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The Justification of Merge Commercial Arbitration in the Conceptual Domain

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ABSTRACT

Arbitration is a dispute resolution mechanism where autonomy is the essence and efficiency is the comparative advantage, and where fairness is not the primary consideration, and judicial review is an important way to maintain the fairness of the award. However, in our legal context, different standards are applied to the setting aside of international and domestic commercial arbitration awards, resulting in an "inverse of fairness and efficiency". In order to resolve this disagreement, the viable solution is to improve the efficiency of domestic commercial arbitration. Specifically, the distinction between international and domestic commercial arbitration should be removed, and the relevant regime for international commercial arbitration should be applied to domestic commercial arbitration. This is a possible way to change the definition of international commercial arbitration because of the similarity in nature between international and domestic commercial arbitration, and because the current theoretical research on the subject is unclear and the definitions are confusing. In addition, the current economic development also calls for the efficiency of domestic commercial arbitration. What is more, the convergence of commercial arbitration has been in place since the New York Convention, which transformed the issue of "internationality" into one of "nationality". The Arbitration Law (Draft) provides a good institutional guarantee for the enforcement and supervision of commercial arbitration after the merger.

Keywords: *Commercial Arbitration; New York Convention.*

I. INTRODUCTION

As the ordinary and normal method of settling international trade disputes,[2] arbitration itself is a private system independent of the judicial system.[3] The institutional design of the arbitration

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[2] See Ricardo de Carvalho Aprigliano, *Homenagem a Pierre Lalive. Transnational (or Truly International) Public Policy and International Arbitration*, 11 REVISTA BRASILEIRA DE ARBITRAGEM 171, 201, (2016). (A study of domestic commercial arbitration in the mid-20th century United States concluded that a substantial percentage of U.S. commercial disputes were arbitrated (rather than litigated).) . ZHAOXIUWEN（赵秀文）, GUOJI SHANGSHI ZHONGCAIFA(国际商事仲裁法)[INTERNATIONAL COMMERCIAL ARBITRATION LAW] 15（Zhongguo Renmin Daxue Chubanshe(中国人民大学出版社) [China Renmin University Press] 2014.

[3] See MARGARET L. MOSES, THE PRINCIPLE AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION,1 (Cambridge University Press 2008).

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process allows the parties to enjoy substantial autonomy and control in the dispute resolution process.[4] Arbitration has the advantages of being international[5], confidential,[6] Non formal, flexible and professional in comparison to other dispute resolution mechanisms. [7]All these advantages combine to make arbitration "highly efficient".

International Commercial Arbitration is a dispute resolution mechanism developed to meet the needs of international commerce（international business）. [8]It is very sensitive to business, coupled with its quasi-judicial attribute, [9]which makes it possible to strike a balance between efficiency and fairness in dealing with disputes between commercial subjects. [10]In short, autonomy is the essence of arbitration, [11]efficiency is its comparative advantage（compared with the mode of litigation）,[12] and the justice of the award is not its primary consideration. [13]In this context, the judicial intervention of the court has become an important way to maintain the fairness of arbitral awards.[14]

Nevertheless, under the current *Arbitration Law of the people's Republic of China* (Revision

[4] See Christian Buhring-Uhle, *A Survey on Arbitration and settlement in International Business Disputes*, in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION 10, 13(Christopher R. Drahozal & Richard w. Naimark ed. , 2005).

[5] Martinez Ramona, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal" Provisions*, 24 SUMMER 493, (1990). MARFUL-SAU & SAMUEL, CAN INTERNATIONAL COMMERCIAL ARBITRATION BE EFFECTITVE WITHOUT NATIONAL COURTS: A PERSPECTIVE OF COURTS INVOLVEMENT IN INTERNATIONAL COMMERCAIL ARBITRATION, 6 (University of Dundee Press 1996).

[6] See ZHUKE(朱科), ZHONGGUO GUOJI SHANGSHI ZHONGCAI SIFASHENCHAZHIDU WANSHAN YANJIU(中国国际商事仲裁司法审查制度完善研究)[THE STUDY ON THE IMPROVEMENT OF CHINESE SYSTEM OF JUDICIAL REVIEW ON INTERNATIONAL COMMERCIAL ARBITRATION] 15 (Falü Chubanshe(法律出版社)[Law Press] 2018).

[7] Mentor LECA & Granit CURRI, *Advantages of International Commercial Arbitration in Resolving the Commercial Contests*, 10 PERSP. L. PUB. ADMIN. 96 (2021). MARGARET L. MOSES, *supra note 3, at 9.*

[8] See WALTER MATTLI & THOMAS DIEZT ED., INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE, 74 (Oxford University Press 2014).

[9] See Huangyizhan(黄一展), *Guoji Touzi Zhongcai Zhidu Ji Qi Fazhan*(国际投资仲裁制度及其发展)[International investment arbitration system and its development], 1 JINGJI QIANZHAN(经济前瞻) [ECONOMIC OUTLOOK], 122, (2016).

[10] See Wangzuxing(汪祖兴),*Xiaolü Benwei Yu Benwei Huigui—Lun Woguo Zhongcaifa de Xiaolü Zhi Wei*(效率本位与本位回归——论我国仲裁法的效率之维)[*On the Efficiency of China`s Arbitration Law*]，4 ZHONGGUO FAXUE(中国法学)[CHINA LEGAL SCIENCE]113, 2005.

[11] See LINYI(林一), GUOJI SHANGSHI ZHONGCAI ZHONG DE YISIZIZHIYUANZE—JIYU XIANDAI SHANGYESHEHUI DE KAOCHA(国际商事仲裁中的意思自治原则——基于现代商业社会的考察)[ON PRINCIPLE OF FAIRY AUTONOMY OF INTERNATIONAL COMMERCIAL ARBITRATION: INVESTIGATION BASED ON MODERN COMMERCIAL SOCIETY] 13(Falü Chubanshe(法律出版社)[Law Press] 2018).

[12] See YANGLIANGYI(杨良宜), GUOJI SHANGWU ZHONGCAI(国际商务仲裁)[INTERNATIONAL BUSINESS ARBITRATION]10(Zhongguo Zhengfa Daxue Chubanshe(中国政法大学出版社)[China University of Political Science and Law Press] 1998).

[13] See ZHANGCHUNLIANG & HUANGHUI XÜZHIHUA(张春良、黄晖、许志华). ZHONGGUO SHEWAI SHANGSHI ZHONGCAICAIJUE: JIZHI YU SHIZHENG(中国涉外商事仲裁裁决撤销：机制与实证)[A STUDY ON THE ANNULMENT OF FOREIGN-RELATED ARBITRAL AWARD IN CHINA: MECHANISM AND PRACTICE] 1(Falü Chubanshe(法律出版社)[Law Press] 2019).

[14] See Eric A. Posner & Nathalie Voser, *Should International Arbitration Awards Be Reviewable?* 94 AMERICAN SOCIETY INTERNATIONAL LAW PROCEEDING126, 129-130 (2000).

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2017) (hereinafter referred to as the "*Arbitration Law"*), China implements the legislative paradigm of "dual-track" for the cancellation of commercial arbitration awards. [15]In essence, the judicial review process provides for both substantive and procedural review of domestic commercial arbitrations, while only procedural review is required for international commercial arbitrations. In essence, the judicial review system in China requires a higher degree of "fairness" in domestic commercial arbitrations. In contrast, international commercial arbitration has a higher degree of freedom than domestic commercial arbitration, driven by a greater desire for efficiency in international business. [16]This results in an "inverse of fairness and efficiency" between domestic and international commercial arbitration, where "low efficiency" is matched by "high fairness". "High efficiency" corresponds to "low fairness". [17]

There are four purely theoretical ways to address this inverse of fairness and efficiency. The first is to increase the efficiency of domestic commercial arbitration; the second is to reduce the judicial "fairness requirement" for domestic commercial arbitration; the third is to reduce the efficiency of international commercial arbitration; and the fourth is to increase the judicial "fairness requirement" for international commercial arbitration. In terms of practical effect, the third and fourth approaches would both result in a reduction in the efficiency of international commercial arbitration and can be classified as same.

The following is an analysis of the aforementioned approaches.

First of all, in the legal domain, especially from the perspective of civil law,[18] fairness is the dominant choice and efficiency is only secondary. [19]Efficiency and effectiveness, as well as fairness, are essential to all activities relating to legislation, law enforcement, justice, law protection and law compliance. [20]In addition, the design of laws and social institutions should reflect social justice, and as equity is at the heart of social justice, more attention must be paid

[15] For details of the relevant legal norms to Minshi Susong Fa(民事诉讼法)[Civil Procedure Law of the People's Republic of China](promulgated by the Standing Comm. Nat`l People` s Cong., Dec. 24, 2021, effective Jan. 1, 2022) art. 274(1) (Chianlawinfo); Zhongcai Fa(仲裁法)[Arbitration Law] (promulgated by the Standing Comm. Nat`l People` s Cong., Sep. 1, 2017, effective Jan. 1, 2018) art. 58 (Chianlawinfo).

[16] See HANDEPEI(韩德培), GUOJISIFA(国际私法)[INTERNATIONAL PRIVATE LAW] 562(Gaodengjiaoyüchubanshe(高等教育出版社)[High Education Press] 3rd ed., 2014).

[17]The terms 'high' and 'low' are used here as comparative concepts, not as absolute highs and lows.

[18]Refer to Fengjie(冯杰), *Minfadian Lunyu Xia Danbaoren Neibu Zhuichangquan Zhengli*(民法典论语下担保人内部追偿权证立)[*The Description and Justification of The Guarantor's Internal Right of Recourse in The Domain of Civil Code*], 2 SHEKDA FAXUE(社科大法学)[UCASS LAW REVIEW], 25, (2022).

[19] See *Chengfa*n(成凡), *Falü Renzhi He Falüyuanze: Qinggan Xiaolü He Gongping*(法律认知和法律原则：情感、效率和公平)[*Legal Cognition and Legal Principle: Emotion, Efficiency and Fairness*], 1 JIAODA FAXUE(交大法学)[SJTU LAW REVIEW],25, (2020).

[20] See *Wenzhengbang*(文正邦), *Gongping yü Xiaolü: Renleishehui de Jiben Jiazhi Maodun*(公平与效率：人类社会的基本价值矛盾)[*Fairness and Efficiency: the Basic Value Contradiction of Human Society]*,1 ZHENGZHI YÜ FALV(政治与法律)[POLITICAL SCIENCE AND LAW], 55, 2008.

to it. Furthermore, from the perspective of long-term economic development, the efficiency of a modern market economy is based on fairness and justice. [21]Therefore, fairness cannot be derogated from simply because of the pursuit of efficiency, but only when certain conditions are met. This article argues that there are two justifications for derogating from the "fairness requirement" in domestic commercial arbitration.

