THE ENFORCEMENT OF FOREIGN AND FOREIGN-RELATED ARBITRAL
AWARDS IN THE PEOPLE’S REPUBLIC OF CHINA:

A CALL FOR REFORM

SAMANTHA JAYNE LORD

Lawyer Admitted to Practice in the Supreme Court of Western Australia and High
Court of Australia
Bachelor of Laws with First Class Honours (Murdoch University)

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Student Number: 30651386
I declare that this thesis is my own account of my research and contains as its main content work which has not previously been submitted for a degree at any tertiary education institution.

Samantha Jayne Lord
ABSTRACT

Over the past 25 years, China has experienced exponential growth. It has surpassed Japan as the second largest economy in the world, and the World Bank has predicted that it will overtake the United States to become the global leader by 2030, if not before. As China’s economic success is underpinned by foreign trade and investment, it comes as no surprise that Chinese entities are, and will be, increasingly involved in disputes with foreign parties. Arbitration is the preferred method of dispute resolution in China, and indeed of the international business community, therefore if China is to take its place as a global leader, it must have a system for the enforcement of foreign and foreign-related arbitral awards that is in line with international best practice and that is reliable, predictable and transparent. However, in many respects China’s current system for the enforcement of foreign and foreign-related arbitral awards falls short of the standard it ought to achieve.

In light of this, this paper explains why China has the potential to become a leading arbitral jurisdiction, analyses China’s system for the enforcement of foreign and foreign-related arbitral awards and in doing so identifies flaws and areas in which it falls short of international best practice, and finally calls for reform of China’s current system by setting out recommended legislative and practical reforms, which it is argued China must make if it is to ultimately take its place as a, or even the, world leader.
# Table of Contents

Acknowledgements...........................................................................................................v

I. Introduction..................................................................................................................1

II. China's Potential To Become A Leading Arbitral Jurisdiction..............................3
   A Arbitration in China: The Historical Foundations .................................................3
   B Arbitration in China: The Cultural Context..........................................................26
   C The Importance of Arbitration in China's Future.................................................30
   D China Has The Potential To Be A Leading Arbitral Jurisdiction .......................33

III. The Framework for Enforcement of Foreign-related and Foreign Arbitral
     Awards in the PRC....................................................................................................35
   A The Role of the National People’s Congress and Its Standing Committee .........35
   B The Role of The Chinese Judiciary.......................................................................36
   C Difference Between Foreign and Foreign-Related Arbitral Awards ....................43
   D Legislative Framework for the Enforcement of Arbitral Awards.......................44
   E The Framework For Enforcement of Foreign-Related and Foreign Arbitral
     Awards As A Basis for Reform ..............................................................................53

IV. The Procedure for Enforcement of Foreign-related and Foreign and Arbitral
     Awards in the PRC...................................................................................................55
   A Making an Application for Enforcement.............................................................56
   B Acceptance of an Application for Enforcement..................................................72
   C Notice of Enforcement..........................................................................................77
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>G</td>
<td>‘Not Yet Binding’ or ‘Set Aside’</td>
<td>206</td>
</tr>
<tr>
<td>H</td>
<td>Non-Arbitrability</td>
<td>216</td>
</tr>
<tr>
<td>I</td>
<td>Contrary to Public Policy</td>
<td>232</td>
</tr>
<tr>
<td>J</td>
<td>Refusal Provisions: Is there a Need for Reform?</td>
<td>250</td>
</tr>
<tr>
<td>VI.</td>
<td>Conclusion: A Call For Reform</td>
<td>262</td>
</tr>
</tbody>
</table>

Bibliography | vi
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THE ENFORCEMENT OF FOREIGN AND FOREIGN-RELATED ARBITRAL AWARDS IN THE PEOPLE’S REPUBLIC OF CHINA:

A CALL FOR REFORM

SAMANTHA JAYNE LORD*

I. INTRODUCTION

There is no doubt that over the past 25 years, the People’s Republic of China (PRC or China) has experienced unprecedented growth that has seen it transform itself from a command economy, closed to the rest of the world,¹ into a market economy² driven by, and dependent upon, foreign trade and investment.³ Referred to as an economic miracle,⁴ China has become the second largest economy in the world and was predicted to overtake the United States to take its place as the world’s largest economy by 2030.⁵ However, recent reports predict it could do so as early as the end of 2014.⁶

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⁴ The World Bank, above n 3, 69, 217, 377.
⁵ Ibid 3.
Foreign trade and investment, which increased rapidly from 2001 when China became a member of the World Trade Organisation, have played a crucial role in China’s economic success to date. With such reliance on foreign trade and investment, it is clear that to secure its economic future, China must adopt a reliable, predictable and transparent regime for resolving disputes between Chinese parties and foreign traders and investors. In particular, as arbitration is the preferred method of dispute resolution of the international business community, this paper argues that China must ensure its arbitration system reflects, and one day sets, the international standard of best practice in international arbitration and in the enforcement of foreign arbitral awards.

To that end: section II of this paper explains why China has the potential to become a leading arbitral jurisdiction; section III sets out the framework for the enforcement of foreign and foreign-related arbitral awards, and identifies the organs that can play a key role in effecting change; section IV discusses the procedure for the enforcement of foreign and foreign-related arbitral awards, identifies flaws and makes recommendations for reform; section V analyses the specific grounds on which a court may refuse to enforce a foreign or foreign-related arbitral award and makes recommendations for reform in this regard; and section VI calls for reform of China’s enforcement system.

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II. CHINA’S POTENTIAL TO BECOME A LEADING ARBITRAL JURISDICTION

This chapter demonstrates why China has the potential to be a, if not the, leading arbitral jurisdiction in the world. To that end, this chapter: first, looks at arbitration in China from an historical perspective; second, examines arbitration in China from a cultural perspective; third, identifies the importance of China's arbitration regime in securing a successful future; and finally, forms a conclusion as to China's potential to become a leading arbitral jurisdiction.

A ARBITRATION IN CHINA: THE HISTORICAL FOUNDATIONS

Arbitration, as a method of dispute resolution, is not a new concept in China and has in fact been used for centuries to resolve civil disputes.¹⁰ This section provides an overview of the history of arbitration in China, with the aim of showing that China is well poised to become a leading arbitral jurisdiction.

1 Arbitration in Ancient China

Throughout China’s ancient history, the law was seen as penal in nature.¹¹ This view stems predominantly from Chinese culture, which exhibited distrust for legal institutions and emphasised that matters should be resolved in a virtuous manner.¹² Because the law was seen as penal in nature, Chinese courts rarely had the opportunity to exercise their jurisdiction over civil disputes.¹³ Rather, civil disputes were viewed as matters that must be resolved amicably and virtuously between the individuals involved, and therefore these disputes were resolved by either mediation or arbitration.¹⁴

Arbitration practice as a method of resolving civil disputes in China can be traced back to around 2100 – 1600 BC.\(^{15}\)

2 The “Beginning” of Arbitration in China

The history of arbitration in China, in a form similar to what we know today, is said to have developed at the start of the 1900s, when arbitration was used as the main method of resolving business disputes.\(^{16}\) In 1912, the government set up the Constitution for Business Arbitration Office\(^{17}\) and established the Working Rules for the Business Arbitration Office a year later.\(^{18}\) These rules provided that the parties to a business dispute could submit their dispute to the Business Arbitration Office for resolution in accordance with the rules.\(^{19}\) The resulting arbitral award was not legally binding unless the parties consented to it being so and, in the absence of such consent, a party could apply for the dispute to be heard in court.\(^{20}\) As such, in the early 1900s, arbitration in China was more akin to modern day conciliation\(^{21}\) than to modern day arbitration proceedings.

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\(^{12}\) Ibid.

\(^{13}\) Ibid.


\(^{17}\) Ibid.

\(^{18}\) Ibid.

\(^{19}\) Ibid.

\(^{20}\) Ibid.

The next phase in the development of the Chinese arbitration system came in the 1950s. On 1 October 1949, the Chinese Communist Party (CCP), led by Mao Zedong, took control of China and established the PRC.\textsuperscript{22} The Chinese People’s Political Consultative Conference adopted the Common Program, which, amongst other things, provided that all laws, decrees and judicial organs of the National Communist Party were abolished, new laws and degrees protecting the people were to be enacted, and a people’s judicial system was to be established.\textsuperscript{23}

From 1949 to 1954, the CCP purged the judicial system and abolished concepts such as separation of law from politics, the equality of all persons before the law, the independence of the judiciary, limitation periods and the bar against retroactive application of the law.\textsuperscript{24} During this period, in the absence of written laws, the PRC encouraged and promoted arbitration as the preferred method of dispute resolution.\textsuperscript{25}

The arbitration regimes for domestic and foreign-related arbitration developed in isolation of each other: the domestic arbitration regime developed out of regulations passed by the PRC, which provided for the mandatory referral of certain disputes to government commissions and bodies having jurisdiction over those disputes.\textsuperscript{26} for example, disputes relating to economic contracts were to be handled by arbitration commissions set up within the State Administration of Industry and Commerce.\textsuperscript{27}

\begin{thebibliography}{9}
\bibitem{22} David Curtis Wright, \textit{The History of China} (Greenwood, 2\textsuperscript{nd} ed, 2011) 147.
\bibitem{24} Erh-Soon Tay, above n 23, 352.
\bibitem{25} Tao, \textit{Arbitration Law and Practice in China}, above n 16, 2.
\bibitem{26} Ibid 2-8.
\bibitem{27} Ibid.
\end{thebibliography}
such, it can be said that the domestic arbitration regime was more akin to an administrative process as opposed to an independent adjudicative process.

In contrast, the foreign-related arbitration regime appears to have developed along more Western lines in an attempt by the PRC to bring China’s arbitration practice in line with international standards. In May 1954, the PRC Government Administration Council adopted the *Decision of the Government Administration Council of the Central People’s Government Concerning the Establishment of a Foreign Trade and Arbitration Commission within the China Council for the Promotion of International Trade.* This decision created the Foreign Trade Arbitration Commission (*FTAC*) under the auspices of the China Council for the Promotion of International Trade (*CCPIT*). *FTAC* had jurisdiction to settle:

such disputes as may arise from contracts and transactions in foreign trade, particularly disputes between foreign firms, companies or other economic organizations on the one hand and Chinese firms, companies or other economic organizations on the other.

*FTAC* was composed of 15 to 21 members who were selected and appointed by the government controlled *CCPIT*. Each party to *FTAC* arbitration had the right to appoint an arbitrator but such arbitrator had to be chosen from the members of *FTAC*. An award rendered by *FTAC* was final and neither party to *FTAC* arbitration had the right to bring an appeal before a court of law or any other organisation.

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29 Ibid art 1.
30 Ibid.
31 Ibid art 3.
32 Ibid art 5.
33 Ibid art 10.
In March 1956, the CCPIT set up the *Provisional Rules of Arbitral Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade*\(^{34}\) (*Provisional FTAC Rules*), which governed the arbitral procedure for those disputes submitted to FTAC.\(^{35}\) The rules broadly covered the same matters which one would expect to find in modern arbitration rules of leading arbitral jurisdictions today: for example the rules set out the details that an application for arbitration must contain;\(^{36}\) how the application must be submitted to the Arbitration Commission;\(^{37}\) how the Arbitration Commission was to deal with an application when it received it;\(^{38}\) the process for appointment of an arbitrator(s),\(^{39}\) how hearings would be conducted,\(^{40}\) how evidence would be dealt with;\(^{41}\) and the details of the final award.\(^{42}\)

Of particular significance in the context of this paper are rules 31 and 32 of the *Provisional FTAC Rules*. Rule 31 provided that an award made by FTAC was final and there was no right of appeal:

> [t]he award given by the Arbitration Commission is final and neither party shall bring an appeal for revision before a court of law or any other organization.\(^{43}\)

Rule 32 of the *Provisional FTAC Rules* further provided that the parties had to execute the award within a given timeframe, and if a party failed to execute the award, the other party could apply to a people’s court of the PRC to enforce the award:


\(^{35}\) Ibid.

\(^{36}\) Ibid r 4.

\(^{37}\) Ibid rr 5-7.

\(^{38}\) Ibid r 8.

\(^{39}\) Ibid rr 9-12.

\(^{40}\) Ibid rr 19-23.

\(^{41}\) Ibid rr 25-27.

\(^{42}\) Ibid rr 29-35.

\(^{43}\) Ibid r 31.
[t]he award of the Arbitration Commission shall be executed by the parties themselves within the time fixed by the award. In case an award is not executed after the expiration of the fixed time, one of the parties may petition the People’s Court of the People’s Republic of China to enforce it in accordance with law.\footnote{Ibid r 32.}

It is therefore evident that by the end of the 1950s, China had established an administrative domestic arbitration regime and a modern system of foreign-related arbitration which, at least in theory, reflected international practice.

4 \textit{The Impact of the Cultural Revolution}

In around 1966, a political struggle began between Mao Zedong and other CCP leaders for dominance of the CCP.\footnote{Wright, above n 22, 164.} From 1966 through to 1969, Mao led what he called the Great Proletarian Cultural Revolution.\footnote{Ibid; Guang Yu, \textit{China 1966-1976, Cultural Revolution revisited: can it happen again?} (Nova Science Publishers, 2011); Michael Schoenhals, \textit{China’s Cultural Revolution, 1966-1969 : not a dinner party} (East Gate Reader, 1996); Thomas W Robinson, \textit{The Cultural Revolution in China} (University of California Press, 1971).} During this period he found support in the discontent youth of China and encouraged them to rebel against authority figures such as their families, schools, universities, workplaces and governments.\footnote{Wright, above n 22, 164.}

As early as June 1966, students had abandoned their studies in order to join Mao’s Red Guards.\footnote{Ibid 165.} Mao detested intellectuals because they thought for themselves.\footnote{Ibid 164.} Thousands of foreign-educated Chinese, including staff at law faculties, were hunted down and sent to the countryside to be reformed through carrying out labour on farms.\footnote{Ibid 169; Zimmerman, above n 11, 53.} Intellectuals
were referred to as the ‘stinking ninth category’ of ‘undesirables’ in Chinese society and their homes were searched for books that could be destroyed.\textsuperscript{51}

Due to the purge of intellectuals during the Cultural Revolution, the growth of China’s legal system was stunted and much of the judicial reform, which had taken place during the years 1949 through to 1966, was abandoned.\textsuperscript{52} Partly due to the Cultural Revolution and partly due to the limited jurisdiction of FTAC,\textsuperscript{53} FTAC only arbitrated 38 cases between 1956 and 1976.\textsuperscript{54}

5 The Resurrection of Arbitration in China

In the late 1970s, the PRC adopted a policy of economic liberalisation, opening up China to the rest of the world and transforming China into a market-socialist economy.\textsuperscript{55} Under pressure from its international trading partners to strengthen and improve the certainty of its legal system, and provide for greater transparency and access to its laws, the PRC embarked on what can be described as a rigorous reform of its legal system to make China a more attractive trading partner.\textsuperscript{56} As part of this reform, China enacted many new laws that stipulated arbitration as the method of dispute resolution.\textsuperscript{57} The relevant provisions of these laws are discussed in the following sections.

\textsuperscript{51} Wright, above n 22, 169.
\textsuperscript{52} Zimmerman, above n 11, 53.
\textsuperscript{56} Zimmerman, above n 11, 54.
\textsuperscript{57} See generally Edward J Epstein et al, Domestic law reforms in post-Mao China (M.E. Sharpe Inc, 1994).
In 1979, China adopted the *Sino-Foreign Equity Joint Venture Law*, article 14 of which provides that any disputes between the joint venture parties must be resolved by consultation, mediation or arbitration, either in China or elsewhere. In 1983, the * Regulations for the Implementation of the Law on Sino-Foreign Equity Joint Ventures* were put in place. Article 109 of these regulations confirms that disputes arising over the interpretation or execution of the joint venture agreement, contract or articles of association, between the parties to a joint venture, shall be settled by friendly consultations or mediation, if possible, and if such consultation or mediation fails, the dispute is to be resolved by arbitration or the courts.

7  **1980: Foreign Economic and Trade Arbitration Commission Established**

In February 1980, the China State Council authorised FTAC to change its name to the Foreign Economic and Trade Arbitration Commission (*FETAC*), and granted this new body the jurisdiction to hear a wider variety of disputes. The new FETAC was not only able to handle foreign trade disputes but was also given jurisdiction to handle disputes relating to Chinese-foreign joint ventures, foreign companies investing in China, reciprocal credit between Chinese and foreign banks, and all other types of disputes.
foreign co-operation. FETAC’s caseload therefore increased as it began to hear a wider variety of foreign-related disputes.

