ARTICLES

PERCEPTIONS AND REALITY: The Enforcement of Foreign Arbitral Awards in China

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Introduction

China is on the cusp of its fourth decade as a party to the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.[1] At the time of China's accession in 1987, the highest levels of the Chinese government supported entry and implementation of the New York Convention, which creates strict international standards requiring member states to enforce most private commercial arbitration awards.[2] In the intervening three decades, numerous studies have been conducted to assess whether Chinese courts enforce foreign arbitral awards consistent with the requirements of the New York Convention.[3] Many of these

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1. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention].

2. At the time of ratification, Premier Zhao Ziyang stated that "[t]he ratification of the Convention . . . is aimed at meeting the demands of implementing the policy of opening China to economic cooperation with foreign countries and facilitating the country's foreign trade." Bruce R. Schulberg, *China's Accession to the New York Convention: An Analysis of the New Regime of Recognition and Enforcement of Foreign Arbitral Awards*, 3 J. Chinese L. 117, 117 (1989).

3. *See, e.g.*, Wenliang Zhang, Recognition and Enforcement of Foreign Judgments in China: Rules, Practice and Strategies (2014); Fiona D'Souza, *The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China*, 30 Fordham Int'l L.J. 1318 (2007); Jessica J. Fei, *Enforcement and Recognition of Foreign Arbitral Awards in China is the Rule, Not the Exception*, 15 Arb. News (Int'l B. Ass'n), no. 1, Mar. 2010, at 89; Ariel Ye, *Enforcement of Foreign Arbitral Awards and Foreign Judgments in China*, 74 Def. Couns. J. 250 (2007); Ronald A. Giller, Sarah L. Wieselgren & Lynette Gladdis, *Enforcing Arbitration Awards in International Franchising*, 34 Franchise L.J. 351 (2015); Xiaowen Qiu, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China*, 11 Am. Rev. Int'l Arb. 607 (2000); Rick Stockmann, *International Commercial*

studies, especially those published in the United States, have reported that there are serious problems with China's system of enforcing foreign arbitral awards.[4]

According to these studies, the problems facing parties seeking to enforce foreign awards in China arise from weaknesses in China's overall judicial system. These studies cited weaknesses including uneven quality of Chinese judicial officials,[5] the tendency of Chinese courts to protect local interests (especially local state-owned enterprises),[6] and the general lack of transparency in many Chinese judicial proceedings related to arbitral enforcement.[7]

In one dated but oft-told anecdote, the chairman of a non-Chinese company seeking to enforce an arbitral award in China described being "shocked" by the delay tactics he faced in Chinese courts. "When we filed the [foreign arbitral] award with the Shanghai Court, the court refused to give us a receipt for the award, or a case number, and for the next two years refused to even acknowledge that the award existed."[8] The foreign company later discovered that the Chinese party to the arbitral proceeding had transferred its assets to its parent and other related entities.

Such anecdotal horror stories spurred further studies attempting to quantify Chinese arbitral practices toward domestic and foreign awards.

Arbitration in China: Issues Surrounding the Resolution of International Commercial Disputes Through Chinese Arbitration, 19 Willamette J. Int'l L. & Disp. Resol. 327 (2011); E'xiang Wan, *The New York Convention of Judicial Application Practice in China*, Nat'l JJ. Coll. L.J. 4 (2009).

4. Manjiao Chi, *Time to Make a Change? A Comparative Study of Chinese Arbitration Law and the 2006 UNCITRAL Model Law and the Forecast of Chinese Arbitration Law Reform*, 5 Asian Int'l Arb. J. 142 (2009); Christopher Shen, *International Arbitration and Enforcement in China: Historical Perspectives and Current Trends*, 14 Currents: Int'l Trade L. J. 69, 74-76 (2005); Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of the Enforcement of Arbitral Awards in the P.R.C.*, 49 Am. J. Comp. L. 249, 253-255 (2001); Benjamin O. Kostrzewa, *China International Economic and Trade Arbitration Commission in 2006: New Rules, Same Results?*, 15 Pac. Rim L. & Pol'y J. 519, 520 (2006); Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 Am. J. Comp. L. 793, 797-802 (1997); Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 Ind. Int'l & Comp. L. Rev. 37, 49-62 (2005); David T. Wang, *Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System*, 48 Santa Clara L. Rev. 649, 678-679 (2008); Li Hu, *Enforcement of Foreign Arbitral Award and Court Intervention in the People's Republic of China*, 20 Arb. Int'l 167, 178 (2004); Taroh Inoue, *Introduction to International Commercial Arbitration in China*, 36 H.K. L. J. 171, 193 (2006); Jason Pien, *Creditor Rights and Enforcement of International Commercial Arbitral Awards in China*, 45 Colum. J. Transnat'l L. 586 (2007); Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 Berkeley J. Int'l L. 329, 341-43 (1997).

5. *See, e.g.*, D'Souza, *supra* note 3, at 1359.

6. *See, e.g.*, Reinstein, *supra* note 4, at 64; Wang, *supra* note 4, at 664-666.

7. *See, e.g.*, D'Souza, *supra* note 3, at 1359.

8. Brown & Rogers, *supra* note 4 (relating anecdotal evidence of problems enforcing arbitral awards in China).

In a 1997 study conducted by the China Chamber of Commerce, Chinese courts enforced ninety-seven out of 134 foreign arbitral awards between 1991 and 1996 (about 72%).[9] In 2001, Professor Randall Peerenboom published perhaps the most influential academic study of Chinese arbitral practices based on interviews with practitioners and parties to arbitrations. Contrary to China Chamber of Commerce's findings, Peerenboom concluded from his study that about half of foreign arbitral awards were enforced within China during a similar period in the 1990s.[10] Perhaps reflecting the conventional wisdom at the time, Jerome Cohen, the dean of U.S. legal academics studying China, declared in 2001 that Chinese reforms aimed at improving arbitral enforcement were merely "band-aids for a patient that is severely ill," while the Chinese legal system as a whole needs "radical surgery and structural rehabilitation."[11]

It is not surprising that China's system of enforcing foreign arbitral awards has received so much attention. As the world's second largest economy and the top recipient of foreign direct investments, China has been, and will likely remain, a major source of transborder business and investment disputes.[12] But while the academic literature is lengthy, it is dated and limited. China's economy and judicial system has continued to evolve in the intervening decade and a half since Peerenboom's widely cited study, and it is possible that China's approach to enforcing foreign arbitral awards has as well. Moreover, even Peerenboom's study (like most U.S.-based studies) failed to engage Chinese judicial opinions and reasoning on the merits to examine and evaluate whether and how Chinese courts analyze New York Convention issues.

At the same time, none of the recent academic literature since Peerenboom's 2001 study has attempted to survey the opinions and experiences of global practitioners who have had experience enforcing arbitral awards in China or who must make decisions about whether to arbitrate disputes in China. Such survey evidence is an important data point for understanding China's current system of foreign arbitral enforcement because judicial decisions may not fully capture the facts on the ground.

This Article seeks to fill these gaps by providing both a detailed analysis of China's judicial opinions on the enforcement of foreign arbitral

9. Cheng Dejun et al., International Arbitration in the People's Republic of China, Commentary, Cases & Material 129 (Butterworths Asia 2d ed. 2000).

10. One well-read practitioner has advised foreign companies to avoid foreign arbitration in China in favor of domestic Chinese court litigation for certain smaller disputes. *See* Steve Dickenson, *The Three Rules for Your China Contract*, China Law Blog (Apr. 24, 2013), http://www.chinalawblog.com/2013/04/the-three-rules-for-your-china-contract.html.

11. *U.S.-China Current Trade and Investment Policies and Their Impact on the U.S. Economy: Hearing Before the U.S.-China Sec. Review Comm'n*, (June 14, 2001) (statement of Jerome Cohen, Professor of Chinese Law, NYU), http://www.uscc.gov/hearings/2001_02hearings/transcripts/01_06_14tran.pdf.

12. *China Overtakes U.S. for Foreign Direct Investment*, BBC (Jan. 30, 2015), http://www.bbc.com/news/business-31052566.

awards as well as recent survey evidence of the experience of foreign practitioners enforcing arbitral awards in China. It begins by reviewing the reasoning and analysis of decisions by Chinese courts considering the enforcement of foreign arbitral awards. It finds that Chinese judicial practice in enforcing foreign awards pursuant to the New York Convention is generally consistent with international standards. A review of this case law leaves little doubt that the top Chinese court, the Supreme People's Court (SPC), takes China's New York Convention obligations seriously and in a manner not dramatically different from international practice.

