

# The Validity and Remedy of the Pathological International Commercial Arbitration Agreement

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**ABSTRACT.** *The international commercial arbitration system has many advantages, such as respecting party autonomy, flexibility and simplicity, and is favored by the parties in the field of commercial contract disputes in practice. An effective and enforceable arbitration agreement is the basis for the smooth conduct of the arbitration proceedings. In fact, in daily international commercial practice, there are usually arbitration agreements that do not meet standards. Some of these arbitration agreements lack the necessary effective elements, so that this type of arbitration agreement is considered to be null and void, while some just lack of enforceability, which is regarded as pathological arbitration agreement. In practice, however, it is complex to identify the pathological agreement and make a distinction between it and other international commercial agreements. Only through analyzing and summarizing the elements of pathological arbitration agreement can we better discuss the remedy methods of it and finally approach such kind of disputes.*

**KEYWORDS:** *pathological arbitration agreement; New York Convention; validity; remedy*

## 1. Introduction

The pathological arbitration agreement was first proposed by Mr. Frédéric Eisemann, who had served as Secretary-General of the International Court of Arbitration of the ICC. He believed that the pathological arbitration agreement was an arbitration agreement which affected the arbitration smoothly through the existence of one or more of its own defects. In addition, other people have different views on the pathological arbitration agreement: “the pathological arbitration

agreement refers to an agreement with minor flaws and is not expressly specified in the specific matter”; “pathological arbitration agreement means no violation of the mandatory provisions of the arbitration law, only because of the existence of unclear factors resulting in invalid arbitration agreement”; and “simply because there is no drafting of a sufficiently broad or well-established arbitration agreement, or because the subsequent events expose the defects of the arbitration agreement”[1].

## **2. Overview of pathological international commercial arbitration agreement**

When it comes to the definition of a pathological arbitration agreement, combined with the opinions mentioned above, the pathological arbitration agreement refers to the arbitration agreement which has the valid conditions stipulated by law but misses the basic content required by law. For the pathological arbitration agreement, it should be dealt with separately under different situations. Meanwhile, when we are clear about the definition, the differences between a pathological arbitration agreement and an invalid arbitration agreement seems to be of great importance[2].

The arbitration agreement is a written agreement submitted to arbitration based on the autonomy of the parties, in order to resolve any contractual or non-contractual disputes between them that have occurred or may occur in the future. An arbitration agreement that is not validly concluded will not be recognized or enforced, which requires its form of validity. In addition, based on a consensual basis, the arbitration agreement needs to be enforceable, including the legal qualifications and abilities of the contracting party, the authenticity of the intention, and the legality of the content of the arbitration agreement. Conversely, it is an invalid arbitration agreement. However, “a clear arbitration agreement is certainly valid, but an effective arbitration agreement may not be very specific.” That is, not each effective arbitration agreement is enforceable. When an arbitration agreement has the form element but its content is incomplete, contradictory, and ambiguous, or the agreement is unclear, we call such kind of arbitration agreement as pathological arbitration agreement.

### ***2.1 Effective elements of international commercial arbitration agreement***

### ***2.1.1 Form elements of international commercial arbitration agreement***

In accordance with Article 2 of the New York Convention, the arbitration agreement must be in written form. According to Paragraph 2 of Article 7 of the 1985 United Nations Commission on International Trade Law Model Law, an arbitration agreement shall be in written form. It not only helps to prove the meaning of submitting the arbitration of the parties, but also standardizes and unifies the validity of the form of the arbitration agreement. In addition, some countries have made special regulations in the form of arbitration agreements. In the case of the British Arbitration Act, it expands the interpretation of “written form”. It only needs to prove the documentary evidence, whether it must be in written form or not, and its form can be identified as written, including the form of recording information. With the rapid progress of the globalization, the development of the international trade and the advent of the information age, the reform and innovation of communication technology in contemporary society has been accelerated. Apart from the traditional ways of interviewing and signing, telephone, telegram, and fax such series of information age products are gradually widely used, so that all parties can trade through e-mails. This kind of electronic data interchange also lead to the reduction of paper documents in trade. Although an increasing number of countries have expanded their interpretation of “writing”, in order to improve the efficiency of arbitration, they should try to take written form, or to supplement the writing procedure promptly, or to confirm the form in writing.