First, in the field of commercial arbitration, the value of efficiency itself is more important than that of fairness. This creates a conflict between the values of "efficiency" and "fairness" and, in accordance with the principle of "value ranking", priority should be given to efficiency. [22]Secondly, as commercial arbitrations, why should they be regulated separately simply because the parties involved are not the same, thereby increasing the burden of domestic commercial arbitration? The reasonableness of such a distinction needs to be considered. A review of the relevant legislation reveals that one of the reasons for the separation of international and domestic commercial arbitration at the time of the Arbitration Law's inception was to maintain the judicial review of domestic commercial arbitration awards at that time, in order to safeguard the public interest. Nevertheless, this article argues that the public interest is also at stake in international commercial arbitration, so why let the possibility of such harm go unchecked when the original intent was to safeguard the public interest? It is therefore argued that such a distinction is not justified. Thus, the inverse of the fairness and efficiency of international and domestic commercial arbitration can be addressed by lowering the fairness requirement for domestic commercial arbitration.

Secondly, the pursuit of efficiency in commercial arbitration is more in line with the basic principles of commercial law in the pursuit of efficiency in transactions. [23]Although at the beginning of the Arbitration Law, some commentators discussed whether the standard of review for international commercial arbitrations should be aligned with that for domestic arbitrations. [24]Specifically, by extending the standard of review for domestic commercial arbitrations to foreign arbitrations, the efficiency of international commercial arbitrations would be reduced. However, commercial law thinking differs from civil law thinking in that civil law seeks

[21] See *Huhuaiguo*(胡怀国), *Jingji Zhuangui Zhong de Gongping Yü Xiaolü(*经济转轨中的公平与效率)[F*airness and efficiency in economic transition*], 6 JINGJI YANJIU(经济研究) [ECONOMIC RESEARCH JOURNAL],155, 157,(2013).

[22] See GAOQICAI(高其才), FALIXUE(法理学)[JURISPRUDENCE]208-209 (Qinghuadaxue Chubanshe(清华大学出版社)[Tsinghua University Press], 4th ed., 2021)

[23] See SHITIANTAO(施天涛), SHANGFAXUE(商法学)[BUSINESS LAW] 21 (Falü Chubanshe(法律出版社)[Law Press], 6th ed., 2020)

[24] See *Chenan*(陈安), *Zhongguo Shewai Zhongcai Jiangaunjizhi Pingxi*(中国涉外仲裁监管机制评析)[*An analysis of the supervision mechanism of china's foreign-related arbitration*], 4 ZHONGGUO SHEHUI KEXUE(中国社会科学) [SOCIAL SCIENCE IN CHINA],19, (1995)

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substantive fairness or equality between two or more parties in a transaction, and achieves "overall fairness" in society by seeking "absolute fairness" between various civil subjects, but rarely considers the transaction as a whole mechanism. It is less concerned with the transaction as a whole, let alone the context in which it is formed and the mechanisms and requirements inherent in it. The commercial law, on the other hand, takes into account the impact of the concluded transaction on other transactions or parties, places the individual transaction in the context of the overall transaction mechanism and considers the efficiency, speed and security of the transaction, and uses the search for the "overall fairness" of the commercial society to achieve the "relative fairness" of the individual. [25]This means that the law of commerce, in the event of a dispute, has to be considered as a whole. This means that commercial law differs from civil law in terms of dispute determination and resolution mechanisms. [26]Therefore, in the context of commercial arbitration, the focus should be on efficiency. This approach is thus justified.

In summary, reducing the fairness requirement and increasing the efficiency of domestic commercial arbitration can resolve the aforementioned inverse dilemma. However, an in-depth analysis of these two paths reveals that the fundamental approach is to improve the efficiency of domestic commercial arbitration. In external terms, the purpose of reducing the fairness requirement is to increase the efficiency of domestic commercial arbitration. Thus, "lowering the fairness requirement" is the means and "improving efficiency" is the end. However, there is more to efficiency than just lowering the fairness requirement, and to limit oneself to lowering the fairness requirement would not be conducive to responding to a rapidly evolving and complex reality. When the choice of system is based on the core idea of enhancing efficiency, the value of commercial arbitration can be realised regardless of the system adopted, making it more flexible. Inherently, as discussed above, one of the justifications for derogating from the fairness requirement in domestic commercial arbitration is that efficiency is more important than fairness in the field of commercial arbitration, and thus the issue is better addressed from this perspective.

The feasibility of enhancing the efficiency of domestic commercial arbitration will be discussed later, in a nutshell, as the distinction between international and domestic commercial arbitration will no longer be made and the relevant regime for international commercial arbitration will be

[25] See *Yüying*(于莹), *Minfa Jibenyuanze Yü Shangfa Loudong Tianbu*(民法基本原则与商法漏洞填补)[*Basic Principle of the Civil Law and the Loophole Filling of Commercial Law*], 4 ZHONGGUO FAXUE(中国法学)[CHINA LEGAL SCIENCE],285, 2019.

[26] See *Zhengyü*(郑彧), *Minfaluoji: Shangfa Siwei Yü Falüshiyong*(民法逻辑：商法思维与法律适用)[*Civil Law Logic: Commercial Law Thinking and Law Application*], 4 FAXUEPINGLUN(法学评论)[LAW REVIEW], 82, 2018.

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applicable to domestic commercial arbitration. In this way, there will be no more "international commercial arbitration" and "domestic commercial arbitration", and it is all attributed to "commercial arbitration".

II. THE JUSTIFICATION OF MERGER: THE TRIPLE DIMENSION OF CONCEPT, STRUCTURE, AND REALITY

(A) Disorder of definition: an inherent requirement at the conceptual level

From the perspective of the fundamental research methods in the field of social sciences, the domain is the basic method for understanding objects of value. [27]The term "domain" refers to a system or field of social relations that is composed of certain social elements and has a specific social content, nature and structure. Thus, when discussing whether a distinction should be made between international and domestic commercial arbitration, it is important to first determine what the current academic definition of international commercial arbitration is.

Specifically in the field of commercial arbitration, the constraints of the system have led to the theory of commercial arbitration being ahead of practice and to some extent leading the development of arbitration practice. However, the confusion within the theory as to the object of study has hindered the advancement of arbitration theory and, consequently, the development of arbitration practice. It is therefore important to define the connotation and scope of the object of study as a starting point for theoretical research, as it is not conducive to discussion if scholars do not share the same conceptual understanding of international commercial arbitration. For this reason, this article begins with a definition of the concept of "international commercial arbitration".

a. Conceptual outline of international commercial arbitration

At present, countries around the world lack a general concept of the concept of international commercial arbitration, and they are even more self-righteous about how to determine "international" and "commercial", which brings about differences in application. In other words, due to the different criteria for determining the "international" nature of arbitration in various countries, some countries have lost jurisdiction over certain types of awards, making it impossible for them to set aside such awards. It can be seen from this that the determination of the concept of international commercial arbitration is related to the conduct of subsequent major arbitral proceedings.

[27] See *Wangmu*(王牧), *Fanzui Gainian: Xingfa Zhinei Yü Xingfa Zhiwai*(犯罪概念：刑法之内与刑法之外[*On the Conception of Crime: Inside and Outside of the Criminal Law*],2 FAXUE YANJIU(法学研究)[CHINESE JOURNAL OF LAW], 3, 5(2007).

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This article conjugates the material, but the volume is voluminous, no matter what is hanging a leak, therefore, here is only a part of the list, not to be described in detail. The selected parts of this article are textbooks published in recent years, or monographs from earlier periods.

Book Title	Definition
《国际私法》[28]	当事人各方将他们之间发生的具有国际性或涉外性的商事争议提交给由一名或数名仲裁员组成的仲裁庭，授权该仲裁庭进行仲裁程序，就争议作出对当事人各方具有约束力的裁决。
《仲裁法学》[29]	涉外仲裁又称为国际商事仲裁，是指含有涉外因素或国际因素的仲裁。
《中国仲裁制度研究》[30]	国际商事仲裁（international commercial arbitration）亦称为国际经济贸易仲裁，涉外经济贸易仲裁、国际仲裁或跨国仲裁（transnational arbitration），是指国际商事交往中不同国家的当事人通过协议自愿将他们之间的有关争议提交某一临时仲裁机构或某一常设仲裁机构审理，由其依据有关法律或依公平原则作出裁决，并约定自觉履行该项裁决所确定的义务的一种制度。
《国际商事仲裁》[31]	所谓国际商事仲裁意指在国际商事活动中，当事人为之后可能发生的争议而达成仲裁协议或在合同中约定仲裁条款，自愿将可能发生的争议提交仲裁机构或某临时仲裁庭进行审理，并由仲裁机构或临时仲裁庭作出对双方具有约束力的仲裁裁决的制度。

[28] See HANDEPEI(韩德培), *supra* note 17

[29] See XIAOJIANGUO(肖建国) ED., ZHONGCAIFAXUE(仲裁法学)[ARBITRATION LAW] 251 (Gaodengjiaoyüchubanshe(高等教育出版社)[High Education Press] 2021).

[30] See YEQING(叶青)ED., ZHONGGUO ZHONGCAI ZHIDU YANJIU(中国仲裁制度研究)[RESEARCH ON CHINA'S ARBITRATION SYSTEM] 261 (Shanghai Shehuikexue Chubanshe(上海社会科学出版社)[Shanghai Academy of Social Sciences Press] 2009).

[31] See LIUXIAOHONG & YUANFAQIAONG(刘晓红 袁发强)ED., GUOJI SHANGSHI ZHONGCAI(国际商事仲裁)[INTERNATIONAL COMMERCIAL ARBITRATION] 13(Beijing Daxue Chubanshe (北京大学出版社)[Peking University Press]2010).

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《国际经济法》[32]	国际商事仲裁，是指在国际经济贸易活动中，当事人双方依托事先或事后达成的仲裁协议，将有关争议提交给仲裁机构进行审理，并作出具有约束力的仲裁裁决的制度。
《国际私法原理与案例》[33]	国际商事仲裁是指国际商事交往中的双方当事人通过签订仲裁协议或仲裁条款，自愿将他们之间的争议提交某一仲裁机构（临时仲裁庭或常设仲裁机构）审理，由其依据法律或依公平原则作出裁决。
《国际商法》[34]	国际商事仲裁是指解决跨国性商事争议的一种仲裁方法。具体是指在国际经济贸易活动中，当事人通过协议自愿将他们之间有关争议提交某一临时仲裁庭或某一常设仲裁机构进行审理，并作出具有约束力的仲裁裁决制度。
《国际商法》[35]	国际商事仲裁是指从事国际商事交易的当事人在纠纷发生之前或纠纷发生之后，达成书面协议，自愿将其纠纷交给第三者进行裁决并受该裁决效力约束的争议解决方式。
《国际私法学》[36]	国际商事仲裁是指仲裁机构根据双方当事人达成的仲裁协议，对当事人提交的国际商事争议进行审理并作出具有拘束力的裁决的争议解决方式。
《国际民事诉讼法	国际商事仲裁是指在国际经济贸易活动中，当事人双方

[32] See ZHANGXIAOJUN(张晓君)ED., GUOJI JINGJIFA XUE(国际经济法学)[INTERNATIONAL ECONOMIC LAW] 292 (Xiamen Daxue Chubanshe(厦门大学出版社)[Xiamen University Press]2017).

[33] See YANGWENLI & GAOLING(杨文丽 高凛), GUOJI SIFA YUANLI YÜ ANLI(国际私法原理与案例)[PRINCIPLES AND CASES OF INTERNATIONAL PRIVATE LAW] 268 (Duiwai Jingmao Daxue Chubanshe(对外经济贸易大学出版社)[University of International Business and Economic Press] 2017).