The Article then reports on a survey of dozens of global arbitration practitioners and confirms prior studies (and the anecdotal evidence) suggesting that foreign businesses have a low opinion of China's treatment of foreign arbitral awards.[13] Yet, in the survey's most surprising finding, a solid majority of practitioners with experience enforcing arbitral awards in China report that such enforcement occurs expeditiously and largely in the absence of judicial bias or hostility toward arbitration.[14] This finding, although tentative and based on a small sample, nonetheless suggests that China's courts have made progress toward offering a relatively reliable system for enforcing foreign arbitral awards. The combination of reasonable New York Convention judicial treatments and moderately positive survey data offers a counterweight to the skeptical conventional wisdom about China's arbitral enforcement.

Yet, as our own survey data of general views of China's legal system further suggests, the skeptical conventional wisdom about China is real and continuing. The Article concludes by suggesting possible explanations for this disconnect between the perception of China's arbitral enforcement system and the reality of our analysis of judicial decisions and survey data. The most common explanation for this disconnect is that Chinese case law does not fully represent the effectiveness of the Chinese system in enforcing foreign arbitral awards. In other words, the generally favorable case law may not reflect the actual procedural and non-doctrinal obstacles to enforcement. While it is no doubt true in many cases, our survey of practitioners who have been able to enforce arbitral awards within China suggests that there is more congruence between the case law and reality than much of the literature has allowed.

For this reason, we suggest another possibility. It could be that China's legal system as a whole, beyond its treatment of arbitral awards, suffers from systemic questions about the competence and independence of its judiciary and the integrity of its legal system. These negative views of China's overall legal system may overshadow whatever positive gains China has made in the protection of foreign arbitral awards in the perceptions of global practitioners. This interesting possibility suggests the narrow improvements in areas such as arbitral enforcement may not make up for the overall weaknesses (real or perceived) in China's legal

13. *See infra* text accompanying notes 79-80.
14. *See infra* text accompanying notes 82-86.

system. It could mean that Professor Cohen was at least correct in part when he called for "radical surgery and structural rehabilitation of" China's legal system rather than "band-aids."

The Article begins in Part I by discussing the academic literature reviewing China's implementation of the New York Convention with respect to foreign arbitral awards. In Part II, the Article lays out the domestic legal framework in China for implementing foreign arbitral awards and reviews judicial decisions interpreting the New York Convention. In Part III, the Article reports on the results of its survey of practitioner perceptions and experiences with the Chinese system of enforcing arbitral awards. Finally, in Part IV, the article concludes with a possible explanation for continuing skeptical views of China's system of enforcing foreign arbitral awards.

I. Previous Studies of China's Implementation of Article V

China's contemporary legal system is relatively new and has continued to mix elements of its traditional "socialist" legal system with modern Western-inspired reforms. For this and other reasons, commentators have long suggested that China's infant legal system would have a difficult time enforcing arbitral awards due to poor judicial efficiency, low judicial quality, a lack of judicial independence, bias against foreign parties, and local protectionism.[15] As discussed in the introduction, there is a substantial body of academic commentary on China's implementation of its New York Convention obligations and its general approach toward international arbitration.[16]

A. *U.S. Academic and Practitioner Commentary*

In the first decade after China's entry into the New York Convention, most academic and practitioner studies of China's arbitral enforcement system in the U.S. reported serious, and nearly insurmountable, weaknesses. Indeed, academic literature in the 1990s is replete with anecdotes and horror stories about the difficulty of enforcing arbitral awards in China. Arbitration scholars Frederick Brown and Catherine Rogers summarized this generally negative attitude in their 1997 study.

> The enforcement problems are legendary for victorious parties seeking to enforce awards in China. Despite the limited grounds upon

15. Chi, *supra* note 4; Shen, *supra* note 4; Peerenboom, *supra* note 4; Kostrzewa, *supra* note 4; Cohen, *supra* note 4; Reinstein, *supra* note 4; Wang, *supra* note 4; Hu, *supra* note 4; Inoue, *supra* note 4.

16. *See, e.g*, E'xiang Wan, *Judicial Practice of the New York Convention in China*, 3 Chief Justice Forum 4, 4-6 (2009); Xiuwen Zhao, *Opinion About Recognition and Enforcement of the New York Convention Award in China: Discussion on the Legislation and Improvement of International Arbitration in China*, 2 Jiangxi Social Sciences 155, 155-163 (2010). Michael J. Moser & John Choong, Asia Arbitration Handbook 123-24 (2011); Jingzhou Tao, Arbitration Law and Practice and China 217-25, 227-30 (3d ed. 2012); Kun Fan, Arbitration in China: A Legal and Cultural Analysis 72-82 (2013).

> which a Chinese court can legitimately deny enforcement of an arbitral award, prevailing parties are routinely unable to enforce arbitral awards.[17]

Other early commentators were more emphatic, stating that it is "virtually impossibl[e] to enforce an arbitral award in China" despite the fact that Chinese courts are bound by law to recognize such arbitration awards.[18]

Commentary made in recent years has been more positive. Experienced China practitioners Sabine Stricker-Keller and Michael Moser found in a 2013 study that China has made "promising and significant progress" and that "[b]oth law and practice . . . are increasingly converging with generally recognised international practice."[19] Sapna Jhangiani and Matthew Lam argue that "the enforcement landscape in China appears to be decidedly positive."[20]

Yet others remain skeptical. Jerome Cohen has concluded that "a considerable measure of uncertainty still exists regarding the enforceability in China's courts of . . . awards affecting foreigners, whether made abroad or in China."[21] More recently, longtime China lawyer Steve Dickinson argued that "US arbitration awards are virtually worthless in China."[22] Based on his experience advising foreign clients in China, he suggests that for cultural reasons Chinese courts will "find any reason they can to avoid enforcing a foreign arbitration award."[23]

B. *Practitioner Studies*

In addition to qualitative studies by scholars and practitioners, several empirical studies were also conducted of China's arbitral enforcement system. The Arbitration Research Institute (ARI) of the China International Economic and Trade Arbitration Commission (CIETAC) published these results, finding that as of 1996, only three out of fourteen applications by lower courts to refuse enforcement were approved. Based

17. Brown & Rogers, *supra* note 4, at 341.

18. Matthew D. Bersani, *Enforcement of Arbitration Awards in China*, 19 China Bus. Rev. 6 (1992), http://www.chinabusinessreview.com/public (observing "the virtual impossibility of enforcing arbitration awards in China" despite the fact that on "paper," Chinese courts are bound by law to recognize certain arbitration awards).

19. Sabine Stricker-Keller & Michael Moser, *Rules of Arbitration of the China International Economic and Trade Arbitration Commission: CIETAC Rules*, *in* Institutional Arbitration: A Commentary 571, 615 (Rolf A. Schütze ed., 2013).

20. Sapna Jhangiani & Matthew Lam, *Enforcement in China—What the Cases Show*, Kluwer Arbitration Blog (Dec. 6, 2013), http://kluwerarbitrationblog.com/blog/2013/12/06/enforcement-in-china-what-the-cases-show/. *See also* Henry Chen & Ted B. Howes, *The Enforcement of Foreign Arbitration Awards in China*, Bloomberg L. Rep. (2009) ("It is likely that China's judicial policy towards foreign arbitral awards will continue to evolve in a positive way.").

21. Jerome A. Cohen, *Settling International Business Disputes with China: Then and Now*, 47 Cornell Int'l L. J. 555, 563 (2014).

22. Dickenson, *supra* note 10; *see also* Dan Harris, *How to Write a China Contract: Arbitration Versus Litigation. Say Where?*, China Law Blog (Aug. 31, 2013), http://www.chinalawblog.com/2013/08/how-to-write-a-china-contract.html.

23. *Id.*

on this very limited data, the ARI found that foreign arbitral awards were enforced 71% of the time.[24]

A second major study of China's early experience with the New York Convention was conducted by Professor Randall Peerenboom in the late 1990s.[25] Based on reported Chinese cases and interviews of practitioners, Professor Peerenboom found that, on average, Chinese courts had a general enforcement rate of 52% for foreign awards.[26] According to Professor Peerenboom, this rate of judicial enforcement was similar, but somewhat higher, than that of domestic Chinese arbitral awards during this period.[27]

Both studies concluded that the rate of judicial enforcement of foreign arbitral awards under the New York Convention and domestic arbitral awards did not differ dramatically.[28] Both also suggested that local protectionism was an important factor in non-enforcement of both domestic and foreign arbitral awards.[29]

The Supreme People's Court, China's highest court, conducted two empirical studies of judicial enforcement of foreign arbitral awards. The first, conducted in 2007, reviewed 610 cases involving arbitral awards between 2002 and 2006.[30] Within this large subset of cases, seventy-four cases involved actions for the recognition and enforcement of a foreign arbitral award. Of these seventy-four, the survey found only five of these decisions resulted in non-enforcement, an enforcement rate of 93%.[31]

More recently, two judges serving on the SPC reviewed fifty-six cases from 2000 and 2011 involving the SPC's review of a lower court's decision to not enforce a foreign arbitral award.[32] Of these fifty-six proposed non-enforcement decisions, the Supreme People's Court confirmed non-enforcement for twenty-one of these lower court decisions. In other words, in 62% of these cases, high court review changed the result from non-enforcement to enforcement.

