

# Research on the Revocation of Foreign-Related Arbitration Awards in Shanghai City

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In this article, the authors take Shanghai City as the representative region and retrieve 48 cases related to applications for the revocation of foreign-related arbitration awards through tools such as China Judgments Online. Based on the compilation, induction, and analysis of the aforementioned documents, the authors briefly outline the current basic situation of cases applying for the revocation of foreign-related arbitration awards: All relevant cases have the characteristics of concentrated expression of foreign-related factors, large amount of subject matter involved, and relatively unified focus of disputes in the case. At the same time, the authors focus on the key issues summarized and gives the authors' views and suggestions: On the issue of optimizing and developing relief measures for foreign-related arbitration awards, the authors agree to further optimize and make special provisions for the application for revocation system, and cancel the "no subject to execution system"; on the disputed issue of the dual track review mechanism, the authors support the establishment of an integrated judicial review model to reduce judicial intervention in arbitration and retain the effectiveness of arbitral awards to the greatest extent.

*Keywords:* foreign-related arbitration awards, revocation dual track review, Shanghai City

## Introduction and Background

As China's economic center, Shanghai City is building global Asia-Pacific Arbitration Center and Shanghai International Legal Service Center and continues to strengthen exchanges and integration of legal services and legal culture with other countries or regions through the "Going out and bringing in" policy, actively serving Shanghai City's high-level opening up to the outside world. Currently, there are 4,075 registered arbitrators in Shanghai City, 23% of whom are foreigners or from Chinese Hong Kong, Chinese Macao, and Chinese Taiwan. They come from 118 countries and regions around the world. Shanghai City is one of the Chinese Mainland cities with the largest number of registered arbitrators covering the number of countries and overseas professionals. Peter Howard Corne, 62, may be the most familiar international arbitrator to the public. He holds dual citizenship of the United Kingdom and Australia. He has settled in Shanghai City for nearly 30 years and has won Magnolia Silver Award (Yu & Zhang, 2024).

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In 2019, Shanghai City issued China's first provincial-level arbitration reform opinions, accelerating the construction of a globally oriented Asia-Pacific arbitration center, and continuously promoted the high-quality development of the arbitration industry through reform and innovation, and demonstrated Shanghai City's soft power of rule of law to the world. Shanghai City has won international trust, which has enhanced the confidence and motivation of market entities from various countries to invest and start businesses in Shanghai City.

In 2019, the Shanghai Municipal Justice Bureau promulgated *Administrative Measures for the Establishment of Business Institutions by Overseas Arbitration Institutions in the Lingang New Area of the China (Shanghai) Pilot Free Trade Zone*, which clarified that qualified overseas arbitration institutions can apply to establish business institutions in the Lingang New Area, to carry out foreign-related arbitration business. Shanghai City became the first city in Chinese Mainland to open its arbitration business to the outside world. In the same year that the document was issued, World Intellectual Property Organization Arbitration and Mediation Center established a business office in Shanghai City. As of June 2023, the agency had accepted nearly 80 foreign-related intellectual property cases.

In recent years, international commercial arbitration has been chosen by more and more parties to international commercial disputes as the main way to resolve disputes due to its advantages such as autonomy and professionalism. However, the "system of a single and final award" leads to possible deficiencies between its own self-supervision and the protection of the legitimate rights and interests of the parties. Accordingly, various countries or regions have taken measures in arbitration legislation and judicial practice, including establishing relevant judicial supervision mechanisms to provide parties with certain remedies. In Chinese Mainland, this mainly manifests in applications for the revocation of arbitral awards.

## **Legal Analysis of Foreign-Related Arbitration Cases in Shanghai City**

### **Basic Data and Main Features**

This article is based on the public data on the China Judgments Online (<https://wenshu.court.gov.cn/>). The Chinese keywords are "origin-related arbitration", the region is "Shanghai City", and the time period is "2014 to 2022". After searching, 85 available awards were obtained. Among them, there were total of 48 cases related to application to set aside arbitration awards. Through investigation and research, this article finds that in current practice, there are certain disputes over the review system for applications to set aside arbitral awards and the content and scope of the corresponding legal grounds for revocation, which urgently need to be further sorted out and standardized. Therefore, this article identifies such issues as the focus of research, with a view to outlining the current basic patterns of cases applying for the annulment of arbitral awards in Shanghai City, clarifying relevant issues, and putting forward opinions and suggestions through a combination of specific practice and theoretical research.

