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Analysis on Cases Denying Chinese Awards: From the Perspective of International Public Policy

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Abstract: The denial of awards made by Chinese arbitration institutions by other contracting states' courts reflects the adaptability of Chinese arbitral awards within the contracting states of the New York Convention. There are two main reasons for such denials: the validity of the arbitration agreement and violations of the principle of natural justice. Issues related to the validity of arbitration agreements are the primary reasons for denial. Overall, the denial of enforcement cannot be imputed to Chinese arbitration institutions. The incomplete implementation of international public policy principles by the courts of contracting states is also a significant factor causing repeated reviews of Chinese awards on the issues of arbitration agreement validity and procedural justice. Chinese arbitration institutions should emphasize the examination of arbitration agreement validity and the reasoning for arbitration jurisdiction, fully implement the agreement of the disputing parties, and actively create space for contracting states' courts to apply international public policy principles.

1. Introduction

The International Law Commission conducted a specialized investigation into the application of the New York Convention, particularly focusing on the issue of "public policy". The Commission recommended that contracting states pay attention to the concept of "international public policy", aiming to promote the broader recognition and enforcement of international arbitration awards globally.[1] The essence of the international public policy principle can be summarized as a further limitation on the exceptions for denying the validity of international commercial awards on public policy grounds.[2]

In practice, the application of public policy is not limited to the simple invocation of Article V(2)(b) of the Convention by the respondent. Theoretically, this provision should be applied ex officio by the courts of the contracting states. All the reasons under Article V can be directly or indirectly claimed by the parties as grounds for the refusal of recognition of an award based on the local public policy of the court.[3] The judgment of the contracting state court on public policy, i.e., whether it limits the application of the public policy exception or the scope of its content, can be seen in all discussions involving the defenses under Article V. The decision of the court to recognize or deny the award reflects the relationship between international public policy and local public policy within its judicial system.

The recognition and enforcement of international commercial arbitration awards inherently cross

at least two jurisdictions, often spanning different legal systems. The reasons for non-recognition of awards should be examined from two perspectives: the jurisdiction where the award was made and the jurisdiction where recognition is sought. The discussion of the international public policy conducted in contracting states highlight potential problems within the judicial systems of the contracting states in complying with the Convention.

It is necessary to distinguish whether the problems arise from the domestic issues of the contracting states where recognition is sought or from the process of making the arbitration award by Chinese arbitration institutions. Identifying the problem will help improving the internationalization of Chinese arbitration institutions.

2. Summary of Contracting States' Courts Denying Chinese Arbitration Awards

2.1 Objective Analysis

Using the names of various Chinese arbitration institutions as keywords, we found 124 cases up to April 2024, where Articles 2 to 7 of the Convention were discussed. Excluding cases that only cited Chinese arbitration awards for precedential analysis, we focused on cases involving the recognition and enforcement of Chinese awards.

The United States, as a major trade partner of China, has handled the most cases involving the recognition and enforcement of Chinese arbitration awards compared to other contracting states. Among the 124 cases analyzed, 47 involved the United States, with 11 cases explicitly refusing to recognize Chinese awards betrayed in Table. 1. Besides the United States, China has faced denials of recognition from courts in Hong Kong, China, France, Germany, and Italy. The specific data is shown in the tables below:

Table 1: Cases Denying Chinese Awards from United States

Case	Year	Holding
China Minmetals Materials Import and Export Co., Ltd. (PR China) v. Chi Mei Corporation (US)	2003	The US court needed to substantively review whether an arbitration agreement existed, overturning the initial decision recognizing the award.
Guang Dong Light Headgear Factory Co., Ltd. (PR China) v. ACI International, Inc.	2010	The existence of the arbitration agreement has not been substantively reviewed, and the U.S. court should re-adjudicate the matter.
Quanqing (Changshu) Cloth-Making Co. Ltd. v. Pilgrim Worldwide Trading, Inc. (US)	2010	The U.S. court reviewed and determined that the arbitration agreement does not exist.
Polimaster Ltd. et al. v. RAE Systems, Inc.	2010	The U.S. court cannot enforce an unclear arbitration agreement.
First Investment Corp. v. Fujian Mawei Shipbuilding, Ltd. et al	2012	The US court believes that the respondent should apply the national immunity statute.
Covington Marine Corporation et al. v. Xiamen Shipbuilding Industry Company, Limited	2012	The US court believes that the respondent should apply the national immunity statute.
First Investment Corporation v. Fujian Mawei Shipbuilding, Ltd. et al.	2012	The US court believes that the respondent should apply the national immunity statute.
Changzhou Amec Eastern Tools and Equipment	2014	The U.S. court believes that the