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24. Wang Shengchang, *Enforcement of Foreign Arbitral Awards in the People's Republic of China*, *in* Improving the Efficiency of Arbitration and Awards: 40 Years of Application of the New York Convention 461, 480-82 (Albert Jan van den Berg ed., 1998).

25. Peerenboom, *supra* note 4.

26. *Id.* at 254.

27. *Id.*

28. Shengchang, *supra* note 24, at 480-83; Peerenboom, *supra* note 4, at 266-68.

29. Yang Honglei (杨弘磊), *Renmin Fayuan Shewai Zhongcai Sifa Shencha Qingkuang de Diaoyan Baogao* (人民法院涉外仲裁司法审查情况的调研报告) [*Report on the Judicial Review of International Arbitration in Chinese Courts*], 1 Wuda Guojifa Pinglun 304 (武大国际法评论) [Int'l L. Rev. of Wuhan Univ.] (2009) (China).

30. *Id.*

31. *Id.*

32. Liu Guixiang & Shen Hongyu (刘贵祥 & 沈红雨), *Woguo Chengren he Zhixing Waiguo Zhongcai Caijue de Sifa Shijian Shuping* (我国承认和执行外国仲裁裁决的司法实践述评) [*Recognition and Enforcement of Foreign Arbitral Awards: A Reflection on Court Practices*], 1 Beijing Zhongcai 1 (北京仲裁) [Beijing Arb.] (2012) (China).

In sum, the empirical data suggests that Chinese courts have a high rate of enforcement of foreign arbitral awards, and this rate has increased over time.[33]

C. *Summary*

U.S. academic and practitioner views of China's domestic enforcement of foreign arbitral awards has veered between highly negative to somewhat negative. Although some recent commentators have argued that the level of enforcement has improved somewhat, the overall consensus remains negative. These views do not appear to have been affected by the numerous empirical studies showing Chinese courts rarely reject enforcement of a foreign arbitral award.

In our view, both strands of scholarship have weaknesses. Although U.S. commentators (especially practitioners) are knowledgeable about China's enforcement record, few of their studies engage directly with the reasoning and analysis of Chinese judicial opinions. Instead, they rely more heavily on anecdotes and personal experience. The leading empirical studies (Peerenboom's excluded) rely too heavily on reported judicial opinions and may be missing important information. In the next two parts, we consider both China's judicial treatment of the New York Convention as well as evidence of the experience of actual practitioners.

II. China's Enforcement Experience

China's primary mechanism for implementing the New York Convention is the "supervisory" reporting system. It typically results in a Supreme People's Court decision for any lower court decision refusing to enforce a foreign arbitral award under Article V, which notes seven grounds under which recognition and enforcement of the award may be refused. The Party then surveys the Supreme People's Court's case law enforcing foreign arbitral awards.[34]

A. *China's Domestic Law Governing Foreign Arbitral Awards*

China's law distinguishes between domestic, foreign-related, and foreign arbitral awards. The laws and procedures governing enforcement of each different kind of arbitral award differ in significant ways that generally favor enforcement of foreign arbitral awards.

1. Different classes of arbitral awards

China's Civil Procedure Law sets forth different standards for enforcement of arbitral awards depending on whether they fall into one of three categories: domestic, foreign-related, or foreign. Enforcement of domestic arbitral awards is governed by Article 217 of the Civil Procedure Law. A domestic award is simply any award issued by an "arbitral

33. *Id.*
34. *Id.*

organ established according to [Chinese] law." Such organs must meet the requirements set forth in Articles 10-15 of China's Arbitration Law.

The Arbitration Law regulates all arbitral awards, but it specifies that different treatment will be provided for foreign-related and foreign awards. Foreign-related awards involve arbitrations "arising from economic, trade, transportation and maritime activities involving a foreign element."[35] Such arbitrations may be submitted to a special arbitral commission established by China's Chamber of International Commerce and may include foreign citizens as members of the arbitral institute as well as arbitrators. "Foreign-related" arbitral awards are thus arbitral awards issued by specialized Chinese arbitral institutions.

The Civil Procedure Law also recognizes arbitral awards "made by a foreign arbitral organ."[36] Such "foreign arbitral organs" are not established pursuant to requirements set forth in China's Arbitration Law. Foreign arbitral organs cannot hold arbitrations seated in China under Chinese law.

2. Standards for the Enforcement of Arbitral Awards

Foreign arbitral awards may be enforced pursuant to Article 269 of the Civil Procedure Law. This law directs parties seeking enforcement of such foreign awards to "apply to the intermediate people's court of the place where the party subjected to enforcement has his domicile or wherever his party is located."[37] The intermediate people's court is further authorized to review such applications "in accordance with the international treaties" to which China is a party or pursuant to reciprocity.

Since China acceded to the New York Convention, almost all foreign arbitral awards have been governed by that treaty. More importantly, in 1987 the Supreme People's Court issued a "Notice of the SPC on the Implementation of the New York Convention," which serves as the basis for implementing that treaty's obligations within China's legal system.

While the enforcement of domestic arbitral awards is subject to a certain level of substantive review, foreign arbitral awards are subject to the New York Convention and Chinese law (including the SPC Notice), which adopt the international standards for judicial enforcement almost verbatim.[38] The only meaningful difference in the formal text is that while the New York Convention states that courts "may" refuse to enforce arbitral awards, Article 70 and 71 of the Arbitration Law states that Chinese courts "shall" refuse to enforce awards if a non-enforcement ground is established. This means that unlike courts in many NY Convention

35. Arb. L. of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 65 [hereinafter Arbitration Law].

36. Civ. Proc. L. of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, rev'd Oct. 28, 2007, effective Apr. 1, 2008), art. 269 [hereinafter Civil Procedure Law].

37. *Id.*

38. Civil Procedure Law, *supra* note 36, art. 260.

jurisdictions, Chinese courts have no discretion over whether to enforce a foreign award if an Article V non-enforcement ground is established.

3. The Supervisory Reporting System

In a sign of China's solicitude for foreign arbitral awards and its concern over the practice of local courts, China has created a separate "Supervisory Reporting System" for the enforcement of foreign arbitral awards. Under this system, a lower court that intends to refuse to enforce a foreign arbitral award must first send its decision to the Supreme People's Court for review. This review process is not an appeal process. It occurs before the lower court issues any decision and the parties to the action have no right to participate in the review. In fact, they are often not even notified that a review by the SPC is occurring.

Despite complaints about transparency and some doubts about its conformity to Chinese law, the report system has the desired effect of centralizing judicial review of the enforcement of foreign arbitral awards in the highest Chinese court. As a result of the report system, any decision to refuse to enforce a foreign arbitral award must ultimately be made by the Supreme People's Court instead of by any particular lower court. This allows a useful and largely comprehensive window into Chinese judicial practice with respect to the enforcement of foreign arbitral awards.

B. *Survey of SPC Case Law*

Replacing the 1923 Geneva Protocol and the 1927 Geneva Convention, the New York Convention made substantial improvements on both, providing more efficient ways in which recognition and enforcement of arbitral awards can be obtained. In fact, when it comes to enforcement of arbitration awards, the New York Convention has been considered to be a highly effective international instrument, arguably making "the greatest single contribution to the internationalization of international arbitration."[39] It is therefore appropriate to survey the Chinese cases in light of the New York Convention and its grounds for refusal laid out in Article V.

1. Overall Statistics on Non-Enforcement

Due to the supervisory reporting system described above, it is possible to develop a fairly complete picture of Chinese judicial practice with respect to the enforcement of foreign arbitral awards. According to our review of publicly available decisions, the Supreme People's Court has reviewed forty-eight lower court decisions rejecting enforcement of a foreign arbitral award. During this period, the SPC allowed the lower court to refuse enforcement in twenty-one reported cases. In four other cases, the SPC has asked lower courts to recalculate time limitations on enforcement applications before issuing a final order. The SPC has failed

39. Nigel Blackabay et al., Redfern and Hunter on International Arbitration 640 (5th ed. 2009).

to release decisions on eleven of these lower court requests. Other studies have reported similar results, although uneven reporting of the decisions by the SPC makes the data somewhat inconsistent.

