,” but the court did not feel the need to decide on this issue because the application of Chapter 1 of the FAA sufficiently resolved the issue).

45. *Bergesen*, 710 F.2d 928.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 932.

50. *Id.*

51. *Id.* (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)).

52. *See id.* at 933 (stating that “[h]ad Congress desired to exclude arbitral awards involving two foreign parties rendered within the United States from enforcement by our courts it could readily have done so. It did not. Additional support for the view that awards rendered in the United States may qualify for enforcement under the Convention is found in the remaining sections of the implementing statute. It has been held that § 203 of the statute provides jurisdiction for disputes involving two aliens. Section 204 supplies venue for such an action and § 206 states that ‘[a] court having jurisdiction under this chapter may direct that arbitration be held . . . at any place therein provided for, whether that place is within or without the United States’ (emphasis supplied). It would be anomalous to hold that a district court could direct two aliens to arbitration within the United States under the statute, but that it could not enforce the resulting award under legislation which, in large part, was enacted for just that purpose.” (citations omitted)).

53. *See Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 13 (S.D.N.Y. 1973) (finding the contract between a United States manufacturer and foreign government concerning the construction of factory buildings for manufacturer to be “clearly . . . ‘commercial’”).

The *Bergesen* decision profoundly influenced “non-domestic” awards in U.S. courts.⁵⁴ So far, the Second Circuit has followed the decision as binding legal authority. In terms of the reaction to *Bergesen*, European commentators have criticized the decision for reaching beyond the boundaries of the Convention and threatening its implementation.⁵⁵ In addition, critics were concerned with the risk of *Bergesen* rendering U.S. enforcement of locally-entered awards involving two foreign parties more cumbersome: First, the enforcement of such awards may be subject to challenges under both Chapter 1 of the FAA and the Convention.⁵⁶ Second, applying the Convention could impose a higher standard for written agreements than the lesser requirements in the domestic FAA.⁵⁷ Yet, since applying the Convention to an award between two foreign parties grants U.S. courts federal jurisdiction to enforce an award that they would not otherwise be able to enforce due to a lack of the required diversity elements,⁵⁸ these commentators have conceded that *Bergesen* “makes the United States a more hospitable forum for foreign parties intending to arbitrate within the United States.”⁵⁹

While *Bergesen* represents the expanding application of the Convention in U.S. courts, *Lander Co. v. MMP Investments, Inc.* further defines “non-domestic” awards in the United States.⁶⁰ The *Bergesen* court used foreign nationalities of parties as the basis for a “non-domestic” award.⁶¹ The court, however, addressed neither the relationship between the FAA and the Convention, nor the impact of the “reciprocity reservation” on “non-domestic” awards.⁶² These issues were examined by the Seventh Circuit in *Lander*.

Lander involved a contract performance dispute between Lander (a New Jersey company), and MMP Investments (an Illinois company), who had entered into an agreement requiring

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54. *Bergesen* has been cited in eighty-two cases and has been cited eighty-one times in law review articles. Shepard’s Summary, *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983) (LexisNexis) (last visited Dec. 4, 2012).
 55. Van den Berg, *supra* note 43, at 46. See also Filip de Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW. J. INT’L L. & BUS. 48, 77 (1991) (criticizing *Bergesen* as a case inspired by U.S. law and one which may pose a threat to the New York Convention-based system, characterized by judicial review of the award in the home country and by relatively limited control in the enforcing country).
 56. See Van den Berg, *supra* note 43, at 54–55 (observing that a losing party may defend itself in recognition and enforcement proceedings according to the FAA and the Convention, and that a losing party may also petition to set aside the award under either Chapter 1 of the FAA or state arbitration law).
 57. See *id.* at 56 (observing that the New York Convention requires a more stringent written agreement than do the FAA or most U.S. state arbitration laws).
 58. 9 U.S.C. § 203 (2006) (stating that an action or proceeding that falls under the Convention is deemed to arise under the laws and treaties of the United States, thus granting federal district courts—including those enumerated in 28 U.S.C. § 460—original jurisdiction over such action or proceeding, regardless of the amount in controversy). The courts under 28 U.S.C. § 460 include the United States Court of Federal Claims and each court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States, and to the judges thereof. 28 U.S.C. § 460 (2006).
 59. Van den Berg, *supra* note 43, at 50.
 60. *Lander Co. v. MMP Invs., Inc. (Lander I)*, 927 F. Supp. 1078 (N.D. Ill. 1996), *rev’d*, 107 F.3d 476 (7th Cir. 1997).
 61. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983).
 62. See *id.* at 932–33 (responding to the argument that the court should interpret the Convention narrowly based on the reciprocity reservation the United States adopted, but not addressing whether the reciprocity reservation prevents the Convention from applying to awards entered in the United States).

Lander's products to be distributed by MMP Investments in Poland.⁶³ The arbitration took place in New York City with an award rendered in favor of Lander.⁶⁴ Lander applied to the District Court for the Northern District of Illinois to confirm the award under the Convention.⁶⁵ On the first issue of whether the United States' reciprocity reservation limited the recognition of non-domestic awards, the court concluded that the reciprocity reservation, "by its express terms, limits the enforcement and recognition of arbitral awards on a territorial basis, that is, to those made in a *country other than the United States*."⁶⁶ The Seventh Circuit reversed, reasoning that the "reciprocity reservation" should be understood to limit the United States from applying the Convention to arbitral awards made in the territory of "*another signatory* of the Convention, like the United States, as opposed to nonsignatories."⁶⁷ In other words, the United States would only enforce arbitral awards made by contracting states, or signatories of the Convention.⁶⁸ It is also worth noting that § 202 of the FAA authorizes the enforcement of arbitral awards in disputes wholly between U.S. citizens if the dispute arises out of a contract involving performance in a foreign country.⁶⁹

With respect to the overlap between the FAA and the Convention, the court claimed, after examining the legislative history of both the FAA and the Convention, that it could not find any suggestion that the Convention was meant to be applied exclusively.⁷⁰ On the contrary, Article VII provides that it will not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."⁷¹ Parties thus have discretion to choose Article I, § 202, or both, in seeking to enforce arbitral awards.⁷²

Applying the Convention to a broader scope of non-domestic awards offers the benefits of more flexible and efficient enforcement: First, it provides independent federal jurisdiction.⁷³ Second, parties have a three-year statute of limitations to initiate enforcement proceedings rather than the one-year period allotted by the FAA.⁷⁴ Third, the Convention allows a court to compel parties to arbitrate in or outside of the United States, whereas the FAA limits a court to compel parties to arbitrate "within the district."⁷⁵ The Convention's broader application will provide more legal options for American parties, both domestically and abroad, and will

63. Lander Co. v. MMP Invs., Inc. (*Lander II*), 107 F.3d 476, 478 (7th Cir. 1997).

64. *Lander I*, 927 F. Supp. at 1079.

65. *Id.* at 1078.

66. *Id.* at 1080–81 (emphasis added).

67. *Lander II*, 107 F.3d at 482 (emphasis added).

68. *Id.* at 481–82.