[34] See QINLIWEI(秦立崴), GUOJI SHANGFA(国际商法)[INTERNATIONAL BUSINESS LAW] 333(Beijing Ligong Daxue Chubanshe(北京理工大学出版社) [Beijing Institute of Technology Press] 2016).

[35] See DONGXINMIN & SUNSHUANG(董新民 孙爽), GUOJI SHANGFA(国际商法)[INTERNATIONAL BUSINESS LAW] , 209 (Duiwai Jingmao Daxue Chubanshe(对外经济贸易大学出版社)[University of International Business and Economic Press] 2015).

[36] See ZHANGXÜ(张旭), GUOJISIFA XUE(国际私法学)[INTERNATIONAL PRIVATE LAW] 335 (Xiamen Daxue Chubanshe(厦门大学出版社)[Xiamen University Press]2017).

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与国际商事仲裁》[37]	依事先或事后达成的仲裁协议，将有关争议提交给某临时仲裁庭或常设仲裁机构进行审理，并作出具有约束力的仲裁裁决的制度。
《现代商事仲裁的理论与实践》[38]	国际商事仲裁意指自然人、法人和其他组织相互之间因商事交易而产生的具有国际因素或涉外因素的仲裁，它以私法方面带有国际因素或涉外因素的争议为主要对象，既不同于解决国家之间在某一公法上争端的国际仲裁，也不同于解决一国范围内自然人、烦人和其他组织相互之间争议的国内仲裁。
《国际商事仲裁的法律适用》[39]	一项高度自治的解决国际商事争议的法律制度。
《国际商事仲裁理论与实务》[40]	国际商事仲裁是指当事人各方将他们之间发生的具有国际性的或者涉外性的商事争议，根据争议的双方当事人达成的仲裁协议自愿提交给中立的第三方裁决，该裁决对双方当事人有拘束力的争议解决方法。其不同于国内仲裁，国内仲裁属于国内程序法的研究范围，主要解决一国国内的经贸、劳动争议。
《中国国际商事仲裁司法审查制度完善研究》[41]	国际商事仲裁是仲裁的一个亚类，它以国际商事领域的争议为仲裁对象。

[37] See LIYÜQUAN(李玉泉)ED., GUOJI MINSHI SUSONGFA YÜ GUOJI SHANGSHI ZHONGCAI(国际民事诉讼法与国际商事仲裁)[INTERNATIONAL CIVIL PROCEDURE LAW AND INTERNATIONAL COMMERCIAL ARBITRATION] 237(Wuhan Daxue Chubanshe(武汉大学出版社)[Wuhan University Press] 1994).

[38] See HANJIAN(韩健), XIANDAI GUOJI SHANGSHI ZHONGCAIFA DE LILUN YÜ SHIJIAN(现代国际商事仲裁法的理论与实践)[THEORY AND PRACTICE OF MODERN INTERNATIONAL COMMERCIAL ARBITRATION LAW] 2 (Falü Chubanshe(法律出版社)[Law Press] 2018).

[39] See ZHUKEPENG(朱克鹏), GUOJI SHANGSHI ZHONGCAI DE FALÜSHIYONG(国际商事仲裁的法律适用)[APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION] 1 (Falü Chubanshe(法律出版社)[Law Press] 1999).

[40] See XÜWEIGONG(徐伟功), GUOJI SHANGSHI ZHONGCIA LILUN SHANGSHI ZHONGCIA LILUN YÜ SHIWU(国际商事仲裁理论与实务)[THEORY AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION] 1(Huazhong Keji Daxue Chubanshe)华中科技大学出版社[Huazhong University of Science and Technology] 2017).

[41] See Zhuke(朱科), *supra* note 7

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Table 1: definition of the concept of international commercial arbitration by scholars

In terms of historical development, an article published in the 1927 Qianye Monthly Newspaper（《钱业月报》） entitled "On the International Commercial Arbitration Tribunal（论国际商事仲裁法庭）" said: International trade is becoming more and more prosperous, and disputes have also increased, and the laws, customs, human feelings, and customs of various countries are not similar, and if the judicial office of one place wants to solve it, it is inevitable that it will be biased and other shortcomings, and the trend will occur, so the international commercial arbitration court will operate and arise. [42]Such tribunals were established for "vigorous efforts to avoid all judicial proceedings in order to ensure the increasing development of international trade".

It can be seen from this that the concept of international commercial arbitration is based on commercial disputes with "international commerce", "international economic trade", "transnational commercial activities" and "international or foreign-related factors".

Concepts are highly general, summarizing existing knowledge, reflecting the essence of transactions, and tools for further understanding. Concepts are the smallest units of thought and the least contentful words. [43]However, the interpretation of the above concepts contains secondary concepts, so that the definition of concepts is still confusing and cannot be defined thoroughly.

In this way, the understanding of international commercial arbitration must be based on the understanding of international commercial affairs, international economic and trade, and international and foreign-related factors.

b. Interpretation of "International Commerce"

international trade, international economic and trade, and transnational commercial activities all fall under the conceptual connotation of "international business". At present, the concept of international business is basically the same at home and abroad. In addition to directly conceptualizing international business itself, some scholars also start from the discipline of international business. Determine the research connotation of international business.

Book Title	Definition

[42] See *Xiejuzeng*(谢菊曾), *Lun Guojishangshi Zhongcaiting*(论国际商事仲裁庭)[*On International Commercial Arbitration Tribunal*], 7 QIANYE YUEBAO(钱业月报)[QIANYE MONTHLY REPORT], 8, (1927).

[43] See *Wujiaguo*(吴家国), *Shenme Shi Gainian*(什么是概念)[*What is the Concept*], 6 QIANXIAN(前线)[FRONT], 20, (1962). *Jiangyi(*江怡), *Shenme Shi Gainian de Tuopu Kongjian*(什么是概念的拓扑空间)[*What is the topological space of concepts*], 5 SHIJIE ZHEXUE(世界哲学)[WORLD PHILOSOPHY],71,(2008).

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《中国市场经济学大辞典》[44]	国际贸易，是指世界各国之间的商品和劳务交换活动。
《international business》[45]	International business includes any form of commercial activities across national borders. It includes any form of international transfer of economic resources, such as goods, labor services (such as technology, skilled labor, transportation) and capital.
《International business》[46]	International business is a science that studies cross-border transactions to meet the needs of individuals and organizations. Economic transactions here include trade and direct investment by overseas enterprises.
《International business》[47]	The study of international business mainly refers to labor activities between countries. This definition includes two meanings. One is that international business studies cross-border economic activities, and the other is that international business studies commercial economic activities, not non-commercial transnational economic activities.
《International Business	International business refers to transactions that take place across national boundaries to meet the needs of

[44] See ZHAOLINRU(赵林如)ED., ZHONGGUO SHICHANG JINGJIXUE DACIDIAN(中国市场经济学大辞典)[DICTIONARY OF CHINA MARKET ECONOMICS] 1109(Zhongguo Jingji Chubanshe(中国经济出版社)[Economic Press China] 2019) (This exchange activity is between the international scope of activities, from the perspective of a country, this activity is foreign trade, the combination of foreign trade of all countries constitute the world trade, the division of labour in society, especially the different international division of labour is the material basis of international trade. International trade is divided into export trade, import trade, according to the different directions of movement of goods, divided into export trade, import trade and transit trade; according to the different forms of goods, divided into tangible trade and intangible trade; according to the different goods through the transit and customs border, divided into total trade and specialized trade; according to the different modes of transport of goods, divided into land trade, sea trade, air transport According to the different modes of transportation of goods, they are divided into land trade, sea trade, air trade and mail order trade, indirect trade and re-export trade. As the US dollar is the most common currency in international trade, so the amount of international trade is generally expressed in US dollars. The development of international trade is a progressive historical trend, and it plays a very important role in raising the level of productivity, promoting the economic development of countries and enhancing cultural exchanges. It plays a very important role. International trade is a link between countries around the world. As China implements a socialist market economy and has to exchange goods with various types of countries in the world, it is inevitable to participate in international trade.)

[45] See PETER J. BUCKLEY ET AL., INTERNATIONAL BUSINESS, 1(Oxford University Press 2022).

[46] See DANIELS ET AL., INTERNATIONAL BUSINESS, 5 (Pearson 2022).

[47] See SURAKSHA, INTERNATIONAL BUSINESS, 9 (Cambridge University Press 2021).

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》[48]	individuals and organizations, which can take different interrelated forms, the basic forms of which are import/export trade and foreign direct investment, as well as licensing, franchising, and management contracts.
《International Business: Theory and Practice》[49]	international business is described as any business activity that crosses national boundaries.
《International Business: Perspectives from Developed and Emerging Markets》[50]	A company engages in international business when it conducts any business functions beyond its domestic borders.
《International Business: A Managerial Perspective 》[51]	International business consists of business transactions between parties from more than one country.
《International Business: The New Realities》[52]	International business refers to firms' performance of trade and investment activities across national borders.

Table 2: definition of international business by domestic and foreign scholars

It can be seen that the scholarly definition of international business or international trade is focused on "international" and the definition of "international" is limited to "crossing national borders". The definition of "commercial" is, however, very broad and general.

c. Determination of "International"

Many of the above-mentioned monographs will follow up on the interpretation of "international" and "commercial" after the concept of international commercial arbitration is determined, and the current scholarly have a variety of disputes about how to determine the

[48] See MICHAEL R. CZINKOTA & IIKKA A. RONKAINEN ET AL., INTERNATIONAL BUSINESS, 4(The Dryden Press, Harcourt Brace College Publishers, 5th ed., 1990).
[49] See RIAD A. AJAMI &KAREL COOL ET AL., INTERNATIONAL BUSINESS: THEORY AND PRACTICE, 4(M. E. Sharpe, 2nd ed., 2005).
[50] See K. PRAVEEN PARBOTEEAH & JOHN B. CULLEN, INTERNATIONAL BUSINESS: PERSPECTIVES FROM DEVELOPED AND EMERGING MARKETS, 5 (Routledge, 2nd ed.,2018)
[51] See RICKY W. GRIFFIN & MICHAEL W. PUSTAY, INTERNATIONAL BUSINESS: A MANAGERIAL PERSPECTIVE, 28(Pearson, 8th ed., 2015).
[52] See S. TAMER CAVUSGIL & GARY KNIGHT ET AL., INTERNATIONAL BUSINESS: THE NEW REALITIES, 26(Pearson, 4th ed., 2017).

"internationality" of arbitral awards, forming three theories. That is, the substantive link factor standard, the dispute nature criterion and the hybrid criterion.

The so-called substantive connection factor criterion means that the nationality, domicile or residence of the parties, the place of registration of the legal person, the company management center and other connecting factors are international, and the arbitration is found to be international. The criterion for the nature of the dispute is that if the dispute involves an international commercial interest, the arbitration will find it to be "international". Hybrid criterion, which incorporate the above two statements, derive from Article 1(3) of the *UNCITRAL Model Law on International Commercial Arbitration* (hereinafter referred to as the "MLICA").