The general picture, however, seems clear enough. Under the Supervisory Reporting system, no lower court can refuse to enforce a foreign arbitral award without first receiving permission from the SPC. Based on publicly available information, fewer than half of those lower court requests for non-enforcement were approved by the SPC. Since another survey of domestic judicial practice suggests that lower courts issued decisions on enforcement in over 600 cases during a similar period, the relatively small number of non-enforcement decisions presents a broadly favorable picture of Chinese judicial practice and the New York Convention.

2. Discussion of Judicial Doctrine and Reasoning

While statistics suggest that Chinese courts have a favorable attitude toward foreign arbitral awards, closer examination of the interpretation of Article V is still worthwhile. Such decisions could reveal any unusual or distinctive approaches to Article V in Chinese judicial doctrine. This subsection will review representative Chinese court decisions relating to each ground of Article V non-enforcement.

a. Article V(1)(a): Invalid Agreement to Arbitrate

Under the New York Convention, courts may refuse enforcement of a foreign arbitral award if the arbitral agreement "is not valid" or if the one of the parties to the agreement lacked capacity to make the agreement.[40] The question of invalidity or incapacity is governed by the law chosen by the parties in the agreement or, if no choice was made, by the law of the country where the award was made.

Chinese courts have regularly relied on this ground to refuse enforcement of a foreign award. For example, in *Proton Automobiles Ltd. v. Venus Heavy Industries Co., Ltd.*,[41] the parties had contracted for the Sino-foreign joint venture and the contract stated that any disputes arising between the parties should be referred to the arbitral tribunal of the Singapore International Arbitration Centre (SIAC) under UNCITRAL Arbitration Rules. A dispute arose between the parties and on 6 July 2007,

40. New York Convention, *supra* note 1, art. V(1)(a) ("The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. . .")

41. Bao Teng Qiche (Zhongguo) Youxian Gongsi Xie Jinxing Zhonggong Zhizao Youxian Gongsi Shenqing Chengren he Jingxing Waiguo Zhongcai Caijue Jiufen An (宝腾汽车（中国）有限公司写金星重工制造有限公司申请承认和执行外国仲裁裁决纠纷案) [Baoteng Automobile Limited Company (China) and Jingxing Heavy Industry Limited's Application for Recognizing and Executing the Foreign Arbitration of Disputes] (promulgated by the Intermediate People's Ct. of Dongguang City, Guandong Province, Aug. 1, 2013, effective Aug. 1, 2013) (China).

Proton filed a request for arbitration. Venus challenged SIAC's jurisdiction on the ground that the arbitration clause in the Sino-foreign joint venture contract had been replaced by a forum-selection clause signed by the parties on a later occasion. Subsequently, the SIAC rendered two arbitral awards in favor of Proton. The Dongguan Intermediate People's Court ruled in favor of Venus agreeing that the arbitration clause in the Sino-foreign joint venture contract had been replaced by a forum-selection clause. As the claimant failed to provide sufficient evidence that the memorandum was false, the arbitration clause was ultimately deemed to be invalid.

A second example is *Voest-Alpine International Trade Co., v. Jiangsu Provincial Foreign Trade Corp.*[42] On 26 August 2004, Voest-Alpine sent a revised sales confirmation to Jiangsu, which Jiangsu never signed. Later, Voest-Alpine filed a request for arbitration to the Singapore International Arbitration Centre. Voest-Alpine sent the notice of arbitration by mail and fax to Jiangsu, Jiangsu did not respond. When Voest-Alpine's attorney later delivered the arbitral notice, Jiangsu denied the existence of an arbitration agreement. SIAC rendered an arbitral award in favor of Voest-Alpine. But when Voest-Alpine sought to enforce the award before the Nanjing Intermediate People's Court, the Court agreed with Jiangsu that there was no valid arbitration agreement between the parties and that the award was therefore unenforceable.

Finally, in *Züblin International GmbH v. Wuxi Woke General Engineering Rubber Co., Ltd.*,[43] the parties entered into a contract providing simply for "Arbitration: ICC Rules, Shanghai shall apply." Following a dispute and submission to arbitration, an International Chamber of Commerce arbitral panel rendered a final award in favor of Züblin, which Züblin attempted to enforce in China. Wuxi Woke resisted enforcement arguing that the arbitration clause was invalid, as it did not designate a specific arbitration institution. The Wuxi Intermediate People's Court refused to recognize and enforce the arbitral award on the ground that the arbitration clause was invalid under Article V(1)(a). On appeal, the

42. Wosite – Aerbeisi (Meiguo) Maoyi Gongsi su Jiangsu Sheng Jiangyin Shi Duiwai Maoyi Gongsi Gouxiao Hetong Jiufen Shangsu An (沃斯特－阿尔卑斯(美国)贸易公司诉江苏省江阴市对外贸易公司购销合同纠纷上诉案) [Voest Alpine Trading USA Corp. v. Jiangsu Jiangyin Foreign Trade Co.], Sup. People's Ct. Gaz. 1998, Issue 4 (Sup. People's Ct. 1998) (China).

43. Zuigao Remin Fayuan Guanyu Deguo Xu Pu Lin Guoji Youxian Zeren Gongsi yu Wuxi Wo Ke Tongyong Gongcheng Xiangjiao Youxian Gongsi Shenqing Queren Zhongcai Xieyi Xiaoli Yi An de Qingshi de Fu Han (最高人民法院关于德国旭普林国际有限责任公司与无锡沃可通用工程橡胶有限公司申请确认仲裁协议效力一案的请示的复函) [Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case concerning the Application of Züblin International GmbH and Wuxi Woke General Engineering Rubber Co., Ltd. for Determining the Validity of the Arbitration Agreement] (promulgated by the Sup. People's Ct., July 8, 2004, effective July 8, 2004), CLI.3.75330(EN) (Lawinfochina).

Supreme People's Court confirmed the lower court's refusal to enforce the award on this ground.[44]

b. Article V(1)(b): Denial of Opportunity to Present One's Case

The New York Convention also permits non-enforcement if 1) a non-prevailing party fails to receive notice of the appointment of the arbitrator or of the arbitral proceedings, or 2) the non-prevailing party was somehow unable to present its case.[45]

Thus, Article V(1)(b) allows defenses against enforcement and recognition of awards on the basis of "grave procedural unfairness in the arbitral proceedings."[46] This is a significant expansion of Article 2(1)(b) of Geneva Convention,[47] the counterpart provision that places limit on enforcement only on the ground of lack of notice.[48] Chinese courts have to this date, however, only invoked the "lack of notice" basis for non-enforcement rather than the broader "procedural unfairness" ground.

For instance, in *Cosmos Marine Management S.A. v. Tianjin Kaiqiang Commerce & Trade Co., Ltd.*[49] a dispute arose between the parties when Tianjin Kaiqiang failed to pay the freight to Cosmos under a charter agreement. Cosmos commenced arbitration proceedings and notified Tianjin Kaiqiang of the arbitration by email. Later, Cosmos sent e-mails on both 9 March 2005 and 17 March 2005, but Tianjin Kaiqiang did not

44. On 23 August 2006, the Supreme People's Court issued its Interpretation on Certain Issues Relating to the Application of the Arbitration Law of the People's Republic of China (PRC Arbitration Law), and Article 4 of the Interpretation suggests that even if an arbitration institution is not expressly designated, the arbitration agreement will not be invalid if the arbitration institution can be ascertained under the applicable arbitration rules. Interpretation of the Supreme People's Court on Certain Issues Relating to Application of the Arbitration Law of the People's Republic of China, Doc. Fa- Shi [Court Explanation] No. 7 (promulgated by the 1375th session of the Jud. Comm. of the Sup. People's Ct., Aug. 23, 2006) (China).

45. New York Convention, *supra* note 1, art. V(1)(b) ("[T]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. . .").

46. Gary B. Born, International Commercial Arbitration 3494 (2d ed. 2014).

47. Article 2(1)(b) of the Geneva Convention states that even when conditions laid out in Article 1 are fulfilled, recognition and enforcement of the award should be refused if "the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented." Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302 [hereinafter Geneva Convention].

48. Born, *supra* note 46.

49. Zuigao Remin Fayuan Guanyu Shifhou Caiding Bu yu Chengren He Zhixing Yingguo Lundun "ABRA Lun 2004 Nian 12 Yue 28 Ri Zuyue" Zhongcai Caijue de Qingshi de Fuhan (最高人民法院关于是否裁定不予承认和执行英国伦敦"ABRA轮2004年12月28日租约"仲裁裁决的请示的复函) [Letter of Reply of the Supreme People's Court on Request for Instructions Re Recognition and Enforcement of "ABRA Ship Lease of December 28, 2004" Arbitration Award of London, UK] (promulgated by the Sup. People's Ct., Jan. 10, 2010, effective Jan. 10, 2010), CLI.3.125660(EN) (Lawinfochina).

respond to any of these emails. On 18 July 2005, the Sole Arbitrator in London rendered an award in favor of Cosmos. Cosmos then applied to the Tianjin Maritime Court for the recognition and enforcement of the arbitral award, which the Court refused. The case was reported to the Tianjin High People's Court and the Court upheld the decision of the Tianjin Maritime Court on the ground that the claimant could not provide evidence that the respondent had received actual notice of the arbitration.