69. See Georges R. Delaume, *Non-Domestic US Awards Qualify for Recognition under the New York Convention*, 1 INT'L BUS. L.J. 102, 102–03 (1998) (citing *Fuller Co. v. Compagnie des Beauxites de Guinée*, 421 F. Supp. 938 (W.D. Pa. 1976)).

70. *Lander II*, 107 F.3d at 481.

71. New York Convention, *supra* note 5, art. VII. *Lander II*, 107 F.3d at 481 ("[T]here is 'no reason to assume that Congress did not intend to provide overlapping coverage between the Convention and the Federal Arbitration Act.'") (quoting *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 934 (2d Cir. 1983)).

72. *Lander II*, 107 F.3d at 481–82.

73. See 9 U.S.C. § 203 (2006) (implementing legislation offers independent federal jurisdiction for arbitration awards or agreements under the Convention).

74. 9 U.S.C. § 207 (2006); 9 U.S.C. § 9 (2006).

75. 9 U.S.C. § 206 (2006); 9 U.S.C. § 4 (2006).

make the United States a more attractive forum for foreign parties to conduct their arbitration.

2. Refusal to Recognize or Enforce Non-Domestic Awards Pursuant to the New York Convention

Each member state of the New York Convention shall recognize arbitral awards as binding and enforce them pursuant to the procedural rules of the territory in which the award is relied upon.⁷⁶ Article III further specifies that in recognizing or enforcing arbitral awards, member states cannot impose substantially more onerous conditions or additional fees or charges than are imposed on recognizing or enforcing domestic arbitral awards.⁷⁷

More significantly, once characterized as a Convention award, Article V enumerates seven grounds for refusing to recognize or enforce an arbitral award at the request of the party against whom the award is invoked. These defenses however are construed narrowly “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts.”⁷⁸

Section 1 provides the first five, where the party against whom the award is invoked must furnish proof to the competent authority where recognition and enforcement is sought that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;^[79] or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

76. New York Convention, *supra* note 5, art. III.

77. *Id.*

78. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004) (quoting *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 335 (5th Cir. 1976).

79. *See Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974) (holding that the petitioner was not prohibited from presenting its case where an arbitral tribunal refused to accommodate a key witness's schedule). The court concluded that:

The arbitration tribunal acted within its discretion in declining to reschedule a hearing for the convenience of [the petitioner's] witness. [The petitioners'] due process rights under American law, rights entitled to full force under the Convention as a defense to enforcement, were in no way infringed by the tribunal's decision.

Id. at 976. *See also Geotech Lizenz AG v. Evergreen Systems, Inc.*, 697 F. Supp. 1248, 1253 (E.D.N.Y. 1988) (finding that the defendant was not denied the opportunity to present its defenses under Article V(1)(b) when it had notice of an arbitration, but chose not to respond by failing to appear or present witnesses at a scheduled arbitration).

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;^[80] or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.^[81]⁸²

Section 2 articulates the remaining two grounds:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.⁸³

3. Grounds for Vacatur of both Domestic FAA and Non-Domestic Awards pursuant to the FAA

Sections 10 and 11 of the FAA set forth the grounds for vacating and modifying arbitral awards. A motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.⁸⁴ It is important to note that § 10 only applies to vacating the award, and not the arbitral agreement.⁸⁵ The court in and for the district wherein the award was made may vacate the award:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;^[86]

80. See *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 91–92 (2d Cir. 2005) (holding a foreign arbitration award unenforceable under Article V(1)(d) where a third arbitrator was appointed (when the agreement expressly provided for only two) because “the composition of the arbitral authority was not in accordance with the parties’ agreement”); *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1442–44 (11th Cir. 1998) (concluding that the panel’s consideration of the late-filed report did not constitute a circumstance where “the arbitral procedure was not in accordance with the agreement of the parties” under Article V(1)(d)).

81. See *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007) (affirming dismissal of enforcement proceeding where a court in Colombia, the country where the arbitration took place, had vacated the arbitral award). *But see* *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996) (refusing to recognize the decision of the Egyptian court to nullify an award because doing so would violate clear United States public policy in favor of arbitration).

82. New York Convention, *supra* note 5, art. V(1).

83. *Id.* at art. V(2).

84. 9 U.S.C. § 12 (2006).

85. See *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 583–84 (2008) (holding that the FAA provides the exclusive statutory grounds for vacating or modifying arbitration awards and prohibits parties from expanding those grounds by agreement).

86. See *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968) (highlighting evident partiality, where a supposedly neutral third arbitrator had served as an expert consultant for one of the parties involved in the dispute). Those aware of this relationship did not disclose it until after the award was rendered. The lower courts refused to set the challenged award aside, but

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.^[87]⁸⁸

Additionally, where the award was “vacated and the time within which the agreement required the award to be made has not expired, the court may in its discretion, direct a rehearing by the arbitrators.”⁸⁹

The courts however, in following a well-established policy that their function to vacate arbitral awards should be limited, interpret the scope of § 10 grounds very narrowly. In *National Oil Corp. v. Libyan Sun Oil Company*, National Oil (a corporation owned by the Libyan Government) and Sun Oil (a Delaware corporation) entered into an oil exploration and production sharing agreement.⁹⁰ After the U.S. government banned imports from and restricted exports to Libya, Sun Oil invoked the *force majeure* provision and suspended performance.⁹¹ National Oil sought enforcement after a foreign arbitral award was issued in its favor, but Sun Oil raised a number of objections including fraud and the arbitrators’ exceeding their powers pursuant to §§ 10(a)(1) and 10(a)(4).⁹² In protecting the finality of arbitration decisions, courts must be “slow to vacate an arbitral award on the ground of fraud.”⁹³ The alleged fraud must not have been discoverable upon exercising due diligence prior to arbitration and it must also relate to a material issue.⁹⁴ The court in *Libyan Sun* emphasized that the Convention “encourage[s] the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by

the Supreme Court, in reversing, applied its reasoning in *Tumey v. Ohio*, 273 U.S. 510 (1927), where “a decision should be set aside where there is ‘the slightest pecuniary interest’ on the part of the judge” and finding “no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of ‘evident partiality’ or the use of ‘undue means.’” Commonwealth, 393 U.S. at 148. This provision demonstrates Congress’ desire to provide not merely for any arbitration, but for an impartial one. *Id.* The Court further emphasized to “be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.” *Id.* at 149.

87. See *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362 at 367 (1994) (holding that “in the absence of specific restrictions in an arbitration agreement, the remedy that an arbitrator fashions does not exceed his or her powers if it bears a *rational* relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator and to the breach of contract found, expressly or impliedly by the arbitrator”). In other words, the question with regard to remedies is not whether the arbitrator has rationally interpreted the parties’ agreement, but whether the remedy chosen is rationally drawn from the contract as so interpreted. Arbitrators have free rein to support their decision with broad principles of justice and equity if the remedy bears some rational relationship to the contract and breach.

88. 9 U.S.C. § 10(a) (2006).

89. *Id.* § 10.

90. 733 F. Supp. 800 (D. Del. 1990).