8 1982: Regulations Concerning the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises Passed

In January 1982, the China State Council enacted the Regulations of the People’s Republic of China Concerning the Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises. Article 27 of these regulations provides that if a dispute arises between the parties during the cooperative exploitation of offshore petroleum resources, the parties must first try to resolve the dispute by friendly consultations. If the parties fail to reach an amicable settlement through consultation, the parties may submit the dispute to an arbitration commission in China for settlement through mediation or arbitration. The parties also have the option of submitting the dispute to an overseas arbitral commission, provided that both parties agree on such submission.

9 1982: Civil Procedure Law of the PRC Passed On A Trial Basis

The next step in the development of the Chinese arbitration system came in March 1982, when the Standing Committee of the National People’s Congress adopted the Civil Procedure Law of the PRC on a trial basis (Trial Civil Procedure Law).

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63 Ibid; Darwazeh and Moser above n 55, 53; Liu and Lourie, above n 54, 541.
64 Liu and Lourie, above n 54, 541.
66 Ibid art 27.
67 Ibid art 27.
68 Ibid.
XX of this law dealt solely with arbitration.\textsuperscript{70} For what appears to be the first time in China’s arbitration history, the law expressly recognised that the parties to an arbitration agreement must not commence litigation proceedings in the Chinese courts in respect of the same dispute for which there is an arbitration agreement.\textsuperscript{71} Article 192 of the \textit{Trial Civil Procedure Law} states:

\begin{quote}
[w]hen a dispute arises from the foreign economic, trade, transport or maritime activities of China, if the parties have reached a written agreement to submit the dispute for arbitration to the foreign affairs arbitration agency of the People’s Republic of China, they shall not bring a suit in a people’s court; if they have not reached such agreement, they may bring a suit in a people’s court.\textsuperscript{72}
\end{quote}

The \textit{Trial Civil Procedure Law} also recognised that \textit{res judicata} lies against an arbitral award such that a dispute, concerning which an arbitral award has already been made, cannot been submitted to a people’s court for determination.\textsuperscript{73}

Similar to rule 32 of the \textit{Provisional FTAC Rules},\textsuperscript{74} article 195 of the \textit{Trial Civil Procedure Law} provided that where one party fails to comply with an arbitral award, the other party may apply to either: (a) a people’s court in the place where the arbitration agency is located; or (b) to the intermediate people’s court in the locality of the property in question, for the enforcement of the award in accordance with the provisions of the \textit{Trial Civil Procedure Law}.\textsuperscript{75}

\begin{flushright}
\textsuperscript{70} Ibid ch XX.
\textsuperscript{71} Ibid ch XX art 192.
\textsuperscript{72} Ibid.
\textsuperscript{73} Ibid ch XX art 193.
\textsuperscript{75} \textit{Civil Procedure Law of the People’s Republic of China (for Trial Implementation)} (People’s Republic of China) National People’s Congress, 8 March 1982 art 195.
\end{flushright}
In September 1986, the PRC acceded to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (New York Convention). In December 1986, the National People’s Congress issued a decision relating to China’s accession to the New York Convention. This milestone event in Chinese arbitration history came almost 30 years after the New York Convention was adopted by the United Nations Commission on International Trade Law (UNCITRAL).

China’s accession to the New York Convention, and indeed a full analysis of China’s implementation of the New York Convention, will be discussed in full detail later in this paper. Suffice it to say here that China’s cautious approach to its accession is evident from its adoption of both reservations available under the Convention: the reciprocity reservation, and the commercial reservation. Despite its reservations in acceding to the New York Convention, China’s accession in and of itself can be viewed as a great achievement for China, especially considering that at this point, China had not yet enacted an arbitration law.

11 *1988: CIETAC Was Established*

In 1988, pursuant to the State Council’s *Official Reply Concerning the Renaming of the Arbitration Commission as the China International Economic and Trade Arbitration Commission*. 

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79 See section III.2.(c) below.
80 New York Convention art I(3).
81 Ibid.
Commission and Amendment of Its Arbitration Rules, the China International Economic Trade and Arbitration Commission (CIETAC) was established. The main function of CIETAC, in the early days, was to independently and impartially settle disputes arising from international or foreign economic and trade related transactions, whether arising out of contract or not.

The China International Economic and Trade Arbitration Commission Arbitration Rules (CIETAC Arbitration Rules) 1988 broadly dealt with the same matters as one would expect to find in the rules of any modern arbitral institution: they contained provisions relating to the jurisdiction of CIETAC and of the arbitral tribunal; the organisation of CIETAC; the application for arbitration, defence and counterclaim; composition of the arbitral tribunal; the hearing; the award; language of the arbitration; and fees. The details of such provisions, however, did not afford a great deal of party autonomy to the parties, nor did they entirely reflect those found in the rules of other arbitration jurisdictions.

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83 Ibid.
85 Ibid ch I s 1.
86 Ibid ch I s 2.
87 Ibid ch II s 1.
88 Ibid ch II s 2.
89 Ibid ch II s 3.
90 Ibid ch II s 4.
91 Ibid ch III art 39.
92 Ibid ch III art 41.
In April 1988, the PRC adopted the *Law of the PRC on Sino-Foreign Co-operative Joint Ventures*.\(^{94}\) Article 26 of this law provides that if a dispute arises between a Chinese party and a foreign party in relation to a co-operative joint venture, the parties will attempt to resolve the dispute through friendly consultations or mediation.\(^{95}\) If the parties fail to come to an amicable settlement, or they do not want to resolve the dispute by consultation or mediation, the parties may submit the dispute either in or outside China, in accordance with their arbitration agreement.\(^{96}\)

13  **1991: Civil Procedure Law of the PRC Passed**

In 1991, China adopted the *Civil Procedure Law of the PRC* to replace the trial version (*Civil Procedure Law 1991*).\(^{97}\) Once again, this new law confirmed that the parties to an arbitration agreement were precluded from submitting a dispute, which fell within the scope of the arbitration agreement, to a people’s court.\(^{98}\) It expressly provided that a party could only submit a dispute to a people’s court where there was no arbitration agreement between the parties and the parties had not subsequently entered into a submission agreement.\(^{99}\)

Article 257 of the *Civil Procedure Law 1991* provided:

> [t]he parties to a contract may not file a lawsuit with a people's court regarding a dispute arising from foreign economic relations and trade, transportation and maritime affairs, if the contract contains an arbitration clause, or if they later reach a written agreement on


\(^{95}\) Ibid art 26.

\(^{96}\) Ibid.


\(^{98}\) Ibid art 257.

\(^{99}\) Ibid.
arbitration or refer their dispute to a PRC agency in charge of arbitrating disputes involving foreigners or to any other arbitration agency. Where the contract does not contain an arbitration clause or the parties concerned do not reach a written agreement on arbitration subsequently, a lawsuit may be filed with a people’s court.\textsuperscript{100}

With the introduction of the \textit{Civil Procedure Law 1991}, an arbitral award in China was once again recognised as final and binding on the parties.\textsuperscript{101} Further, where there was an arbitral award in respect of a dispute, no party could submit that dispute to the courts nor was there a right of appeal against the award.\textsuperscript{102} The law also set out the procedure for the enforcement of arbitral awards rendered by foreign-related arbitration commissions and the grounds on which a court may refuse to recognise and enforce a foreign-related arbitral award.\textsuperscript{103}

14 \textit{1995: China’s First Arbitration Law Came Into Effect}

In 1994, the PRC promulgated China’s first arbitration law to take effect on 1 September 1995 (\textit{Arbitration Law 1995}), representing a major milestone in China’s arbitration history.\textsuperscript{104} Article 1 of the \textit{Arbitration Law 1995} sets out the purpose of the law:

\begin{quote}
[t]his Law is formulated in order to ensure the impartial and prompt arbitration of economic disputes, to protect the legitimate rights and interests of the parties and to safeguard the sound development of the socialist market economy.\textsuperscript{105}
\end{quote}

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{100}] Ibid.
  \item[\textsuperscript{101}] Ibid art 259.
  \item[\textsuperscript{102}] Ibid.
  \item[\textsuperscript{103}] Ibid arts 217, 260.
  \item[\textsuperscript{104}] \textit{Arbitration Law of the People’s Republic of China} (People’s Republic of China) National People’s Congress, 31 August 1994, revised by the \textit{Decision of the Standing Committee of the National People’s Congress on Revising Certain Laws} (People’s Republic of China) National People’s Congress, 27 August 2009 (‘\textit{Arbitration Law 1995}’).
  \item[\textsuperscript{105}] Ibid ch I art 1.
\end{itemize}
\end{footnotesize}
A review of the *Arbitration Law 1995* shows that it covers the basic principles of arbitration, such as establishment of an arbitration commission and association, the form, content and validity of the arbitration agreement, the application for arbitration and the arbitration procedure, the composition of the arbitral tribunal, the arbitral award and procedure for cancelling an award, and the enforcement of an award.

Although the *Arbitration Law 1995* does cover these basic principles, its provisions are significantly different to those found in international best practice such as the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) (UNCITRAL Model Law).

15 1994 to 1998: CIETAC Arbitration Rules Amended

In 1990, CIETAC administered 238 arbitrations. In 1992, in the landmark decision of *China International Construction and Consultancy Corporation v Beijing Lido Hotel Company*, the Supreme People’s Court held that an arbitral award, rendered by a CIETAC arbitral tribunal, could not be enforced because the parties to the arbitration agreement were both Chinese and as such CIETAC did not have jurisdiction to

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106 Ibid ch II.
107 Ibid ch III.
108 Ibid ch IV s 1.
109 Ibid ch IV s 2.
110 Ibid ch V.
111 Ibid ch VI.
114 See China International Economic and Trade Arbitration Commission, ‘Total Cases Accepted by CIETAC (Foreign and Domestic)’ CIETAC (online) <http://www.cietac.org/index.cm>,
115 *China International Construction and Consultancy Corporation (CICCC) v Beijing Lido Hotel Company (Lido)* reported in (1993) 4 Selected Cases of the People’s Courts 137, 140.
determine the dispute.\textsuperscript{116} Subsequently, in 1994, CIETAC amended its rules to widen its jurisdiction to include foreign-related disputes between Chinese parties.\textsuperscript{117}

A further amendment came in 1995 to accommodate laws and regulations promulgated by the State Council in relation to securities transactions.\textsuperscript{118} In particular, the amendment was aimed at accommodating the \textit{Provisional Regulations on the Administration of the Issuing and Trading of Stocks 1993}.\textsuperscript{119} Articles 79 and 80 of these regulations together provided that parties to a contract for the issuance or trading of securities could include an arbitration clause in their contract requiring that disputes be settled by arbitration by an approved arbitration commission.\textsuperscript{120}

Similarly in 1998, the CIETAC Arbitration Rules were amended to give CIETAC jurisdiction over disputes involving foreign invested enterprises.\textsuperscript{121} These new amendments also provided CIETAC with jurisdiction to administer disputes relating to the Hong-Kong Special Administrative Region, the Macao Special Administrative Region, and the Taiwan region.\textsuperscript{122}

\textsuperscript{116} Ibid.
\textsuperscript{118} Tao, \textit{Arbitration Law and Practice in China}, above n 12, 28.
\textsuperscript{119} \textit{Provisional Regulations on the Administration of the Share Issuance and Trading} (People’s Republic of China) The State Council, 22 April 1993 arts 79-80.
\textsuperscript{120} Ibid.
\textsuperscript{121} \textit{Arbitration Rules of the China International Economic and Trade Arbitration Commission of the People’s Republic of China} (People’s Republic of China) China of International Commerce, 6 May 1998 art 2; for commentary see Tao, \textit{Arbitration Law and Practice}, above n 16, 29.
The final major legislative step in establishing the modern arbitration system, which is in place in China today, came in 1999 when the *Foreign Economic Contract Law*,¹²³ the *Economic Contract Law*¹²⁴ and the *Technology Contract Law*¹²⁵ were collectively superseded by the *Contract Law of the PRC*.¹²⁶

The *Contract Law of the PRC* allows a party to refer a matter to an arbitration commission in the following circumstances:

(a) where the party wishes to modify or revoke a contract, which was concluded as a result of a significant misconception, or which was obviously unfair at the time when concluding the contract;¹²⁷

(b) where a party objects to a contract being terminated;¹²⁸

(c) where there is a dispute in relation to an amount of liquidated damages owing from one party to another;¹²⁹ or

(d) where there is a contractual dispute between the parties.¹³⁰

With respect to (d) above, the parties to a dispute may first attempt to resolve their dispute through consultation or mediation.¹³¹ If such attempt fails or the parties do not

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¹²⁷ Ibid art 54.
¹²⁸ Ibid art 96.
¹²⁹ Ibid art 114.
¹³⁰ Ibid art 128.
¹³¹ Ibid.
wish to use consultation or mediation, the parties may submit the dispute for arbitration before an agreed arbitration institution.\textsuperscript{132}

17 2000 to 2012: CIETAC Arbitration Rules Further Amended

In 2000, a further minor amendment was made to the CIETAC Arbitration Rules, through which CIETAC was given jurisdiction to administer purely domestic disputes.\textsuperscript{133} In 2005, CIETAC’s jurisdiction was consolidated and rephrased to cover: (a) disputes involving international or foreign-related disputes; (b) disputes related to the Hong-Kong Special Administrative Region, the Macao Special Administrative Region or the Taiwan region; and (c) domestic disputes.\textsuperscript{134} The whole structure of the CIETAC Arbitration Rules was changed to enhance party autonomy and procedural flexibility, and foster fairness and transparency in the arbitral procedure.\textsuperscript{135} The aim of these amendments was to bring the CIETAC Arbitration Rules in line with international standards.\textsuperscript{136} The CIETAC Arbitration Rules were amended to include the possibility of a party appointing an arbitrator from outside the CIETAC panel,\textsuperscript{137} the option for using either an inquisitorial or an adversarial style of proceedings,\textsuperscript{138} and the possibility of CIETAC administering cases under rules other than its own.\textsuperscript{139}

\begin{thebibliography}{99}
\bibitem{132} Ibid.
\bibitem{138} Ibid art 29(3).
\bibitem{139} Ibid art 4(2); Moser and Yu Jianlong, above n 93, 555.
\end{thebibliography}
By 2011, CIETAC’s caseload had increased to 1485 arbitrations, most of which were being handled by the Beijing headquarters. The growth of CIETAC as an international commercial arbitration centre has been attributed to a number of factors: (1) the Chinese government authorised CIETAC as the sole international commercial arbitration centre in China; (2) numerous laws in China specifically recommend that parties should refer their dispute to CIETAC; (3) the rapid expansion of the Chinese economy as a result of international trade and investment has naturally led to an increase in the number of arbitrable disputes; and (4) Chinese parties generally have little experience with dispute resolution procedures outside China therefore in the majority of cases the Chinese party will include a CIETAC arbitration clause in its standard form contract and will generally not be agreeable to another institution being named.

In March 2012, CIETAC released a further amended version of its rules, effective as of 1 May 2012 (2012 CIETAC Arbitration Rules). The 2012 CIETAC Arbitration Rules were designed to meet the needs of development, to further standardise CIETAC’s procedures, to bring the Rules in line with international best practice and to promote efficiency. However, tensions developed during the drafting of the 2012

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140 See China International Economic and Trade Arbitration Commission, ‘Total Cases Accepted by CIETAC (Foreign and Domestic)’ CIETAC (online) <www.cietac.org/index.cms>.
142 See section I above.
143 Liu and Lourie, above n 54, 542.
CIETAC Arbitration Rules between the Beijing headquarters of CIETAC and both the Shanghai and Shenzhen sub-commissions.\textsuperscript{146} A dispute then erupted between the Beijing headquarters of CIETAC and the Shanghai and Shenzhen sub-commissions upon release of the 2012 CIETAC Arbitration Rules as it was at this point that the division of power and money within CIETAC changed.\textsuperscript{147} Article 2(3) of the 2012 CIETAC Arbitration Rules provides:

CIETAC is based in Beijing. It has sub-commissions or centres in Shenzhen, Shanghai, Tianjin and Chongqing. The sub-commissions/centres are CIETAC’s branches, which accept arbitration applications and administer arbitration cases with CIETAC’s authorization.\textsuperscript{148}

The 2012 CIETAC Arbitration Rules therefore established the role of CIETAC Beijing as the primary Secretariat of CIETAC and emphasised the notion that the sub-commissions are merely branches of CIETAC, rather than independent arbitral institutions in their own right.\textsuperscript{149}

In response to the amendments, and to the shift in power and money, on 10 July 2012, the Shanghai sub-commission declared itself independent of CIETAC.\textsuperscript{150} Following this, in a press release on 1 August 2012, CIETAC Beijing disqualified both the CIETAC Shanghai and the CIETAC Shenzhen sub-commissions from accepting and administering CIETAC cases on the ground that, in violation of the CIETAC articles of

\textsuperscript{147} Ibid.
\textsuperscript{149} Rose, above n 146, 142.