This article summarizes the case closing situation, cause of the case, foreign-related factors, focus of dispute, and case judgment results, and draws the following six characteristics.

First, the number of related cases has surged in 2021, with a large proportion of cases applying for the revocation of arbitral awards. Judging from the distribution of case closure time: Five cases were closed in 2014, 10 cases were closed in 2015, seven cases were closed in 2016, 12 cases were closed in 2017, one case was closed

in 2018, five cases were closed in 2019, four cases were closed in 2020, 32 cases were closed in 2021, and nine cases were closed in 2022.

In terms of causes of action, there were 48 cases applying for the revocation of arbitral awards, 10 cases applying for confirmation of the validity of the arbitration, 18 cases concerning arbitration agreements/arbitration clauses, eight cases concerning the recognition and enforcement of foreign arbitral awards, and one case's application for interim measures. There are a relatively large number of cases involving applications to revoke arbitral awards.

Second, foreign-related factors are concentrated, and most of them are foreign-related. This article sorts out the foreign-related factors of the collected documents in accordance with Article 1 of *Interpretations of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on the Application of Laws on Foreign-Related Civil Relations*. Although the manifestations of foreign-related factors are diverse, in practice, cases in which the main body is foreign-related (one party is a foreign citizen or a foreign legal person) account for a large proportion and should be the most important manifestation in practice. Among the aforementioned 48 cases, there were 47 cases involving foreign subjects, 0 cases involving foreign objects, one case involving foreign legal facts, and 0 cases involving other circumstances.

Third, the subject matter of the lawsuit is relatively large. According to simple statistics, among the foreign-related arbitration claims in the aforementioned cases, 26 cases were between 1 RMB and 1 million RMB; seven cases were between 1 million RMB and 10 million RMB; nine cases were between 10 million RMB and 30 million RMB. There were six cases worth more than 30 million RMB, among which one arbitration request had a subject matter of over 100 million RMB.

Fourth, the focus of disputes in the case is relatively unified. After a simple statistic of the adjudication results of the aforementioned 48 cases, it was found that among the cases applying for the revocation of foreign-related arbitration awards, the focus of disputes in the cases was relatively unified, mainly focusing on "whether the relevant evidence on which the award is based has been forged/concealed", "whether the arbitrator made an unlawful award", "whether the arbitral award is contrary to social and public interests", "whether the arbitration procedure is illegal", and "whether the arbitration procedure is inconsistent with the arbitration rules".

After summarizing the focus of the dispute, this article finds that the proportion of substantive causes of action and procedural causes of action is basically the same in terms of the reasons for dismissal proposed by the applicant. In terms of substantive causes of action, applicants mostly apply for dismissal on the grounds of "whether the relevant evidence on which the award is based has been forged/concealed"; in terms of procedural causes of action, applicants mostly apply for dismissal on the grounds of illegal arbitration procedures.

Fifth, the case verdict tends to support the validity of the arbitration agreement and the arbitration award. A simple statistic on the judgment results of the aforementioned 48 cases showed that there were 46 first-instance cases and two second-instance cases. Most of the cases applying for the revocation of foreign-related arbitration awards ended with the first-instance award; in terms of the judgment results, the court tended to support the two parties. The arbitration agreement between the two parties was valid. Regarding the applicant's application to revoke the arbitration award, the court's decision was to reject the applicant's application.

Sixth, the selection of arbitration institutions complies with the agreement and there are very few exceptions. In addition, after simple statistics of the aforementioned 48 cases involving arbitration institutions, it was found

that there was a total of 23 cases in which the two parties had arbitration clauses or arbitration agreements; there was a total of 21 cases in which the two parties had an agreed arbitration institution; there was a total of 21 cases in which the parties had agreed upon arbitration rules; there were a total of 20 cases in which the parties had agreed on the place of arbitration.