91. *Id.*

92. *Id.*

93. *Id.* at 814 (quoting *Dogherra v. Safeway Stores, Inc.* 679 F.2d 1293, 1297 (9th Cir. 1982).

94. *Id.*

which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries” and held that Sun Oil failed to successfully assert its defenses because there was no material fraud in the proceeding.⁹⁵

In terms of Sun Oil’s allegation that the arbitrators exceeded their authority, the court relied on *Mutual Fire, Marine & Inland Insurance Co. v. Norad Reinsurance Co.*’s description of the inquiry a court should make:

In conducting our review we must examine both the form of relief awarded by the arbitrator as well as the terms of that relief. We must determine if the form of the arbitrators’ award can be *rationally derived* either from the agreement between the parties or from the parties submissions [sic] to the arbitrators. In addition, the terms of the arbitral award will not be subject to judicial revision unless they are “*completely irrational*.”⁹⁶

Article V(1)(c) follows the more detailed § 10(d) of the FAA, which authorizes vacating an award “where the arbitrators exceeded their powers.”⁹⁷ Like other Convention defenses to enforcement, this defense has a well-established policy to be narrowly construed.⁹⁸ Its counterpart, § 10(d) of the FAA, has also been given a narrow reading.⁹⁹

In addition to the statutory grounds for vacatur, common law has established implied grounds for which arbitral awards may be denied when the award stands in violation of public policy. It must be noted however, that judicial review of an arbitral award is still very restrictive and the power to vacate an award upon common law grounds is narrowly tailored for limited applicability.¹⁰⁰ This is so because the courts have recognized, in the enactment of

95. *Libyan Sun Oil Co.*, 733 F. Supp. at 813 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

96. *Id.* at 817 (quoting *Mutual Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 56 (3d Cir. 1989)) (emphasis in original) (alteration in original).

97. *Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier*, 508 F.2d 969, 976 (2d Cir. 1974).

98. *Id.*

99. *Id.*

100. *See Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008) (supporting limited judicial intervention with respect to vacating arbitral awards). In this case, toy manufacturer Mattel was sued by its landlord Hall Street Associates over a dispute concerning Mattel’s property lease. The parties’ arbitration agreement atypically allowed the District Court to override the arbitrator’s decision if “the arbitrator’s conclusions of law are erroneous.” *Id.* at 579. The arbitrator rendered a decision in favor of Mattel. Hall Street sought review from the district court, which found that the arbitrator’s decision contained legally erroneous conclusions. On appeal, the Ninth Circuit ruled that even if the arbitrator committed legal errors, it was not the place of the courts to review the soundness of the arbitrator’s decision. The exception provided for in the parties’ arbitration agreement granted the federal courts a much broader role in supervising the arbitration than is specifically allowed in the FAA. The FAA explicitly provides for only a narrow set of circumstances under which courts can override an arbitration award, such as corruption, partiality, or misbehavior on the part of the arbitrator. 9 U.S.C. § 10 (2006). The Ninth Circuit viewed the FAA’s list of circumstances meriting judicial review as an exclusive list. The Supreme Court granted certiorari and in a 6–3 decision, rejected any sort of expansion (not only that parties to a contract cannot expand, but even the courts cannot expand it, and not even for extraordinary circumstances) of the limited scope of judicial review stated in §§ 10 and 11 of the FAA:

We think . . . the text compels a reading of the §§ 10 and 11 categories as exclusive . . . “fraud” and a mistake of law are not cut from the same cloth That aside, expanding the detailed categories would rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility. On application for an order

the FAA, a legislative intent of a strong federal principle that respects and defers to voluntary arbitration, particularly within the commercial context. The purpose of passing the FAA was to provide an alternative to the complications of litigation. Reevaluating the merits of a particular remedy by the courts would thus diminish this purpose by fueling more litigation. Judicial intervention would also undermine the parties' initial contractual expectation of a final and binding decision based on the selected arbitrators'—and not some arbitrary judge's—best judgment.¹⁰¹

For example, the argument that a non-domestic arbitral award is not expressly grounded in a foreign jurisdiction does not serve as a sufficient reason for vacating the award. In *Chromalloy*, a dispute between a U.S. company and the Republic of Egypt led to an arbitral award rendered in favor of the U.S. company. “Egypt’s complaint that ‘[t]he arbitral award is null under Arbitration Law, . . . because it is not properly “grounded” under Egyptian law,’ reflects [its] suspicious view of arbitration, and is precisely the type of technical argument that U.S. courts are not to entertain when reviewing an arbitral award.”¹⁰² The United States is “well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”¹⁰³

a. Violation of Public Policy

A court’s refusal to enforce an arbitrator’s award because it is contrary to public policy is a specific application of the more general doctrine rooted in common law that a court may refuse to enforce contracts that violate law or public policy.¹⁰⁴ Public policy arguments under the Convention should be accepted with “caution, so as not to discourage enforcement of United States arbitration awards by courts of other countries.”¹⁰⁵ Under the Convention, U.S. courts have found “public policy” to refer to “the most basic notions of morality and justice.”¹⁰⁶ The Supreme Court has since clarified that a court’s refusal to enforce an arbitrator’s interpretation of a contract is limited to situations where the contract as interpreted would

confirming the arbitration award, the court “must grant” the order “unless the award is vacated, modified, or corrected as prescribed in §§ 10 and 11 of this title.” There is nothing malleable about “must grant,” which unequivocally tells courts to grant confirmation in all cases, except when one of the “prescribed” exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.

Hall St. 552 U.S. 576, 586–87. “Instead of fighting the text, it makes more sense to see the three provisions, §§ 9–11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.” *Id.* at 588.

101. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 271–72 (2004).

102. *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907, 911 (D.D.C. 1996) (omission in original).

103. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985).

104. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 36–37 (1987).

105. *MGM Prods. Grp., Inc. v. Aeroflot Russian Airlines*, 573 F. Supp. 2d 772 (S.D.N.Y. 2003), *aff’d*, 91 F. App’x 716 (2d Cir. 2004).

106. *Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).

violate some explicit public policy that is well defined and dominant, and not from general considerations of supposed public interests.¹⁰⁷ In *United Paperworkers International Union v. Misco, Inc.*, the arbitrator determined that Cooper, an employee of Misco, Inc., did not violate company policy by his use or possession of marijuana on company property, and ordered Cooper's reinstatement.¹⁰⁸ The district court vacated the award and the Fifth Circuit affirmed, holding that reinstatement would violate public policy against operation of dangerous machinery by persons under the influence of drugs.¹⁰⁹ The Supreme Court reversed and held that the Fifth Circuit's formulation of public policy did not comply with the requirement that such policy must be ascertained in reference to concrete laws and legal precedents and not from general arbitrary considerations of supposed public interests.¹¹⁰

In *Seymour v. Blue Cross/Blue Shield*, the insured party challenged the arbitral award because the insurer's unilateral modification of the original policy was contrary to public policy, where an insurance policy may not be modified to reduce benefits unless parties agree in writing.¹¹¹ The Tenth Circuit affirmed the district court order confirming the award because appellants failed to show that the alleged public policy was grounded in established law. The court further articulated that so long as an arbitrator draws his decision from the parties' agreements, a reviewing court is generally precluded from disturbing the award.¹¹² A federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation would be a better one.¹¹³ If a court is to disturb an award, it can only do so under strict statutory or judicially-created standards.¹¹⁴

This narrow interpretation of the public policy defense was reiterated by the court in *Libyan Sun Oil*, where "enforcement would violate the forum state's most basic notions of morality and justice."¹¹⁵ Sun Oil argued that confirming the award against it would be inconsistent with U.S. anti-terrorism policy, but the court rejected this in declaring that "'public policy' and 'foreign policy' are not synonymous."¹¹⁶ The Second Circuit addressed this very issue in *Parsons*: "[t]o read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.'"¹¹⁷ Here, the court held that National Oil, as an entity owned by a recognized foreign government, was entitled to access U.S. courts regardless of the state of diplomatic relations

107. *Misco*, 484 U.S. at 43. See also *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998).