Likewise, in *Aiduoladuo (Mongolia) Co., Ltd. v. Zhejiang Zhancheng Construction Group Co., Ltd.*,[50] the parties contracted for a construction project in Mongolia, and Zhejiang Yaojiang Construction Group Co., Ltd. provided contractual guarantees. Later, Zhejiang Yaojiang changed its name to Zhejiang Zhancheng. Aiduoladuo initiated arbitration against Zhejiang Zhancheng under the auspices of the Mongolian National Arbitration Centre. The Mongolian National Arbitration Centre rendered a default award in favor of Aiduoladuo (Mongolia). Aiduoladuo (Mongolia) applied to the Shaoxing Intermediate People's Court for the recognition and enforcement of the arbitral award. The Court, however, refused to recognize and enforce the award on the ground that the claimant had not provided evidence to prove that the respondent Zhejiang Zhancheng had received notice of the arbitral proceedings. The case was appealed to the Zhejiang High People's Court and the Supreme People's Court (SPC), which upheld the lower court's decision to refuse to recognize and enforce the arbitral award.

c. Article V(1)(c): Exceeding Scope of Arbitral Agreement

The third ground against recognition and enforcement of an arbitral award under the New York Convention allows non-enforcement if the award "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration."[51]

This exception reflects the underlying requirement of the Convention, which is that international commercial arbitration should always be based on consent of the parties.[52] An arbitral tribunal, therefore, lacks the

50. Guanyu Caiding Bu Yu Chengren Menggu Guojia Zhongcai Fating 7323-06 Hao Zhongcai Caijue De Baogao Zhe Shang Wai Ta Zi Di 1 Hao Zuigao Renmin Fayuan: Guanyu Meng - Ai Duo La Duo Youxian Zhe Ren Gongsi Shenqing Chengren He Zhixing Menggu Guojia Zhongcai Fating 7323-06 Hao Zhongcai Caijue An (关于裁定不予承认蒙古国家仲裁法庭7323-06号仲裁裁决的报告浙商外他字第1号最高人民法院：关于蒙 一 艾多拉多有限责任公司申请承认和执行蒙古国家仲裁法庭7323-06号仲裁裁决案) [The Report of Not Recognizing Mongolian National Arbitration Court's No. 7323-06 Arbitration Award Zhe Shang Wai Issue 1 Supreme People's Court: About Meng-Aiduodaduo Limited Company's Application to Recognize and Execute No. 7323-06 Arbitration Award of the Court of Arbitration of Mongolia] (promulgated by the Sup. People's Ct., Aug. 14, 2009, effective Aug. 14, 2009) (China).

51. New York Convention, *supra* note 1, art. V(1)(c).

52. Born, *supra* note 46, at 3542.

authority to decide on issues or claims that the parties have not consented to arbitrate.

Article V(1)(c) defense is often invoked in two different ways. First, it may be applied "where a valid arbitration agreement existed, but the issues and claims decided by an award exceeded or differed from those presented to the tribunal by the parties in the arbitration.[53] The second way in which the defense may be invoked is where an arbitral tribunal decided issues or claims that went beyond the scope of the original arbitration agreement.[54]

Gerald Metals Inc. v. (1) Wuhu Smelter & Refinery Plant (2) Wuhu Hengxin Copper Group Co., Ltd.[55] is a case that applied Article V(1)(c) defense under the second application described above. There, Gerald and Wuhu Smelter & Refinery Plant concluded a sales agreement including a seat of arbitration in London. Later, a dispute arose regarding delivery of the goods under the sales contract. Gerald then submitted the matter for arbitration before the London Metal Exchange, which rendered an award in favor of Gerald. Subsequently, Gerald applied to the Anhui High People's Court for the recognition and enforcement of the arbitral award. The Court concluded that Wuhu Hengxin had not entered into the sales contract and the claimant could not provide evidence that Wuhu Hengxin had a connection with Wuhu Smelter & Refinery Plant. On that basis, the Court held that the whole arbitral award should be refused recognition and enforcement. The Supreme People's Court (SPC) rejected this conclusion however, and held that only the part of the arbitral award that went beyond the scope of the arbitration clause between Wuhu Smelter and Gerald should be refused, and the remainder should be recognized and enforced.

Thus far, there are no reported Supreme People's Court decisions discussing lower court decisions applying the first ground of Article V(1)(c).

d. Article V(1)(d): Violations of Parties' Agreed Arbitral Procedures or Law of Arbitral Seat

Article V(1)(d)[56] presents two grounds on which enforcement and recognition of an arbitral award could be challenged: (1) failure to comply with the parties' agreed arbitral procedures; and (2) failure to comply

53. *Id.*

54. *Id.*

55. Zuigao Renmin Fayuan Guanyu Meiguo GMI Gongsi Shenqing Chengren Yingguo Lundun Jinshu Jiaoyi Suo Zhongcai Caijue An de Fuhan (最高人民法院关于美国GMI公司申请承认英国伦敦金属交易所仲裁裁决案的复函) [Letter of Reply of the Supreme People's Court on Application of Gerald Metals Inc. for Recognition of London Metal Exchange Arbitration Award] (promulgated by the Sup. People's Ct., Nov. 24, 2003, effective Nov. 24, 2003), CLI.C.24714(EN) (Lawinfochina).

56. New York Convention, *supra* note 1, art. V(1)(d) ("The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place . . . .").

with the law of the country where the arbitration took place.[57] Article V(1)(d) is closely related to Article V(1)(b) in that both provide a defense against enforcement on the basis of procedural unfairness or defects in the arbitral proceedings.[58] Article V(1)(d), however, can be distinguished from Article (1)(c) in that it focuses on noncompliance with the procedures specifically agreed upon by the parties, while Article V(1)(b) provides broad defense when there is noncompliance with "generally-applicable and mandatory standards of procedural fairness."[59]

A case that challenged enforcement and recognition on the first ground is *First Investment Corp. of Marshall Island v. (1) Fujian Mawei Shipbuilding Ltd. (2) Fujian Shipbuilding Industry Group Corp.*[60] There, a dispute arose from a shipbuilding option agreement entered into among the parties in 2003, which contained an arbitration clause agreeing to conduct arbitration by an ad hoc three-member arbitral tribunal in London. The Arbitral Tribunal rendered an award in favor of First Investment, and that company then applied to the Xiamen Maritime Court for the recognition and enforcement of the arbitral award. The Court concluded that there were three versions of the arbitral award, only one of which was reviewed by Mr. Shengchang Wang, a party-appointed arbitrator. Mr. Wang had been taken into custody on criminal charges and had not participated in the later stages of the arbitration. On that basis, the Court decided to refuse enforcement based on Article V(1)(d) of the New York Convention citing this irregularity in the arbitration procedure where one party's arbitrator was unable to participate fully in the proceedings. On appeal, the Fujian High People's Court and the Supreme People's Court confirmed the refusal to enforce the award.

Another case that applied the defense on the ground of noncompliance with the procedure specifically agreed by the parties is *Shin-Etsu Chemical Co., Ltd. v. Jiangsu Zhongtian Technology Co., Ltd.*[61] Shin-Etsu and Jiangsu Zhongtian concluded an arbitration clause in a long-term

57. Born, *supra* note 46, at 3560.

58. *Id.*

59. *Id.*

60. Zuigao Renmin Fayuan Guanyu Ma Shao Er Qundao Diyi Touzi Gongsi Shenqing Chengren he Zhixing Yingguo Lundun Linshi Zhongcai Ting Zhongcai Caijue An de Fuhan (最高人民法院关于马绍尔群岛第一投资公司申请承认和执行英国伦敦临时仲裁庭仲裁裁决案的复函) [Letter of Reply of the Supreme People's Court on Application of First Investment Corp. of the Marshall Islands for Recognition and Enforcement of Arbitration Award of an Ad Hoc Arbitration Tribunal in London] (promulgated by the Sup. People's Ct., Feb. 27, 2008, effective Feb. 27, 2008), CLI.3.125493(EN) (Lawinfochina).