In addition, there is also a doctrine that there is also a theory that the parties agree on the standard. [53]Its theory derives primarily from Article 1(3) of the MLICA, which states that "the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country". Moreover, Singapore, Australia, Canada, and Hong Kong all use this standard. Besides, it is precisely because of the introduction of this standard that the scope of application of international commercial arbitration has been expanded, [54]making it occupy the status of "domestic commercial arbitration" that should have been.

Consequently, the previous academic community's definition of the concept of "international commerce" only meets the "substantial link factor standard". However, from the perspective of the MLICA and the relevant formulations of the International Chamber of Commerce, the recognition of "international" is understood in a broad sense and is not limited to the "substantive link factor standard". [55]At the same time, it is determined from Article 522 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (Amended in 2022)* and the relevant rules of the *China International Economic and Trade Arbitration Commission (2015 Version)*, and China also

[53] See *Liwanjia*(李婉嘉), *Zaitan Guoji Shangshi Zhongcai de "Guojixing"*(再谈国际商事仲裁的"国际性")[*Reconsideration on the International Character of International Commercial Arbitration]*, 2 LILUN JIE(理论界)[THEORY HORIZON],80, (2014).

[54] See ZHANGXIAOJUN(张晓军), *supra* note 33

[55] See Lijian(李建), *Zhongguo Fayuan Zai Guoji Shangshi Zhongcai Zhong de Diwei He Zuoyong*(中国法院在国际商事仲裁中的地位和作用)[*The Position and Role of Chinese Courts in International Commercial Arbitration*], in GUOJIFAXUE LUNCONG(国际法学论丛)[INTERNATIONAL LAW REVIEW] 2, 563 (Beijingshi Faxuehui Guojifaxue Yanjiuhui(北京市法学院国际法学研究会)[Beijing Law Society Association of International Law]ed. 1999) (The International Chamber of Commerce states clearly in its instruction manual that the international character of arbitration does not mean that the parties must be of different nationalities. Contracts may transcend national boundaries for the sake of the entity, for example a contract performed in another country by two citizens of the same country or a contract concluded by a country with a foreign subsidiary doing business in its country.)

adopts a "broad" understanding of the determination of "international". Thus, whether international or domestic, the determination of the international is not limited to the factor of substantive linkage, and it is still inappropriate for the foregoing conceptual determination to still adhere to this criterion.

d. Description of "Commercial"

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the "New York Convention") delegates to Contracting States the right to interpret the meaning of "commercial", making it particularly difficult to define "commercial" uniformly. Therefore, although the aforementioned definition of "commercial" of "international commercial" is difficult to negotiate with the "commercial" in International Commercial Arbitration in China,[56] due to the characteristics of the definition of "commercial" itself, and there is no big difference between the understanding of "commercial" between international commercial arbitration and domestic commercial arbitration, this article does not comment on it.

e. Deficiencies in the definition of current concepts

As mentioned above, there are currently five sets of concepts, one is the "international commercial arbitration" defined by scholars (A), the second is the concept of "international commercial" (B) of international commercial arbitration defined by scholars, the third is the "international" (C) called by academic theoretical research, the fourth is the "commercial" (D) in the discussion, and the fifth is called "international business (E)" in economics.

The connotations of the above five groups of concepts have been explained above, and I will not repeat them here, but only make conceptual comparisons. First of all, the determination of the original concept or the original concept violates the basic requirements of the "concept", and there are still conceptual connotations under the concept (especially, "international commercial arbitration" includes the concept of "international commercial"), resulting in vague concepts. Moreover, when interpreting "international commercial arbitration", scholars define "international" as "crossing national borders" in "international commerce", which is

[56] *Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China* II. In accordance with the commercial reservation declaration made by China upon its accession to this Convention, China will apply the Convention only to disputes arising out of legal relationships, whether contractual or not, which are considered commercial under China's laws. The so called "legal relationships, whether contractual or not, which are considered commercial" refers to the economic rights and obligations arising from contracts, torts or relevant legal provisions, such as sales of goods, lease of property, project contracting, processing, technology transfer, equity or contractual joint adventure, exploration and development of natural resources, insurance, credit, labor services, agency, consultation services, marine, civil aviation, railway or road passenger and cargo transportation, product liability, environment pollution, marine accidents, and ownership disputes, except disputes between foreign investors and the host government.

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inconsistent with the concept of "international" (c) studied later, resulting in inconsistent scope of the previous and subsequent discussions. The more serious crux of the matter is that the original concept cannot define the extended concept, resulting in some things that should belong to the object described by the concept being excluded because they do not conform to the concept of things, which does not conform to the original meaning of the concept definition. The same is true of the interpretation of "commercial". Moreover, because of the many reasons mentioned above, the scope of "international (c) + commercial (d)" that is currently studied by scholars or recognized by the New York Convention is much greater than that of "international commerce(ial)" (B), so that the concept definition loses its original meaning. It can be seen from this that the current definition of the concept of international commercial arbitration in the academic circles is divorced from its analysis of the connotation of international and commercial matters, and the scope of international commercial arbitration is relatively small in academic circles.

However, due to the current lack of consensus on whether it is academic circles or judicial practice circles in various countries, there is no consensus on the two important key elements of "international" and "commercial", which makes it difficult to define them, because no matter how to define them, it is ultimately contrary to reality. In a nutshell, there is a certain degree of disorder in the current academic circles on the concept of "international commercial arbitration", and it is impossible to fully describe the nature of things themselves, which is not in line with the nature of the concept itself. In addition, the academic circle itself lacks a general understanding of international commercial arbitration, and the international concept of international commercial arbitration changes with the changes of the times, and the difference in historical stages is doomed to the different understanding and understanding of the "international" factors of the formulators. [57]A Solidify cognition of the term is therefore likely to be a constraint on the future development of arbitration.

In this context, from a conceptual point of view, the certainty of the concept has been reduced by reducing the number of factors affecting its connotation from two to one. The earlier conceptual description of "international commercial arbitration" required separate explanations of "international", "commercial" and "arbitration". It is also necessary to clarify what the function of the word "international" in the term "international commercial arbitration" is,

[57] See Sunjianli(孙建丽), Guoji Shangshi Zhongcai Zhong Dangshiren Yisizizhi Wenti Yanjiu(国际商事仲裁中当事人意思自治问题研究)[Study on Questions Relating to Party Autonomy in International Commercial Arbitration](Jun. 2020)(Ph.D. dissertation, University of International Business and Economic)(on file with the UIBE Library).

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whether it is to qualify "commercial arbitration" or to describe "commercial". In essence, in the aforementioned context, it is important to determine whether international commercial arbitration is "international commercial arbitration（国际的商事仲裁）" or "the arbitration of international commercial （国际商事的仲裁）". [58]

The need to clearly define the above concepts will cause many academic controversies, which are not conducive to the improvement of efficiency in commercial arbitration practice. The reason for this is that international commercial arbitration originated from practice and may not coincide with classical theory, but the significance of the definition of the concept cannot be denied. For this reason, this paper believes that under the conceptual theory, the logical loopholes under the conceptualisation of international commercial arbitration cannot be ignored, but there is no need to continue to argue. In essence, it only determines what constitutes "commercial arbitration" and abandons the element of "international". In this way, the definition of commercial arbitration is more precise.

(B) Similarity of properties: the possibility of a typological construction

Apart from the fact that the distinction between international and domestic commercial arbitration should no longer be made from the external perspective of the concept, it can also be established from its internal structure.

Although some commentators insist that from the perspective of China's law, it is of great significance to distinguish between international commercial arbitration and domestic commercial arbitration from theory. [59] Moreover, this distinction is not based on the need for pedantic pure theory, but is based on the special considerations of the cause of international commercial arbitration, which are based on the difference between the two. The regime should take into account the reduction of restrictions on the contentious matters on which an arbitral award may be delivered in international commercial arbitration and a more lenient condition for international commercial arbitration in terms of the conditions for recognition and

[58] See *Tanjinghcun*(谭景春),*Mingming Pianzheng Jiegou de Jiegou Yüyi Guanxi Ji Qi Zai Cidian Shiyi Zhong de Zuoyong*(名名偏正结构的语义关系及其在词典释义中的作用)[*Semantic Relations Between Nouns and Noun Modifiers and Their Roles in Dictionary Definetion*], 4 ZHONGGUO YÜWEN(中国语文)[STUDIES OF CHINESE LANGUAGE],342, (2008). *Xingfuyi & Shenwei*(邢福义 沈威), *Lilun de Gaishan He Shishi de Zhicheng—Guanyü Lingshuxing Pianzheng Jiegou Chongdang Yuan Binyü*(理论的改善和事实的支撑——关于领属性偏正结构充当远宾语)[*The Improvement of Theories and the Support from Fact: A Case Study of Genitive Structures as Distant Objects in Double-object Constructions]*, 3 HANYU XUEBAO(汉语学报)[CHINESE LINGUISTICS],2, (2008).

[59] See SHENWEI & CHENZHIDONG(沈伟 陈治东), SHANGSHI ZHONGCAIFA: GUOJISHIYE HE ZHONGGUO SHIJIAN(商事仲裁法：国际视野和中国实践)[COMMERCIAL ARBITRATION LAW: GLOBAL CONTEXT AND CHINA PRATICE], 16-17(Shanghai Jiaotong Daxue Chubanshe(上海交通大学出版社)[SJTU Press 2020].

enforcement of arbitral awards. [60]Such considerations do not need to be made in domestic commercial arbitration.

However, the significance of the distinction mentioned above is entirely a theoretical compromise under the current norm, which means that the theory is interpreting the norm. It is precisely because of the special provisions of reality that the theory distinguishes them. Rather than looking at current rulemaking from the highest level of theory. In essence, if the rules were modified, such differences would cease to exist.

The specific differences are mainly reflected in the nature, establishment of institutions, the authority and selection of arbitrators, arbitration jurisdiction, arbitration rules, and the validity of arbitral awards.

In many textbooks and monographs, the nature of international commercial arbitration is roughly as follows:[61] 1. The non-mandatory jurisdiction; 2.There are persons who enjoy full autonomy at that time; 3. Flexibility and speed; 4. Confidentiality; 5. Arbitration is more conducive to the performance and enforcement of the award; 6. International commercial arbitration is more conducive to the trust and reassurance of the parties than litigation; 7. Arbitration is more efficient; 8. There is no trouble with parallel litigation, and the ruling is final. [62]The comparison of reference systems to litigation when discussing their nature or construction in academic circles has led to the application of the nature of domestic commercial arbitration in many treatises. [63]No emphasis was placed on the distinction between international and domestic commercial arbitration. [64]In other words, it is difficult to distinguish between international commercial arbitration and domestic commercial arbitration in terms of nature. Or it may be said that domestic commercial arbitration and international commercial arbitration are similar in nature.

From a historical perspective, the earlier arbitration law, except for the recognition and enforcement of foreign arbitral awards, generally did not distinguish between domestic commercial arbitration and international commercial arbitration, and mainly regulated the

[60] *Id.*

[61] It should be noted, however, that in discussing the characteristics of international commercial arbitration, commentators have not been able to highlight its differences from domestic commercial arbitration, but have focused more on its advantages over other forms of dispute resolution, primarily litigation. This has led to a high degree of overlap, if not identicality, between the academic overview of the characteristics of international commercial arbitration and domestic commercial arbitration.