Co., Ltd v. Eastern Tools & Equipment, Inc. et al. and Xuchu Dai, as the Bankruptcy Administrator for Changzhou AMEC Eastern Tools and Equipment Co., Ltd. v. Eastern Tools & Equipment, Inc.		signing of the arbitration agreement contravenes principles of natural justice and U.S. public policy.
Exceed International Limited v. DSL Corporation	2014	The U.S. court finds that the arbitration agreement does not exist and that the United States is not obliged to follow the original arbitration decision or the opinions of the arbitration review courts.
CEEG (Shanghai) Solar Science & Technology Co., Ltd. v. Lumos LLC, now known as Lumos Solar LLC (United States District Court, District of Colorado, Civil Action No. 14-cv-03118-WYD-MEH)	2015	The U.S. court finds that this tribunal violates procedural justice and U.S. public policy.
CEEG (Shanghai) Solar Science & Technology Co., Ltd v. Lumos LLC, n/k/a Lumos Solar LLC (United States Court of Appeals, Tenth Circuit, No. 15-1256)	2016	The U.S. court finds that this tribunal violates procedural justice and U.S. public policy.
Jiangsu Beier Decoration Materials Co., Ltd. v. Angle World LLC	2022	The U.S. court believes that Chinese courts did not conduct a substantive review on the existence of the arbitration agreement, and thus, the U.S. court needs to conduct a substantive examination.

Table 2: Cases Denying Chinese Awards (Mainland) from Hong Kong, China

Case	**Year**	**Holding**
Paklito Investment Limited v. Klockner East Asia Limited	1993	The Hong Kong, China court holds that the tribunal violates due process.
Polytek Engineering Company Limited v. Hebei Import & Export Corporation	1998	The Hong Kong, China court finds that it violates procedural justice and contravenes Hong Kong, China's public policy.
Guangdong Shunde Zhanwei Trading Co., Ltd. v. Sun Fung Timber Company Limited	2021	The Hong Kong, China court finds that it contravenes Hong Kong, China's public policy.

Table 3: Cases Denying Chinese Awards from European Countries

Case	**Year**	**Holding**
Société de Réalisations et d'Études pour les Industriels du Bois – Séribo v. Hainan Yangpu Xindadao Industrial Co Ltd	2012	The French court believes that CIETAC lacks jurisdiction for arbitration.
Tema Frugoli SPA, in liquidation (Italy) v. Hubei Space Quarry Industry Co. Ltd.	2001	The composition of the arbitral tribunal does not comply with the arbitration agreement.
Buyer v. Seller, Oberlandesgericht [Court of Appeal], Celle, 8 Sch 11-02	2003	The German court reviewed the existence of the agreement and subsequently denied enforcement.

Table 4: Case Denying Chinese Awards from Australia

Case	Year	Holding
Beijing Jishi Venture Capital Fund(Limited Partnership) v. James Z Liu et al.	2021	The tribunal cannot assume that a spouse can confirm receipt of a notice on behalf of a party, which violates public policy in Australia.

2.2 Divergence on validity of the arbitration agreement accounts for most denial cases

The arbitration agreement is the basis of arbitral authority. Some scholars argue that leaving the arbitration award entirely to the discretion of the arbitral tribunal does not align with the spirit of the conventions.[4] The convention list the validity of the arbitration agreement as one of the reasons for refusing to recognize and enforce convention awards. If there is no requirement for contracting states to review, such a provision serve meaningless. As illustrated in the Table. 1, in 11 cases where U.S. courts denied recognition of Chinese arbitration awards, 7 cases involved scrutiny of the parties' arbitration agreements and the jurisdiction they confer. Similar reasons written in Table. 2 have led to non-recognition of Chinese awards in Hong Kong, China, and in the German court in Table. 3. Unlike Hong Kong, China court in 2021, which denied awards from the Zhanjiang Arbitration Commission of Guangdong Province based on the existence of arbitration agreement in Table. 2, French and Italian courts denied awards because the arbitral tribunal lacked jurisdiction due to discrepancies between the agreed arbitration rules and the actual arbitration procedure, which could be found in Table. 3.