108. *Misco*, 484 U.S. at 44.

109. *Id.* at 29.

110. *Id.* at 43-44.

111. *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020 (10th Cir. 1993).

112. *Id.* at 1022 (quoting *Misco*, 484 U.S. at 36). See also *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

113. *Seymour*, 988 F.2d at 1023 (quoting *W.R. Grace and Co. v. Local Union No. 759*, 461 U.S. 757, 764 (1983)).

114. BRUNET ET AL., *supra* note 11, at 566.

115. *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974). See also *Waterside Ocean Navigation Co. v. Int'l Navigation Ltd.*, 737 F.2d 150, 152 (2d Cir. 1984).

116. *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 819 (D. Del. 1990).

117. *Id.* (quoting *Parsons*, 508 F.2d at 974).

when the U.S. President had neither declared war on, nor derecognized that foreign government.¹¹⁸ Although Sun Oil argued that enforcement of the award would result in U.S. dollars financing terrorist exploits, the President is the one empowered to prevent such a transfer through the Libyan Sanctions Regulations.¹¹⁹ Libya's terrorist tactics toward international commercial arbitration are completely beside the point.¹²⁰

A violation of public policy may serve as grounds for vacating an arbitral award, but it is important to note that "U.S. public policy in favor of final and binding arbitration of commercial disputes is unmistakable, and supported by treaty, statute, and case law."¹²¹ The requirements for enforcement of a foreign judgment are that there is "proper service of process and that the original claim not violate U.S. public policy."¹²² "The [FAA] 'and the implementation of the Convention in the same year by amendment of the [FAA],' demonstrate that there is an 'emphatic federal policy in favor of arbitral dispute resolution' particularly 'in the field of international commerce.'"¹²³ For instance, the district court in *Chromalloy* had already found the arbitral award "proper as a matter of U.S. law, and that the arbitration agreement between Egypt and [Chromalloy] precluded an appeal in Egyptian courts."¹²⁴ Recognizing the decision of the Egyptian court to nullify the arbitral award therefore would violate clear U.S. public policy favoring final and binding arbitration.

C. Reconciling the FAA and the New York Convention

Some parties have raised the issue of whether U.S. courts are even authorized to apply provisions of the FAA to non-domestic awards issued in the United States pursuant to the Convention's Article V(1)(e). The Second Circuit in *Alghanim* found that awards rendered in the United States trigger Article V(1)(e) where the awards that "ha[ve] been set aside or suspended by a competent authority of the country in which, *or under the law of which*, that award was made" are construed to mean that courts in the country where the arbitration was conducted are allowed to apply domestic arbitral law to a motion to set aside or vacate those arbitral awards.¹²⁵ In other words, it appears that the FAA and the Convention do not conflict as much as operate in tandem. For example, in *Sole Resorts*, the district court found, because the disputed arbitration award was rendered through judgment of a domestic arbitration panel, that the case was governed by the FAA rather than the Convention.¹²⁶ The parties, however, agreed that the Convention would govern because the arbitration involved two foreign corporations and a property located outside the United States.¹²⁷ The Second Circuit held that the determination of this issue would make no substantive difference in the

118. *Id.* at 807.

119. *Id.* at 820.

120. *Id.*

121. *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907, 913 (D.D.C. 1996).

122. *Id.* (quoting *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981)).

123. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)).

124. *Id.*

125. *See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 21 n.3 (2d Cir. 1997); *Spector v. Torenberg*, 852 F. Supp. 201, 205–06 & n.4 (S.D.N.Y. 1994).

126. *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 102 n.1 (2d Cir. 2006).

127. *See Alghanim & Sons*, 126 F.3d at 19.

analysis of the case as the FAA and the Convention have “‘overlapping coverage’ to the extent that they do not conflict.”¹²⁸

In practice, it appears that Article V(1)(e) does not pose a serious challenge to the enforcement of non-domestic awards rendered in the United States pursuant to the FAA. The interaction and application of the Convention and the FAA are fairly consistent with one another. In *Chromalloy*, the court supported the interpretation of the Convention and the FAA’s coexisting operation. Chromalloy, a U.S. corporation, entered into a military procurement contract with Egypt, where the parties subsequently entered into arbitration over a contract termination dispute.¹²⁹ The arbitral panel rendered an award favorable to Chromalloy, and when Chromalloy petitioned to enforce the award in district court, Egypt appealed to the Egyptian Court of Appeal for award nullification.¹³⁰ When the Egyptian Court of Appeal nullified the award, Egypt proceeded to file a motion to dismiss Chromalloy’s petition to enforce.¹³¹ Egypt deferred to Article V(1)(e) of the Convention providing that recognition and enforcement of an award may be refused if there is proof that the award has been set aside by a competent authority of the country in which, or under the law of which, that award was made.¹³² On the other hand,

While Article V provides a discretionary standard, Article VII of the Convention *requires* that, “The provisions of the present Convention *shall not* . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the count[r]y where such award is sought to be relied upon.”¹³³

In other words, if the Convention did not exist, the FAA would provide Chromalloy with a legitimate claim to enforcement of the arbitral award.¹³⁴ Egypt argued that using Article VII to invoke the FAA contradicts the Convention by creating an impermissible conflict under 9 U.S.C. § 208, and thereby eliminating all consideration under Article V.¹³⁵ In its attempt to reconcile the conflict between Articles V and VII, the district court determined that when two statutes are capable of coexistence, it is the duty of the courts to regard each as effective.¹³⁶ Article V provides a permissive standard under which a court may refuse to enforce an award and Article VII mandates that the court must consider claims under applicable local law; yet, Article VII does not eliminate all consideration of Article V.¹³⁷ Since the arbitral award in *Chromalloy* was valid as a matter of U.S. law, Article VII merely required the court to protect Chromalloy’s rights under domestic U.S. laws.¹³⁸ There is no conflict between Chromalloy’s use of Article VII to invoke the FAA and the language of the Convention.¹³⁹

128. *Id.* at 20.

129. *Chromalloy*, 939 F. Supp. at 908.

130. *Id.*

131. *Id.*

132. *Id.* at 909.

133. *Id.* (quoting 9 U.S.C. § 201) (alterations in original).

134. *Id.* (citing 9 U.S.C. §§ 1–14).