[62] See Margaret L. Moses, *supra* note 4

[63] XIESHISONG(谢石松), SHANGSHI ZHONGCAI FA(商事仲裁法)[COMMERCIAL ARBITRATION LAW], 4-12(Gaodengjiaoyüchubanshe(高等教育出版社)[High Education Press] 2003).

[64] Even when the differences between the two are discussed, they are only superficially described, not in depth, as to the essential differences between the two systems.

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domestic arbitration system. With the development of international commercial arbitration, domestic commercial arbitration and international commercial arbitration have gradually separated from each other, and when the MLICA was adopted by various countries, the legislative style of "monism" and "dualism" gradually appeared in the norms of the arbitration system.[65] The monism is to revise the original domestic arbitration system to adapt to the development of international arbitration, and the direct manifestation is to incorporate domestic commercial arbitration into the normative system of the MLICA, and to apply to both domestic arbitration and international commercial arbitration with a liberal legal regime. [66]Dualism means that international commercial arbitration and domestic commercial arbitration are regulated separately, regardless of whether a specific law is enacted.[67]

The development of China's arbitration system has been the opposite, with commercial arbitration in China long divided into domestic commercial arbitration and international commercial arbitration, which were distinctly different before the enactment of the *Arbitration Law* (1994). However, once the *Arbitration Law* (1994) was enacted, the two were largely aligned, with the only difference being that the judicial support and supervision of foreign-related arbitrations by the people's courts adopted different procedures and standards from those of domestic arbitrations, which better cooperates China's policy of attracting foreign investment.[68]

Furthermore, the adoption of a monism or dualism approach does not have to be "one-size-fits-all", and legislators can adapt to the facts; in 1997, Germany amended *Code of Civil Procedure(Zivilprozessordnung, ZPO)* and the norms of arbitration law accordingly, so that in its amendment bill it no longer distinguished between the domestic and international commercial arbitration regimes. [69]

All of this demonstrates that there is no natural and insurmountable gap between international and domestic commercial arbitration. All these differences are the result of the design of the law

[65] Pieter Sanders, *Quo Vadis Arbitration? --Sixty Years of Arbitration Practice--A Comparative Study,* Kluwer Law International, 321-322, (1999).
[66] Monism is practised in countries such as Germany, Mexico and Canada.
[67] Dualism is practiced in China, Singapore, Russia, etc.
[68] See *Zhangshengcui*(张圣翠), *Woguo Shewai Zhongcai Falüzhidu Zhi Wanshan*(我国涉外仲裁法律制度之完善)[*Perfection of China's Foreign related Arbitration Legal System*], 5 FAXUE(法学)[LAW SCIENCE] 126, (2013).
[69] See ZHANGZHI(张志), ZHONGCAI LIFA DE ZIYOU HUA GUOJI HUA HE BENTU HUA(仲裁立法的自由化、国际化和本土化)[THE LIBERALIZATION, INTERNATIONALIZATION AND NATIONALIZATION OF ARBITRATION LEGISLATION], 98(Zhongguo Shehui Kexue Chubanshe(中国社会科学出版社)[China Social Science Press] 2016).

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However, little has been written in the current theoretical literature on the distinction between international commercial arbitration and domestic commercial arbitration. in the process of writing this article, "international commercial arbitration" is searched in the "CNKI" database with "international commercial arbitration" as the keyword "theme", with a total of 2697 articles. After visualisation, it was found that the subject matter was mostly focused on the arbitral tribunal and the parties.[70]

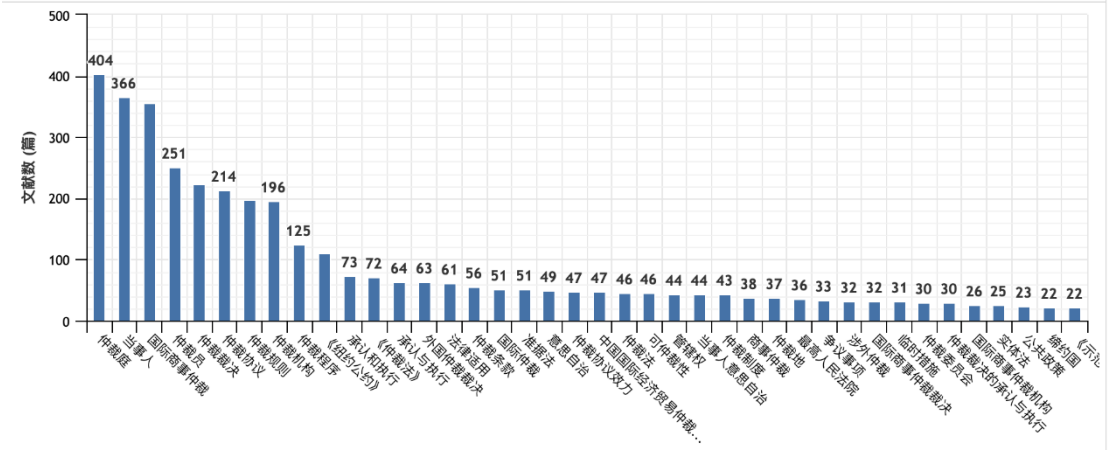

Figure 1 Distribution of relevant literature by subject

Limited by time and ability, the author is unable to read all the literature listed, only a cursory glance at the articles on international commercial arbitration contained in the "CSSCI" since 2000, and did not find that the relevant discussions make a special and detailed discussion of the distinction between domestic and foreign commercial arbitration, and most of them only make concluding statements, that is, international commercial arbitration enjoys greater freedom than domestic commercial arbitration.

Compared with China, foreign commentators have a more mature discussion on whether to distinguish between international commercial arbitration and domestic commercial arbitration. Such statements are mostly found in debates about whether dualism or monism should be adopted. Among its proponents of dualism, the binary paradigm stems from the recognition that in domestic disputes involving only its own nationals or residents, the interest of the State in the arbitral proceedings and the intervention of the courts in the arbitral proceedings and the outcome of the arbitration is greater. [71]Moreover, the high degree of flexibility and autonomy required by international commercial arbitration is highly incompatible with the more restrictive legal regimes required by domestic arbitration.[72] The argument in favor of monism is that

[70] See CNKI (Nev. 12 2021), https://kns.cnki.net/KNS8/Visual/Center.
[71] W. Laurence Craing, *Some Trends and Developments in the Law and Practice of International Commercial Arbitration*, 30 TEXAS INTERNATIONAL LAW JOURNAL 1, (1995).
[72] Leliga Anglade, *Current Development: Ireland as a Place for International Arbitration*, 12 THE AMERICAN

international commercial arbitration and domestic commercial arbitration should not be treated differently, because the international or domestic nature of a contract makes it apply different arbitration laws and regulations, which is neither necessary nor reasonable.[73]

The monistic system adopts the model of applying the same arbitration legal system to domestic commercial arbitration and international commercial arbitration, which is more convenient in application, and directly promotes the development of the domestic commercial arbitration system, improves the flexibility and freedom of domestic commercial arbitration, conforms to the legal trend of the international commercial arbitration system, and is more fair to the parties to the arbitration. Therefore, from the perspective of the long-term development of the arbitration system and the fairness of the arbitral parties, the monistic system is the development trend of arbitration legislation, and the binary system is a more prudent legislative technique. [74]

However, unlike the general theory in academic circles, some commentators have proposed from the perspective of practice that what really hinders the merger of commercial arbitration is the institutional source of international commercial arbitration and domestic commercial arbitration. The fundamental difference between international commercial arbitration and international commercial arbitration is not the difference in the degree of freedom of the two parties, but in the difference in the legal systems rooted by the two parties, international commercial arbitration is greatly influenced by common law, although domestic commercial arbitration is close to the former at the level of rules, but there are still major differences in trial methods.[75] In essence, international commercial arbitration requires the lawyers of the parties to take the initiative to promote and make demands to the arbitral tribunal, while the process of domestic commercial arbitration relies more on the arbitral tribunal, and the obligation of the parties is to cooperate with the requirements of the arbitral tribunal, provide corresponding information, answer the questions of the arbitral tribunal, and take written materials as the core.

With regard to the foregoing discussion, this article argues that under the same set of rules, the so-called distinction mentioned above is irrelevant and does not constitute the fundamental reason for distinguishing between international commercial arbitration and domestic commercial arbitration. Moreover, China's foreign-related commercial arbitration is not

REVIEW OF INTERNATIONAL ARBITRATION 263, (2001).

[73] James O. Rodner, *International and National Arbitration: A Fading Distinction*, 5 JOURNAL OF INTERNATIONAL ARBITRATION 19, (2002).

[74] See XIAOJIANGUO(肖建国), supra note 30

[75] JINDU YANJIUYUAN(金杜研究院)[KING & WOOD INSITUTE](Jun. 8 2020 8:11 P.M.), https://mp.weixin.qq.com/s/GfVHdV28AHo8XncF8wtE8Q.

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fundamentally different from domestic arbitration in terms of basic procedures.[76]

First of all, the difference proposed by the commentator from a practical point of view is only a statement of fact, that is, there are different procedural approaches between the two sides in practice. The difference in such procedures is caused by the difference in the two-method system, and the differences in legal systems are typical such as different litigation procedures, different substantive norms, and whether customary law and precedents can influence adjudication. [77]In a word, the fundamental reason for the fundamental difference described by the aforementioned commentators is that the rules of procedure differ between common law and civil law systems. Following this logic, the foregoing commentators do not seem to have noticed that, in the same legal system, that is, in the case of the same relevant procedural rules, whether international commercial arbitration or domestic commercial arbitration may be conducted domestically, the scenario of an international commercial arbitration being conducted in a common law country and domestic commercial arbitration being conducted in China or in other civil law countries. Suppose, when an international commercial arbitration and a certain domestic commercial arbitration are arbitrated by an arbitration institution in China, the arbitration rules of the two parties are the same, so why is it said that the legal systems are different? Subject to the arbitral tribunal's compliance with the arbitral procedures, the procedures for international commercial arbitration and domestic commercial arbitration shall be fully consistent.

Hence, the statement that "different legal systems lead to different procedures" does not seem to be sufficient to constitute a reason for distinguishing between international commercial arbitration and domestic commercial arbitration.

In addition, the arbitration rules of different international commercial arbitration institutions and the rules of domestic arbitration institutions have appeared obviously "homogenized". Moreover, the revision and update of domestic arbitration institutions at the level of rules also keep up with international trends and converge with relevant international rules. And this is also agreed upon by the aforementioned commentators. [78]In addition, the source of international commercial arbitration law includes domestic law, and the application of international treaties in international commercial arbitration still depends on the interpretation and recognition of

[76] See YEQING(叶青)ED., *supra* note 31

[77] *Ranhao*(冉昊), *Liang Da Faxi Falü Shishi Xitong Bijiao—Caichan Falü de Shijiao*(两大法系法律实施系统比较——财产法律的视角)*[A systemic Comparison of the Execution of the Law in the Two Great Legal System From the Perspective of Property Law]*, 1 ZHONGGUO SHEHUI KEXUE(中国社会科学) [SOCIAL SCIENCE IN CHINA],59, (2006).