In the case of *Hainan Yangpu* heard in the French court shown in Table. 3, the parties agreed in the dispute resolution clause that "in case of dispute, they shall first attempt to resolve it through friendly negotiation; failing which, the matter shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for mediation and arbitration; if no agreement can be reached, the dispute shall ultimately be resolved through arbitration by the International Chamber of Commerce (ICC)." In the appellate proceedings, the supreme court in France ultimately held that CIETAC cannot arbitrate without the parties having reached agreement through direct negotiation. The court found that there was no agreement by the parties to arbitrate under CIETAC. Consequently, the enforcement of an arbitration award without the existence of an arbitration agreement would contradict the principles of international public policy. Similar situations arise in cases like the *Tema Frugoli* case heard in the Italian court, where arbitration agreements are deemed unclear, leading to the non-enforcement of awards. The Italian court determined that once parties agree to use two arbitration institutions for dispute resolution, disputes over which arbitration institution's decision should prevail may arise due to the sequence in which arbitration was initiated, potentially rendering one arbitration institution's award unenforceable due to lack of agreement.

Therefore, once the issue of the existence of an arbitration agreement is under re-examination, contracting state courts must consider two main aspects: first, whether there is an arbitration agreement; and second, whether the terms of the arbitration agreement are clear and how they were implemented in practice during the arbitration. Based on these two points, courts decide whether to recognize the arbitration award in the case at hand. In cases where Chinese awards were denied, the examination of the first aspect—whether there is an arbitration agreement—often involves substantive hearings rather than direct assessment based on international public policy reasons. The second aspect, examining the realization of terms of the agreement and its implementation in practice, often requires contracting state courts to interpret the parties' agreed terms and judge them against local or international public policy. However, substantive review is less common. The objective reason for this phenomenon, in my view, lies in the fact that once arbitration to resolve disputes is

agreed upon, the specifics of how and under which arbitration institution, and whether mediation precedes arbitration, do not fundamentally affect the existence of arbitral jurisdiction. These differences only determine which arbitration institution will govern and under what rules. After all, whether arbitration should be used is one thing; how arbitration is conducted is another.

2.3 Misunderstandings on basic notions of morality and justice

It is noteworthy that in the cases researched, which I do not argue hereafter, some contracting state courts that refuse to recognize Chinese arbitration awards claimed *contra bonos mores*, which international public policy describe as most basic notion of morality and justice.[5] Under substantive international public policy principles, the principle of natural justice can be exemplified by principles such as good faith, adherence to agreements, prohibition of discrimination, and prohibition of acts contrary to good morals.[6] Under procedural international public policy principles, the principle of natural justice is interpreted as including "adequate and sufficient notice" "reasonable opportunity" to attend the proceedings, "principle of fairness in arbitral proceedings".[7]

In the case of Changzhou Amec in the United States court shown in Table. 1, the reason for denying the Chinese arbitration award was the court's acceptance of the respondent's defense that they were coerced and detained at the time of signing the arbitration agreement.[8] Due to the inability to access the original case materials, I refrain from commenting on this issue where I believe misunderstandings happened in the U.S. court hearing. After all, any interference into China's judiciary power is extremely contradictory to international public policy.

In comparison, other contracting states' courts typically reject Chinese arbitration awards on grounds related to procedural issues shall be paid more attention. In Hong Kong, China, two other judgments denying Mainland arbitration awards were based on parties' failure to attend arbitration proceedings or absent themselves from certain factual investigation stages. Australian court, on the other hand, cited improper service of process as a reason why the original arbitration did not achieve procedural justice. Against the backdrop of international procedural public policy, such cases illustrate how well Chinese arbitration institutions adapt to their national civil procedure laws and whether there are deficiencies. The perspectives of U.S. courts in the CEEG series of cases from Table. 1, French court in the *Hainan Yangpu* case, Australian court in *Beijing Jishi* case in respective Table. 3 and 4, all highlight significant differences between Chinese civil procedure laws and those of other jurisdictions.

3. Are the Denials of Chinese Awards by Contracting Staes' Courts all Justified?

When contracting states execute the purposes and objectives of the Convention, recognizing or denying international commercial awards reflects key principles of international public policy. Can those denial be justified by international public policy?