135. *Id.* at 914 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 530 (1995)).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

III. Enforcing Foreign-Related Arbitral Awards Rendered in the People's Republic of China

A. CIETAC and CMAC: The International Arbitration Institutions of the PRC

The China International Economic and Trade Arbitration Committee (CIETAC) and the China Maritime Arbitration Commission (CMAC) are presently the two chief international arbitration institutions in China for arbitrating disputes involving foreign elements.¹⁴⁰ CIETAC handles all types of general commercial disputes, whereas CMAC addresses maritime disputes.¹⁴¹ Both CIETAC and CMAC are products of the 1950s, when the Soviet Union model greatly influenced China.¹⁴²

The earliest embodiment of CIETAC was established in 1956 as FTAC, or the Foreign Trade Arbitration Commission.¹⁴³ FTAC's jurisdiction was confined to disputes arising from international trade transactions with foreign companies or other economic organizations as one party, and Chinese companies or other economic organizations, as the other.¹⁴⁴ In 1980, FTAC was renamed FETAC, or the Foreign Economic and Trade Arbitration Commission, where the State Council expanded its jurisdiction to include disputes arising from various aspects of China's economic relationships with foreign countries, such as disputes related to and arising from Chinese and foreign joint venture investments.¹⁴⁵ In 1988, FETAC amended its name to CIETAC, and CIETAC was ultimately permitted to take cognizance of *all* disputes arising from international economic and trade transactions.¹⁴⁶

Parallel to FTAC, the Maritime Arbitration Commission (MAC) was established in 1959 as the dedicated arbitral institution for the resolution of maritime disputes.¹⁴⁷ After a series of amendments that broadened its scope of jurisdiction in 1982 and 1983, MAC was renamed CMAC in 1983.¹⁴⁸ As of June 1988, CMAC has exercised jurisdiction over:

- disputes regarding the remuneration for salvage services rendered by sea-going vessels to each other or by a sea-going vessel to a river craft and vice versa;
- disputes arising from collisions between sea-going vessels or between sea-going vessels and river crafts or from damages caused by sea-going vessels to harbour structures or installations; and
- disputes arising from chartering sea-going vessels, agency services rendered to sea-going vessels, carriage by sea by virtue of contracts of affreightment, bill of lading or other shipping documents, as well as disputes arising from maritime insurance.¹⁴⁹

140. JINGZHOU TAO, *ARBITRATION LAW AND PRACTICE IN CHINA* 20 (2008).

141. *Id.*

142. Xiaowen Qiu, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China*, 11 AM. REV. INT'L ARB. 607, 608 (2000).

143. TAO, *supra* note 140.

144. *Id.*

145. *Id.*

146. *Id.* at 21.

147. *Id.*

148. *Id.*

149. *Id.* at 21–22.

B. Legal Authority for Enforcement of Foreign-Related Awards

“Prior to the introduction of the *Arbitration Law*, foreign-related awards merely referred to awards rendered by the two foreign-related arbitration institutions: CIETAC and CMAC.”¹⁵⁰ This remained unchanged until the Trial Civil Procedure Law took effect, where Article 195 addressed the matter of enforcing arbitral awards rendered by foreign-related arbitral commissions by providing the following provision:

When one of the parties concerned fails to comply with an award made by a foreign-related arbitration institution of the People’s Republic of China, the other party may request that the award be executed in accordance with the provisions of this article by the Intermediate People’s Court at the place where the arbitration institution is located or where the property is located.¹⁵¹

This provision is significant for several reasons. First, the provision does not articulate grounds upon which the court may refuse enforcement: the authority of the court was restricted to only issuing orders to execute the respective arbitral awards.¹⁵² Consequently, the court had no legal basis upon which to refuse recognition and enforcement of a foreign-related award.¹⁵³ Furthermore, to enforce an award, the successful party had to apply to the court at the place where the arbitral institution or the property was located, which as a practical matter, led all applications for enforcement to be submitted to the Intermediate People’s Court in Beijing, where CIETAC and CMAC are both headquartered.¹⁵⁴

In 1991, the Civil Procedure Law made significant amendments to the Trial Civil Procedure Law, with new provisions further supplementing the enforcement of foreign-related awards rendered in China.¹⁵⁵ Article 257 provides that if a party fails to comply with the terms of an arbitral award that is rendered by a foreign-related arbitral institution, the other party may initiate enforcement proceedings with the Intermediate People’s Court.¹⁵⁶ Furthermore, the Intermediate People’s Court empowered to exercise such jurisdiction shall be the Intermediate People’s Court located in the jurisdiction where:

- the person subject to the enforcement proceedings has its domicile or its place of residence, as concerns natural persons, or as concerns legal persons, the location of their registered address or their principal place of business;
- the person subject to the enforcement proceedings has no place of domicile, place of residence or principal place of business, but has property within the territory of China, the location of the said property.¹⁵⁷

150. *Id.* at 157.

151. *Id.* (quoting Trial Civ. P. Law, Ch. 20, art. 195 (1982)).

152. *Id.* at 157.

153. *Id.*

154. *Id.* at 157–58.

155. *Id.* at 158. The law was adopted by the NPC on Apr. 9, 1991 and further amended on Oct. 28, 2007 by the Standing Committee of the NPC.

156. *Id.*

157. *Id.*

1. Defining “Foreign-Related”

The New York Convention divides awards into (1) foreign awards and (2) non-domestic awards.¹⁵⁸ The Chinese Arbitration Law, on the other hand, distinguishes among three types of awards: (1) domestic awards; (2) foreign awards rendered outside of China; and (3) foreign-related awards or awards made by CIETAC or CMAC involving a “foreign element.”¹⁵⁹ There is no definition of “non-domestic” award provided in the Civil Procedure Law.¹⁶⁰ A Supreme People’s Court opinion has articulated nevertheless, the following factors that it would interpret to constitute a “foreign-related” award: “(1) one of both parties are foreign nationals, stateless persons or foreign companies or organizations; (2) the legal actions leading to the formation, amendment or termination of a legal relationship occurred in a foreign country; or (3) the subject matter is located in a foreign country.”¹⁶¹

A “non-domestic” award pursuant to the Convention would appear to be synonymous with a “foreign-related” award under the Arbitration Law, but they may not be considered a substitute of one another in a strict sense, because theoretically, if one applies the Convention test of “nationality” or territoriality,” then all “foreign-related awards” would be classified *ipso facto* as “domestic awards” in China as they are rendered by Chinese arbitration institutions within China.¹⁶² Yet, the situation is quite the opposite: as foreign-related awards involve “foreign elements,” Chinese arbitration law regards them as “quasi-convention awards” and thus treats them in a more favorable manner than “domestic awards.”¹⁶³ The Civil Procedure Law draws an explicit distinction between “domestic award” and “foreign-related award.”¹⁶⁴ Though the Arbitration Law does not make this express distinction, it sets forth special provisions that are only applicable to “foreign-related” awards.¹⁶⁵

2. Grounds for the Setting Aside or Non-Enforcement of a Foreign-Related Award

Pursuant to Articles 70 and 71 of the Arbitration Law, where a motion for the setting aside or the non-enforcement of a foreign-related arbitral award is supported by sufficient evidence to prove one of the circumstances set forth in Article 258 of the Civil Procedure Law, the Intermediate People’s Court must then form a collegiate bench to decide upon the motion.¹⁶⁶

158. New York Convention, *supra* note 5, art. I(1).

159. Qiu, *supra* note 142, at 607.

160. Manjiao Chi, *Time to Make a Change? A Comparative Study of Chinese Arbitration Law and the 2006 UNCITRAL Model Law and the Forecast of Chinese Arbitration Law Reform*, 5 ASIAN INT’L ARB. J. 142 (2009), *manuscript available at* <http://ssrn.com/abstract=1674278>.