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association, the sub-commissions had refused to apply the 2012 CIETAC Arbitration Rules and to remain under Beijing leadership.\(^{151}\) Three days later, on 4 August 2012, the Shanghai and Shenzhen sub-commissions once again restated their independence from CIETAC Beijing and announced that they would continue to use the CIETAC Rules 2005 until such time as their own rules come into force.\(^{152}\)

The final step in the split away from CIETAC came in December 2012, when CIETAC formally announced its termination of the authorisation of the Shanghai and Shenzhen sub-commissions to act and administer CIETAC arbitration cases.\(^{153}\) The sub-commissions have since established themselves as legitimate and independent arbitral institutions, with the former being named Shanghai International Economic and Trade Commission or Shanghai International Arbitration Centre,\(^{154}\) and the latter being named the South China International Economic and Trade Commission or the Shenzhen Court of International Arbitration.\(^{155}\)

The effects of the split on arbitration in China, and on confidence in the Chinese arbitral system, have already begun to ripple through with the Jiangsu Higher People’s Court declining to enforce an arbitral award on the basis that it was rendered by the CIETAC


\(^{154}\) See <www.shiac.org>.

\(^{155}\) See <www.sccietac.org>.
Shanghai sub-commission, which no longer had jurisdiction to hear the dispute because it was no longer part of CIETAC.\textsuperscript{156}

It is no surprise that commentators have argued that as a result of the split, and the way in which the dispute was handled by CIETAC Beijing, CIETAC is now a tarnished brand and must do much work to promote itself as an \textit{international}, rather than a Chinese, arbitral institution.\textsuperscript{157}

However, statistics seem to be at odds with this view, with a recent 2014 press release stating that CIETAC:

accepted in 2013 a total of 1,256 economic and trade dispute cases, including 375 foreign-related cases and 881 domestic cases. The total is an 18.5\% increase (by 196 cases) from 2012. Of the total, the CIETAC Beijing (headquarters) accepted 1,058 cases, up by 8.51\%, including 322 foreign-related cases (up by 19 cases) and 736 domestic cases (up by 64 cases).\textsuperscript{158}

Other commentators have also agreed that while 2012 may have focused on the split between CIETAC, China has since taken positive steps to rebuild its brand as an arbitration destination.\textsuperscript{159} There is no doubt that CIETAC has been, and continues to be, instrumental in the development of arbitration in China and, in particular, in the promotion of China as the seat of arbitration.

\textsuperscript{156} \textit{Jiangxi LDK Solar Hi-Tech Co. Ltd v CSI Solar Power (China) Inc}, Higher People’s Court of Jiangsu, Suzhou, 7 May 2013 reported in (2013) XXXVIII \textit{Yearbook of Commercial Arbitration} 354.

\textsuperscript{157} Rose, above n 146, 175 – 176.


\textsuperscript{159} David Howell, James Rogers and Mathew Townsend ‘Reconsidering arbitration in China’ (2013) \textit{China Law and Practice}. 
2008: Civil Procedure Law 1991 Amended

On 28 October 2007, the Standing Committee of the National People’s Congress promulgated the Decision on Revising the Civil Procedure Law of the People's Republic of China of the Standing Committee of the National People's Congress, which amended the Civil Procedure Law 1991. The main changes in so far as the enforcement of arbitral awards is concerned addressed the timeframe for making an application for enforcement. The new version of the Civil Procedure Law came into effect on 1 April 2008 (Civil Procedure Law 2008).

2013: Civil Procedure Law 2008 Amended

On 31 August 2012, the Standing Committee of the National People’s Congress promulgated the Decision of the Standing Committee of the National People's Congress on Revising the "Civil Procedure Law of the People's Republic of China" which introduced amendments to the Civil Procedure Law 2008, effective from 1 January 2013 (Civil Procedure Law 2013). The amendments were aimed at increasing certainty of the arbitration process and expanding the support that the people’s courts can offer to arbitration.

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161 Ibid art XV.
165 Howell, above n 159.
It is clear from the history of arbitration in China that arbitration is not a new concept to the Chinese. While arbitration in its modern form has only recently taken shape in the PRC, arbitration as a method of dispute resolution can be traced back to Ancient Chinese origins. With China's accession to the New York Convention, the establishment of CIETAC, the enactment of the Arbitration Law 1995, and the support that China has shown for arbitration through its designation of arbitration as the key dispute resolution method and, in particular, through its recent changes to the CIETAC Arbitration Rules and the Civil Procedure Law 2013, it is argued here that China has solid historical foundations in place on which it has the potential to build a successful and indeed leading arbitration system.

B Arbitration in China: The Cultural Context

Not only does China’s arbitration history set solid foundations on which to build a successful arbitration regime, so too does Chinese culture. This section identifies the key philosophical influences on arbitration in China and explains how they contribute to China’s potential to be a leading arbitral jurisdiction.

1 Confucian Influences

The traditional Chinese view of law is primarily influenced by Confucian teachings. Confucianism is an ethical system which seeks to teach people the proper way to behave in society. The guiding Confucian belief is that an individual should be

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166 Zimmerman, above n 11, 36.
guided by certain values, rather than being forced to behave in a certain way because of the threat of punishment by the law. The main Confucian values are benevolence (Ren), loyalty (Yi), ritualism (Li), wisdom (Zhi) and sincerity (Xin).

Confucianism emphasises duties and obligations of people rather than individual rights and focuses on the interests and harmony of the family or community rather than the rights of each single person. Although there are codes of conduct in Confucianism, there is no rigid code of law which can be enforced. Rather Confucianism emphasises the rule of man as opposed to the Western style rule of law. Confucian belief is that good comes from within a person therefore if a person chooses to have the rulers decide a dispute the result is that arbitrary justice is done by those who hold power. As such, those following the Confucian way of life have a disdain for litigation and prefer to have their disputes resolved by mediation, negotiation or arbitration due to the consensual nature of these dispute resolution processes. On this basis, it is argued here that Chinese culture makes it apt for establishing a successful arbitration regime based on consent and party autonomy.

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168 Chen, above n 167, 262.
170 Kaufmann-Kohler and Kun, above n 14, 479-492; see generally Liu Shu-Hsien, Understanding Confucian Philosophy: Classical and Sun-Ming (Praegar, 1998).
171 Shu-Hsien, above n 170.
172 Zimmerman, above n 11, 36; Chad Hansen, A Daoist Theory of Chinese Thought: A Philosophical Interpretation (Oxford University Press, 1992) 64.
173 Hansen, above n 172, 351-354.
174 Zimmerman, above n 11, 36.
175 Kaufmann-Kohler and Kun, above n 14, 479-492.
176 Zimmerman, above n 11, 36.
2 Daoism Influences

Daoism is a school of thought that maintains that a person must follow the Dao (the way) without interference of desires.\textsuperscript{177} The Dao came to refer to a proper course of human conduct.\textsuperscript{178} Daoists encourage inaction and political passivity and they oppose institutions and organisations, laws and governments, which they believe all obstruct the Dao.\textsuperscript{179} Daoists advocate that the best way to govern is not to govern and therefore that government should serve only as a guide.\textsuperscript{180} Daoists believe in a system of moral retribution in which the Daoist gods in heaven and hell will punish people for their wrongdoing.\textsuperscript{181} They therefore believe that there is no need for the government to have law in place to punish people for their wrongdoing.\textsuperscript{182} Daoism is, in a way, similar to the natural law theory in Western legal theory.\textsuperscript{183} It is argued here that Daoism forms a solid basis on which principles of arbitration, such as the prevalence of the agreement of the parties can thrive.

3 Legalism Influences

The third school of thought, which has significantly influenced the Chinese legal system, is Legalism. This school of thought has its roots in the teachings of the First Emperor of China and advocates a system of rewards and punishments in order to avoid social disruption.\textsuperscript{184} The Legalists present a strong case for replacing local customs and

\textsuperscript{178} Stephen R. Bokenkamp, ‘Daoism: An Overview’ in Lindsay Jones (ed), \textit{Encyclopaedia of Religion} (Macmillan Reference USA, 2\textsuperscript{nd} ed, 2005) 2176, 2178.
\textsuperscript{179} Zimmerman, above n 11, 39;
\textsuperscript{180} Ibid.
\textsuperscript{181} Ibid; Bokenkamp, above n 178, 2178; see generally Livia Kohn, \textit{Daoism and Chinese Culture} (Three Pines Press, 2001); David C. Yu, \textit{History of Chinese Daoism} (University Press of America, 2000).
\textsuperscript{182} Zimmerman, above n 11, 39; see generally Hansen, above n 172.
\textsuperscript{183} Peng He, ‘The Difference of Chinese Legalism and Western Legalism’ (2011) 6(4) \textit{Frontier Law China} 645, 646.
\textsuperscript{184} Zimmerman, above n 11, 39.
guiding principles with a unified, state-approved legal system that is clearly written, sets immutable standards, and is backed up with an appropriate system of punishment for disobedience.\textsuperscript{185} The Legalists argue for a society ruled by black letter law.\textsuperscript{186} According to Legalists, the law is to be created by the official authorities and published to the common people.\textsuperscript{187} Chinese legalism has been said to be akin to the Western legal theory of positivism.\textsuperscript{188} However, Chinese legalism does not exclude morality.\textsuperscript{189} It can be said that the prevalence of legalist ideology formed the basis for the introduction of the written rule of law in China. It is argued here that the Legalist approach forms a reliable basis on which the Chinese can justify the need for a detailed, written arbitration regime.

4 \textit{Does Chinese Culture Support Reform of China’s Arbitration Regime?}

It is clear that the Chinese legal system is influenced by three main schools of thought: Confucianism, Daoism and Legalism. It is argued here that the influence of all three schools has the potential to shape China’s future as a leading arbitral jurisdiction. The Confucian and Daoist preference towards being guided by moral principles, and their preference towards resolving disputes through negotiation, form a solid cultural and philosophical basis on which arbitration principles, such as party autonomy, can flourish. On the other hand, the rigid view of the law advocated by Legalism has the potential to foster the predictability and certainty needed for the arbitration system to be appealing to foreign entities.

\textsuperscript{185} Karen Turner, ‘Legalism’ in Lindsay Jones (ed), \textit{Encyclopaedia of Religion} (Macmillan Reference USA, 2\textsuperscript{nd} ed, 2005) 5394, 5395.
\textsuperscript{186} Peng He, above n 183, 649.
\textsuperscript{187} Ibid.
\textsuperscript{189} Peng He, above n 183, 649.
There is no doubt that arbitration and the enforcement of arbitral awards is vital to securing China’s future position as a leader in the world economy. This section explores why this is so.

1  **Arbitration Is The Preferred Method of Dispute Resolution**

It has long been recognised that arbitration is the preferred method of dispute resolution of the international business community. Over the last decade, China has actively promoted arbitration as the preferred method of dispute resolution for dealing with both domestic and international commercial disputes in China. As such, arbitration is vital to China’s ability to do business with the rest of the world – if a fair and predictable arbitration system is not available, those doing business with China will think twice about entering into business relationships with Chinese parties.

2  **China’s Is Set To Become The Leader of The World Economy**

From the early 1500s until the early 1800s, China's economy was one of the largest in the world, but the following two centuries were catastrophic, with China declining dramatically between 1820 and 1950. However, in 1979 China began to rise again with a transition from a rural, agricultural society to an urban, industrial one, and from a socialist economy to a private-sector-led economy. The exponential growth, which that transition has brought throughout the past four decades, has marked a major event in world history.

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190 Blackaby et al, above n 9, 1 [1-01]; Di Pietro, above n 9, 85.
193 Ibid.
Since the opening of the Chinese economy in 1979, China's international trade has expanded steadily, with major acceleration occurring in the 1990s. By 2004, China's exports and imports had grown faster than world trade had for 20 years. China is now the world's largest manufacturer and exporter, the largest importer of copper and steel, and among the largest importers of iron ore and aluminium. This rapid growth has brought many other achievements with it: for example, two of the world's top 10 banks are now Chinese; 61 Chinese companies are on the Global Fortune 500 List; the world's second-largest highway network, the world's three longest sea bridges and six of the world's largest container ports are located in China.

Since China entered its globalisation phase in 1998, it has become a leader in the world economy, overtaking Japan in 2010 and coming second only to the United States by 2012. In 2011, the International Monetary Fund predicted that China would surpass the United States as the leader of the world economy by 2016, much earlier than anticipated. It appears that China is on track to reach that goal, with recent 2014 reports and speeches from the International Monetary Fund stating that China alone has accounted for over a third of the global economy’s growth over the past five years, and over half of the growth of the emerging and developing economies. There is also widespread speculation that China could even achieve its goal by as early as the end of

195 Ibid 5.
196 The World Bank, China 2030, above n 3, 3.
197 Ibid.
199 Ibid 3.
With such rapid growth, China is set not only to become the leader of the world economy, but to become the global leader.  

3 China’s Economic Success Is Dependent On Its Dispute Resolution System

Given that arbitration is the preferred method of dispute resolution of the international business community and China’s economy is growing rapidly, mainly as a result of foreign trade and investments, it comes as no surprise that parties to contracts with the Chinese are increasingly stipulating arbitration as the dispute resolution mechanism in contracts entered into between Chinese and non-Chinese entities.

Further, a perfect arbitration regime is rendered nugatory if the resulting arbitral award cannot be enforced against the Chinese entity. As far back as the 1920s the international business community has recognised that the success of international arbitration depends not only on the willingness of the courts to enforce arbitration agreements but also on their willingness to enforce the resulting arbitral awards. As the United States Supreme Court once said, in the landmark case of Scherk v Alberto Culver, to refuse to recognise and enforce an arbitral award:

202 Wolf and Pilling, above n 6; Monaghan, above n 6; Giles, above n 6, 1; J.M.F and L.P, above n 6.
204 See section I above.
would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.\textsuperscript{207}

On this basis, it is argued here that China's future economic success is dependent upon it having an arbitration system and an enforcement system in place that mirrors international best practice both in theory and in practice.

D \textit{CHINA HAS THE POTENTIAL TO BE A LEADING ARBITRAL JURISDICTION}

This chapter has shown that arbitration is not a new concept to the Chinese. Rather, arbitration has been used in China as a method of resolving civil disputes for centuries and it is now the preferred method of dispute resolution. As such, the history of arbitration in China forms a strong foundation on which it can build and enhance to bring it in line with modern, international standards. In addition, the cultural and philosophical background of the Chinese people show that the Chinese are more amenable to arbitration, as a consensual method of dispute resolution, than they are to a strict and rigid court procedure. It is argued here that Chinese culture therefore provides it with the potential to create an arbitral regime that thrives on party autonomy, is void of bias and corruption, and provides the predictability required for foreigners to be confident in the Chinese arbitration system, in particular in its system for enforcement of foreign awards.

Moreover, China’s predicted future place as the leader of the world economy suggests it has excellent potential to become a, if not the, leading arbitral jurisdiction in the world. The World Bank has stated:

\textsuperscript{207} Ibid 508.
No other country is poised to have as much impact on the global economy over the next two decades. Even if China's growth rate slows as projects, it would still replace the United States as the world's largest economy by 2030 .... it is expected to remain the world's largest creditor.208

It is no doubt inevitable that as its economy grows, more and more disputes will arise and China's arbitration system will be put to the test.

Against this backdrop, China’s recent launch of the 2012 CIETAC Arbitration Rules and the implementation of the Civil Procedure Law 2013 both indicate that the Chinese have turned their minds to arbitration, have begun to understand the importance of having a predictable, certain and transparent arbitration process and have started to bring about the necessary change. It is therefore argued that if China is to live up to its expectations of becoming the world's largest economy, and potentially the global leader, by 2030, the next step is for China to turn its mind to its enforcement procedure and bring about the reforms suggested in this paper.

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208 The World Bank, China 2030, above n 3, 7.
III. THE FRAMEWORK FOR ENFORCEMENT OF FOREIGN-RELATED AND FOREIGN ARBITRAL AWARDS IN THE PRC

To analyse whether the Chinese system for the enforcement of foreign and foreign-related arbitral awards is in need of reform, and if so how that reform can be brought about, it is necessary to understand the framework in which the current enforcement system sits. This section III therefore: first, describes the role of the Chinese legislature in the enforcement of arbitral awards in the PRC; second, discusses the role of the Chinese judiciary in the same; third sets out the difference between foreign-related and foreign arbitral awards in the PRC; fourth identifies the legislative framework in which enforcement of foreign-related and foreign arbitral awards takes place; and fifth comments on the framework for enforcement of foreign-related and foreign arbitral awards as a basis for reform.

A THE ROLE OF THE NATIONAL PEOPLE’S CONGRESS AND ITS STANDING COMMITTEE

The National People’s Congress is the highest organ of the PRC\(^{209}\) and is responsible for passing and amending legislation.\(^{210}\) It meets once per year for two to three weeks but elects a number of individuals to form the Standing Committee of the National People’s Congress, which sits permanently.\(^{211}\) Interestingly, the National People’s

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\(^{210}\) Ibid ch III s I arts 58, 62, 64.