[78] See *supra* note 76

domestic law, [79]so domestic law has a greater impact on international commercial arbitration than international treaties. [80]Such implications are not only at the substantive level of the international commercial arbitration system, but also of procedural significance. Although international commercial arbitration allows parties to agree on arbitration rules, arbitration rules do not completely exclude national law. Arbitration rules are based on the premise that mandatory domestic law norms prevail over arbitration rules that are inconsistent with them. [81]It is precisely for this reason that commentators have questioned the existence of the international commercial arbitration law itself, arguing that only the internal arbitration law exists.[82]

Therefore, the assertion of institutional origin is not sufficient to justify the separation of international and domestic commercial arbitration.

In addition, the biggest difference between international commercial arbitration and domestic commercial arbitration in the judicial review procedure lies in the difference in the examination standards of the two sides, although some theories have advocated that the two should be reconciled,[83] but this statement is limited to one corner of judicial review, and advocates extending the review standard of domestic commercial arbitration to international commercial arbitration at the expense of reducing the efficiency of international commercial arbitration. In other words, at the time of the revision of the *Arbitration Law*, there were already commentators discussing the relaxation of the review criteria for domestic commercial arbitration. [84]What's more, in the process of revising the *Arbitration Law*, the *Draft for Comments on the Arbitration Law of the People's Republic of China (Revised)* (hereinafter referred to as the *Draft for Comments*) has unified the review criteria for foreign-related arbitration and domestic arbitration, [85]laying a good foundation for the subsequent integration of the two. As revealed above, the distinction between international commercial arbitration and domestic commercial

[79] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY & MATERIALS, 20(Kluwer Law and Taxation Publishers, 1994).

[80] YÜXIFU(于喜富), GUOJI SHANGSHI ZHONGCAI DE SIFA JIANDU YÜ XIEZHU(国际商事仲裁的司法监督与协助)[JUDICIAL SUPERVISION AND ASSISTANCE IN INTERNATIONAL COMMERCIAL ARBITRATION], 28 (Zhishichanquan Chubanshe(知识产权出版社)[Intellectual Property Publishing House Co., Ltd.] 2006).

[81] See W. Laurence Craing, *supra* note 72.

[82] See W. Laurence Craing ,*supra* note 72.

[83] See CHENAN(陈安), supra note 25

[84] See Liuxiaohong & Fengshuo(刘晓红 冯硕), *Zhiduxing Kaifang Beijing Xia Jingwai Zhongcai Jigou Neidi Zhongcai de Gaige Yinying*(制度型开放背景下境外仲裁机构内地仲裁的改革因应)*[Reform Approaches of Overseas Arbitration Institutions in Mainland Under Institutional Opening Background*], 3 FAXUEPINGLUN(法学评论)[LAW REVIEW], 125, (2020).

[85] ZHONGHUA RENMIN GONGHEGUO SIFABU(中华人民共和国司法部)[MINISTRY OF JUSTICE OF THE PEOPLE'S REPUBLIC OF CHINA],(Jul. 30 2021 4:00 P.M.), http://www.moj.gov.cn/pub/sfbgw/lfyjzj/lflfyjzj/202107/t20210730_432967.html.

arbitration emphasized by the current academic circles is a "mock distinction", and in practice there is no such difference. The consolidation of commercial arbitration seems inevitable in light of the convergence of rules.

However, through analysis, this paper believes that the real difference between international commercial arbitration and domestic commercial arbitration is that there are foreign-related factors in international commercial arbitration, which usually involve matters such as extraterritorial service, evidence collection, preservation, etc., and effective arbitral awards may also need to go to foreign countries to apply for recognition and enforcement.[86] Foreign-related factors are often implicated in the public interest of the same country, and will involve the issue of "arbitrability". This distinction is inherent in the two, and no matter how the rules are modified, they cannot make the two rules completely consistent. This will be discussed in detail later.

(C) Purpose of the merger: Practical appeals for realistic developments

Some commentators briefly mentioned the reasons for the separation of international commercial arbitration and domestic commercial arbitration in China. In summary, it is a compromise on reality. [87]

The root cause of the separation of international commercial arbitration and domestic commercial arbitration lies in the fact that China's international commercial arbitration system began in the 1950s and preceded the promulgation of the *Arbitration Law*. Therefore, when the *Arbitration Law* was promulgated, legislators needed to consider how to incorporate international commercial arbitration into China's arbitration legal system, that is, how to deal with the relationship between international commercial arbitration and domestic commercial arbitration.

If international commercial arbitration is incorporated into domestic commercial arbitration, it means abandoning the international commercial arbitration system that has formed Chinese characteristics, which is not accepted by legislators and therefore abandoned. If domestic commercial arbitration is incorporated into international commercial arbitration, it will face two major problems. First, if there is no distinction between inside and outside, it theoretically means that all arbitration institutions in China can accept international commercial arbitration cases, but due to the constraints of conditions, not all arbitration institutions at that time could reach the level of foreign-related arbitration institutions such as the China International

[86] See XIAOJIANGUO(肖建国), supra note 30
[87] See SHENWEI & CHENZHIDONG(沈伟 陈治东), supra note 60

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Economics and Trade Arbitration Commission (CIETAC), so it was unrealistic to merge. Second, judicial supervision of arbitral awards is more important, especially the criteria on which the court bases when a party applies for the setting aside of the arbitral award or requests the court to refuse to enforce the award during enforcement proceedings. What is more, China had already acceded to the *New York Convention* at that time, and if international and domestic commercial arbitration were to be unified, it would cause the courts to abandon the examination of the facts and legal substance of domestic commercial arbitration, and this practice would not be acceptable to legislators. Moreover, at that time, China's foreign-related arbitration legal system was similar to the international commercial law arbitration system, while domestic commercial arbitration had long been established by arbitration in economic contracts, lacking the characteristics of modern commercial arbitration system such as civil nature and flexibility, and it was difficult to negotiate in a short period of time. [88]

Based on this, the legislators finally decided to establish an international commercial arbitration system and a domestic commercial arbitration system. [89]

Following this logic, just as China adopted the dualism when formulating the *Arbitration Law* at that time, due to the development of reality, legislators should pay more attention to reality when choosing a system. Therefore, when the actual situation changes, changes should be made to the corresponding systems suitable for practical development.

From a realistic point of view, it is feasible to no longer distinguish between international and domestic commercial arbitration as a realistic claim.

When discussing the reform of China's arbitration system, many commentators have based on the comparison of international commercial arbitration between different jurisdictions, and then believe that China should increase the reform of international commercial arbitration to promote the development of the international commercial arbitration system and adapt to the development of China's foreign-related trade. [90]But reality shows that in the new environment, more attention is paid to domestic trade.

Since the epidemic has severely frustrated international economic exchanges in 2020 and 2021,

[88] See XIAOJIANGUO(肖建国), supra note 30.

[89] See QUANGUO REN DA CHANG WEI HUI FAZHI GONGZUO WEIYUANHUI & ZHONGGUO GUOJI JINGJI MAOYI ZHONGGUO WEIYUANHUI MISHUJU(全国人大常委会法制工作委员会民法室 中国国际经济贸易仲裁委员会秘书局), ZHONGHUA RENMIN GONGHEGUO ZHONGCAI FA QUAN SHU(中华人民共和国仲裁法全书)[THE ARBITRATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA], 153 (Falü Chubanshe(法律出版社)[Law Press] 1995).

[90] See ZHANGSHENGCUI(张圣翠), ZHONGGUO ZHONGCAI FAZHI GAIGE YANJIU(中国仲裁法制改革研究)[RESEARCH ON THE REFORM OF ARBITRATION LEGAL SYSTEM IN CHINA], 157-158(Beijing Daxue Chubanshe(北京大学出版社)[Peking University Press 2018]).

the 2019 data has been selected here for discussion. According to the *Annual Report of the Supreme People's Court on judicial review of commercial arbitration (2019)*, in 2019, 253 arbitration commissions across the country handled more than 480,000 cases, of which more than 280,000 were traditional commercial arbitration cases, an increase of more than 93,000 cases over 2018, an increase of 50%; The total amount of the subject matter of the case was 762 billion yuan, an increase of 67 billion yuan over 2018, a growth rate of 9.6%. Arbitral awards that have been revoked or not enforced by the people's court are always within 1%. Since under China's law, there are only a few institutions that can make foreign-related commercial arbitrations, that is, international commercial arbitration, and most commercial cases are domestic commercial arbitrations. This gives a glimpse of the rapid growth of the current number of domestic commercial arbitrations in China.

In addition, according to the statistics of the "*Annual Report on China International Commercial Arbitration (2020-2021)*" released by CIETAC, in 2020, 259 arbitration commissions across the country accepted 400711 cases, of which 261047 cases were traditional commercial arbitration cases, a decrease of 20,364 cases compared with 2019, a year-on-year decrease of 7%; 47 arbitration commissions used online arbitration to handle 139664 cases, a decrease of 65,880 cases compared with 2019, a year-on-year decrease of 32%. In 2020, the total amount of arbitration cases nationwide was 718.7 billion yuan, a decrease of 41.1 billion yuan from 2019, a year-on-year decrease of 5.4%.[91]

At the same time, the CIETAC, together with the Hong Kong Arbitration Commission, was ranked among the top five arbitration institutions in the world by *the 2021 International Commercial Arbitration Annual Report* released by King Mary College in the United Kingdom. [92]

In summary, it can be seen that the current world recognition of some foreign-related arbitration institutions in China has greatly improved, which also means that the number of international commercial arbitrations in China will be greatly increased. However, this does not completely deduce that the proportion of domestic commercial arbitration will decline. This article summarizes the relevant cases (including domestic and foreign-related cases) and their proportions accepted by CIETAC since 2000, as shown in the following table:

[91] See ZHONGGUO GUOJI JINGJI MAOYI ZHONGCAI WEIYUANHUI(中国国际经济贸易仲裁委员会)[CHINA INTERNATIONAL ECONOMIC TRADE ARBITRATION COMMITTEE](Sep. 13 2021 8:24 P.M.)https://mp.weixin.qq.com/s/HXt4uU4zE1BuwfedUvZUyQ.

[92] See Queen Mary University of London，https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/.

Year	Total number of cases received by CIETAC (foreign and domestic)	Number of foreign cases received by CIETAC	Percentage of foreign cases
2020	3615	739	20.44%
2019	3333	617	18.51%
2018	2962	522	17.62%
2017	2298	476	20.71%
2016	2181	483	22.15%
2015	1968	437	22.21%
2014	1610	387	24.04%
2013	1256	375	29.86%
2012	1060	331	31.23%
2011	1435	470	32.75%
2010	1352	418	30.92%
2009	1482	559	37.72%
2008	1230	548	44.55%
2007	1118	429	38.37%
2006	981	442	45.06%
2005	979	427	43.62%
2004	850	462	54.35%
2003	709	422	62.34%
2002	684	468	68.42%
2001	731	562	76.88%
2000	633	543	85.78%

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Table 3: CIETAC foreign-related case statistics at a glance [93]

It can be found that the proportion of foreign-related arbitration cases has decreased in recent years, remaining above 20% before 2017. In 2018, due to the impact of the Sino-US trade war, the proportion of foreign-related arbitrations declined, and the follow-up slow repair increased. Although the year-on-year growth rate of international commercial arbitration cases after 2017 is more objective, [94]its proportion has shown a downward trend, and the reason behind this is that in addition to the decline in international trade due to the epidemic, [95]the more important reason is the increase in the number of domestic commercial arbitrations. [96]Moreover, the fundamentals of the domestic economy for long-term improvement have not changed. [97]In the current situation of the resurgence of the epidemic in the world, domestic trade will show stronger resilience.