In terms of agreed arbitration institutions, the aforementioned 21 cases mainly involve three institutions: Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center), Shanghai Arbitration Commission, and China International Economic and Trade Arbitration Commission. Counting repeated agreements (in some cases, both parties have agreed to arbitrate), if the institution is Shanghai International Economic and Trade Arbitration Commission or Shanghai Arbitration Commission, the proportions of the three institutions involved are approximately 28.6%, 71.4%, and 4.8% respectively. The above institutions are basically the arbitration institutions agreed upon in the arbitration agreement or arbitration clause between the parties, with very few exceptions.

### **Legal Analysis of Substantive Aspects**

After a simple statistics and summary of the aforementioned 48 cases, the article finds that the cases can be divided into two categories based on the focus of dispute: applications for revocation based on substantive issues in the process of foreign-related arbitral awards, and applications for revocation based on procedural issues during the process of foreign-related arbitral awards. The following parts will analyze the specific circumstances of the aforementioned cases according to this classification.

In cases of application for annulment that focus on substantive issues in the process of foreign-related arbitration awards, the applicant's reasons for applying mainly focus on the four types: "the relevant evidence on which the award was based was forged", "the arbitrator made an unlawful award", "the arbitral award was contrary to social and public interests", and "the party's right to make representations was not fully guaranteed".

In view of the first two types of situations, through reading and summarizing the contents of relevant judgment documents, it is found that in such cases, the trial path of the court receiving the case is mainly as follows: (1) Analyzing the case situation, the judge confirms that it is a foreign-related relationship through *Interpretations of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China on the Application of Laws on Foreign-Related Civil Relations* and conduct review in accordance with or with reference to foreign-related arbitration awards; (2) the judge refers to *Arbitration Law of the People's Republic of China* (namely Article 70) and *Civil Procedure Law of the People's Republic of China* (namely Article 291) and proceed checking.

In terms of award results, the court receiving the case generally determines that the parties' application reasons do not fall within the statutory grounds for revocation of the arbitral award and will not review it in accordance with the law; it also determines that the parties' reasons for rescinding the arbitral award are untenable and rejects the parties' application for revocation in accordance with the law.

In view of the situation raised by the parties that "the arbitration award is contrary to the public interests of the society", it was found that the trial approach of the court receiving the case is basically as follows: (1) The judge conceptually discusses the public interests of the society and emphasize its publicity, specificity and social nature which are different from the interests of both parties to the contract. (2) The judge analyzes whether the

content of the disputed contract covers social and public interests, and whether the arbitration result will have an impact on social and public interests.

In terms of ruling results, the court in question generally found that the contract involved only involved rights and obligations voluntarily reached by both parties as equal civil subjects on the basis of equal negotiation. It would not have an impact on social and public interests, and the reason for dismissal could not be established.

In response to the situation raised by the parties that “one’s own right to make statements is not fully guaranteed”, in actual cases, the court receiving the case makes its determination on such situations mainly by studying and interpreting the content of the arbitration rules used by the arbitration institution and conducting a comparative analysis with the claims of the parties and the actual situation of the arbitration. Although such claims are one of the statutory grounds for revocation stipulated in Article 291 of *Civil Procedure Law of the People’s Republic of China*, there are many cases where parties misread and misinterpret the provisions of the arbitration rules, resulting in parties’ claims being unable to be supported by the court receiving the case.

### **Legal Analysis of Procedures**

In cases of applications for annulment that focus on procedural issues in the process of foreign-related arbitral awards, the applicant’s grounds for application mainly focus on two aspects: “the arbitration procedure is illegal” and “the arbitration procedure is inconsistent with the arbitration rules”.