\(^{211}\) Ibid ch III s I arts 57, 63.
Congress elects the president and vice-president of the PRC,\(^{212}\) and elects the president of the Supreme People’s Court.\(^{213}\)

Further, the Standing Committee of the National People’s Congress is, amongst other things, responsible for supervising the work of the Supreme People’s Court\(^{214}\) and has the power to appoint or remove (at the recommendation of the president of the Supreme People’s Court) the vice-presidents and judges of the Supreme People’s Courts and members of its judicial committee.\(^{215}\)

It is argued that the National People’s Congress and its Standing Committee, through their legislative function, are essential to the development and reform of the system for the enforcement of arbitral awards in the PRC. In addition, through their role as the appointing authority for key individuals (both within the government and within the judiciary) they have the potential to facilitate a pro-arbitration approach to the enforcement of arbitral awards in the PRC.

**B THE ROLE OF THE CHINESE JUDICIARY**

An understanding of the Chinese court structure, and the powers and obligations of each court, is imperative if one is to understand the process for enforcement of foreign and foreign-related arbitral awards in the PRC. Chapter III, section VII of the *Constitution of the PRC 2004* establishes the ‘people’s courts’ and sets out the hierarchy of the Chinese judicial system, along with the rights and responsibilities of each people’s court.\(^{216}\)

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\(^{212}\) Ibid ch III s I art 62(4).

\(^{213}\) Ibid ch III s I art 62(7).

\(^{214}\) Ibid ch III s I art 67(6).

\(^{215}\) Ibid ch III s I art 67(4).

\(^{216}\) Ibid ch III s VII.
Hierarchy of the People’s Courts

Article 124 of the Constitution of the PRC 2004 establishes the Supreme People’s Court,\footnote{Constitution of the PRC 2004 ch III s VI art 124.} which is the highest judicial organ of the state\footnote{Ibid ch III s VI 127(2); Organic Law of the People's Courts of the People's Republic of China (People's Republic of China) National People's Congress, 1 July 1979, revised according to the Decision Concerning the Revisions of the Organic Law of the People's Courts of the People's Republic of China (People's Republic of China) National People's Congress, 2 September 1983, and Decision of the Standing Committee of the National People's Congress on Amending the Organic Law of the People's Courts of the People's Republic of China (People’s Republic of China) National People’s Congress, 31 October 2006 ch II art 29 (‘Organic Law of the PRC 2007’).} and is ultimately responsible to the National People's Congress and its Standing Committee.\footnote{Constitution of the PRC 2004 ch III s VI art 128.} Article 127(2) of the Constitution of the PRC 2004 sets the hierarchy of the courts, by providing that a higher level court will supervise the administration of justice by lower level courts.\footnote{Ibid ch III s VI art 127(2).} In particular, the Supreme People’s Court has the power to supervise the administration of justice by the local people’s courts at all levels.\footnote{Organic Law of the PRC 2007 ch II art 29.}

(a) The Supreme People’s Court

The Supreme People’s Court is composed of a president, vice-presidents, chief judges and associate chief judges of different divisions, and judges.\footnote{Ibid art 30.} It has the jurisdiction to hear certain cases of first instance, as set out in laws and decrees, and, more importantly in the context of enforcement of arbitral awards, cases of appeals and protests lodged against judgments and orders of higher people’s courts.\footnote{Ibid art 31.} In addition, the Supreme People’s Court gives interpretations on questions concerning the application of laws and decrees in judicial proceedings.\footnote{Ibid art 32.} Moreover, as will be discussed in greater detail later...
in this paper, the Supreme People’s Court is ultimately responsible for any decision to refuse to enforce an arbitral award.\textsuperscript{225}

It is argued here that through taking a pro-arbitration approach to the enforcement of foreign and foreign-related arbitral awards, and to opinions concerning the interpretation and application of laws relating to arbitration, the Supreme People’s Court has the power to fundamentally reform the system for, and approach to, the enforcement of foreign and foreign-related arbitral awards in the PRC.

(b) \textit{Higher People's Courts}

The higher people’s courts sit directly below the Supreme People’s Court and are located in the provinces, autonomous regions and municipalities under the control of the Central Government.\textsuperscript{226} They are made up of a president, vice-president, chief judges and associate chief judges of divisions, and judges.\textsuperscript{227} The higher people’s courts deal with cases in the first instance assigned by laws and decrees, cases of first instance transferred from lower people’s courts, and cases of appeals and protests lodged against judgments and orders made by a lower courts.\textsuperscript{228} As will be seen in section IV of this paper, the higher people’s courts often review the decisions of the intermediate people’s courts on the enforcement of arbitral awards.\textsuperscript{229}

\textsuperscript{225} See section IV.H below; \textit{Notice of the Supreme People’s Court on the Handling of Issues Concerning Foreign-related Arbitration and Foreign Arbitration} (People’s Republic of China) Supreme People’s Court, 20 August 1995 art 2.
\textsuperscript{226} \textit{Organic Law of the PRC} 2007 ch II art 25.
\textsuperscript{227} Ibid ch II art 26.
\textsuperscript{228} Ibid ch II art 27.
\textsuperscript{229} See below section IV.
(c) Intermediate People's Courts

The intermediate people’s courts are established in prefectures of provinces and autonomous regions, and municipalities directly under the Central Government or under the jurisdiction of a province or an autonomous region. Each intermediate people’s court is made up of a president, vice-president, chief judges and associate chief judges of divisions and judges. Applications for enforcement of arbitral awards are made to the intermediate people’s courts and as such they play a key role in the enforcement of foreign-related and foreign arbitral awards in the PRC.

(d) Basic People's Courts

The basic people’s courts are the lowest level of court in the PRC. They are located at the county and municipal district level and are comprised of a president, vice-president and judges. As applications for enforcement of arbitral awards are to be made to the intermediate people’s courts, the basic people’s courts are rarely involved in enforcement proceedings.

2 Overarching Role of the People’s Courts

The overarching role of the people’s courts is defined as being:

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to try … civil cases and, through judicial activities, to ... settle civil disputes, so as to safeguard the system of dictatorship of the proletariat, maintain the socialist legal system and public order, protect socialist property owned by the whole people,
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231 Ibid ch II art 23.
232 Civil Procedure Law 2013 ch 27 arts 279, 283.
234 Ibid ch II art 18.
collective property owned by working people and the legitimate private property of citizens, the citizens' right of the person and their democratic and other rights, and ensure the smooth progress of the socialist revolution and socialist construction of the country.\footnote{Organic Law of the PRC 2007 art 3.}

It is clear from the express words of this article that, while part of the courts’ role is to settle civil disputes, they must do so with the aim of protecting Chinese interests. A tension therefore arises in the context of the enforcement of foreign and foreign-related arbitral awards against a Chinese entity (in particular against a state-owned Chinese entity). This is because, in the author’s view, few, if any, circumstances would arise where a court would be able to protect the property of Chinese entities, while at the same time enforce an arbitral award against them. It appears that this tension has been given little consideration by the courts or by commentators, although it may serve to explain why in many cases the people’s courts choose not to enforce arbitral awards.\footnote{See section V below.}

3 Impartiality and Independence of the Judiciary

The people's courts are required to exercise their power independently, without interference by any administrative organ, public organisation or individual\footnote{Organic Law of the PRC 2007 ch 1 art 4.} and are required to treat all people equally.\footnote{Ibid ch 1 art 5.} If a party to a case considers that a member of the judicial personnel has an interest in the case, or for any other reason cannot determine the matter impartially, the party has the right to ask the member to withdraw.\footnote{Ibid ch 1 art 15.} As such, parties seeking to enforce an arbitral award in China should have comfort that, at least in theory, the courts are under an obligation to carry out their tasks impartially and independently.
The Concept of Judicial Committees

An interesting aspect of the Chinese judicial system is that the people's courts at all levels have 'judicial committees.' These judicial committees are made up of members of the judiciary, who are chosen by the local people's congress at the corresponding level. The judicial committees are responsible for discussing judicial experience, difficult or important cases, and other issues relating to the work of the judiciary. It is argued here that through discussion, publication of opinions and advocating for reform, the Chinese judicial committees have the potential to make a significant difference to the attitude towards the enforcement of foreign and foreign-related arbitral awards in the PRC.

The Appeals System

In China, cases of first instance are tried in the relevant court by a collegial panel of judges or of judges and people's assessors (aside from very simple civil cases that are tried by a single judge). People’s assessors used to be members of the public who were selected by the courts to sit alongside judges.

In 2004, the Standing Committee of the National People’s Congress issued the Decision of the Standing Committee of the National People’s Congress on Perfecting the System of People’s Assessors, which was implemented by the Notice of the Supreme People’s Court and the Ministry of Justice on Printing and Distributing the Opinions on the

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241 Ibid ch I art 10.
242 Ibid.
244 David Fang, ‘Jurors given clearer duties in move to clean up courts; Under new system, assessors will be appointed by people’s congresses’, South China Morning Post (China), 11 September 2004, 4.
Work of Appointing, Training and Appraising People’s Assessors.\textsuperscript{245} The decision was essentially aimed at combating corruption in the legal community through imposing requirements on the qualifications of people’s assessors, requiring the local people’s congress to appoint the people’s assessors, and requiring them to sit on a bench with judges for important civil and administrative cases.\textsuperscript{246} In order to be a people’s assessor, a citizen must have the educational background of college or above.\textsuperscript{247} Once appointed, a people’s assessor will undertake training before sitting on a trial.\textsuperscript{248} If the president of a people’s court finds some definite error in the determination of facts, or application of law, in a legally effective judgment or order of his court, he must submit the judgment or order to the judicial committee for disposal.\textsuperscript{249} Aside from this, the people's courts adopt a system whereby the second instance is the last.\textsuperscript{250} This means that a party may bring an appeal from a judgment, or order, of first instance of a local people's court to the next higher level court.\textsuperscript{251} However judgments and orders made in the appeal by the intermediate courts, higher courts or the Supreme People's Court are legally effective judgments and orders and cannot be appealed.\textsuperscript{252}

\textsuperscript{245} Notice of the Supreme People’s Court and the Ministry of Justice on Printing and Distributing the Opinions on the Work of Appointing, Training and Appraising People's Assessors implementing Decision of the Standing Committee of the National People’s Congress on Perfecting the System of People’s Assessors (People's Republic of China) Supreme People’s Court and the Ministry of Justice, 13 December 2004.

\textsuperscript{246} Fang, above n 244, 4.

\textsuperscript{247} Notice of the Supreme People’s Court and the Ministry of Justice on Printing and Distributing the Opinions on the Work of Appointing, Training and Appraising People’s Assessors implementing Decision of the Standing Committee of the National People’s Congress on Perfecting the System of People’s Assessors (People’s Republic of China) Supreme People’s Court and the Ministry of Justice, 13 December 2004 art 2.

\textsuperscript{248} Ibid arts 10-13.

\textsuperscript{249} Organic Law of the PRC 2007 ch I art 13.

\textsuperscript{250} Ibid ch I art 11.

\textsuperscript{251} Ibid.

\textsuperscript{252} Ibid.
Given that the Supreme People’s Court has the final word on the non-enforcement of arbitral awards,\textsuperscript{253} the appeals system seem to be of little significance in the context of the enforcement of foreign and foreign-related arbitral awards. However, the people’s courts are only under an obligation to report cases of non-enforcement up to the Supreme People’s Court\textsuperscript{254} therefore it appears that it may be possible, through the appeals system, for a party against whom an award is invoked to appeal to the court at the next level against a decision to enforce an arbitral award.

\section*{C \textit{Difference Between Foreign and Foreign-Related Arbitral Awards}}

Understanding the distinction between foreign and foreign-related arbitral awards in the PRC is key to understanding the Chinese system for enforcement of arbitral awards, and the reforms proposed by this paper. Prior to the introduction of the \textit{Arbitration Law 1995}, ‘foreign-related’ arbitral awards were those rendered by the two foreign-related arbitration institutions in China, CIETAC and the China Maritime Arbitration Commission (\textit{CMAC}).\textsuperscript{255} However, this position changed with the introduction of the \textit{Arbitration Law 1995} when the scope of ‘foreign-related’ arbitral awards broadened.

Today, ‘foreign-related’ arbitral awards are those that fall within chapter VII of the \textit{Arbitration Law 1995}. Article 65 of the \textit{Arbitration Law 1995} provides:

\begin{quote}
[t]he provisions of this Chapter shall apply to the arbitration of disputes arising from economic, trade, transportation and maritime activities involving a foreign element.\textsuperscript{256}
\end{quote}

The \textit{Arbitration Law 1995} does not contain any specific definition of ‘foreign-related.’

\textsuperscript{253} See section IV.H below.
\textsuperscript{254} Ibid.
\textsuperscript{255} Tao, \textit{Arbitration Law and Practice}, above n 16, 171.
\textsuperscript{256} \textit{Arbitration Law 1995} ch VI art 65.
Concerning the Application of the Civil Procedure Law of the People’s Republic of China describes the type of cases, which will be deemed to involve ‘foreign elements’:

[c]ivil cases in which one party or both parties are foreigners, stateless persons, foreign enterprises or organizations or the legal facts for establishment, alteration or termination of a civil legal relationship between the parties concerned take place at abroad, or the subject matter of an action is located at abroad shall be the civil cases involving foreign elements.

An arbitration will therefore involve a foreign element, and an arbitral award will be foreign-related, where: (a) at least one party involved in the matter is not a Chinese national; (b) the legal facts which play a role in the legal relationship between the parties occur in a foreign country; or (c) where the subject matter of the dispute is in a foreign country. In contrast, an award will be purely ‘foreign’ under Chinese law where such an award was rendered in a foreign country.

D LEGISLATIVE FRAMEWORK FOR THE ENFORCEMENT OF ARBITRAL AWARDS

As Chinese law differentiates between foreign-related and foreign arbitral awards, the legislative framework for the enforcement of each of these types of awards is different. The applicable frameworks are discussed below.

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258 Ibid art 304.
259 Tao, Arbitration Law and Practice, above n 16, 174.
1 Legislative Framework for the Enforcement of Foreign-Related Arbitral Awards

(a) The Old System For Enforcement

Prior to 1982, the only law that referred to the enforcement of foreign-related arbitral awards in the PRC was the Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade 1954.\textsuperscript{260} Article 11 of this decision provided that:

\begin{quote}
[t]he award of the Arbitration Commission shall be executed by the parties themselves within the time fixed by the award. In case an award is not executed after the expiration of the fixed time, a People’s Court of the People’s Republic of China shall, upon the request of one of the parties, enforce it in accordance with the law.\textsuperscript{261}
\end{quote}

As such, it is clear that prior to 1982, foreign-related arbitral awards were primarily self-executing. Where the parties failed to voluntarily comply with the award within the stipulated timeframe, the relevant people’s court had the power to execute the award, upon the request of a party.

(b) Trial Civil Procedure Law

The position changed in 1982 when the Standing Committee of the National People’s Congress introduced the Trial Civil Procedure Law. Where an arbitration commission in the PRC rendered a foreign-related arbitral award, article 195 of the Trial Civil Procedure Law allowed a party to apply to the intermediate people’s court in the place


\textsuperscript{261} Ibid art 11.
where the arbitration commission was located, or at the place where the property in question was located, for the enforcement of the arbitral award in accordance with the law.\textsuperscript{262}

(c) \textit{Civil Procedure Law 1991 to 2013}

The law was again amended in 1991 when the \textit{Trial Civil Procedure Law} was replaced with the \textit{Civil Procedure Law 1991}. The 1991 version of the \textit{Civil Procedure Law} provided that if one party failed to implement an arbitral award, the party entitled to the benefit of an arbitral award had the right to apply to the relevant intermediate people’s court for enforcement of the award.\textsuperscript{263} The 1991 version also provided that if certain grounds were satisfied, the intermediate people’s court must deny enforcement of the award.\textsuperscript{264}

In 1992, the Judicial Committee of the Supreme People’s Court issued the \textit{Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China},\textsuperscript{265} which confirmed, in article 313, that if one party fails to perform a foreign-related award and the other party applies to the people’s court for enforcement of the award, the application shall be handled according to the \textit{Civil Procedure Law}.\textsuperscript{266}

The Standing Committee of the National People’s Congress enacted amendments to the \textit{Civil Procedure Law 1991} in 2007 and again in 2013. The law as it stands today

\textsuperscript{262} \textit{Civil Procedure Law (for Trial Implementation)} (People’s Republic of China) National People’s Congress, 1 October 1982 art 195.
\textsuperscript{263} \textit{Civil Procedure Law 1991} art 259.
\textsuperscript{264} Ibid art 260.
\textsuperscript{266} Ibid art 313.
contains detailed provisions on the enforcement of foreign-related arbitral awards. Article 273 of the Civil Procedure Law 2013 provides that where a party fails to comply with its obligation to perform a foreign-related arbitral award, the other party may apply for enforcement of the award to the intermediate people’s court of the place of domicile of the person against whom the arbitral award is enforced, or of the place where the property of that person is located.\footnote{Civil Procedure Law 2013 ch 26 art 273.} Notably in the 2007 version of the Civil Procedure Law, article 257 expressly referred to arbitral awards rendered by foreign-related arbitral commissions,\footnote{Civil Procedure Law 2008 art 257.} whereas article 273 of the new 2013 version seems to have broadened this to refer to awards ‘made by an arbitral organ of the People’s Republic of China handling cases involving foreign element.’\footnote{Civil Procedure Law 2013 ch 26 art 273.}

Further, article 274 of the Civil Procedure Law 2013 sets out the grounds on which the intermediate people’s court shall refuse to enforce a foreign-related arbitral award.\footnote{Ibid art 274.} These are discussed in detail in section V of this paper.