161. *Id.* (manuscript at 16) (citing the SPC Notice on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which China Has Acceded).

162. *Id.* (manuscript at 17).

163. *Id.* (citing Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM. L. & POL’Y J. 403, 445 (2006)).

164. Civ. P. Law of the People’s Republic of China, ch. 27.

165. Arb. Law of the People’s Republic of China, ch. 7.

166. TAO, *supra* note 140, at 172 (citing Arb. Law of the People’s Republic of China, ch. 7, arts. 70–71; Civ. P. Law of the People’s Republic of China, ch. 28, art. 258).

If the evidence is satisfactory, the court is required to order the non-enforcement of the award.¹⁶⁷ The most noteworthy aspect of the motion for the non-enforcement of a foreign-related award is that the Intermediate People's Court of the location of the arbitration institution exercises jurisdiction over these motions, and *not* the Intermediate Court in charge of enforcing the arbitral award.¹⁶⁸ In other words, a motion to enforce an arbitral award falls under the jurisdiction of the Intermediate People's Court where the individual subject to enforcement proceedings is domiciled, his/her place of residence, or the location of his/her property in China,¹⁶⁹ whereas a motion of non-enforcement of the award falls under the jurisdiction of the Intermediate People's Court of the location of the arbitral institution.¹⁷⁰ For example, the Shanghai No. 2 Intermediate People's Court accepts and exercises jurisdiction over applications for the non-enforcement of awards rendered by the Shanghai sub-commission of CIETAC.¹⁷¹

In terms of the potential conflict between the cross-filing of motions—one to enforce an award and one for non-enforcement of the same award—Article 64 of the Arbitration Law provides that an application to set aside an arbitral award will result in the suspension of any enforcement proceedings pertaining to the award.¹⁷² In essence, a motion for non-enforcement of an award—regardless of when it was filed—may temporarily or even permanently preempt any motion to enforce the same award.¹⁷³ If the court rules to set aside the award, the court hearing the motion to enforce is obligated to terminate the enforcement procedure.¹⁷⁴ If the application for non-enforcement is rejected, the enforcement procedure may subsequently resume.¹⁷⁵

Since the progress of a motion to enforce rests entirely upon the ruling on the motion for non-enforcement, Article 64 appears to be more partial to the party filing for non-enforcement, by allowing this party to effectively interrupt and stay the prevailing party's (of the arbitration itself) enforcement efforts until a decision on non-enforcement is made. On the other hand, it may be argued that this provision accelerates and thereby makes the entire enforcement/non-enforcement process more efficient—instead of waiting until one Intermediate Court decides upon the matter of enforcement before filing a non-enforcement motion by the party upon whom the order to carry out the arbitral award is placed, the opportunity to raise a non-enforcement motion saves time and judicial resources. In any case, if the court denies the motion for non-enforcement, the court under which the motion for enforcement is pending will thus proceed with its relevant hearing.

167. *Id.*

168. *Id.*

169. Civ. P. Law of the People's Republic of China.

170. *Id.* art. 258.

171. TAO, *supra* note 140, at 172.

172. *Id.* at 173 (citing Arb. Law of the People's Republic of China, art. 64).

173. *See id.*

174. *Id.*

175. *Id.*

With respect to the grounds to deny enforcement of a foreign-related award, Article 258¹⁷⁶ limits them to the following considerations:

lack of a valid arbitration agreement;

failure to notify the respondent to appoint an arbitrator or to proceed with the arbitration, or deprivation of the respondent of the opportunity to present his case due to reasons he is not responsible for;

improper composition of the arbitral tribunal or lack of conformity of the arbitration proceedings with arbitration rules;

matters decided exceed the scope of the arbitration agreement or the limits of authority of the arbitration institution; and

enforcement of the award would contradict the social and public interest of China.¹⁷⁷

C. Reconciling the Civil Procedure Law and the Arbitration Law of 1994 with the New York Convention

Article I(1) of the New York Convention provides that the Convention shall also apply to arbitral awards not considered as domestic awards in the state where recognition and enforcement are sought.¹⁷⁸ While ratifying the Convention however, China “elected to foreclose this possibility.”¹⁷⁹ As a result, awards rendered in China are not eligible for enforcement inside China pursuant to the Convention—in China’s accession to the Convention, its adopted the “reciprocity reservation of the New York Convention, thereby confirming that the New York Convention shall only apply to arbitral awards made in the territory of other contracting states.”¹⁸⁰ Though this specific provision of the Convention is inapplicable, China’s Civil Procedure Law addresses the enforcement of these awards in a manner that essentially mirrors the provisions in the Convention.¹⁸¹

Yet the efficient and proper implementation of both China’s Civil Procedure Law and Arbitration Law depends on the correct understanding and handling of cases by judicial personnel.¹⁸² There already exists a record of foreign-related arbitral awards that have been erroneously set aside and/or denied enforcement by the corresponding Intermediate People’s courts, raising questions of the competence of China’s judiciary to effectively implement its own laws, and in conjunction with the New York Convention.¹⁸³ For instance, the New York Convention is rarely taught in Chinese law schools and translations of it in Chinese are not widely disseminated.¹⁸⁴ Additionally, it is well established that the courts’ lack of effectiveness in enforcing arbitral awards is due to a variety of other social and institutional reasons such as poor efficiency of the courts, low quality of judges (especially within the lower

176. “The Arbitration Law refers to Art. 260. However, Art. 260 became Art. 258 when the Civil Procedure Law was revised in 2007.” *Id.* at 172 n.32.

177. Civ. P. Law of the People’s Republic of China.

178. New York Convention, *supra* note 5, art. I(1).

179. TAO, *supra* note 140, at 159.

180. *Id.* (emphasis omitted).

181. *Id.* at 160.

182. *Id.* at 172–73.

183. *Id.* at 173.