61. Zuigao Renmin Fayuan Guanyu Buyu Chengren Riben Shangshi Zhongcai Xiehui Dongjing 04-05 Hao Zhongcai Caijue de Baogao de Fuhan (最高人民法院《关于不予承认日本商事仲裁协会东京04-05号仲裁裁决的报告》的复函) [Letter of Reply of the Supreme People's Court on the Report of Non-Recognition of No. 04-05 (Tokyo) Arbitration Award of Japan Commercial Arbitration Association] (promulgated by the Sup. People's Ct., Mar. 03, 2008, effective Mar. 03, 2008), CLI.3.125492(EN) (Lawinfochina).

sales contract, agreeing to conduct arbitration in Japan under the Arbitration Rules of the Japan Commercial Arbitration Association (JCAA). Later, a dispute arose from performance of the contract. On 12 April 2004, Shin-Etsu submitted the matter for arbitration before the JCAA. On 23 February 2006, the JCAA rendered an award in favor of Shin-Etsu. Shin-Etsu then applied to the Nantong Intermediate People's Court to recognize and enforce the award, but the Nantong Court refused on the ground that the arbitral procedure was not in accordance with the agreement of the parties. The case was reported to the Jiangsu High People's Court, which upheld the decision of the lower court and concluded that the arbitral procedure was not in accordance with JCAA's Arbitration Rules. The Supreme People's Court held that the arbitral tribunal exceeded the period fixed by the Arbitration Rules of the JCAA and failed to give a notice of the extension of the deadline for the final arbitral award to the other party. Accordingly, the SPC refused to recognize and enforce the arbitral award.

Finally, *China Shipping Development Co., Ltd. Freighter Company v. Anhui Technology Imp. & Exp. Co., Ltd.*[62] is a case that invoked Article V(1)(d) defense due to noncompliance with the law of the country where the arbitration took place. There, China Shipping Development and Anhui Technology concluded an arbitration clause in their charter-party, agreeing to conduct arbitration in Hong Kong under the provisions of English law. Subsequently, a contractual dispute arose between the parties. Later, China Shipping Development appointed Mr. William Packard as the arbitrator, but Anhui Technology did not respond to any notices. On 9 March 2006, the Sole Arbitrator Mr. William Packard rendered an award in favor of China Shipping Development, which later applied to the Wuhan Maritime Court for the recognition and enforcement of the award. The Court concluded that the composition of the tribunal and the arbitral procedure were not in accordance with the law applicable to the arbitration clause, and, therefore, the recognition and enforcement of the award should be rejected. On appeal, the Hubei High People's Court denied the recognition and enforcement of the award, reasoning that Hong Kong procedural law should apply to the arbitral procedure and English law was applicable only to substantive issues. Thus, the composition of the tribunal was not in accordance with Hong Kong law. The Supreme People's Court affirmed the holding, refusing to recognize and enforce the arbitral award based on Articles V(1)(d) of the New York Convention.

62. Zuigao Renmin Fayuan Guanyu dui Zhonghai Fazhan Gufen Youxian Gongsi Huolun Gongsi Shenqing Chengren Lundun Zhongcai Caijue Yi'an de Qingshi Baogao de Dafu (最高人民法院关于对中海发展股份有限公司货轮公司申请承认伦敦仲裁裁决一案的请示报告的答复) [Reply of the Supreme People's Court's on Request for Instruction Re Application of China Shipping Development Co., Ltd. Tramp Co. for Recognition of London Arbitration Award] (promulgated by the Sup. People's Ct., Aug. 06, 2008, effective Aug. 06, 2008), CLI.3.141711(EN) (Lawinfochina).

e. Article V(1)(e): Awards That Are Not "Binding"

Article V(1)(e)[63] allows non-enforcement due to lack of finality, or when a court in the seat of arbitration set aside the arbitral award. Some degree of "finality" of the award is required for recognition under most contemporary international arbitration conventions and arbitration legislation.[64] According to reported cases available, the authors have not found any reported cases in which the Chinese courts have invoked Article V(1)(e) of the New York Convention.

f. Article V(2)(a): Arbitrability

Courts following the New York Convention may also refuse enforcement where "the subject matter of the difference is not capable of settlement by arbitration under the law of the country."[65] This ground has been employed by the SPC in *Wu Chunying v. Zhang Guiwen (2009)*.[66] The case involved two Chinese citizens who entered into a contract requiring arbitration in the Mongolian National Arbitration Centre in Mongolia. One of the parties passed away and his widow, Wu Chunying, invoked the arbitration clause contained in the contract and commenced arbitration proceedings against Zhang Guiwen before the Mongolian National Arbitration Centre. The plaintiff applied to the Chinese courts for the recognition and enforcement of the arbitral award. The SPC held that this dispute depended on succession issues that were not capable of settlement by arbitration under Article 3 of the People's Republic of China Arbitration Law.[67] On that basis, the SPC concluded that the dispute arose from inheritance and refused to recognize and enforce the arbitral award in accordance with Article V (2)(a) of the New York Convention.

g. Article V (2)(b): Public Policy

The seventh and final ground against recognition and enforcement of an arbitral award under the New York Convention is when "recognition or enforcement of the award would be contrary to the public policy of that country."[68] Article V(2)(b) provides an "escape device" by

63. New York Convention, *supra* note 1, art. V(1)(e) ("The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made . . . .").

64. Born, *supra* note 46, 3606.

65. New York Convention, *supra* note 1, art V(2)(a).

66. Zuigao Renmin Fayuan Guanyu Buyu Chengren ji Zhixing Menggu Guojia Zhongcai Ting Zhongcai Caijue de Qingshi de Fuhan (最高人民法院关于不予承认及执行蒙古国家仲裁庭仲裁裁决的请示的复函) [Letter of Reply of the Supreme People's Court's on Request for Non-Recognition and Non-Enforcement of Arbitration Award of Mongolia National Arbitration Tribunal] (promulgated by the Sup. People's Ct., Sep. 02, 2009, effective Sep. 02, 2009) CNARB, http://www.cnarb.cn/Item/3380.aspx (China).

67. The Arbitration Law of the People's Republic of China states that the following disputes may not be arbitrated: (1) martial, adoption, guardianship, support and succession disputes; (2) administrative disputes that shall be handled by administrative organs as prescribed by law. Arbitration Law, *supra* note 35, art. 3.

68. New York Convention, *supra* note 1, art. V(2)(b).

allowing the contracting state to use local law in lieu of the uniform international standards laid out in Article V(1).[69] Although it is one of the most frequently invoked defenses against enforcement, it is worth noting: "the exception 'has been interpreted erratically by the courts and is probably the most misused ground of all [in Article V].'"[70]

Only one SPC decision has applied the public policy defense to enforcement. In (1)*Hemofarm DD (2)MAG International Commerce Co., (3)Sulame Media Co., Ltd. v. Jinan Yongning Pharmaceutical Co., Ltd,*[71] Hemofarm, MAG, and Jinan Yongning entered into a contract stating that any disputes arising between the parties should be referred to the ICC in Paris for arbitration. Sulame Media Co., Ltd. joined the contract as a shareholder of the Jinan Hemofarm in April 2000. On 6 August 2002, Jinan Yongning initiated proceedings regarding rental and leased property against the Jinan Hemofarm before the Jinan Intermediate People's Court. The Jinan Hemofarm challenged the jurisdiction of the Jinan Intermediate People's Court based on the arbitration clause. The Court, however, dismissed the objection and held that the Jinan Hemofarm was not a party to the JV contract that contained an arbitration clause on ICC arbitration in Paris and gave the court jurisdiction. Subsequently, the Jinan Intermediate People's Court ruled in favor of Jinan Yongning in the suits. On 3 September 2004, Hemofarm, MAG, and Sulame initiated arbitration against Jinan Yongning at the ICC. Later, the ICC found that the preservation of JV Company's assets initiated by Jinan Yongning constituted a breach of the JV contract and caused losses to the claimants. The arbitral tribunal rendered an award in favor of the claimants. In September 2007, Hemofarm, MAG, and Sulame applied to the Jinan Intermediate People's Court for the recognition and enforcement of the arbitral award. The Jinan Intermediate People's Court refused to recognize and enforce the award on the ground that the tribunal ignored the effective judgments of the Chinese court, exceeded its scope of arbitral jurisdiction, and that the enforcement of the award would violate China's public policy. The case was reported to the Shandong High People's Court, which upheld the decision of the Jinan Intermediate People's Court. The Supreme People's Court also held that the arbitral tribunal violated China's judicial sovereignty and the jurisdiction of the Chinese courts by deciding on the same disputes which had been heard before the Chinese court, and therefore the enforcement was against China's public policy. Based on the evidence presented, the SPC refused to recognize

69. Born, *supra* note 46, at 3647.

70. *Id.*

71. Zuigao Remin Fayuan Guanyu Bu Yu Chengren he Zhixing Guoji Shanghui Zhongcai Yuan Zhongcai Caijue de Qingshi de Fu Han (最高人民法院关于不予承认和执行国际商会仲裁院仲裁裁决的请示的复函) [Letter of Reply of the Supreme People's Court to a Request for Instructions on the Non-Recognition and Non-Enforcement of an Arbitration Award of the ICC International Court of Arbitration] (promulgated by the Sup. People's Ct., Jun. 02, 2008, effective Jun. 02, 2008), CLI.3.132739(EN) (Lawinfochina).

and enforce the arbitral award in accordance with Article V(2)(b) and Article V(1)(c) of the New York Convention.