3.1 A brief review of the Convention's Objective.

The primary objective of treaty formation is to promote as much recognition and enforcement of international commercial arbitral awards outside their jurisdiction as possible. This also serves as the premise for discussing and applying principles of international public policy — the main purpose of limiting exceptions to the application of public policy is to ensure that more international commercial arbitral awards enforced. In pursuit of this objective, contracting states inevitably ponder among different principles when recognizing contracting states' arbitral awards. For instance, the UK courts explicitly noted that even if their opinion on a specific issue differs from that of Chinese courts, what matters in enforcing a convention award is not how the UK courts would decide the issue domestically,

but rather that the Chinese tribunal has already decided. Therefore, the UK courts must strike a balance between local public policy and international public policy — the finality of the arbitral award — and ultimately choose to enforce the arbitral award.[9] The principle of estoppel is an important aspect of international public policy that promotes enforcing convention awards.[10] Such principles endorsed in Hong Kong, China courts' judgement as the principle of "mechanistic" or "international comity", while in Britain, the reasoning in respecting the finality of awards prevail.[11] However, the principle of estoppel could have been discussed in judgements denying Chinese awards. Whether to apply this principle often fall within the scope of national judicial autonomy, while legitimacy of such choices can still be discussed.

3.2 The room for applying international public policy in denying awards

In denying Chinese awards, U.S. courts have explicitly stated that they do not need to follow previous decisions made by other countries regarding arbitration agreements.[12] However, disregarding the review opinions of the original arbitration tribunal and related courts largely contradicts the Convention's objective of promoting the maximum recognition of awards. Analyzing the specific content and reasons, it appears that U.S. courts respond negatively to the ambiguousness of validity of arbitral agreements. They advocate for U.S. courts to re-examine the cases and ignore the actions of parties protesting arbitration jurisdiction by not participating in the Chinese arbitration process, treating omission as evidence to claim the absence of arbitration consent. Given the principle of international public policy, which advocates for jurisdictional objections to be raised as early as possible before the tribunal, the U.S. courts' approach is clearly detrimental to resolving disputes through arbitration. It also causes an attitude of arrogance among parties towards ignoring arbitration institutions. The U.S. courts' denial of other contracting states' awards and recognition of annulled awards not only hinders the U.S. from fulfilling the Convention's objectives, but risks showing disrespect for the judicial sovereignty of other countries.[13] The principle of due process in the field of international public policy is often considered to mean "reasonable opportunity" On this point, contracting courts do not significantly diverge. However, regarding other issues affecting the procedural fairness, contracting states have different solutions.

The French court have struggled with the interpretation of unclear arbitration agreements, they concluded that Chinese arbitration institution lacked jurisdiction. I believe the main reason was the parties' failure to clearly express their intent regarding final arbitration jurisdiction in China. However, as there was no evidence of the party raising objections before the tribunal, I also believe that the principle of estoppel failed to be applied here.

In the *Beijing Jishi* case, the Australian court held that the Chinese arbitration award violated procedural justice and Australian public policy. However, an adult spouse living with the party is indeed a valid recipient of service of process in China.[14] The approach of the Australian court fails to respect the judicial sovereignty of other countries in procedural issue, does not uphold the purpose of the Convention through estoppel. After all, if a party claims that service was not properly issued, the best forum for seeking relief would be the supervisory court of China.

4. Recommendations to Chinese arbitral institutions

In response to awards being rejected, Chinese arbitration institutions should recognize that how contracting states' courts implement the Convention and whether they adhere to international public policy principles are beyond China's jurisdiction. There is no need to overreact to isolated denial cases. For instance, the case of France dealing with triple arbitration agreement clauses is extremely exceptional.

Chinese arbitral institutions should make more thorough examinations and investigations into the

validity of arbitration agreements. Even UK courts, which strongly adhere to international public policy principles, have expressed concerns about the insufficient examination of certain issues by Chinese courts and arbitration institutions, which may alert arbitral institutions. It is crucial for Chinese arbitration institutions to recognize the possibility of awards being enforced abroad and to strengthen reasoning and explanations to spare room for the principle of estoppel, thereby facilitating the recognition and enforcement of Chinese arbitration awards abroad. Additionally, proactively inquiring about the language and procedures of arbitration in international cases and ensuring the parties' agreement on the procedures and rules used in arbitration can significantly promote the recognition and enforcement of Chinese arbitration awards abroad.

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[7] See United Nations Commission on International Trade Law Arbitration Rules, 1984.

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[11] See Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd, See also Xiamen Xinjingdi Group Ltd v. Eton Properties Limited, et al. See British case Minmetals Germany GmbH v. Ferco Steel Ltd, 2008

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