184. Chi, *supra* note 160 (manuscript at 19).

courts), a lack of judicial dependence, administrative intervention, the (infamous) influence of *guan xi*, or personal relations, bias toward foreign parties, and most significantly, local protectionism.¹⁸⁵

Local protectionism in China has seriously challenged judicial independence and its ability to reform.¹⁸⁶ It is usually the root cause for the undue delay and impediments to enforcing foreign-related awards because the local courts depend on local governments for personnel and financial support while local governments rely on local companies for revenue.¹⁸⁷ This interest becomes a high priority when the enforcement of an award could risk economic ruin for a small to medium-sized town heavily or even entirely dependent on a target company's operations and financial welfare.¹⁸⁸ Protecting the local companies from enforcement—to submit to and carry out a potentially detrimental award—is in turn, to protect the courts themselves.¹⁸⁹

Such local protectionist tendencies can often be observed in the spurious justifications for the denial of enforcement, such as the invocation of the “social and public interest of China,” as was articulated in the 1992 decision of *Dongfeng Garments Factory of Kai Feng City and Tai Chun International Trade (HK) Co. Ltd. v. Henan Garments Import and Export Group Co.* by the Zhengzhou Intermediate People's Court.¹⁹⁰ In Chinese law, unlike the FAA and New York Convention, there is no such phrase as “public policy.”¹⁹¹ Instead, Article 260 of the Arbitration Law uses “social and public interest in China,” interpreted by its domestic standard, or the basic legal and moral rule of China.¹⁹² There is no notion with respect to “international public interest or public policy.”¹⁹³ In *Dongfeng*, CIETAC rendered an award in favor of the plaintiff, a Hong Kong company.¹⁹⁴ The plaintiff thereafter sought to enforce the award in the local court in China, which refused on the basis that “according to current State policies and regulations, enforcement . . . [it] would seriously harm the economic influence of the State and public interest of the society, and adversely affect the foreign trade order of this State.”¹⁹⁵ The justification of this decision would appear to be that the defendant was a major economic force in the locality of Zhengzhou, where the court sat, and that forcing the defendant to pay substantial damages was seen as detrimental to the social and public

185. *Id.*

186. TAO, *supra* note 140, at 173.

187. Chi, *supra* note 160 (manuscript at 20). See also Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in People's Republic of China*, 1 ASIAN-PAC. L. & POL'Y J. 12, 63 (2000).

188. TAO, *supra* note 140, at 174.

189. Chi, *supra* note 160 (manuscript at 20).

190. TAO, *supra* note 140, at 174. See also GEMMELL, *supra* note 1, at 28.

191. Qiu, *supra* note 142, at 611.

192. *Id.*

193. *Id.* at 612. See also Bruce R. Schulberg, *China's Accession to the New York Convention: An Analysis of the Regime of Recognition and Enforcement of Foreign Arbitral Awards*, 3 J. CHINESE L. 117, 143–44 (1989) (stating that while some courts have read “public policy” to mean that a decision may not violate domestic laws, most courts have interpreted it as “international order”).

194. Qiu, *supra* note 142, at 612.

195. *Id.*

interest of Zhengzhou.¹⁹⁶ This decision to deny enforcement, premised upon public interest, was ultimately overturned by the Supreme People's Court, not on any grounds of "international public interest," but that the local court should not see the enforcement of the award in this particular case as violating the "public interest in China."¹⁹⁷ Although the arbitral award was ultimately enforced in *Dongfeng*, the "social and public interest" defense to enforcement is not the same as the term "public policy" in the United States. U.S. courts have held that the public policy defense under the Convention applies only when "enforcement would violate the forum state's most basic notions of morality and justice."¹⁹⁸ On the other hand, "public interest" appears to be more broadly construed and may include any financial, cultural, environmental, or other interests so long as the interest is public and not concentrated toward any small group.¹⁹⁹ Although the Arbitration Law does not expressly include public interest as a ground for denying the enforcement of a foreign-related award, its silence does not necessarily refute the public interest idea set forth in the Civil Procedure Law.²⁰⁰ Therefore, public interest provides a legitimate legal stance for the courts to use in denying enforcement.²⁰¹

While Chinese enforcement provisions appear to be structurally and procedurally sound, there has been a substantial amount of criticism with regard to the methodology of award enforcement.²⁰² Critics point to Chinese refusal to enforce foreign-related awards due to

196. *Id.*

197. *Id.*

198. *See* Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier, 508 F.2d 969, 974 (2d Cir. 1974) (finding that allowing the "public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility" and "national policy" does not equate to "public policy").

199. Zhou, *supra* note 163, at 449. *See also* HU LI, ENFORCEMENT OF THE INTERNATIONAL COMMERCIAL ARBITRATION AWARD: WITH SPECIAL REFERENCE TO THE ENFORCEMENT OF THE ARBITRAL AWARD IN THE PEOPLE'S REPUBLIC OF CHINA 148 (2000) (citing the violation of sovereignty, damage to natural resources, serious contamination to the environment, threat to public health or safety, or corruption of morality as possible violations of social public interest and resulting in the refusal of enforcing an arbitral award).

200. Zhou, *supra* note 163, at 449.

201. *Id.*

202. *See* GEMMELL, *supra* note 1, at 182 (quoting James Zirin, *Confucian Confusion*, FORBES, Feb. 24, 1997) (illustrating the most notorious case for the lack of Chinese court enforcement of a foreign-related award: *Repower Ltd v. Shanghai Far East Aerial Technology Import and Export Corp.* (case not officially reported)). Repower, based in Florida, signed a joint venture deal with the defendant, a Chinese party, to develop a battery factory. Repower would provide the know-how and distribute the product while the Chinese would organize the plant. The Chinese imposed a price hike of 40% shortly thereafter, allegedly because of higher utility costs. Plaintiff terminated the deal and initiated arbitration in Stockholm, Sweden. There, plaintiff won a five-million dollar award, but the award could only be enforced for six months and the Chinese courts stalled its recognition. After the U.S. government applied pressure on the Chinese, the Shanghai Intermediate People's Court ultimately recognized the award, but it was at that point when Plaintiff discovered that most of the assets of his Chinese partner had been transferred elsewhere. *See also* Wang Sheng Chang, *The Practical Application of Multilateral Conventions Experience with Bilateral Treaties Enforcement of Foreign Arbitral Awards in the People's Republic of China*, ICCA CONGRESS SERIES 496 (Paris, 1999) (dismissing *Repower's* application to enforce the award on the ground that the judgment debtor had filed for bankruptcy and that there were therefore no assets against which the award could be enforced).

regional protectionist preferences. Such refusals have caused these critics to suggest that CIETAC awards are “paper tigers”²⁰³ and lead to “spotty at best” enforcement.²⁰⁴

However, China has made an effort to view and treat foreign-related awards as quasi-Convention awards, and thus treat them more favorably than it would domestic awards.²⁰⁵ For instance, the Supreme People’s Court has implemented measures to guarantee and maintain more uniform interpretation and application of the New York Convention.²⁰⁶ Most notably, the Supreme People’s Court issued two notices that collectively require it to examine and confirm any judicial decision to deny enforcement of a foreign-related arbitral award or any judicial decision to set aside a foreign-related arbitral award rendered by a PRC based foreign-related arbitration institution.²⁰⁷

The first notice, issued in 1995, established a Centralized Report and Review System (Prior Reporting System) covering all cases where an Intermediate People’s Court refuses to enforce or refuses to recognize and enforce a foreign-related arbitral award.²⁰⁸ Essentially, the contemplating court, before deciding to refuse recognition and/or enforcement, must report its findings to the Higher People’s Court within the same jurisdiction for review.²⁰⁹ If the Higher People’s Court also agrees that enforcement or recognition and enforcement should be refused, it must report its findings to the Supreme People’s Court.²¹⁰ Only after the Supreme People’s Court approves the findings may the Intermediate People’s Court rule to refuse recognition and/or enforcement of the award.²¹¹