While this is the only reported SPC decision discussing the "public policy" exception in the New York Convention, it is worth noting that the lower courts had offered an alternative basis for non-enforcement – exceeding the scope of the arbitration clause – that would have also supported the same result. While the case reveals that Chinese courts are willing to invoke the public policy defense to enforcement, the fact that another ground for non-enforcement could have been invoked limits the guidance that this case provides.

h. Article II(1) and Article II(2): Absence of Arbitration Clause and "Agreement in Writing"

Two grounds against recognition and enforcement of an arbitral award under Article II of the New York Convention are as follows:

> (1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> (2) The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

The following two cases successfully challenged enforcement and recognition of an arbitral award on the grounds that requirements under Article II(1) and Article II(2) were not fulfilled.

First, in *Hanjin Shipping Co., Ltd. v. Guangdong Fuhong Oil Co., Ltd.,*[72] Hanjin filed an application for enforcement of an arbitral award issued by a Sole Arbitrator in London before the Guangzhou Maritime Court. The Court, however, held that since the claimant failed to provide sufficient evidence that there was a valid written arbitration agreement between the parties, the award did not meet the requirements under Article II(1) and Article II(2) of the New York Convention. Thus, the Court denied the recognition and enforcement of the award. The case was reported to the Guangdong High People's Court and the Guangdong High People's Court upheld the decision of the Guangzhou Maritime Court. Later, the Supreme People's Court ruled that as there was no arbitration agreement between Hanjin and Guangdong Fuhong, the request for recognition and enforcement of the award failed to conform to the requirements under Article II of the New York Convention and should be rejected.

72. Hanjin Chuanwu Youxian Gongsi Su Guangdong Fuhong Youpin Youxian Gongsi (韩进船务有限公司诉广东富虹油品有限公司) [Letter of Reply of the Supreme People's Court About the Requested Instruction for Hanjing Shipping Limited Company's Application to Recognize and Execute the British Arbitration Case] (promulgated by the Sup. People's Ct., Feb. 6, 2006, effective Feb. 6, 2006) CLI.3.104496(EN) (lawinfochina).

In a similar vein, in *Concordia Trading B.V. v. Nantong Gangde Oils Co., Ltd.*,[73] Concordia filed an application for recognition and enforcement of an arbitral award issued by the Federation of Oils, Seeds and Fats Associations (FOSFA) before the Nantong Intermediate People's Court. The Court, however, held that the arbitration clause between the parties failed to conform with Article II(2) of the New York Convention, which provided that an arbitration agreement must be in writing. Thus, the Court denied the recognition and enforcement of the award. The case was then reported to the Jiangsu High People's Court, which upheld the decision of the Nantong Intermediate People's Court. Later, the Supreme People's Court also held that the arbitration clause did not meet the requirements of Article II(1) and Article II(2) of the New York Convention due to the lack of written form.

i. Statutory Grounds for Non-Enforcement

In addition to the exceptions set forth in the New York Convention, China has imposed certain statutory grounds allowing non-enforcement of a foreign arbitral award. The time limit for application of enforcement is one year for natural persons and six months when both parties are legal entities.[74] Courts have consistently imposed these limits on applications for the enforcement of foreign arbitral awards.

In *Peter Joseph Scheuer v. Edward E. Lehman*,[75] Peter Joseph Scheuer sought enforcement of an arbitral award issued by the International Centre for Dispute Resolution of American Arbitration Association before the Beijing No.1 Intermediate People's Court. The Court, however, held that under Article 219 of Civil Procedure Law of the People's Republic of China, the claimant's application of recognition and enforcement of the arbitral award exceeded the time limit of the application for enforcement. The case was then appealed to the Beijing High People's Court and ultimately the Supreme People's Court, which ruled that the application for enforcement exceeded the time limit and that the award should be refused recognition and enforcement in accordance with Article 219 of Civil Procedure Law of the People's Republic of China.[76]

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73. Guanyu Shenqing Chengren he Zhixing (FOSFA) Di 3948 Hao Zhongcai Caijue Yi An de Qingshi de Fu Han (关于申请承认和执行 (FOSFA) 第3948号仲裁裁决一案的请示的复函) [The Letter of Reply About the Requested Instruction Regarding the Application to Recognize and Execute Arbitration Case No. 3948 (FOSFA)] (promulgated by the Sup. People's Ct.) CNARB, HTTP://WWW.CNARB.COM/ITEM/3372.ASPX (China).

74. JINGZHOU TAO, RESOLVING BUSINESS DISPUTES IN CHINA ¶14-780 (2005).

75. Bide Shude Su Aidehua Leimen (彼得·舒德诉爱德华·雷门) [Peter Joseph Scheuer v. Edward E. Lehman], MIN SI TA ZI No. 47, (Sup. People's Ct. Jan. 22, 2007) (China).

76. On 28 October 2007, the Standing Committee of the National People's Congress issued Civil Procedure Law of the People's Republic of China (2007 Amendment), and Article 15 of the Amendment extends the duration of the time limitation to two years. Civil Procedure Law, *supra* note 36, art. 15.

Chinese courts have also refused to recognize an award rendered against a party that was not properly registered under Chinese law. In *Subway International B.V. v. Beijing Sabowei Food Co., Ltd.*,*77* Subway initiated proceedings against Beijing Sabowei before the Beijing No. 2 Intermediate People's Court for recognition and enforcement of an arbitral award issued by the International Centre for Dispute Resolution of American Arbitration Association. The Court, however, held that Beijing Sabowei was not established within the territory of the People's Republic of China and that the award should be refused recognition and enforcement. The case was then appealed to the Beijing High People's Court and the Supreme People's Court, which held that Beijing Sabowei was not legally registered and therefore, as a legal matter, the respondent did not exist.

C. *Summary*

The enforcement practices of the 156 countries that are a party to the New York Convention is unlikely to be completely uniform. Still, it is worth reviewing China's judicial interpretations of the Convention to assess the quality of its engagement with the treaty's legal obligations and principles. This review finds little evidence that China's courts have departed in any meaningful way from the broadly accepted understandings of Article V. The most common grounds for non-enforcement in China arise from the lack of a valid arbitration agreement or a lack of notice of an arbitral proceeding. The interpretations in these areas are reasonable and appear to be good faith applications of Article V.

The most distinctive case discussed involved an invocation of the "public policy" ground for non-enforcement. As discussed earlier, this ground for non-enforcement allows local courts to raise local law or policy grounds against foreign arbitral awards. The only SPC decision that invoked the public policy defense, however, did so in a narrow context involving a conflict between an arbitral award and a previously decided Chinese court decision, and the case could have been resolved on different grounds. This comparatively narrow, and rare, invocation of the public policy defense shows that Chinese courts have not adopted an expansive view of non-enforcement. The unwillingness of courts to invoke a general denial of due process as a basis for non-enforcement provides further evidence of this narrow and careful approach to Article V.

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77. Saibaiwei Guoji Youxian Gongsi Su Beijing Sabowei Canyin Youxian Gongsi(赛百味国际有限公司诉北京萨伯威餐饮有限公司) [Letter of Reply of the Supreme People's Court on Request for Instructions Re Application of Subway International Co., Ltd. for Recognition and Enforcement of Award No. 50 114 T 00171 07 of International Arbitration Tribunal of the International Centre for Settlement of Investment Disputes] (promulgated by the Sup. People's Ct.+, Feb. 26, 2009, effective Feb. 26, 2009), CLI.3.160677(EN) (Lawinfochina).

III. Survey of Practitioners 2014

As discussed previously, empirical studies relying only on judicial opinions may provide an incomplete picture of the actual practice or "facts on the ground" in China with respect to foreign arbitral awards. Given the continuing negative impressions of China's arbitral enforcement in U.S. commentary, further evidence might help explain this negativity in ways that a review of judicial opinions does not.