(d) Arbitration Law 1995

Similar provisions to those contained in the Civil Procedure Law 2013 can also be found in the Arbitration Law 1995. Article 71 of the Arbitration Law 1995 provides that:

[i]f a party presents evidence which proves that a foreign-related arbitration award involves one of the circumstances set forth in the first paragraph of Article 260 of the

\footnote{Civil Procedure Law 2013 ch 26 art 273.}

\footnote{Civil Procedure Law 2008 art 257.}

\footnote{Civil Procedure Law 2013 ch 26 art 273.}

\footnote{Ibid art 274.}
Civil Procedure Law, the people’s court shall, after examination and verification by a collegial panel formed by the people's court, rule disallow the enforcement.\textsuperscript{271}

Due to the revisions to the Civil Procedure Law, the reference to article 260 should be a reference to the article 274 of the Civil Procedure Law 2013.

(e) A Note On The New York Convention

Interestingly, the New York Convention does not apply to foreign-related arbitral awards in the PRC. Article I(1) of the New York Convention provides that it shall apply to arbitral awards ‘not considered as domestic awards’ in the State where recognition and enforcement of the award is sought.\textsuperscript{272} However, as discussed above at section I.A.10 and section III.D.2.(c) of this paper, when the PRC ratified the New York Convention it made the reciprocity reservation and therefore agreed only to enforce arbitral awards under the New York Convention, which were rendered in another Contracting State.\textsuperscript{273} As such, the New York Convention does not apply to the enforcement of foreign-related arbitral awards in China.

2 Legislative Framework for the Enforcement of Foreign Arbitral Awards

(a) The Old System of Self-Executing Awards

Prior to 1982, there was no legislation in China dealing with the recognition and enforcement of foreign arbitral awards.\textsuperscript{274} Rather, enforcement of foreign arbitral awards relied solely on the party against whom an award was rendered voluntarily.

\textsuperscript{271} Arbitration Law 1995 ch 7 art 71.
\textsuperscript{272} New York Convention art 1(1).
\textsuperscript{274} Tao, Arbitration Law and Practice, above n 16, 174.
complying with the award. Needless to say that in the absence of legislative provisions requiring the enforcement of foreign arbitral awards, where the party against whom a foreign arbitral award was rendered was Chinese, the party seeking to enforce the arbitral award had no legitimate means of seeking such enforcement. Consequently, in many instances, arbitral proceedings were rendered fruitless.

(b) *Trial Civil Procedure Law*

In 1982, the *Trial Civil Procedure Law* took the first step towards the Chinese legal system providing rights in relation to the enforcement of foreign arbitral awards. Article 204 of chapter XX of the *Trial Civil Procedure Law* essentially provided that recognition and enforcement of a foreign arbitral award would only take place in the PRC if the people’s courts were obliged to consider recognition and enforcement of a foreign arbitral award in accordance with a relevant international treaty or on the basis of reciprocity. If the people’s courts were obliged to consider recognition and enforcement, the courts had to enforce the award unless it violated fundamental principles of law of the PRC or her national and social interest. A party could not apply directly to the court to have an arbitral award recognised and enforced: rather, a foreign court had to make an application on behalf of the party seeking recognition and enforcement. In addition, the arbitral award or 'judgment' had to be final in the jurisdiction where it was rendered. An application could therefore not be made to the people’s courts for recognition and enforcement where, for example, the arbitral award was subject to set aside proceedings in another jurisdiction.

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276 *Civil Procedure Law of the People’s Republic of China (for Trial Implementation)* (People’s Republic of China) National People’s Congress, 8 March 1982 ch XX art 204.  
277 Ibid.  
278 Ibid.  
279 Ibid.
(c) Accession to the New York Convention

The next major milestone in the recognition and enforcement of foreign arbitral awards in China came in 1986 when China acceded to the New York Convention. The New York Convention today provides the main legislative framework for the recognition and enforcement of foreign arbitral awards in the PRC. The New York Convention imposes an obligation on member states to recognise and enforce arbitral awards.\textsuperscript{280} Article III of the New York Convention states that:

\begin{quote}
\hspace*{1cm} each Contracting State shall recognize arbitral awards as binding and enforce them ... under the conditions laid down in the following articles.\textsuperscript{281}
\end{quote}

As discussed above, in acceding to the New York Convention, the PRC made two reservations: the reciprocity reservation; and the commercial reservation.\textsuperscript{282} Under the reciprocity reservation, the PRC agreed only to enforce those foreign awards that were rendered in another Contracting State to the New York Convention.\textsuperscript{283} Given that, as at May 2014, there are 149 signatories to the New York Convention, it appears that such a reservation has not, and is probably unlikely, to cause many issues in the enforcement of foreign arbitral awards in the PRC.

Under the commercial reservation however, the PRC agreed to enforce only those awards that are considered ‘commercial’ under the law of the PRC.\textsuperscript{284} The \textit{Circular of Supreme People’s Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards}.

\textsuperscript{281} New York Convention art III.
\textsuperscript{283} Ibid.
\textsuperscript{284} Ibid.
Enforcement of Foreign Arbitral Awards Entered by China provides guidance as to how ‘commercial’ is likely to be interpreted by the people’s courts. Article 2 of this circular provides as follows:

[i]n accordance with the commercial reservation statement made by China when entering the Convention, this Convention shall only apply to the disputes arising from contractual and non-contractual commercial legal relationship. ‘Contractual and non-contractual legal relationship’ specifically refers to the economic rights and obligations resulted from contract, infringement or arising according to law...

Article 2 then goes on to list examples of legal relationships that will be classed as ‘commercial’ under PRC law including: sale of goods; lease of property; project contracting; processing; technology assignment; joint adventure; joint business operation; exploration and development of natural resources; insurance; credit; labour service; surrogate; consultation service; marine/civil/aviation/railway/road passenger and cargo transportation; product liability; environment pollution; and disputes over ownership.

From a plain reading of the express words of the circular, it appears that while the reservation at first seems to be restrictive, it has in fact been interpreted broadly to mean any economic rights and obligations arising from law. Article 2 of the circular does however contain an express carve out for disputes between foreign investors and the host government.

286 Ibid.
287 Ibid art 2.
288 Ibid.
289 Ibid.
Further, article V of the New York Convention contains the ‘refusal’ provisions and sets out an exhaustive list consisting of only five grounds on which an enforcing court can refuse to recognise and enforce an award.\textsuperscript{290} It is well established that the grounds listed in article V of the New York Convention are interpreted narrowly, in light of the pro-enforcement bias of the New York Convention.\textsuperscript{291} In \textit{Parsons & Whittemore Overseas Co v Société Générale de l’Industrie du Papier (RAKTA)},\textsuperscript{292} the US Federal Court of Appeals expressly stated that the defences to enforcement of a foreign award ‘should be construed narrowly. Once again a narrow construction would comport with the enforcement-facilitating thrust of the Convention’.\textsuperscript{293} The refusal provisions will be discussed in detail in section V of this paper.

(d) \textit{Arbitration Law 1995}

The \textit{Arbitration Law 1995} contains limited provision for the enforcement of foreign arbitral awards. However, article 62 of the \textit{Arbitration Law 1995} does state that:

\begin{quote}
[t]he parties shall perform the arbitration award. If a party fails to perform the arbitration award, the other party may apply to the people’s court for enforcement in accordance with the relevant provisions of the Civil Procedure Law. The people’s court to which the application has been made shall enforce the award.\textsuperscript{294}
\end{quote}


\textsuperscript{292} \textit{Parsons & Whittemore Overseas Co v Société Générale de l’Industrie du Papier (RAKTA)} 508 F 2d 969 (2nd Cir. 1974).

\textsuperscript{293} Ibid.

\textsuperscript{294} \textit{Arbitration Law 1995} ch VI art 62.
Interestingly, the final sentence of article 62 of the *Arbitration Law 1995*, by its express use of the word ‘shall’, places the enforcing people’s court under a mandatory obligation to enforce arbitral awards. No exception is provided to this mandatory provision and no guidance is given on how this provision ought to be interpreted.

(e) *Civil Procedure Law 2013*

The *Civil Procedure Law 2013* simply provides that a party wishing to enforce a foreign arbitral award can apply directly to the intermediate people’s court either where the party against whom the award is invoked is domiciled or where the party’s property is located.\(^{295}\) It also provides that the enforcing court must deal with the application for enforcement in accordance with the relevant provisions of the international treaties concluded, or acceded to, by the PRC, or on the principle of reciprocity.\(^{296}\) In the case of a foreign arbitral award rendered by an arbitral tribunal in a Contracting State to the New York Convention, the New York Convention will apply to the recognition and enforcement of the award. As will be seen in section IV of this paper, the *Civil Procedure Law 2013* also provides the relevant legislative framework for the enforcement procedure itself.

E **THE FRAMEWORK FOR ENFORCEMENT OF FOREIGN-RELATED AND FOREIGN ARBITRAL AWARDS AS A BASIS FOR REFORM**

This section III has identified the key organs of the PRC that have the power to bring about change to the PRC’s system of enforcement of foreign and foreign-related arbitral awards. At the highest level, the National People’s Congress and its Standing Committee hold the ultimate power to develop and legislatively implement a reformed

\(^{295}\) *Civil Procedure Law 2013* ch 28 art 283.

\(^{296}\) Ibid.
system for the enforcement of arbitral awards. Further, it is argued that the Supreme People’s Court has the ultimate judicial power to foster a pro-arbitration approach amongst the judiciary towards the enforcement of both foreign and foreign-related arbitral awards, through proposing legislative reforms to the National People’s Congress, issuing opinions on the interpretation and application of the laws relating to the enforcement of awards, discussing the approach towards enforcement of arbitral awards amongst the judicial committees, and overseeing the work of the lower courts in dealing with applications for enforcement.

Moreover, this section III has shown that the legislative framework for the enforcement of foreign-related, and that for foreign, arbitral awards is different. While the Civil Procedure Law 2013 and the Arbitration Law 1995 form the legislative basis for the enforcement of foreign-related arbitral awards, the New York Convention forms the legislative basis for the enforcement of foreign arbitral awards. It is argued that the first step in reforming the PRC’s system for the enforcement of arbitral awards to bring it in line with international best practice, and to make it reliable and predictable, is to eradicate the difference between the two types of arbitral awards and develop one single, unified system of enforcement based on the New York Convention. It is argued here that such a step will increase confidence in the Chinese enforcement system and perhaps even encourage more foreign parties to designate a Chinese arbitration commission to handle their disputes, with the knowledge that the resulting award will still be enforced under the international standards set by the New York Convention.
IV. THE PROCEDURE FOR ENFORCEMENT OF FOREIGN-RELATED AND FOREIGN AND ARBITRAL AWARDS IN THE PRC

While many esteemed authors focus their attention on the grounds on which a court may refuse to enforce a foreign or foreign-related arbitral award in the PRC, it seems that little attention is paid to the actual procedure for enforcement of an award. The New York Convention sets out some basic requirements for an application to enforce a foreign arbitral award, but the details of such procedure were deliberately not included in the Convention and therefore are governed by national law, which differs from country to country. As such, an analysis of whether reform to the enforcement regime in the PRC is needed must necessarily involve and analysis of the procedure for enforcement.

To that end, this section IV: first, steps through and analyses the mechanical procedure of how a party seeking to enforce an arbitral award in China must make its application; second, sets out and examines the procedure that the courts undertake in dealing with an application for enforcement of an arbitral award; and third, analyses whether the procedure established by China is in need of reform and makes recommendations in this regard.

297 New York Convention art IV.
A **MAKING AN APPLICATION FOR ENFORCEMENT**

While the New York Convention sets out some basis requirements for an application for enforcement for foreign arbitral awards, the procedure for making an application for enforcement of foreign and foreign-related arbitral awards is primarily set out in the Civil Procedure Law 2013. The numerous opinions and notices interpreting both the Civil Procedure Law 2013 and the New York Convention provide additional details on the requirements of an enforcement application.

1 **Parties to Enforcement Proceedings**

(a) *Who Has The Right to Seek Enforcement of An Arbitral Award?*

The starting point in determining who has the right to seek enforcement of a foreign-related, or foreign, arbitral award is that the party applying for enforcement must have been a party to the arbitration proceedings, and must be entitled to some benefit as a consequence of the arbitral award. With respect to foreign-related arbitral awards, a party has the right to apply for enforcement of an award where the other party fails to comply with the award. In contrast, with respect to foreign arbitral awards, article IV of the New York Convention merely refers to ‘the party applying for recognition and enforcement,’ and as such does not make a failure by a party to comply with an award a pre-requisite for an application for enforcement.

Despite the slight difference of approach between the Civil Procedure Law 2013 and the New York Convention, it seems unlikely that it results in much practical difference.

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300 New York Convention arts III, IV.
302 Civil Procedure Law 2013 ch 26 art 273.
303 New York Convention art IV.
This is because it is unlikely that a party would incur the time and expense in making an application for enforcement if the party against whom enforcement would be sought voluntarily complies with the award.

(b) The Party Against Whom Enforcement Is Sought

Ordinarily the party against whom enforcement is sought must have been a party to the arbitration proceedings and must be obliged to give some benefit to the other party according to the award.\textsuperscript{304} However, there are a number of circumstances in which it may not be possible to enforce an arbitral award against the same party named in the arbitral award.\textsuperscript{305} This is particularly so in light of the economic development in China and the resulting restructuring and organisation of Chinese companies.\textsuperscript{306} The law in the PRC and the practice of the Chinese courts has developed to accommodate such situations.

\textsuperscript{304} Wunschheim, above n 301, 140.
\textsuperscript{306} Wunschheim, above n 301, 140.
(i) *Where The Party Against Whom Enforcement Is Sought Changes Its Name*

If the party against whom enforcement is sought changes its name between the issuance of the arbitral award and the end of the enforcement proceedings, article 273 of the *Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China* provides that:

the people’s court may order the changed legal person or other organisation as the person subject to enforcement.\(^{307}\)

As such, a change in name will not operate to preclude enforcement of an arbitral award. It is argued here that such a provision can only operate to increase the confidence of foreign traders and investors in China’s enforcement system as they can rest assured that formalistic name changes will not bar enforcement of an award in their favour.

(ii) *Where The Party Against Whom Enforcement Is Sought Merges With Another Entity*

If the party against whom enforcement is sought merges with, or is taken over by, another entity between the issuance of the arbitral award and the end of enforcement proceedings, the entity that takes its the rights and obligations also takes on the party’s obligations pursuant to the arbitral award.\(^{308}\) The party seeking enforcement of an arbitral award can still do so against the new entity which has taken on the rights and

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obligations of the original defendant to the enforcement proceedings. Again it is argued here that such a provision ought to increase the confidence of foreign traders and investors in China’s enforcement system by providing them with an express provision on which to rely to enforce an arbitral award against a merged entity.

(iii) Where The Party Against Whom Enforcement Is Sought Is Split

Where the party against whom enforcement is sought is split into two or more entities, the rights and obligations of that party shall be undertaken by the legal entities existing after the relevant alteration. In particular, the liability of the party against whom the award is invoked is split between each succeeding entity to an extent proportionate to the assets each obtained from the original entity. Similar to where a party against whom an award is invoked has merged with another entity, the ability of foreign entities to enforce their award against multiple entities, where the original party to the award has split, must be seen in a positive light and ought to increase the confidence of foreign entities in the reliability and certainty of China’s enforcement system.