The second notice, issued in 1998, established a Prior Reporting System that specifically addresses any decision of the Intermediate People’s Court to cancel a foreign-related arbitral award rendered by a PRC-based arbitration institution.²¹² If the court, in considering an application to cancel an award, determines that the award was rendered in any one or more of the circumstances established in Article 258 of the Civil Procedure Law, the court must refer the matter to the Higher People’s Court within thirty days of accepting the application, for a determination.²¹³ Should the Higher People’s Court concur with the lower level court decision, it must, within fifteen days of receiving the application from the Intermediate People’s Court, submit an Approved Advice to the Supreme People’s Court and may not render any decision until the latter has rendered a response.²¹⁴

These two reporting systems do not apply to domestic arbitral awards, but only to foreign-related awards.²¹⁵ Furthermore, the prior reporting requirement only applies when the

203. GEMMELL, *supra* note 1, at 181 (quoting M. Bersani, *The Enforcement of Arbitration Awards in China*, 10 J. OF INT’L ARB. 47 (1993)).

204. *Id.* (quoting G. Rushford, *The Rushford Report*, ASIAN WALL ST. J., Nov. 29, 1999).

205. Zhou, *supra* note 163, at 449.

206. Chi, *supra* note 160 (manuscript at 20).

207. TAO, *supra* note 140, at 174.

208. *Id.*

209. *Id.* at 175.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 175–76.

214. *Id.* at 176.

215. *Id.*

People's Court determines that enforcement of the foreign-related awards should be denied or cancelled.²¹⁶ There is no requirement to report decisions for the enforcement of a foreign-related award or the dismissal of applications for the cancellation of a foreign-related award.²¹⁷

The reporting system has been criticized for a variety of reasons, such as breaching the independence of the lower courts, and for its ineffective and inefficient procedure and limited application.²¹⁸ On the other hand, this new system of centralized report and review, which creates a standard that is equal to if not more favorable than the Convention, reflects the Supreme People's Court's respect towards foreign-related arbitration.²¹⁹ This system therefore has significantly reinforced the confidence of foreign investors, who had once feared that local protectionist preferences and tendencies may influence and unduly soil the enforcement of arbitral awards in China.²²⁰ The reporting mechanism also represents the "highest level of power monopolization": the power to refuse enforcement may only be exercised by the Supreme People's Court.²²¹ Therefore, when lower courts are requested to enforce a foreign-related award, the only meaningful decision they are able to make is an affirmative one and order enforcement.²²² By adopting this mechanism, the uniformity of interpretation and application of the New York Convention will be better achieved since the adjudicating power rests ultimately only upon the Supreme People's Court.²²³ Furthermore, the reporting system serves as an interim measure, created with the purpose to safeguard the legitimate rights and interests of arbitral award holders in an environment of local protectionism.²²⁴ Over time, as this problem diminishes, so will the need for such a mechanism.²²⁵

IV. Conclusion

Overall, U.S. courts favor upholding the integrity of foreign-related arbitration through their exercise of *imperium* by enforcing the arbitral awards composed by arbitrators who lack this power. This is clearly witnessed through Congress' enactment of the FAA, an enforcement mechanism that incorporates the New York Convention, as well as through the courts' well-established preference to refrain from judicial intervention and construe the exceptions to enforcement and grounds for vacatur in a narrow and restrictive manner.

On the other hand, since the New York Convention does not apply directly in U.S. courts but through the FAA, U.S. courts have greater discretion with respect to their determination of the application and scope of the two Conventions. The extent of domestic judicial interpretation and subsequent intervention, particularly in the context of enforcing or

216. *Id.*

217. *Id.*

218. *Id.*; Zhou, *supra* note 163, at 450.

219. Zhou, *supra* note 163, at 450.

220. TAO, *supra* note 140, at 176.

221. Chi, *supra* note 160 (manuscript at 20).

222. *Id.*

223. *Id.*

224. TAO, *supra* note 140, at 176.

225. *Id.*

vacating non-domestic arbitral awards, is challenging for domestic courts to assess. Even though the New York Convention sets forth the general parameters for domestic courts to follow, the goal of uniformity is compromised due in large part to broad indefinite language, inconsistent domestic implementation processes and varying judiciaries' exercise of discretion. Achieving a uniform application of the New York Convention among the member states—even among different courts within one member state—is therefore not certain.

Yet, the Convention has achieved much success thus far in that it is easier, and more efficient and practical to enforce a non-domestic arbitral award than it is to seek enforcement of a foreign court judgment. The risk for inconsistent domestic judicial intervention, in a domestic court's implementation of the New York Convention interpreted through the FAA, is a small concern compared to the big picture of the Convention's purpose and ability to encourage and promote the recognition and enforcement of foreign-related arbitral awards. The enforcement of the New York Convention through the FAA has provided American businesses with a widely used system to obtain domestic enforcement of international commercial arbitration awards, subject only to minimal standards of domestic judicial review.²²⁶

With respect to the PRC, it is without a doubt that the foreign-related arbitral bodies—CIETAC in particular—have, since their inception, more or less maneuvered their way to successful global institutionalization.²²⁷ From its preliminary stages of a Soviet model as FTAC, CIETAC today handles more international disputes than any arbitral body in the world.²²⁸ Given CIETAC's record success at addressing and adapting to challenges it has faced, the likelihood of continued improvement and success is highly foreseeable. Nevertheless, CIETAC cannot do it alone with respect to the enforcement of its awards rendered.²²⁹ Enforcement reform within the court system must also occur if the PRC is to transform into a truly attractive venue for international arbitration.²³⁰

In terms of the New York Convention, it is clear that the Chinese judicial commitment to uphold its implementation is strong.²³¹ For further improvement, one legal scholar suggests that the Chinese legislature amend and unify its rules for the recognition and enforcement of foreign-related awards because the current discrepancies between the Civil Procedure Law and the Arbitration Law, and between Chinese rules and the Convention standards, create confusion, complications, and subsequent impediments.²³² The present standards for recognition and enforcement of foreign-related awards in China do not significantly differ from the rules set forth pursuant to the Convention.²³³ The only key difference is that the term “public interest” in Article 260(2) of the Civil Procedure Law is more broadly construed and therefore not synonymous to the term “public policy” embodied within the Convention.

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

227. GEMMELL, *supra* note 1, at 190.

228. *Id.*

229. *Id.*

230. *Id.*

231. Zhou, *supra* note 163, at 454.

232. *Id.* at 445.

233. *Id.*

Yet, the later enacted 1994 Arbitration Law does not include the Civil Procedure Law's "public interest" provision.²³⁴ Though it does not necessarily invalidate Article 260(2) of the Civil Procedure Law, this silence on the matter is indicative of the legislative intention to potentially amend Article 260(2) and fully adopt and incorporate the New York Convention standards in the near future.²³⁵

234. *Id.*

235. *Id.*