### ***2.1.2 Substantive elements of international commercial arbitration agreement***

#### ***2.1.2.1 The capacity of parties to arbitration agreement***

During foreign-related business activities, the basic premise of ensuring the validity of commercial transactions is that the capacity of the parties involved in the transaction must be recognized by law. It is the same with the validity of the arbitration agreement, which is determined by the capacity of the parties to the agreement. Pursuant to Article 5 of the New York Convention, a court of contracting state may refuse to recognize the arbitration award, as long as a party to an arbitration agreement complies with “The parties to the agreement were under the

law applicable to them, and under some incapacity”. Although Article 2 of the New York Convention does not clearly classify the client’s incapacity as a defence, this factor is addressed through cross-references to the Article 5 of the Convention.

#### ***2.1.2.2 Manifestation of intention***

The true manifestation of intention means that the actual inner effect of the parties is reflected by the expression of their acts exactly. It is not only the requirement of the principle of autonomy but also the constituent element of the effective contract. In the arbitration system, the determination and affirmation of the manifestation of intention is the premise of the request for arbitration, and the basic elements of the arbitration agreement include the manifestation of intention of the request for arbitration, so it should not be semantically ambiguous or specious.

#### ***2.1.2.3 The contents of the arbitration agreement must be lawful***

The contents of the arbitration agreement must be lawful, which means the content can not violate the law and the principle of the customs and morals, and especially means that the disputed matter submitted to arbitration is based on the legal provisions of the relevant countries. The arbitration of contentious matter means that the arbitration as a way of settling dispute can resolve which kinds of dispute and can not approach which kinds of issue, including the contentious dispute, the compensability of the disputes and the resolution of the dispute leading to the occurrence of property relations, which not only refer to the existence of the facts of the legal state, but also the settlement of the dispute[3].

### ***2.3 The manifestation of pathological international commercial arbitration agreement***

#### ***2.3.1 Lack of general elements of arbitration agreement***

In practice, although the majority of arbitration institutions would provide model arbitration clauses, the parties would still write the so-called “defective” arbitration clauses down. These defective arbitration clauses lack general elements. As

mentioned above, if an arbitration agreement lacks the effective element then it is invalid, but when the absence of a general element that makes it reflect the content of the parties' specific arbitration, it is often not regarded as ineffective. The general elements refer to the contents of the arbitration institution, the arbitration rules, the location of arbitration, and the composition of the arbitration tribunal. The lack of general elements is manifested in the following ways: the arbitration institution is determined but the arbitration rules are not agreed; the location and the institution of arbitration is clear but the name of the arbitration institution is uncertain.

### ***2.3.2 Internal contradictions of arbitration agreement***

The internal contradictions of arbitration agreement include the vague language of content and the ambiguous intention of arbitration. Language ambiguity refers to the existence of the wrong expression of a part of the arbitration agreement content. While the ambiguous intention of arbitration means that at the beginning of making an arbitration agreement, the relevant content is not written down clearly, so that its subsequent understanding could be full of ambiguity, which could be performed by the agreement that based on the consensus, whose location of arbitration is not unique, including the pathological arbitration agreement of choosing two or more arbitration institutions; the chosen arbitration institution based on the consensus is inconsistent with the applicable arbitration rules in the arbitration agreement; the name of the selected arbitration institution is inaccurate.