(iv) Where The Party Against Whom Enforcement Is Sought Is Part of A Group of Companies

Interestingly, under PRC law, in circumstances where the party against whom enforcement is sought is a subsidiary of another entity, the people’s court may order enforcement against the parent entity, or against another company in the group of companies, provided that such enforcement does not harm the rights of other creditors

310 Wunschheim, above n 301, 141.
to the property of the parent, or other entity in the group.\textsuperscript{311} Such a provision may be viewed in a positive light from the perspective of a foreign trader or investor seeking to enforce an arbitral award against an entity within a group of companies. This is because it provides protection to the party seeking to enforce the award against the effects of events such as the insolvency of the entity against which the award was rendered. However, the power of the people’s court to enforce an arbitral award against another member within a group of companies appears to undermine the very foundation of arbitration, being the consent of the parties to arbitrate.\textsuperscript{312} Moreover, the approach is contrary to the many doctrines developed by leading arbitral jurisdictions, such as the United Kingdom\textsuperscript{313} and France,\textsuperscript{314} regarding the specific, and limited, circumstances in which an arbitral award can be enforced against another entity within a group of companies.

\begin{itemize}
  \item[] (v) \textit{Where The Party Against Whom Enforcement Is Sought Is Part Of A Joint Venture}
\end{itemize}

If the party against whom enforcement is sought has established a joint venture with another company, any income it earns from that joint venture will be considered as property of the party and can be subject to enforcement.\textsuperscript{315} However, the other party to the joint venture will not be named as a defendant to the enforcement proceedings.\textsuperscript{316} Such a provision appears to be fair and again ought to increase the confidence of foreign

\begin{itemize}
  \item[] \textsuperscript{311} Ibid 142.
  \item[] \textsuperscript{312} Born, above n 299, 224; Blackaby et al, above n 9, 85 [2.01]; Bernard Hanotiau, \textit{Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions} (Kluwer Law International, 2006) 48-51.
  \item[] \textsuperscript{315} Shengchang Wang, \textit{Resolving Disputes in the PRC: a practical guide to arbitration and conciliation in China} (FT Law and Tax Asia Pacific, 1996) 169.
  \item[] \textsuperscript{316} Ibid.
\end{itemize}
traders and investors by expressly providing them with a further stream of income against which to seek enforcement of an award.

2 The Court with Competent Jurisdiction

A party wishing to enforce either a foreign-related or a foreign arbitral award must submit its application for enforcement to an intermediate people’s court. With respect to foreign-related arbitral awards, a party may apply to the intermediate people’s court located in the place either: (a) where the person against whom the application for enforcement is made has his domicile; or (b) where the property of the person against whom the application for enforcement is made is located. A party wishing to enforce a foreign-related arbitral award therefore has the choice of submitting its application to one of two intermediate people’s courts. It is argued here that as a matter of practice, a party choosing a location for enforcement must think carefully about where the party against whom the award is invoked has liquid assets and which court is most likely to be reliable and independent.

On the other hand, the New York Convention only refers to a ‘competent authority’ in the place where recognition and enforcement is sought. To this end, article 283 of the Civil Procedure Law 2013 provides that the party seeking enforcement of a foreign award must apply to the intermediate people’s court where the party against whom the award is invoked has his place of domicile or where his property is located. This

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319 Wunschheim, above n 301, 138; Blackaby et al, above n 9, 624 [11.14].
320 New York Convention art 5.
321 Civil Procedure Law 2013 ch 27 art 283.
approach is *prima facie* in line with approach to the enforcement of foreign-related arbitral awards set out above.

However, the *Circular of Supreme People’s Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China* provides that where the person against whom the award is being invoked is a legal person, the party seeking recognition and enforcement of the award must do so at the intermediate people’s court where the legal person’s principal executive office is located. Only if the principal office is located outside of the PRC does the invoking party have the right to seek recognition and enforcement from the intermediate people’s court where the party subject to enforcement’s property is located. As such, a party wishing to enforce a foreign arbitral award does not have a choice as to where it seeks enforcement of the award, contrary to what may appear to be the case under the *Civil Procedure Law 2013*. It is unclear whether the National People’s Congress intended to create a hierarchical system for determining the relevant court to have jurisdiction over enforcement proceedings for the purposes of foreign arbitral awards.

Moreover, it is also unclear whether the provisions of the circular prevail over the *Civil Procedure Law 2013*, given that it relates specifically to the implementation of the New York Convention, or whether the *Civil Procedure Law 2013* prevails, given that it is the most recent law on point. In practice, however, there appears to be little different because, as will be discussed later in this section IV, an enforcing court in the PRC has

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323 Ibid art 3.
324 Ibid.
326 Wunschheim, above n 301, 138.
the power to ‘entrust’ enforcement to another people’s court if that other court is located in a more suitable jurisdiction.\(^{327}\) Further, it is also reported that, in practice, the jurisdiction of an intermediate people’s court to decide on an enforcement application is very rarely, if at all, contested.\(^{328}\)

3 Form and Content of the Application

A party seeking enforcement of an arbitral award, either foreign-related or foreign, must make a written application to the relevant intermediate people’s court.\(^{329}\) The application must be made in Chinese.\(^{330}\) While Chinese law does not set out the content requirements of an application for enforcement, it is accepted that such an application should contain the following information:\(^{331}\)

- the title of the application,\(^{332}\)
- the names and addresses of both the applicant(s) and the respondent(s) and their legal representatives (if applicable),\(^{333}\)
- the nature of the award and the basis for enforcement, including the type of award and the rights and obligations of the parties pursuant to the award.\(^{334}\)

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\(^{327}\) See section IV.K below.

\(^{328}\) Ibid.


\(^{333}\) Wang above n 315, 25-29; Peerenboom, above n 332, 19.
• a description of the relief sought, including the kind of enforcement measures requested;\textsuperscript{335}

• the reasons for the enforcement application, including an explanation of the defendant’s failure to comply with its obligations under the arbitral award;\textsuperscript{336}

• a description of the property subject to the enforcement proceedings, including its nature and location;\textsuperscript{337}

• a description of the defendant’s economic situation, to the extent that the applicant is aware of it;\textsuperscript{338} and

• the signature and seal of the applicant.\textsuperscript{339}

Furthermore, for the enforcement of both foreign-related and foreign arbitral awards, certain supporting documentation must be submitted with the application for enforcement. With respect to foreign arbitral awards, article IV(1) of the New York Convention requires the applicant to submit a ‘duly authenticated original award or duly certified copy thereof’\textsuperscript{340} and the original arbitration agreement or a duly certified copy thereof.\textsuperscript{341}

With respect to both foreign and foreign-related arbitral awards, in practice there seems to be little consistency amongst the courts in the PRC with respect to what additional

\textsuperscript{334} Wang above n 315, 25-29; Peerenboom, above n 332, 19.  
\textsuperscript{335} Wang above n 315, 25-29; Peerenboom, above n 332, 19.  
\textsuperscript{336} Wang above n 315, 25-29; Peerenboom, above n 332, 19.  
\textsuperscript{337} Wang above n 315, 25-29; Peerenboom, above n 332, 19.  
\textsuperscript{338} Wang above n 315, 25-29; Peerenboom, above n 332, 19.  
\textsuperscript{339} Wang above n 315, 25-29; Peerenboom, above n 332, 19.  
\textsuperscript{340} New York Convention art IV(1)(a); Circular of Supreme People’s Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China (People’s Republic of China) National People’s Congress, 2 December 1986 art 4(1).  
\textsuperscript{341} New York Convention art IV(1)(b); Circular of Supreme People’s Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China (People’s Republic of China) National People’s Congress, 2 December 1986 art 4(1).
supporting documents may be required: according to one survey, some judges did not
know what documents were required. Additional documents may be required either
at the time when the applicant submits the application for enforcement, or upon request
of the court in the enforcement proceedings. Such documents may include:

- a copy of the applicant’s identity card or passport, or in the case of a legal entity, a
copy of its incorporation certificate as well as a power of representation issued by an
authorised representative;

- proof of the existence of property against which the award can be enforced and
proof that such property is located within the territorial jurisdiction of the court to
which the application for enforcement has been made;

- the lawyer’s power of attorney; and

- additional documents not required under PRC law such as evidentiary documents
relied on by the arbitral tribunal in making its award.

Further practical issues arise in preparing an application for enforcement of a foreign
arbitral award in China by virtue of the fact that, where the arbitration took place
overseas, many of the supporting documents required will be in a language other than
Chinese. The Civil Procedure Law 2013 requires that all documents, which are not in

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343 Ibid.
344 Wunschheim, above n 301, 145; Peerenboom, above n 332, 19.
346 Peerenboom, above n 332, 19.
347 Ibid.
Where a document is issued overseas, it must be notarised by a public notary and further legalised by the relevant Chinese embassy and consulate abroad before being submitted to a court in China. It is therefore evident that the formal and content requirements of an enforcement application in China are unclear and ambiguous. It is argued here that if China is to provide a reliable and predictable system for the enforcement of both foreign and foreign-related arbitral awards, consensus must be reached amongst the people’s courts as to the requirements of an application for enforcement. Upon reaching a consensus, legislation ought to be enacted accordingly.

4 Time Limits with Respect to an Application for Enforcement

The time limits with respect to making an application for enforcement of a foreign-related or foreign arbitral award in China appear to have been one of the more controversial topics in the sphere of enforcement of arbitral awards. This section explores some of the reasons for the controversy.

(a) When a Party May Apply For Enforcement

Under Civil Procedure Law 1991, a party had six months, in which to make an application for enforcement, from the day following the deadline for the performance of an arbitral stipulated in the award itself. This timeframe was highly criticised as being far too harsh in light of the documentation required to be submitted with the application. In fact, in one survey of over 42 court decisions on enforcement of arbitral awards in the PRC, approximately 10% of applications were dismissed for

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348 Civil Procedure Law 2013 ch 23 art 262.
349 Ibid art 264.
351 Peerenboom, Seek Truth, above n 342, 288-289; Wunschheim, above n 301, 146.
failure to comply with the timeframe in which to submit the application for enforcement.  

The timeframe was therefore amended in 2007 so that under the Civil Procedure Law 2013, a party has two years, in which to make an application for enforcement, from the last day of the period specified in the arbitral award for its performance or, if no date is specified, from the day when the legal document takes effect. Commentators have suggested that the date on which the award takes effect is the date on which the parties receive it. However, article 57 of the Arbitration Law 1995 expressly provides that ‘[t]he arbitration award shall be legally effective as of the date on which it is made.’ It is therefore argued here that time begins to run on the date the award was made in circumstances where the award does not provide a timeframe for performance. However, it appears that no such timeframe is imposed under the New York Convention, allowing a party to apply for recognition and enforcement of a foreign arbitral award at any point after the award has become effective. It is argued here that the approach taken by the New York Convention ought to be preferred to ensure that there is no possibility of an enforcement application being rejected on a time bar basis.

352 Wunschheim, above n 301, 146.
353 Civil Procedure Law 2008 ch 20 art 215; Civil Procedure Law 2013 ch 20 art 239.
354 Wunschheim, above n 301, 147.
357 See Civil Procedure Law 2013 ch 27 art 283 which provides that the enforcement of foreign arbitral awards will be in accordance with the international conventions and treaties to which the PRC has acceded.
(b) Extending The Time Limit

In principle, the two year timeframe cannot be extended.\(^{358}\) In *Vysanthi Shipping Co Ltd v China Food, Oil and Feed Co Ltd, China People’s Insurance Co and China People’s Insurance Hebei Branch*,\(^{359}\) the Vysanthi Shipping Co Ltd applied for enforcement of the arbitral award almost a year after the final award had been rendered.\(^{360}\) The Tianjian Maritime Court refused to enforce the award on the basis that the application had been made outside the six month timeframe.\(^{361}\)

Despite the strict approach taken in the Vysanthi Shipping Case, an amendment to the *Civil Procedure Law 1991* in 2007 appears to have changed the position and opened up the possibility of the courts granting an extension to the time limit in certain circumstances: the *Civil Procedure Law 2013* now provides that suspension of the time limit will be governed by the provisions stated on the suspension, thereby leaving it open for the courts to grant a suspension of the time limit in which a party can make an application for enforcement.\(^{362}\)

Further, article 27 of the *Interpretations of the Supreme People’s Court on Certain Issues Concerning Application of Enforcement Procedure of the Civil Procedure Law of the People’s Republic of China*\(^{363}\) leaves open the possibility of a suspension of the time limit in cases where ‘force majeure or other obstructions’ prevent a party from making

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\(^{358}\) *Vysanthi Shipping Co Ltd v China Food, Oil and Feed Co Ltd, China People’s Insurance Co and China People’s Insurance Hebei Branch*, Tianjing Maritime Court’s Decision, 29 October 2004 [2004] Tianhai Faquezi No.1.

\(^{359}\) Ibid.

\(^{360}\) Ibid.

\(^{361}\) Ibid.

\(^{362}\) *Civil Procedure Law 2013* ch 19 art 231.

the application for enforcement within the designated timeframe.\textsuperscript{364} The precondition to the suspension is that the force majeure event or obstruction must have existed during the last six months of the two year time limit for applying for enforcement.\textsuperscript{365}

(c) \textit{Where an Application is Incomplete}

Where a party files an application within the time limit but the application is incomplete, the court must, in principle, give the party the opportunity to complete its application and may not directly reject the application.\textsuperscript{366} It appears that if further information is provided after the time limit has expired, the courts will still consider that the party has made the application within the required time.\textsuperscript{367} It is argued here that while these principles are derived from previous Chinese court cases on point, an amendment ought to be made to the \textit{Civil Procedure Law 2013} to make it expressly clear that an incomplete application for enforcement will not result in a party being time barred from enforcing an award in its favour.

\textsuperscript{364} Ibid art 27.
\textsuperscript{365} Ibid.
5 Costs

The party making an application for enforcement of either a foreign-related or foreign arbitral award bears the costs of that application. Article III of the New York Convention expressly provides that a Contacting State cannot impose higher fees for enforcing a foreign arbitral award than it does for a domestic award.

Article 1 of the Provisions of the Supreme People’s Court on the Issue concerning Fees Collection and Review Period for Recognition and Enforcement of Foreign Arbitration Awards provides that a people’s court shall collect RMB500 for accepting a party’s application for recognition of a foreign arbitral award. Further, the Measures for the Payment of Court Fees provides that the party who makes an application for recognition and enforcement of a foreign arbitral award or a foreign-related arbitral award, must pay application fees. Chapter 3 of the Measures on for the Payment of Court Fees, in particular article 14, sets out the rates to be applied in determining the application fees.

While article 3 of the Provisions of the Supreme People’s Court on the Issue concerning Fees Collection and Review Period for Recognition and Enforcement of Foreign Arbitration Awards provides that the court will pre-collect the application fee for

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368 Peerenboom, above n 332, 21.
369 New York Convention art III.
371 Ibid art 1.
373 Ibid art 10(8).
374 Ibid art 10(1).
375 Ibid art 14.
applications in relation to the enforcement of foreign arbitral awards, article 20 of the *Measures for the Payment of Court Fees* provides that the application fee for an application to enforce an award, made by a Chinese arbitration institution, shall not be paid in advance and instead shall be paid after enforcement of the award. Article 20 is further reiterated in article 4 of the *Notice of the Supreme People’s Court on Application of Measures for Payment of Court Fees.*

Moreover, if an applicant fails to pay the applicable application fee within the relevant time limit, the people’s court will handle the matter by deeming the party concerned to have withdrawn the action or application automatically. In addition to the application fee, expenses incurred by witnesses, translators and/or interpreters in appearing before an enforcing court will be collected by the people’s courts at rates set by the State.

As such, while it is unclear which party to the enforcement proceedings will bear such costs, it is clear that the court will collect these additional costs if they are incurred during the course of the enforcement proceedings.

It is therefore clear that the cost regime relating to the application for a foreign, as opposed to a foreign-related, arbitral award is slightly different. While it is unclear whether, in breach of article III of the New York Convention, China imposes higher costs on a party seeking to enforce a foreign arbitral award, as opposed to a foreign-related arbitral award, the due date for payment is certainly different. This once again highlights the need for China to adopt one enforcement procedure to apply to both

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377 Ibid art 3.
380 Ibid art 2.
regimes. This, it is argued, will increase confidence in China’s enforcement system and will help to alleviate concerns of foreign traders and investors that they will be treated less favourable than the Chinese before the Chinese courts.

B  *ACCEPTANCE OF AN APPLICATION FOR ENFORCEMENT*

Chinese law sets out a number of conditions that must be met before a people’s courts will accept an application for enforcement of an arbitral award. Once these conditions are met, the court must accept the application for enforcement and render a decision.

1  *Conditions for Acceptance of the Application for Enforcement*

Certain conditions must be met before an intermediate people’s court (or other competent court) will accept an application for enforcement of an arbitral award. These conditions are set out below.

(a)  *The Arbitral Award Must Be Legally Effective*

First, the arbitral award must be legally effective. While Chinese law does not expressly state what constitutes a legally effective arbitral award, it does contain sufficient information for us to determine the essence of such an award.

(i)  *The Arbitral Award Must Be In Writing*

This requirement is not expressly stated in the *Arbitration Law 1995* or the *Civil Procedure Law 2013*. Rather, it is said to be implied from a number of provisions namely: article 54 of the *Arbitration Law 1995*, which provides that an arbitral award

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382 Wunschheim, above n 301, 148.
383 Ibid.
must be signed by the arbitrators and sealed by the arbitration commission;\textsuperscript{384} and article IV(1) of the New York Convention, which requires the applicant to submit a ‘duly authenticated original award or duly certified copy thereof’\textsuperscript{385} with the application for enforcement.