In July 2014 the authors polled respondents in an online survey conducted under the auspices of Kluwer Arbitration blog, a leading international arbitration blog. The survey divided respondents based on whether they had experience with arbitration of international commercial disputes in China. Of the sixty-three respondents surveyed, 75% had such experience, while 25% did not.[78]

In terms of general perceptions, the overwhelming majority of respondents perceived the likelihood of enforcement in China to be harder than most countries. Of those who responded, 56% perceived that enforcing awards in China was "much harder" than other countries, while 31% perceived that it was "somewhat harder." Only 2% perceived enforcement of awards in China to be easier than elsewhere.[79] Such survey responses seem congruent with the general skeptical view of China's arbitral practices found among U.S. commentators.

The fifty respondents who reported on their actual experience enforcing awards in China, however, offered a different view. Regarding their general satisfaction, 72% were satisfied with arbitration in China as a dispute settlement mechanism, compared with 22% who expressed dissatisfaction, and 6% who were not sure.[80] This level of general satisfaction is lower than what other surveys have found with respect to international arbitration generally, although not dramatically lower. In a 2008 survey of corporate counsel, PriceWaterhouseCoopers (PWC) found that 86% of respondents were "satisfied" with international arbitration.[81]

Additionally, a majority of these respondents reported that, in their experience, enforcement of an arbitral award in China was achieved expeditiously. Fifty-two percent of respondents stated that the time required to recognize, enforce, and execute an award in China took less than six months, while 20% stated that it took between six months and one year. Nine percent said it took between one and two years to enforce the award, and a further 9% said it took between two and four years.[82]

78. Kluwer Arbitration Blog Survey, July 2014 (47 "yes", 16 "no").

79. *Id.* (of the forty-eight who responded, twenty-seven stated they perceived it to be "much harder" to enforce in China, fifteen "somewhat harder", three "about the same", one "somewhat easier", two "no impression").

80. *Id.* (of the fifty who responded, thirty-six are satisfied, eleven are not satisfied, and three are not sure.)

81. Queen Mary Univ. of London & PricewaterhouseCoopers, International Arbitration: Corporate Attitudes and Practices 5 (2008), http://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf [hereinafter PWC Study].

82. Kluwer Arbitration Blog Survey, *supra* note 78 (of the forty-four who

The respondents also indicated that they generally were successful in recovering either the full amount of the award or a high percentage of the full amount. Forty-eight percent of respondents stated that they recovered the total amount of the award, while 16% recovered between 76% and 99% of the award. An additional 9% stated that they recovered between 51% and 75% of the award, while 11% stated that they recovered less than half of the award.[83] This data, which shows that between 64% to 73% of respondents were able to recover most of their award, compares favorably with Peerenboom's 2001 data, which showed that barely half of respondents had succeeded in winning enforcement of their arbitral awards.

Almost half of our respondents with experience in China (46%) indicated that they settled the case rather than pursuing enforcement. This percentage is also similar to that of the PWC study, which reported that 40% of corporate counsel negotiated post-arbitral award settlements rather than pursue judicial enforcement.[84] The reasons for settlement varied, with 55% stating that they settled because they were in a weak position, 19% in order to reduce costs, 12% because of concerns about enforcement in China, 7% because the opposing party lacked assets, and 5% in order to maintain a good relationship with the other party.[85] Again, some of these numbers are similar to findings in the PWC study, which found that 9% of respondents settled post-award due to concerns about the location of enforcement.

Finally, when asked whether they had ever experienced recognition and enforcement difficulties in China, 82% answered in the affirmative, with the difficulties including "the local execution procedure" (61%), "perceived lack of independence or bias of judges and administrative personnel of the local courts" (16%), high costs (11%), unfriendliness toward enforcing foreign awards (7%), and time (5%).[86]

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responded, twenty-three said enforcement took less than six months, nine said it took between 6 and 12 months, four stated that it took between one and two years, four stated that it took between two and four years, and four stated that they were not sure).

83. *Id.* (of the forty-four who responded, twenty-one said they recovered 100% of the amount, seven said they recovered 76% to 99% of the amount, four stated that they recovered 51% and 75% of the amount, five stated that they recovered between 26% and 50% of the amount, two said they recovered less than 25% of the amount, and five stated that they were not sure).

84. PWC Study, *supra* note 81, at 8.

85. Kluwer Arbitration Blog Survey, *supra* note 78 (of the forty-eight who responded, twenty-two stated that they had settled an arbitration award case. Of the forty-two who expressed the reason for settlement, twenty-three stated that it was because of their weak position, eight in order to reduce costs, five because of concerns about enforcement in China, three because of the lack of assets of the opposing party, two in order to preserve a good relationship with the other party, and one for other reasons.)

86. *Id.* (of the forty-five who responded, thirty-seven stated they had encountered recognition and enforcement difficulties in China, while eight stated that they had not. Of the forty-four who gave reasons for those difficulties, twenty-seven

Despite these last responses, these results suggest that parties seeking to enforce foreign arbitral awards have had a surprisingly positive experience. The results show that respondents with experience in China are largely satisfied with international arbitration and that a significant majority wins enforcement or collection of all or almost all of their foreign arbitration awards within one year. The respondents cite difficulties relating to enforcement that are procedural rather than relating to judicial independence or general unfriendliness to international arbitration. Moreover, the overwhelming majority of respondents who settled a case do so for strategic reasons, not because of concerns about enforceability.

In light of these results, however, it is somewhat surprising that a majority (56%) of survey respondents continued to state that they perceive enforcing awards in China to be either somewhat or much harder than in other countries. While comparisons to respondents to the PWC survey do suggest enforcement of arbitral awards in China is slightly more challenging than in most countries, the reported experience of our survey respondents does not show China is dramatically more challenging or difficult than other jurisdictions.

Conclusion

As a whole the survey shows that practitioners with experience enforcing arbitral awards in China face some difficulties, but a large majority are able to recover all or most of their awards. This finding is not surprising, given the comparatively narrow bases for non-enforcement authorized by the SPC. Thus, it is possible to say that enforcing foreign arbitral awards in China is not dramatically more difficult than most jurisdictions, and China's judicial decisions also reflect general congruence with typical international arbitral practice.

The question remains then: why is there still such strong skepticism of China's judicial enforcement of foreign arbitral awards among U.S. commentators and even among our survey respondents? The most common answer — that the "facts on the ground" are not reflected in the SPC's case law — is belied by the fact that many of our survey respondents report generally successful experiences enforcing arbitral awards in China. Some other reason for this disconnect must exist.

While a definitive conclusion is beyond the scope of this article, we suggest this disconnect is related to larger problems in China's legal system. For instance, China's legal system as a whole, beyond the commercial realm, retains a low image among Western observers. As leading U.S. scholars have argued, China's legal system has shown a well-documented shift "away from law" in non-commercial areas, such as, criminal law, constitutional law, or administrative law, and toward non-judicial remedies

identified the local execution procedure, seven the perceived lack of independence of the judges or administrative personnel of the local courts, five the high costs, three the unfriendliness towards enforcing foreign awards, and two the time.)

and sanctions.[87] Current trends, in particular, suggest that a top-down political reaction to growing levels of social protest and conflict in China has resulted in a general political unwillingness to permit courts to emerge as independent legal institutions capable of dealing with such disputes.[88]

The same may not be true of commercial disputes. China appears to have made headway in giving priority to improving the legal management of "commercial" issues, especially commercial law related to foreign parties.[89] Indeed, the World Bank's Doing Business survey ranks China as seven in the world in the ease of enforcing contracts, above the United States (ranked twenty-one).[90] This bifurcation of the Chinese legal system to favor protection of foreign commercial rights over domestic non-commercial rights is reflected in the "review" system, which appears to have successfully promoted the enforcement of foreign arbitral awards.

Whether China can maintain this bifurcation of its commercial legal system and the rest of its legal system is worthy of future study. This Article's more modest goal is to establish that, with respect to the enforcement of foreign arbitral awards, China has managed to build a legal system more effective than is generally believed among most U.S. commentators.

87. Carl F. Minzner, *China's Turn Against Law*, 59 Am. J. Comp. L. 935 (2011) (arguing China's government is substantively weakening China's judicial system); Randall Peerenboom, *More Law, Less Courts: Legalized Governance Judicialization and Dejudicialization in China* (La Trobe Law Sch. Legal Studies, Paper No. 10, 2008), http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=1265147; *see also* Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, 25 Colum. J. Asian L. 1 (2012).

88. Minzner, *supra* note 87, at 937-38.

89. Xin He, *Enforcing Commercial Judgments in the Pearl River Delta of China*, 57 Am. J. Comp. L. 419, 419 (2009) (offering positive assessment of judicial practice with respect to commercial judgments).

90. *Economy Rankings*, World Bank Group, http://www.doingbusiness.org/rankings (last accessed Nov. 19, 2015).