In this context, international commercial arbitration has greater autonomy than domestic commercial arbitration, so this paper believes that the relevant system of international commercial arbitration should be designed to apply to domestic commercial arbitration, so as to improve the efficiency of domestic commercial arbitration. If international commercial arbitration is more special and inconvenient to apply to domestic commercial arbitration, and there are legitimate reasons, it can of course be regulated by using the basic principles of civil and commercial affairs; If, without a justifiable reason, it is merely a convention commonly known as an agreement, it should not be a constraint on the corresponding system. In this way, it can not only improve the efficiency of domestic commercial arbitration, but also solve the above-mentioned situation of fairness and efficiency inversion, meet the needs of actual development, and also be in line with international rules.

Such an approach is not an indiscriminate copy of extraterritorial practices, but a realistic

[93] See ZHONGGUO GUOJI JINGJI MAOYI ZHONGCAI WEIYUANHUI(中国国际经济贸易仲裁委员会[CHINA INTERNATIONAL ECONOMIC TRADE ARBITRATION COMMITTEE](Dec. 15 2021),http://www.cietac.org/index.php?m=Page&a=index&id=24.

[94] See ZHONGGUO GUOJI JINGJI MAOYI ZHONGCAI WEIYUANHUI(中国国际经济贸易仲裁委员会[CHINA INTERNATIONAL ECONOMIC TRADE ARBITRATION COMMITTEE](Dec. 15 2021), http://www.cietac.org/index.php?m=Article&a=show&id=17429.

[95] See WORLD TRADE ORGANIZATION (DEC. 11 2020)https://www.wto.org/english/news_e/news20_e/trdev_11dec20_e.htm.

[96] There are at least two reasons for the rise in the number of domestic commercial arbitrations. The first is the decline in world foreign trade as a result of the epidemic, which has forced a shift from foreign trade to domestic trade; the second is the development of the domestic market and the increase in domestic demand, which has led to a boom in domestic commercial transactions and a consequent increase in arbitrations.

[97] ZHONGHUA RENMIN GONGHEGUO SHANGWUBU ZONGHESI GUOJI MAOYI JINGJI HEZUO YANJIUYUAN(中华人民共和国商务部综合司、国际贸易经济合作研究院)[GENERAL DEPARTMENT OF THE MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA & INSTITUTE OF INTERNATIONAL TRADE AND ECONOMIC COOPERATION](Nev. 3 2021.3:24 P.M.), http://zhs.mofcom.gov.cn/article/cbw/202111/20211103221875.shtml.

choice. Mr. Yang (杨良宜)has always believed that in international commercial arbitration, especially maritime arbitration, the UK has the greatest influence, and the law and practice of UK arbitration have a great influence on international law. China's maritime (mainly charterparties) have as many as 70%-80% or a significant number of goods bought and sold with LML clauses. It is even more to advocate domestic arbitration, especially maritime, hoping to carry forward in the future, if you want to make foreign parties fully willing and assured to come to Beijing for arbitration, I am afraid that we must try to be as close as possible to the London approach, and refer more to the English arbitration law. [98]

In addition, compared with international arbitration institutions, the subject matter of cases accepted by China's arbitration institutions is relatively small, and in 2018, 255 arbitration institutions across the country accepted 544536 cases, with a total subject amount of 695 billion yuan, and the average subject amount was only 1.2736 million yuan. Among them, the average subject amount of cases accepted by CIETAC was relatively high, which was 34.2977 million yuan. However, in the same period, the amount of foreign arbitration institutions' subject matter far exceeded that of domestic arbitration institutions. Typical examples are that the average subject amount of the cases accepted by the ICC in 2018 was US$131 million (about RMB918 million at the same exchange rate), and the average subject amount of the cases accepted by SIAC in 2018 was US$26.14 million (about RMB1,853.8 million at the same exchange rate). [99]

In the face of such a large number of small arbitration cases, in order to enhance the credibility of international arbitration in China and at the same time improve the level of arbitration of domestic arbitrators, it is necessary to increase the amount of arbitration cases. It is a feasible path for any arbitration institution to accept cases from the institutional level, regardless of whether it is international or domestic, and any arbitration institution can arbitrate domestic and international commercial cases.

In summary, at a time when domestic commercial transactions are booming, relevant remedies should be improved, and more autonomy in domestic commercial arbitration should be given a possibility. If it is said that the earlier separation of international commercial arbitration and domestic commercial arbitration was a compromise of reality, then under the pressure of the current development of reality, a compromise should also be made to make a compromise

[98] See YANGLIANGYI(杨良宜), *supra* note 13

[99] See SUNWEI(孙巍), ZHONGGUO SHANGSHI ZHONGCAI FALÜ YÜ SHIWU(中国商事仲裁法律与实务)[LAW AND PRACTICE OF CHINESE COMMERCIAL ARBITRATION], 16 (Falü Chubanshe(法律出版社)[Law Press],2nd ed., 2020).

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between international commercial arbitration and domestic commercial arbitration.

In addition, the current normative form of international commercial arbitration is not satisfactory, not only the relevant norms are scattered among many different legal norms, but the implied provisions mixed with the institutional norms of domestic commercial arbitration are even more unclear. [100]The blunt division of the arbitration system into two parts is very detrimental to the correct application of the norm. It not only causes the system to be uncoordinated, but also leads to errors and omissions in practice.[101]

III. AFTER "NON-INTERNATIONALIZATION": THE IMPLICATIONS OF THE *NEW YORK CONVENTION*

(A) The Transformation of the Problem - From "International" to "Nationality"

As revealed above, the real difference between international commercial arbitration and domestic commercial arbitration lies in the fact that there are foreign-related elements in international commercial arbitration, because the enforcement and recognition of awards require the cooperation of foreign courts, which in turn extends to the issue of "arbitrability" of the case. The issue of arbitrability is essentially a public policy restriction imposed by the state on arbitration in accordance with its own needs, and the essence is the state's control over arbitration.[102] It has two connotations, one is subjective arbitrability, that is, whether the legal capacity of the subject of the arbitration agreement can meet the requirements of arbitration. [103]The second is objective arbitration, that is, whether a disputed matter can be resolved by arbitration as permitted by legislation.[104] The arbitrability of the subjective level involves the personality difference of the arbitration subject, and its multiplicity is based on the existence or absence of the parties' capacity for civil conduct. The objective level of arbitrability is naturally related to the public order of a country. [105]Out of the need to safeguard the national public

[100] See Zhangshengcui(张圣翠), *supra* note 69.

[101] See *Guweixia*(顾维遐), *Women Xinlai Zhongcai Ma?—Guanyu Zhongguo Zhongcai Yanjiu de Yingwenwenxian Zongshu*(我们信赖仲裁吗？——关于中国仲裁研究的英文文献综述)[*Do we trust arbitration—— A review of english literature on arbitration studies in china*], 2 BEIJING ZHONGCAI(北京仲裁)[BEIJING ARBITRATION QUARTERLY],1, (2010).

[102] See LIUXIAOHONG(刘晓红)ED., GUOJI SHANGZHI ZHONGCAI ZHUANTI YANJIU(国际商事仲裁专题研究)[A MONOGRAPHIC STUDY ON INTERNATIONAL COMMERCIAL LAW], 12 (Falü Chubanshe(法律出版社)[Law Press] 2018).

[103] See ZHAOXIUWEN(赵秀文), GUOJI SHANGSHI ZHONGCAI JIQI SHIYONG FALÜYANJIU(国际商事仲裁及其适用法律研究)[RESEARCH ON INTERNATIONAL COMMERCIAL ARBITRATION AND ITS APPLICABLE LAW], 61(Beijing Daxue Chubanshe(北京大学出版社)[Peking University Press 2002].

[104] See OUMINGSHENG(欧明生), MINSHANGSHI JIUFEN KEZHONGCAIXING WENTI YANJIU(民商事纠纷可仲裁性问题研究)[RESEARCH ON ARNITRATION OF THE CIVIL AND COMMERCIAL DISPUTE], 3-4(Zhejiang Daxue Chubanshe(浙江大学出版社)[Zhejiang University Press 2013].

[105] See ALAN REDFEN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION,

interest, the state pays more attention to objective arbitrability than subjective arbitrability, so only objective arbitrability is discussed here. Arbitrability is important because some commercial cases may meet the criteria for arbitration in State A, but do not meet the criteria for arbitration in Country B, and it is difficult for arbitral awards in relevant cases in Country A to be recognized and enforced in State B.

At present, there are four criteria for judging whether countries can arbitrate, "reconcilable", "commercial disputes", "property rights and interests" and "public order". Among them, the "public order" criterion occupies a fundamental position in determining the arbitrability of a case in a country. [106]Therefore, the impact of public order standards on the arbitrability of cases is focused here. In practice, when determining whether the subject matter of a dispute satisfies the standard of public order, the court generally relies only on domestic law and does not consider the laws of other countries. [107]This practice is also recognized in the *MLICA* and the *New York Convention.* This is in line with the determination of the nationality of arbitration under the *New York Convention.*

The New York Convention itself pioneers a far-reaching conceptual distinction, namely, international commercial arbitral awards as foreign arbitral awards and domestic arbitral awards, giving arbitral awards the nationality of a specific country, and only for foreign arbitral awards there is a question of recognition and enforcement (refusal) and enforcement of foreign arbitral awards, while in-country arbitral awards are not within the category of (refusal) recognition and enforcement, but of revocation or (non-enforcement). In short, foreign arbitral awards only have the problem of recognition and enforcement, not the issue of revocation; There is only the question of revocation or enforcement of an inland arbitral award, not an issue of recognition. Thus, the New York Convention transforms the issue of recognition and enforcement into the question of the nationality of arbitral awards. This clarifies, in an indirect sense, the state ownership of the right of revocation between contracting States, i.e. the State of nationality of the arbitral award has the right of revocation. Therefore, the decisive key lies in determining the nationality of the arbitral award. [108]This statement also clearly shows that relevant international organizations are trying to weaken the conceptual distinction between international commercial arbitration and domestic commercial arbitration.

As previously discussed, international commercial arbitration is foreign-related and therefore

137(Sweet & Maxwell, 2nd ed. 1991)

[106] See LIUXIAOHONG(刘晓红)ED., *supra* note 103.

[107] See ZHAOXIUWEN(赵秀文), *supra* note 104.。

[108] See ZHANGCHUNLIANG & HUANGHUI XÜZHIHUA(张春良、黄晖、许志华), supra note 14.