\textsuperscript{384} Arbitration Law 1995 ch IV art 54.
\textsuperscript{385} New York Convention art IV(1)(a); Circular of Supreme People’s Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China (People’s Republic of China) National People’s Congress, 2 December 1986 art 4(1).
(ii) The Arbitral Award Must Be Made By The Arbitrators

Articles 39, 51, 53 and 55 of the Arbitration Law 1995 all refer to an arbitration award rendered by an arbitral tribunal and as such, the award must be made by the arbitrators.386 While this may seem to be an obvious point, there is room for confusion as the Civil Procedure Law 2013 refers to an ‘award made by a foreign arbitral commission,’387 rather than by the arbitrators. The general view of commentators is that such provisions of the Civil Procedure Law 2013 are to be interpreted only as a reference to the type of award rendered, i.e. a foreign-related arbitral award, and not to be interpreted as meaning an award actually rendered by an arbitral institution.388 As will be discussed in section V of this paper, the people’s courts have adopted an approach of refusing to enforce arbitral awards that are not rendered by all members of an arbitral tribunal.389

(iii) The Award Must Deal with All or Part of The Claims in Dispute

The requirement that the award deal with all or part of the claims in dispute is derived from article 54 of the Arbitration Law 1995 which provides:

an arbitral award must specify the arbitration claim, the facts of the dispute, the reasons for decision, the results of the award, the allocation of arbitration fees and the date of the award.390

387 Civil Procedure Law 2013 ch 27 art 283.
388 Wunschheim, above n 301, 118.
389 See section V.F.3.(d) below.
390 Arbitration Law 1995 ch IV art 54.
Article 55 of the *Arbitration Law 1995* goes on to state that if part of the facts of the matter become clear then the arbitral tribunal may first make an award in respect of such part.\(^{391}\)

(iv) *The Award Must Be Signed By The Arbitrators And Sealed By The Arbitration Commission*

Article 54 of the *Arbitration Law 1995* expressly provides that an arbitral award shall be signed by the arbitrators and sealed by the arbitration commission.\(^{392}\) It goes on to make an exception for a dissenting arbitrator who has the choice of whether or not to sign the award.\(^{393}\)

(b) *The Applicant Must Have Submitted A Proper Application To The Competent Court Within The Two Year Timeframe*

The applicant must have submitted an application in writing, which fulfils the form and content requirements set out above.\(^{394}\) In particular, the application must contain the relevant supporting documentation and must be provided in Chinese.\(^{395}\) In addition, the applicant must have submitted the application to the competent court\(^{396}\) within the two year timeframe.\(^{397}\)

(c) *The Applicant Must Be The Party Entitled To Some Benefit*

The final requirements that must be satisfied before a court will accept an application for enforcement of an arbitral award are that the applicant must be the party entitled to

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\(^{391}\) *Arbitration Law 1995* ch IV art 55.

\(^{392}\) Ibid art 54.

\(^{393}\) Ibid.

\(^{394}\) See above section IV.A.3.

\(^{395}\) See above section IV.A.3.

\(^{396}\) See above section IV.A.2.

\(^{397}\) See above section IV.A.4.
some benefit pursuant to the arbitral award, and the defendant must be the party obliged
to provide that benefit to the applicant.\footnote{398}{Wunschheim, above n 301, 152.} In addition, the award must contemplate an
enforceable obligation such as the obligation to pay a given amount or perform a certain
act.\footnote{399} {Ibid.}

2 \hspace{1cm} \textit{Decision of the Court on Acceptance of the Application for Enforcement}

Provided that the conditions for acceptance of the application for enforcement are met,
the intermediate people’s court must proceed to hear the enforcement application.\footnote{400}{\textit{Civil Procedure Law 2013} ch 20 art 240.}

Once the court has accepted an application for enforcement of an arbitral award, it has
seven days in which to appoint an ‘enforcement officer’ to handle the proceedings.\footnote{401}

Where the conditions for acceptance of an application for enforcement are not met, the
court will reject the application and will therefore, in practice, not enforce the arbitral
award.\footnote{402}{Ibid.} It is argued that such a rejection is technically \textit{not} the same as a refusal by the
courts to enforce an arbitral award. However, in practice some courts will treat a
rejection of an application for enforcement in the same way as a refusal to enforce an
arbitral award and will therefore ask the relevant higher people’s court for approval.\footnote{403}

As the effects of a rejection of an application for enforcement are unclear under Chinese
law, it is argued here that provisions ought to be enacted to expressly acknowledge that

\footnote{398}{Wunschheim, above n 301, 152.}
\footnote{399}{Ibid.}
\footnote{400}{\textit{Civil Procedure Law 2013} ch 20 art 240.}
\footnote{401}{\textit{Some Regulations of the Supreme People’s Court for Strictly Abiding by the Time Limits for Case
Hearing and Execution} (People’s Republic of China) Supreme People’s Court, 22 September 2000 art 6;\textit{Provisions of the Supreme People’s Court on Certain Time Limits for Disposition of Enforcement Cases by the People’s Courts} (People’s Republic of China) Supreme People’s Court, 31 December 2006 arts 2, 18.}
\footnote{402}{Wunschheim, above n 301, 153.}
\footnote{403}{\textit{Swiss Bunge SA v Shenzhen Qingchubaoshui Trade Co,} Reply of the Supreme People’s Court, 9 May
2007 [2006] Min Si Ta Zi No. 47 and Request of the Guangdong Higher People’s Court’s, 6 December
2006 [2006] Yue Gaofa Min Si Ta Zi No.9 reported in WunschARB, \textit{Chinese Court Decision Summaries on Arbitration} (Kluwer Law International).}
a decision to reject an application on form grounds does not constitute a decision not to enforce an arbitral award under either article V of the New York Convention or under article 274 of the Civil Procedure Law 2013. It is further argued that rather than rejecting an application for enforcement where it does not comply with the formal requirements for such an application, the people's courts ought to accept the application and afford the applicant the opportunity to correct the application. This is particularly so to minimise the likelihood of an application being made close to, or on, the expiry of the time limit for making an application, and then being time barred as a result of the rejection of the application.

C NOTICE OF ENFORCEMENT

Article 216 of the Civil Procedure Law 2013 places the enforcement officer under an obligation, after receiving the application for enforcement, to send a notice of enforcement to the person against whom the arbitral award is invoked. According to article 279 of the Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China, the enforcement officer must send the notice of enforcement within ten days of receiving the application for enforcement. However, article 4 of the Provisions of the Supreme People’s Court on Certain Time Limits for Disposition Enforcement Cases by the People’s Courts appears to have changed this to a mere three days. This article expressly sets out that the enforcement officer must provide the notice of enforcement

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404 Civil Procedure Law 2013 ch 20 art 240.
406 Ibid ch XVII art 279.
407 Provisions of the Supreme People’s Court on Certain Time Limits for Disposition Enforcement Cases by the People’s Courts (People’s Republic of China) Supreme People’s Court, 31 December 2006.
408 Ibid art 4.
in writing within three days of receiving the materials of the case and must require the
duty to declare his property and to perform the
obligations determined by the award.409 Further, within three days of receiving the case
materials, the enforcement officer must also request the applicant for enforcement to
provide an indication of the property of the person subject to enforcement.410 It is
argued here that the three day timeframe, while strict, evinces a pro-enforcement
approach and is encouraging to foreign traders and investors as it demonstrates, at least
in theory, that applications for enforcement will be dealt with in a timely manner.

D Objections to Enforcement

The party against whom enforcement of an arbitral award is sought can raise an
objection to the enforcement proceedings in a so-called ‘request for non-enforcement,’
setting out the grounds on which enforcement of the award should be refused or any
other jurisdictional objections to the enforcement proceedings.411 The party must do so
within 10 days of receiving the notice of enforcement.412 It appears, in the author’s
view, that 10 days is a rather short timeframe in which to submit any objections to
enforcement. This is especially so given that the applicant for enforcement has two
years in which to prepare its application.

Following receipt of a request for non-enforcement, article 9 of the Provisions of the
Supreme People’s Court on Certain Time Limits for Disposition of Enforcement Cases
by the People’s Courts provides that:

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409 Ibid.
410 Ibid art 5.
411 Interpretations of the Supreme People’s Court on Certain Issues Concerning Application of the
Enforcement Procedure of the Civil Procedure Law (People’s Republic of China) Supreme People’s
Court, 3 November 2008 art 3.
412 Ibid.
[w]ith regard to an examination of an objection to enforcement, the personnel designated to handle the case shall raise his opinion on examination and settlement of the objection within 15 days of receiving the material concerning the objection and the files of the enforcement case.\(^{413}\)

As such, the enforcement officer has 15 days from receiving the material concerning the objection to set out his opinion on the objection. Depending on the scale of the objection and the complexity of the case, 15 days may be considered too short in which to render an opinion on the objection. However, the short timeframe can again be seen in a positive pro-enforcement light, giving confidence to enforcing parties that the process will be carried out as quickly and efficiently as possible.

E  **REPRESENTATION IN ENFORCEMENT PROCEEDINGS**

Strictly speaking, foreign lawyers are not permitted to appear in the people’s courts as lawyers. Article 263 of the *Civil Procedure Law 2013* provides that:

[w]hen foreign nationals, stateless persons or foreign enterprises and organizations need lawyers as agents ad litem to bring an action or enter appearance on their behalf in the people's court, they must appoint lawyers of the People's Republic of China.\(^{414}\)

This essentially means that the lawyer(s) representing an applicant for enforcement of an arbitral award must be a Chinese citizen admitted to the Chinese bar.\(^{415}\) However, foreign lawyers may still coordinate and monitor the work done by local lawyers.\(^{416}\)

\(^{413}\) *Provisions of the Supreme People’s Court on Certain Time Limits for Disposition Enforcement Cases by the People’s Courts* (People’s Republic of China) Supreme People’s Court, 31 December 2006 art 9.

\(^{414}\) *Civil Procedure Law 2013* ch 23 art 263.

\(^{415}\) *Measures for the Implementation of the National Judicial Examination* (People’s Republic of China) Ministry of Justice, the Supreme People’s Court and the Supreme People’s Procuratorate, 14 August 2008.

\(^{416}\) *Provisions of the Ministry of Justice on the Execution of the Regulations on the Administration of Foreign Law Firms’ Representative Offices in China* (People’s Republic of China) Ministry of Justice, 4
some cases, foreign lawyers acting as agent *ad litem* of the defendant (as opposed to acting strictly as lawyers) have appeared as the sole representative on behalf of the client.\textsuperscript{417} It is argued here that although foreign entities cannot have their own foreign lawyers appear in a Chinese court, it is positive that foreign lawyers can still direct the work of local lawyers and, if necessary, can appear as agents for their clients.

F \hspace{1em} \textit{HEARING}

There is no provision of Chinese law that mandates that a hearing on an enforcement application in its entirety, or on an objection to enforcement, must take place. Rather, article 10 of the *Provisions of the Supreme People’s Court on Certain Time Limits for Disposition of Enforcement Cases by the People’s Courts* provides that:

where it is necessary to conduct a hearing for an examination of an objection to enforcement, the collegiate panel shall hold a hearing in which the enforcement applicant, the party against whom enforcement is sought, and any other interested parties can present their case.\textsuperscript{418}

The circumstances in which a hearing should be deemed ‘necessary’ are not clearly defined but are said to encompass situations where the defendant makes a request for non-enforcement, where one party requests suspension of the enforcement proceedings or where a third party raises one or more objections as to enforcement against certain property.\textsuperscript{419} Where a hearing is deemed necessary, it must take place within 10 days of

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\textsuperscript{417} Peerenboom, above n 332, 22.

\textsuperscript{418} *Provisions of the Supreme People’s Court on Certain Time Limits for Disposition of Enforcement Cases by the People’s Courts* (People’s Republic of China) Supreme People’s Court, 31 December 2006 art 10.

\textsuperscript{419} Wunschheim, above n 301, 157.
the court deciding to hold a hearing.\textsuperscript{420} It is argued here that a hearing ought to be deemed necessary where an objection to enforcement is made in order to ensure that the defendant to the enforcement application is given an opportunity to be heard. It is further argued that the 10 day timeframe in which the hearing must be held is far too short for the parties concerned to be able to prepare their case and therefore ought to be extended.

\textbf{G \hspace{1cm} REQUEST FOR INFORMATION FROM AN ARBITRATION COMMISSION}

During the course of dealing with an application for enforcement of an arbitral award, the court may request the arbitration commission, which administered the arbitration, to provide explanations as to aspects of the award, or to provide access to the arbitration archives relating to the arbitration proceedings.\textsuperscript{421} A ruling, made by the people’s court in handling a case involving arbitration, may be served on the relevant arbitration institution.\textsuperscript{422} The provision is drafted broadly, appears to provide the courts with a wide power to ask for various types of documents, and does not take into account the situation in which the arbitration commission refuses to hand over the requested documents.\textsuperscript{423}

It is unclear for what purpose the people’s courts may request documents from the arbitration commission. However, any attempt by the courts to conduct a full merits review of a case would go against the principles and the approach taken towards the

\textsuperscript{420} Provisions of the Supreme People’s Court on Certain Time Limits for Disposition of Enforcement Cases by the People’s Courts (People’s Republic of China) Supreme People’s Court, 31 December 2006 art 10.

\textsuperscript{421} Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the “Arbitration Law of the People’s Republic of China” (People’s Republic of China) Supreme People’s Court, 23 August 2006 art 30.

\textsuperscript{422} Ibid.

\textsuperscript{423} Fabio Bortoltti, Michael Moser and Friven Yeoh, ‘Commentary: New Supreme People’s Court Interpretation on Mainland China’s Arbitration Law’ (2006) 21(9) International Arbitration Reports 37, 37, 39.
Moreover, it is argued here that placing arbitration documents on a public court record severely damages and impedes one of the fundamental advantages of arbitration: confidentiality. It is therefore argued that this power of the court to request documents from an arbitration commission ought to either be eradicated or used extremely sparingly.

H  DECISION ON ENFORCEMENT AND THE PRIOR REPORTING SYSTEM

The people’s court, to which a party has submitted an application for enforcement of an arbitral award, must accept the case and must decide to enforce the award unless one of the grounds for refusing enforcement is made out. While these grounds are explained and discussed in detail in section V of this paper, suffice it to say here that where an intermediate people’s court refuses to enforce either a foreign-related or a foreign arbitral award, the provisions of the Notice of the Supreme People’s Court on the Handling of Issues Concerning Foreign-related Arbitration and Foreign Arbitration apply.

Article 2 of this notice essentially provides that where a people’s court is inclined to refuse enforcement of a foreign-related, or a foreign, arbitral award, it must report its finding to the higher people’s court of the jurisdiction concerned for examination before it hands down its decision. If the higher people’s court agrees to refuse to enforce the award, it must report its opinion to the Supreme People’s Court. The higher people’s court must send its report to the Supreme People’s Court within two months of

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424 See section V below.
425 Born, above n 299, 88-89.
426 Civil Procedure Law 2013 ch 27 art 273-274.
428 Ibid art 2.
429 Ibid.
acceptance of the application.\textsuperscript{430} Only after the Supreme People’s Court gives its reply can the ruling on the refusal to enforce the arbitral award be handed down.\textsuperscript{431} This system has become known as the ‘Prior Reporting System’

While on one hand it has been argued that the role of the Supreme People’s Court, as the final decision maker on non-enforcement cases, violates the independence of the lower courts,\textsuperscript{432} on the other hand, commentators argue that this centralised reporting and reviewing system has:

significantly bolstered the confidence of foreign investors who feared that local protectionism might unduly influence the enforcement of arbitral awards in China.\textsuperscript{433}

It is also important to note at this point that once the Supreme People’s Court has handed down its ruling on enforcement, that ruling cannot be appealed.\textsuperscript{434} If a higher people’s court or the Supreme People’s Court decides to enforce the award, the people’s court must continue with the enforcement proceedings.

I \textit{EXAMINATION OF PROPERTY}

Where a people’s court decides to enforce an arbitral award, Chinese law imposes duties on both parties to an enforcement application, and the court, to identify property against which enforcement may be ordered.

\textsuperscript{430} Ibid art 4.
\textsuperscript{431} Ibid art 2.
\textsuperscript{432} In general see Yeoh, above n 325, 268.
\textsuperscript{433} Tao, \textit{Arbitration Law and Practice}, above n 16, 205.
\textsuperscript{434} Wunschheim, above n 301, 179.
Obligations of The Parties

The applicant must provide information to the court in the application for enforcement with respect to the property of the party against whom enforcement is sought.\(^{435}\) If the applicant fails to provide such information in its initial application, within three days of receiving the application, the enforcement officer may request the applicant to provide that information.\(^{436}\) The defendant is also under an obligation to provide a report of its own property situation at the time of receipt of the notice of enforcement and for one year preceding receipt of the notice.\(^{437}\) The applicant also has the right to request access to the property status report provided by the party subject to the enforcement proceedings and the court is obliged to grant access.\(^{438}\) The applicant is however under an obligation to keep confidential any information contained in the property status report.\(^{439}\) It is argued here that placing the defendant under an obligation to provide information as to its property is comforting for foreign entities. This is because foreign entities could potentially find it difficult to locate the defendant’s property.