From the relevant contents of Article 70 of *Arbitration Law of the People’s Republic of China* and Article 291 of *Civil Procedure Law of the People’s Republic of China*, it can be seen that the statutory review reasons for rescinding foreign-related arbitrations are basically procedural reasons. However, in practice, the claims of applicants on procedural issues are often unable to obtain support from the court where the case was filed. What they have in common is that the applicant claims that the matter in violation of procedures is actually a substantive matter upon examination, the applicant does not raise an objection during the arbitration award process, the applicant does not have a comprehensive grasp of the content covered by the agreed arbitration, or the applicant does not understand the corresponding agreement, situations such as unclear understanding of the arbitration rules.

### **Reform of the Dual Track Review Mechanism**

The arbitration supervision measures in *Arbitration Law of the People’s Republic of China* are embodied in the system of a single and final award that has taken legal effect. If it is found that there is an error or violation of law, the relevant parties may apply to the court with jurisdiction to revoke the award or apply to the court with jurisdiction in accordance with legal procedures for non-enforcement of the award. In terms of specific provisions, China’s legislation adopts a dual track approach to the supervision and review of arbitration. The review of domestic arbitration and foreign-related arbitration is legislatively distinguished: The scope of the supervision and review of domestic arbitration covers both substance and procedure. The supervision and review of foreign-related arbitration only supervises and corrects procedural errors or violations. The difference between inside and outside brought about by this mechanism is not only reflected in the distinction between the scope of review of substantive content and procedural content, but also exists in the specific review procedures (Li, 2016).

Through the collection, summary, and analysis of the aforementioned 48 related cases, it was found that the parties mostly used the substantive review content in the arbitration award as the basis for the application.

According to the content of Article 70 of *Arbitration Law of the People's Republic of China*, the court tried to confirm whether the foreign-related matters could be revoked. In the case of arbitration awards, the review mainly focuses on procedural matters, and the substantive content of the arbitration award does not fall within the scope of review by the court. In practice, the court receiving the case often rejects the applicant's application based on this. In situations where parties use procedural matters as the reason for applying for annulment, the parties' applications often face dilemmas such as the fact that the matter is still a substantive dispute, insufficient supporting evidence, and unclear understanding of the arbitration rules.

In essence, the applicant has confused the application of Articles 58 and Article 70 of *Arbitration Law of the People's Republic of China*. Applicants often apply to annul foreign-related arbitration awards on the grounds of applying to annul domestic arbitration awards. This article believes that this practical situation also fully reflects the conflict between the review mechanism of domestic arbitration awards and the review mechanism of foreign-related arbitration awards in the current dual track review mechanism.

There has been debate in academic circles regarding the operation and reform of the dual track review mechanism. Scholars who support the dual track review mechanism have cited the British legislative practice of weakening the court's supervision and intervention in arbitration and dividing arbitration into domestic arbitration and international arbitration as an example, arguing that *Arbitration Law of the People's Republic of China* distinguishes domestic arbitration in stipulating the court's supervision of arbitration; supervision and foreign-related arbitration supervision are in line with China's history and reality, and are also in line with international common practice. He believes that it is a common practice in the international community to distinguish international arbitration from domestic arbitration, and the scope of judicial review is limited. Shrinking and weakening are also mainstream development trends. It is completely necessary for *Arbitration Law of the People's Republic of China* to distinguish domestic arbitration from international arbitration and limit the scope of supervision of international arbitration to procedures, and it will not lead to the arbitration system getting out of control (Song, 2014).

Scholars who oppose the dual track system believe that the historical causes and legislative background of the dual-track review mechanism no longer exist. They once said that the distinct internal and external system is not conducive to promoting the integration of China's foreign-related arbitration system with relevant international practices and is not conducive to promoting the integration of China's foreign-related arbitration system with relevant international practices. China's foreign-related arbitration system is rapidly becoming modernized and internationalized (Qin, 2017).

Judging from international legislation and practice, it has become a common practice in most countries to adopt the same review standards for domestic arbitration and international arbitration. *UNCITRAL Model Law on International Commercial Arbitration* inherits the relevant content of *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (commonly known as the New York Convention) and lists the circumstances in which an application for the revocation of an arbitral award may be made in Article 34, without distinguishing between domestic arbitration and international arbitration; the United Kingdom, France, Germany, and other countries adopt basically the same supervision methods for arbitral awards. The commonality of this type of international practice is that even if domestic arbitration and international arbitration are formally distinguished, the matters reviewed are basically the same and are limited to procedural matters. It can be seen

that it is a general consensus to establish procedural review standards in the process of judicial review of arbitral awards (Berg, 1981).