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involves the extraterritorial enforcement of arbitral awards, and whether arbitral awards can be enforced will involve the judgment of foreign courts determining the "arbitrability" of the case. However, such enforcement issues do not occur in China, because the criteria for the classification of arbitration nationality in China are the arbitration institutions.[109]

Therefore, both international commercial arbitration and domestic commercial arbitration belong to the broad sense of "domestic commercial arbitration", and since it is made in China, it is bound to conform to China's public interest and has arbitrability, [110]so it can be enforced. The question is whether foreign-related arbitrations with Chinese nationality can be enforced in foreign countries, and this will return to the issue of arbitration nationality. If both parties are parties to *the New York Convention* and the provisions of the case are not retained, the nationality of the arbitration shall be determined in accordance with the provisions of the Convention and then enforced. During this period, the process of enforcement of arbitral awards has nothing to do with whether it belongs to (China's) domestic commercial arbitration or international commercial arbitration. [111]

(B) The path realization in the context of the revision of the Arbitration Law

It goes without saying that arbitral awards made by arbitral institutions in China can be enforced because they have the nationality of China, regardless of whether they have foreign-related factors, but the nationality of the awards made by arbitral institutions in China needs to be discussed.

Prior to this amendment, in accordance with Article 1 of the *Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China,* china applied the Convention to the recognition and enforcement of arbitral awards made in the territory of another Contracting State in accordance with the declaration of reciprocal reservations made by China when it acceded to the Convention. As a result, commercial arbitrations conducted by foreign arbitration institutions in China are excluded. [112]The so-called commercial awards made by foreign arbitration institutions in China

[109] See *Zhanghu*(张虎), *Waiguo Zhongcai Caijue Zai Woguo Chengren Yü Zhixing Chengxü de Chonggou*(外国仲裁裁决在我国承认与执行程序的重构)[*Reconstruct the Procedure of Recognition and Enforcement of Foreign Arbitral Award in China*], 10 FAXUE ZAZHI(法学杂志) [LAW SCIENCE MAGAZINE],106, 2018.

[110] As we do not currently officially recognise *ad hoc* arbitration, it is not considered here.

[111] However, as the current system leads China to define commercial arbitrations with foreign elements as international commercial arbitrations, and domestic commercial arbitrations without foreign elements are generally not designed to be enforced extraterritorially, the problem in practice usually manifests itself as the extraterritorial enforcement of international commercial arbitrations.

[112] See *Chenli*(陈力), *ICC Guoji Zhongcaiyuan Zai Woguo Zuocheng Zhongcai Caijue de Chengren Yü Zhixing*(ICC国际仲裁院在我国作成仲裁裁决的承认与执行)[*Recognition and enforcement of arbitral awards made by ICC International Arbitration Court in China*], 6 FASHANG YANJIU(法商研究)[STUDIES IN LAW AND

mean "non-domestic awards". [113]Different from *the New York Convention,* China does not agree with the validity of non-domestic rulings, [114]which also causes a certain degree of damage to the legitimate rights and interests of individuals and related organizations in China, and even more brings discord in the content of international and domestic norms.

Until 2020, Shanghai municipality formulated and implemented the Administrative Measures for the Establishment of Business Institutions in the Lingang New Area of the China (Shanghai) Pilot Free Trade Zone, which marked a clear legal basis for overseas arbitration institutions to conduct business in Chinese mainland. [115]Later, on 1 January 2021, Beijing municipality officially promulgated the Administrative Measures for the Registration of Overseas Arbitration Institutions establishing business institutions in the China (Beijing) Pilot Free Trade Zone, the purpose of which is to clarify the specific norms for the establishment and operation of foreign institutions in China. All of this can show that China has an encouraging and supportive attitude towards overseas arbitration institutions to enter the Chinese mainland carry out arbitration activities, and its attitude toward opening up the commercial arbitration market is open and positive. [116]

The third paragraph of article 12 of the *Draft for Comments* clearly stipulates that "where a foreign arbitration institution establishes a business institution within the territory of the People's Republic of China and handles foreign-related arbitration business, it shall be registered by the judicial administrative department of the province, autonomous region or municipality directly under the Central Government and reported to the judicial administrative department of the State Council for the record". This is equivalent to Chinese mainland from

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BUSINESS],80, (2010).

[113] See ZHONGGUO GUOJI ZHONGCAI 30 REN(中国国际仲裁30人)ED., 1958 NIAN <CHENGREN YÜ ZHIXING WAIGUO ZHONGCAI CAIJUE GONGYUE> LILUN YÜ SHIYONG(1958年<承认与执行外国仲裁裁决公约>理论与适用)[CONVENTION THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (1959 NEW YORK CONVENTION) THEORY AND PRACTICE] , 7 (Falü Chubanshe(法律出版社)[Law Press] 2020).

[114] See *Zhaoxiuwen*(赵秀文), *Lun Feineiguo Caijue de Falü Xingzh*i(论非内国裁决的法律性质)[*On the legal nature of non-domestic adjudication]*, 4 BEIJING ZHONGCAI(北京仲裁)[BEIJING ARBITRATION QUARTERLY],77, (2008).

[115] See Brentwood Industries Co. Ltd. Guangdong Fa An Long Jixie Chengtao Shebei Gongcheng Youxian Gongsi Shenqing Chengren Yü Zhixing Fayuan Panjue Zhongcai Caijue Anjian Yi Shen Minshi Caidingshu(布兰特伍德公司、广东阀安龙机械成套设备工程有限公司申请承认和执行法院判决、仲裁裁决案件一审民事裁定书)[Blantwood Industry Co., Ltd. Guangdong Valanlong Mechanical Complete Equipment Engineering Co., Ltd. applied for recognition and enforcement of court judgments and arbitral awards], (2015) Sui Zhong Fa Min Chu 62 (Intermediate People` s Ct. 2020)(Chinalawinfo) (There have been earlier cases where China has recognised awards made by the ICC Court of Arbitration in China as foreign-related, but these are ultimately isolated cases.)

[116] See Shenjian & Zhangying(沈建 张迎), *Jingwai Zhongcaijigou Zai Zhongguo Neidi de Caijue GuojiRending*(境外仲裁机构在中国内地的裁决国籍认定)[*Determination of Nationality of Arbitration Award Made by Overseas Arbitration Institutions in China`s Mainland*], 5 Shangshi Zhongcia Yü Tiaojie(商事仲裁与调解)[Commercial Arbitration & Mediation],40, (2021).

the legal level, giving foreign arbitration institutions the same "national treatment" as domestic arbitration institutions. This measure will help to further encourage foreign arbitration institutions to carry out foreign-related arbitration business in Chinese mainland. At the same time, by establishing a business body in the Chinese mainland, overseas arbitration institutions can further clarify the issues of the origin of the award, the competent court, etc. In addition, the legal status of such "non-domestic awards" with foreign-related factors and very similar to international commercial arbitrations should be accurately determined, so as to avoid confusion between the two.

In other words, the improvement of the criteria for determining the nationality of arbitral awards in the *Draft for Comments* provides a good institutional guarantee for the enforcement and supervision of commercial arbitration after the "non-international nature" of commercial arbitration.

IV. SUMMARY

In the context of the epistemology guided by classical Marxist principles that practice and knowledge influence each other, this article argues that even though the current judicial practice cannot achieve "non-international" commercial arbitration and cannot fully integrate international commercial arbitration with domestic commercial arbitration, and there is a lack of relevant discussion, as long as the theory is feasible However, as long as it is feasible in theory, it is bound to be practised in practice. In the jurisprudential context, the law is an important intermediary between theory and practice,[117] and the normative nature of the law itself requires that the law make choices about behaviour, which is the reason for its existence.[118] In view of the natural lag of law, it is necessary to theoretical research, provided that the corresponding theory is feasible. For the purposes of this article, the current legal regulation of international commercial arbitration is a recognition of practice, while theory is a rendition of rules and practice. The theory does not fully guide the practice. The paper argues that the absence of internationality in commercial arbitration is both intrinsically necessary and practically feasible.

Arbitration itself is a highly efficient form of dispute resolution, with efficiency as its primary pursuit and judicial involvement as an important means of maintaining fairness. However, in

[117] See *Zhanghongxin*(张洪新), *Shijian Zhong de Falü Zhong de Shijian—Hate Yü Dewojin Lunzhan de Yichan*(实践中的法律与法律中的实践——哈特与德沃金论战的遗产)[*Law in Practice and Practice in Law -- the legacy of the debate between Hart and Dworkin*], 5 DONGFANG FAXUE(东方法学) [ORIENTAL LAW],143,(2014).
[118] See *Gehongyi*(葛洪义), *Falü de Shijian Shuxing de Shijian Shuxing Yü Zhiqü*(法律的实践属性与旨趣)[*The Practical Attribute and Purport of Law*], 3 ZHEJIANG SHEHUI KEXUE(浙江社会科学)[ZHEJIANG SOCIAL SCIENCE],24, (2020).

practice in China, there is a dual legislative paradigm, resulting in an "inverse of fairness and efficiency" between domestic and international commercial arbitration, with "low efficiency" matching "high fairness" and "high efficiency". "The "high efficiency" is matched by the "low fairness". The only possible way to improve domestic commercial arbitration is to merge international commercial arbitration with domestic commercial arbitration, so that the rules of international commercial arbitration are also applicable to domestic commercial arbitration.

There is a degree of confusion in the current writings of many scholars regarding the concept of "international commercial arbitration", which does not fully describe the nature of the matter itself and is not in line with the nature of the concept itself. The definition of the concept of international commercial arbitration is not in line with the essence of the concept, as it is divorced from the analysis of international and commercial connotations. In addition, the lack of a general definition of international commercial arbitration in the academic community itself, coupled with the fact that the international concept of international commercial arbitration has changed over time, and that the different historical stages have led to a different understanding and appreciation of the 'international' factor by the framers, makes such a solid definition an easy constraint on the future development of arbitration.

While there has been little discussion of the essential difference between international and domestic commercial arbitration, some commentators have suggested that the fundamental difference lies in the different institutional origins of the two systems from a practical perspective. Since a country does not have both a common law and a civil law system, there is no difference in the enforcement of arbitration in a particular country where the rules of domestic and international arbitration are the same. There is thus no real reason, either from a practical or a theoretical point of view, to prevent the two from converging.

It is generally accepted that the main difference between international and domestic commercial arbitration lies in the fact that the former enjoys more freedom of movement than the latter, and that domestic commercial transactions will become more frequent in light of today's domestic economic development and foreign trade trends. If there are no justifiable reasons, and if it is only an agreed practice, it should not be a constraint on the corresponding system. This would not only improve the efficiency of domestic commercial arbitration, address the aforementioned inverse of fairness and efficiency, and meet the needs of reality, but would also be in line with international rules. *the New York Convention* is a groundbreaking initiative.

The New York Convention pioneered the concept of foreign and domestic awards, with the intention of weakening the distinction between international and domestic commercial

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arbitration and shifting the issue from "international" to "nationality". The Draft makes a significant breakthrough in the "nationality" of arbitrations, in a change from China's previous approach to "non-domestic awards". The Draft provides a good institutional guarantee for the enforcement and supervision of commercial arbitration after the "non-internationality" of commercial arbitration.

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