## **3. Identification of the validity of pathological international commercial arbitration agreement**

### ***3.1 General analysis of the validity of pathological international commercial arbitration agreement***

#### ***3.1.1 The way of determining the applicable law of arbitration agreement is not uniform***

International commercial arbitration agreements may arise where different national laws apply, which mainly due to the nationality of the parties to the

arbitration, the place of business or the arbitration located at foreign countries and other factors, so that the application of law is a very important factor in determining the validity and invalidation of the arbitration agreement and even in interpreting the arbitration agreement. Since the requirements of the effective arbitration agreement vary from country to country, the same arbitration agreement may have different determination of results in the country of the arbitration and the country where the award is executed, which will inevitably affect the enforcement of the arbitration award. However, in the legal provisions of many countries, it is extremely simple to determine the content of the applicable law of the arbitration agreement, and in the process of specific arbitration practice, referring to the method of applying the applicable law to the contract of national business is a usual way to determine the applicable law of the arbitration agreement. This is mainly because that the arbitration agreement is also one of the contracts, so there is no need to establish a set of laws that differ from other contracts for it. Based on the legislation and practice of each country's private international law, the dividing system and the whole system are two basic ways for determining the applicable law of contracts. Since 1960, the whole system has gained the upper hand, which is more able to maintain the inner harmony of arbitration agreement and is universally adopted for international arbitration practice[4].

### ***3.1.2 Different stipulations of the substantive elements of arbitration agreement***

“The arbitration laws of each country are affected by the unique social politics, historical background, legal cultural tradition, economic system and the degree of support to arbitration in the country, so the specific stipulations of the effective elements of arbitration agreement are different in national law.” In the practice of international commercial arbitration, there are obvious differences in the determination of arbitration agreement which have an effective agreement because of the different legislation of arbitration law of various countries and the different determinations of different arbitration institutions. For example, the determination of an effective element of an arbitration agreement by the British Arbitration Act includes its existence in written form and the purpose of the agreement to settle disputes arising in the present or future. But compared with our country's arbitration law, the effective elements include each parties' meaning expression of the

submitting for arbitration, the arbitration matters, the selected arbitration commission and the civil subject qualification of the parties.

### ***3.2 The stipulations of the New York Convention for the determination of the validity of a pathological international commercial arbitration agreement***

According to Article 2 of the New York Convention, the determination of the validity of an international commercial arbitration agreement shall be vested to the national courts of the state party. In accordance with sub-paragraph (a) of paragraph 1, Article 5, the determination of the validity of an arbitration agreement shall be in accordance with the law of the state, when the decision is made under the cases of the parties' choosing the applicable law proved to be invalid or the parties do not expressly point out the applicable law. Although the Convention does not directly point out that the subject of the arbitration agreement is the courts of the contracting states, it is obvious from the derivation of the contents of the articles. In the New York Convention, there is no clear reference to the measures taken by the courts of the state party to determine the invalidity of an arbitration agreement in accordance with the applicable law of the arbitration award, but rather the right of determining the case is vested to the court that is applied for recognition and enforcement of the foreign arbitration award.

Based on the principle of party autonomy in the international commercial arbitration, the parties are entitled to choose their applicable law based. In the case of existing arbitration clauses, the determination of the validity of the arbitration agreement shall apply to the law chosen by the parties in the main contract, and the other view holds that the applicable law shall not be applied unless the arbitration clause has specially agreed upon applicable laws. While another view thinks that, based on the independence of the arbitration clause, if the parties do not appoint to the specific applicable law, the applicable law of the principal contract can not be applied as presumed.

## **4. Remedies for pathological international commercial arbitration agreement**

### ***4.1 Remedies for arbitration agreement lack of general elements***

***4.1.1 Remedies for arbitration agreement with selected arbitration institutions but no agreement on arbitration rules***

According to the Article 18 of the Arbitration Law of People's Republic of China, when the stipulations of arbitration matters in arbitration agreement is unclear, the parties can supplement it. Based on this, in case of such an arbitration agreement, what can be done firstly is to remedy by the parties themselves. Then, the arbitration institutions can assist the parties to supplement the content. In practice, when the parties expressly select an arbitration institution in an arbitration agreement without determining the rules of arbitration, the prevailing practice is to determine the rules from the specific institution that the parties agree to choose for arbitration. As one case from the Supreme People's Court of China pointed out in its reply to the High Court of Fujian Province that the parties chose the ICC as an arbitration institution, and that the arbitration institution is the sole arbitration institution enforcing the rules of ICC arbitration, therefore, the parties shall arbitrate in accordance with the rules of ICC arbitration.