This article believes that arbitration, as an independent judicial procedure, has been chosen by the parties and should give full play to its own advantages such as efficiency, flexibility, confidentiality, and professionalism. If the substantive part of arbitration is brought into the scope of court supervision by law, it will essentially give the arbitration mechanism a certain degree of subordination and use litigation as an appeal remedy for arbitration. Such a treatment will easily affect the effectiveness of the system of a single and final of arbitration and will interfere with the development of arbitration. In addition, considering that the important basis for choosing arbitration is party autonomy, to a certain extent, the willingness of the parties to choose arbitration is also related to whether the relevant provisions of the arbitration place are in line with international practices, and whether the arbitration place has joined *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and the use of *UNCITRAL Model Law on International Commercial Arbitration* is also an important reference factor for parties to choose.

On the basis of the above, combined with the discussion on international legislation and practice mentioned above, retaining the dual track review mechanism is not the best option. The operation of the dual track review mechanism makes the review of domestic arbitration more rigid and arbitrary, while the review mechanism of foreign-related arbitration is more flexible and prudent. Under such differential treatment, it may also lead to a decrease in the willingness of domestic businessmen to use arbitration as a way to resolve disputes and dampen people's enthusiasm for choosing arbitration. If things continue like this, it may affect the further development of domestic arbitration and hinder the further unified development of China's arbitration system (Reyes & Gu, 2018).

From a comprehensive judgment, this article supports the academic view of establishing an "integrated judicial review model" and should gradually promote the development of the dual track review mechanism to the merged track review mechanism. In its *Relevant Provisions on Reporting Issues for Judicial Review of Arbitration Cases*, the Supreme People's Court of the People's Republic of China also followed the internal reporting system of foreign-related arbitration awards, including domestic arbitration awards within the scope of reporting, and guided the merger of domestic arbitration to foreign-related arbitration. On the basis of fully summarizing practical experience, this article suggests gradually optimizing judicial practice. Without destroying the efficiency and fairness of arbitration, by improving arbitration-related legislation and strengthening the professional level of arbitrators, the arbitration supervision method has been changed from comprehensive supervision to procedural supervision, which is consistent with the arbitration legislation of the United Kingdom, the United States, France, and other countries. In line with the development of arbitration and international conventions, the court's supervision of arbitration will be gradually reduced, and the scope of court supervision will be gradually transferred to the supervision of only procedural matters. Courts are encouraged to conduct supervision and review with a more prudent attitude, and at the same time try to avoid using judicial actions to interfere with the validity or execution of arbitral awards (Shen, 2019).

Last but not the least, considering that the Chinese public still lacks sufficient understanding of the procedural aspects of public order and good customs due to the limitations of cognition of substantive laws such as civil law norms, this has resulted in the procedural significance of public order and good customs being ignored

in arbitration practice. Moreover, as the abstract nature of the concept of public interest itself and uncertainty, the degree of its application is difficult to grasp and should be clarified. In this regard, this article believes that enumerating certain clear reasons and adding supplementary clauses are the general direction for the court's application. Such adjustments can not only ensure the clarity of the adjudication standards to the greatest extent but also ensure the unity of the adjudication results and providing a certain buffer and discretionary space for specific applications (Mao, 2021).

### Conclusion

Based on the results from practice and the research of domestic scholars in Chinese Mainland, this article believes that the optimization and development of foreign-related arbitration relief measures should be combined with the existing theoretical development and refer to specific practical needs to further optimize and make special provisions for the application to revoke relief measures. Cancellation will not be allowed. In terms of the development of the dual track review mechanism, this article is more in favor of the establishment of an integrated judicial review model, promoting the development of dual track to merged track, trying to reduce judicial intervention in arbitration with a more prudent attitude, and maximizing the preservation of the advantages of arbitration itself and the effectiveness of arbitration results.

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