***4.1.2 Remedies for arbitration agreement of selecting two arbitration institutions simultaneously***

This agreement is also known as the floating arbitration agreement. For this kind of floating arbitration agreement, it is the best solution for the parties to deal with the arbitration on the basis of their own consensus. Since the selection of two arbitration institutions is a mutually agreeable outcome, the purpose of which is to resolve the dispute in the event of an arbitration matter. And this choice is not contrary to the principle of party autonomy, since it is not contrary to the meaning expression, after the arbitration, the content should not hinder its effectiveness, so it is necessary for the arbitration institution to determine its effectiveness. In our country's judicial practice, the validity of such arbitration agreement shall be confirmed by the arbitration institution which is the first one the arbitration has been brought to. From the joint venture contract dispute case "Qilu Pharmaceutical Factory v. American Antai International Trade Company", the Supreme Court expressly stated that as long as the parties make their own choice of selecting one from the two agreed arbitration institutions, this dispute could be settled through



submitting to arbitration, and the People's Court has no jurisdiction in this case.

#### ***4.2 Remedies for arbitration agreement with internal contradictions***

##### ***4.2.1 Remedies for arbitration agreement with inaccurate name of selected arbitration institution***

For cases where the name of the selected arbitration institution is inaccurate, this is not the same as the absence of a selected arbitration institution. There is existing a significant difference. If the name of the selected institution is inaccurate, the purpose of the party is clear, and the remedy for this situation is mainly based on the comparison between the content characteristics of the principal contract and the inaccurate arbitration institution, and then to judge its condition and characteristics. If the name of the arbitration institution is not accurate, but based on the characteristics of the location of the arbitration, its name can be identified, and the corresponding remedy can be carried out. For example, if the arbitration agreement agrees to submit the arbitration to the "Shanghai International Commercial Arbitration Commission", the settlement of identifying this "Shanghai International Commercial Arbitration Commission" dispute, combined with the location of the arbitration in Shanghai's characteristics, can be obviously solved as regarding it as CITAC Shanghai Branch, which seems to be more appropriate[5].

##### ***4.2.2 Remedies for arbitration agreement with specific arbitration institution that can not be arbitrated***

For cases where a specific arbitration institution is not able to arbitrate, there should be different remedy methods based on the facts of the cases. Take the Arbitration Rules of the China International Economic and Trade Arbitration Commission carried out in 2012 as an example, according to Article 1, it directly lists the history of the name of the China International Economic and Trade Arbitration Commission, showing that once the parties use one of the names, each of the selected name can be interpreted as China International Economic and Trade Arbitration Commission. To a certain extent, the use of the name is understood as non-existent, resulting in the occurrence of the situation can not be arbitrated. In

addition, based on the “beneficial to the effective principles”, the validity of the arbitration agreement should be realized on the basis of the party autonomy as far as possible, and the arbitration institution which contains the true intention of the parties should be inferred from the agreed content to make the arbitration agreement effective[6].

## 5. Conclusion

Through the above discussion and analysis, as long as it has the effective elements, the pathological arbitration agreement can become a valid arbitration agreement. From determining the validity of the pathological arbitration agreement, respecting the party’s autonomy, and taking an appropriate and open attitude to identify the validity of the pathological arbitration agreement, it’s better to remedy it accordingly. Based on the practice of international commercial arbitration, combined with the historical background of economic globalization, all countries’ legislation and practice tend to determine the validity of the pathological arbitration agreement and realize the party’s arbitration consensus. But it is worth mentioning that our country’s arbitration law does not keep pace with the international practice, which shows that there is still huge room for improvement in the validity of the pathological arbitration agreement and the actual remedy methods.

## References

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