Obligations of the Court

Where the applicant provides ‘definite and specific information’ on the property situation or identifies property against which an award may be enforced, the enforcement officer has five days from the provision of the relevant information to carry

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\(^{435}\) Provisions of the Supreme People’s Court on Certain Time Limits for Disposition Enforcement Cases by the People’s Courts (People’s Republic of China) Supreme People’s Court, 31 December 2006 art 5.

\(^{436}\) Ibid.


\(^{438}\) Interpretations of the Supreme Court on Certain Issues Concerning Application of the Enforcement Procedure of the Civil Procedure Law (People’s Republic of China) Supreme People’s Court, 3 November 2008 art 34.

\(^{439}\) Ibid.
out an investigation on and verify the information provided.\textsuperscript{440} Where the applicant of an enforcement application fails to provide any information in relation to the property of the person subject to enforcement, or has difficulty in providing such information, the applicant can request the enforcement officer to carry out an investigation to identify property against which enforcement may be sought.\textsuperscript{441} In this circumstance, the enforcement officer must commence an investigation within 10 days of the filing of the applicant’s request for an investigation.\textsuperscript{442}

Further, with respect to the property status report provided by the person against whom enforcement is sought, the court may carry out investigations to verify it on application by the applicant for enforcement or in accordance with its own investigatory powers.\textsuperscript{443} Article 242 of the \textit{Civil Procedure Law 2013} provides the court with the power to make enquiries as to the defendant’s financial status.\textsuperscript{444} The enquiries should attempt to identify income, bank deposit, securities, real property, vehicles, machinery or equipment, intellectual property, rights and interests in (and proceedings from) overseas investments and any creditor rights which exist.\textsuperscript{445} Depending on the specific circumstances of the case, the enforcement officer must complete the investigation on the property situation of the person against whom enforcement within one month.\textsuperscript{446} Again, such a provision of Chinese law ought to increase confidence in the Chinese system for enforcement as, at least in theory, the Court is under an obligation to delve

\textsuperscript{440} \textit{Provisions of the Supreme People’s Court on Certain Time Limits for Disposition Enforcement Cases by the People’s Courts} (People’s Republic of China) Supreme People’s Court, 31 December 2006 art 6.
\textsuperscript{441} Ibid.
\textsuperscript{442} Ibid.
\textsuperscript{443} \textit{Interpretations of the Supreme Court on Certain Issues Concerning Application of the Enforcement Procedure of the Civil Procedure Law} (People’s Republic of China) Supreme People’s Court, 3 November 2008 art 35.
\textsuperscript{444} \textit{Civil Procedure Law 2013} ch 21 art 242.
\textsuperscript{445} \textit{Provisions of the Supreme People’s Court on Certain Time Limits for Disposition Enforcement Cases by the People’s Courts} (People’s Republic of China) Supreme People’s Court, 31 December 2006 art 6.
\textsuperscript{446} Ibid.
into the defendant’s property situation and to identify the property against which enforcement may take place.

J Enforcement Assistance Notice

Article 242 of the Civil Procedure Law 2013 provides that during the course of enforcement, the people’s court may issue an enforcement assistance notice to the relevant unit which must comply with the notice.\textsuperscript{447} This article is usually relied upon where the court needs assistance from the bank or some other person able to assist with the transfer of the property the subject of the enforcement proceedings. The power of the people’s courts in this regard appears to be broad and it is argued here ought to increase the confidence of foreign entities seeking to enforce an arbitral award in China.

K Entrustment

1 Meaning of ‘Entrustment’

As discussed above, the party applying for enforcement must submit the application to the relevant intermediate people’s court.\textsuperscript{448} However, where a party against whom enforcement is sought, or the property against which enforcement may be ordered, is located in a jurisdiction other than that in which the applicant has made the enforcement application, the people’s court in the jurisdiction in which the applicant has made the enforcement application may ‘entrust’ the other court to enforce the award.\textsuperscript{449} In this situation the people’s court, to which the application was originally made, is known as

\textsuperscript{447} Civil Procedure Law 2013 ch 21 art 243.

\textsuperscript{448} Ibid ch 26 art 273, ch 7 art 283; Circular of Supreme People’s Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China (People’s Republic of China) National People’s Congress, 2 December 1986 art 3.

\textsuperscript{449} Civil Procedure Law 2013 ch 19 art 229.
the ‘entrusting court’ and the court to which the application is transferred is known as the ‘entrusted court.’

2 Exceptions to Entrustment

There a number of special circumstances in which entrusted enforcement need not take place, namely:

- the person subject to enforcement has property in different jurisdictions and the property in any of the localities is insufficient in itself to repay the debts;

- several persons subject to enforcement in different jurisdictions have a particular connection in the assumption of the liability for discharging debts;

- it is necessary to render a decision to change or add the person subject to enforcement outside the jurisdiction of the court concerned;

- the property of the party concerned in another locality has been preserved during the trial of the case and it is more convenient to render the enforcement in that place; and

- upon approval of the relevant high people’s court, the entrusted enforcement is inconvenient to be rendered due to other special circumstances.

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450 Wunschheim, above n 301, 159.
451 Certain Provisions of the Supreme People’s Court on Strengthening and Improving Enforcement by Entrustment (People’s Republic of China) Supreme People’s Court, 8 March 2000 art 2(1).
452 Ibid art 2(2).
453 Ibid art 2(3).
454 Ibid art 2(4).
455 Ibid art 2(5).
In order to commence enforcement through the entrustment mechanism, the court to which the enforcement application was originally submitted must request the local court for assistance with enforcement, and the local court must do as it is requested.\textsuperscript{456} The entrusted court must then commence rendering the enforcement within 15 days of receiving the request for assistance with enforcement.\textsuperscript{457}

The entrusting court must notify the applicant in a timely manner that the enforcement proceedings have been entrusted to another court.\textsuperscript{458} At this stage, the applicant for enforcement may either directly urge the entrusted court to enforce the award or may request the entrusting court to do so.\textsuperscript{459} Where the entrusting court has collected the application fee in advance, it must refund the fee to the applicant for enforcement within three days of requesting assistance from the entrusted court.\textsuperscript{460}

The entrusted court must take the enforcement measure(s) and compulsory measure(s) necessary for enforcement to take place in accordance with the law on its own, or it may determine the manner of enforcement in collaboration with the entrusting court.\textsuperscript{461} The entrusted court is under an obligation to enforce the award rigidly in accordance with

\textsuperscript{456} Civil Procedure Law 2013 ch 19 art 229; Certain Provisions of the Supreme People’s Court on Strengthening and Improving Enforcement by Entrustment (People’s Republic of China) Supreme People’s Court, 8 March 2000 art 3; Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China (People’s Republic of China) Judicial Committee of the Supreme People’s Court, 14 July 1992 ch XVII art 259.

\textsuperscript{457} Civil Procedure Law 2013 ch 19 art 229; Certain Provisions of the Supreme People’s Court on Strengthening and Improving Enforcement by Entrustment (People’s Republic of China) Supreme People’s Court, 8 March 2000 art 4.

\textsuperscript{458} Certain Provisions of the Supreme People’s Court on Strengthening and Improving Enforcement by Entrustment (People’s Republic of China) Supreme People’s Court, 8 March 2000 art 7.

\textsuperscript{459} Ibid.

\textsuperscript{460} Ibid art 5.

\textsuperscript{461} Ibid art 6.
the award and with the requirements of the entrusting people’s court.\textsuperscript{462} If the date, time limit and method for the debtor to pay off debts needs to be changed, the entrusted court must obtain approval from the applicant for enforcement and must notify the entrusting people’s court of the change in a timely manner.\textsuperscript{463} The entrusted court is not authorised to review the arbitral award, save for pointing out any obvious errors in the award.\textsuperscript{464} In addition, the entrusted court must inform the entrusting court of any circumstances which require suspension or early termination of the enforcement proceedings and must request the entrusting court’s approval.\textsuperscript{465}

If either the applicant or the entrusting court requests information about the enforcement proceedings, the entrusted court is obliged to provide such information in a timely manner.\textsuperscript{466} Further, after the entrusted court has commenced its work, if the entrusting court discovers that the person subject to enforcement has property within its jurisdiction against which the award can be enforced, it must notify the entrusted court in a timely manner and the courts may then work together to decide on joint enforcement or on taking other measures to assist in the enforcement.\textsuperscript{467} Finally, once the enforcement by the entrusted court is complete, that court shall collect an

\begin{footnotes}
\item[463] Ibid.
\item[465] \textit{Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China} (People’s Republic of China) Judicial Committee of the Supreme People’s Court, 14 July 1992 ch XVII art 263.
\item[466] \textit{Certain Provisions of the Supreme People’s Court on Strengthening and Improving Enforcement by Entrustment} (People’s Republic of China) Supreme People’s Court, 8 March 2000 art 7.
\item[467] Ibid art 8.
\end{footnotes}
enforcement application fee along with the expenses actually incurred in the course of enforcement from the parties.\textsuperscript{468}

It is argued here that the entrustment mechanism is effective and contributes to the development of a reliable enforcement system in China. In particular, the fact that enforcement will be entrusted to the court in the jurisdiction where the defendant’s property is located is encouraging to entities seeking to enforce arbitral awards in China and operates to relieve any concerns or difficulties on the enforcing entities behalf in locating the relevant jurisdiction in which the defendant’s property is located and commencing proceedings in that jurisdiction.

L\textsuperscript{\textit{\textbf{}}} \textit{Suspension of Enforcement Proceedings}

There are certain circumstances in which an enforcing court may suspend enforcement of an arbitral award:

- first, where the applicant agrees that the enforcement may be postponed i.e. where the parties may attempt to negotiate with respect to enforcement;\textsuperscript{469}

- second, where a third party raises an objection to the enforcement, either because it has ownership rights in the property against which enforcement is sought or because the enforcement would in some other way affect its rights;\textsuperscript{470} and

- third, where one of the parties dies or in the case of a legal entity, where it ceases to exist.\textsuperscript{471}

\textsuperscript{468} Certain Provisions of the Supreme People’s Court on Strengthening and Improving Enforcement by Entrustment (People’s Republic of China) Supreme People’s Court, 8 March 2000 art 5.
\textsuperscript{469} Civil Procedure Law 2013 ch 22 art 256(1).
\textsuperscript{470} Ibid ch 22 art 256(2); Interpretations of the Supreme Court on Certain Issues Concerning Application of the Enforcement Procedure of the Civil Procedure Law (People’s Republic of China) Supreme People’s Court, 3 November 2008 art 15.
With respect to the second circumstance set out above, if the enforcing court is unable to determine whether the objection is justified, the applicant for enforcement must commence an action before the adjudicative division of the enforcing court in order to obtain a decision on the merits of the objection. The enforcement proceedings will be suspended until the court has made a decision on the merits of the objection if the third party provides sufficient and effective security to request suspension of the enforcement proceedings.

In addition to the above, article 232(5) of the *Civil Procedure Law 2013* broadly states that the people’s court may suspend enforcement proceedings under ‘other circumstances that the people’s court deems the enforcement should be suspended.’ ‘Other circumstances’ appear to include the following:

- where the parties conclude a settlement during the course of enforcement, the enforcement officer will examine the settlement agreement to determine whether it is in accordance with Chinese law. If the settlement agreement violates Chinese law then the enforcement proceedings will continue. If however, the settlement agreement is in accordance with Chinese law, the enforcement officer will make a written record of the terms of the settlement and have both parties sign or seal the record. In this case, the enforcement proceedings will be suspended until the time limit for complying with the obligations under the settlement agreement expires.

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471 *Civil Procedure Law 2013* ch 22 art 256(3)-(4).
474 *Civil Procedure Law 2013* ch 22 art 256(5).
475 Wunschheim, above n 301, 162.
476 Ibid.
477 *Civil Procedure Law 2013* ch 19 art 230.
the parties fail to fulfil their obligations under the settlement agreement within the required time limit, the people’s court shall resume the enforcement proceedings but that part, if any, of the settlement agreement which has been enforced shall be excluded.\footnote{Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China (People’s Republic of China) Judicial Committee of the Supreme People’s Court, 14 July 1992 ch XVII art 266.} Where the time limit for enforcement was suspended due a settlement agreement, the time limit shall be continuously calculated from the last day of the time limit for enforcement under the settlement agreement;\footnote{Ibid ch XVII art 267.}

- where the defendant raises a set-off claim against its obligations pursuant to the arbitral award;\footnote{Provisions of the Supreme People’s Court on Certain Issues Concerning Correct Application of Measures for Stay of Enforcement (People’s Republic of China) Supreme People’s Court, 28 September 2002 art 3(3).}

- where the defendant has initiated setting aside of the arbitral award.\footnote{Arbitration Law 1995 ch VI art 64; Qingdao Co of Shandong Real Estate Development Corp v Yuelong Industrial Co Ltd, Reply of the Supreme People’s Court, 8 July 2003 [2002] Min Si Ta Zi No. 8 and Request of the Beijing Higher People’s Court’s [2002] Jing Gaoda No. 20 reported in (2004) 7(1) Guide on Foreign-Related Commercial and Maritime Trials 18–22.} Although article 64 of the Arbitration Law 1995 related only to domestic awards, it is argued and expected that the courts will handle foreign-related and foreign arbitral awards in a similar way and would therefore suspend enforcement when a defendant has initiated setting aside proceedings;\footnote{Wunschheim, above n 301, 163.}

- where an issue in respect of enforcement has been submitted to a higher court for determination. In such circumstances, the lower court must suspend enforcement proceedings until the higher court has made a decision.\footnote{Provisions of the Supreme People’s Court on Certain Issues Concerning Correct Application of Measures for Stay of Enforcement (People’s Republic of China) Supreme People’s Court, 28 September 2002 art 2(1).}
When any of the above circumstances exist, a people’s court can grant suspension of enforcement proceedings but the time period for a stay must not exceed three months.\textsuperscript{484} The time period granted by the people’s court may be extended in special circumstances but in any event must still not exceed three months.\textsuperscript{485} The time period commences as of the date of making the decision to suspend enforcement by the enforcement court.\textsuperscript{486} If the decision on enforcement is handed down by a higher court, the time limit commences when the enforcing court receives the decision.\textsuperscript{487} Enforcement proceedings will then resume upon the first to occur of either the expiry of the suspension period or upon the discontinuance of the circumstance justifying the suspension.\textsuperscript{488}

It therefore appears that while the circumstances in which suspension may occur can be quite broad, the fact that three months is the maximum amount of time for suspension is encouraging as it once again demonstrates the obligation of the people’s courts to deal with enforcement applications as quickly as possible.

\section*{M \textit{Early Termination of Enforcement Proceedings}}

There are number of circumstances, expressed in article 257 of the \textit{Civil Procedure Law 2013}, in which a court may terminate enforcement proceedings prior to the completion of such proceedings, namely:

\begin{itemize}
\item if the applicant has withdrawn the application for enforcement;\textsuperscript{489}
\item where the arbitral award has been set aside;\textsuperscript{490}
\end{itemize}

\textsuperscript{484} Ibid art 10.
\textsuperscript{485} Ibid.
\textsuperscript{486} Ibid.
\textsuperscript{487} Ibid.
\textsuperscript{488} Ibid art 13.
\textsuperscript{489} \textit{Civil Procedure Law 2013} ch 22 art 257(1).
where the party against whom enforcement is sought is an individual and that person
dies and is not succeeded;\(^{491}\) or

whether the party against whom enforcement is sought is too poor to repay his
debts, has no source of income and loses his ability to work.\(^{492}\)

Article 233(6) of the \textit{Civil Procedure Law 2013} also broadly states that the people’s
court shall make a ruling to terminate enforcement under ‘other circumstances that the
people’s court deems the enforcement should be concluded.’\(^{493}\) It appears that little
guidance is given under Chinese law as to how ‘other circumstances’ should be interpreted.

In order for early termination to be effective, certain conditions must be met. The
people’s court must provide a written ruling, which sets out the total value of the subject
matter of the enforcement, the value of the enforced portion of the arbitral award and
the value of the remaining unenforced portion.\(^{494}\) It must also include the statement that
the applicant for enforcement may apply to a competent people’s court for the
enforcement of the remaining portion of the award.\(^{495}\) Before issuing the ruling on
termination, the enforcing court must notify the applicant for enforcement.\(^{496}\) If the
applicant for enforcement objects to the termination of the current enforcement
proceedings, the enforcing court must organise a new task force to arrange a public

\(^{490}\) Ibid ch 22 art 257(2).
\(^{491}\) Ibid ch 22 art 257(3).
\(^{492}\) Ibid ch 22 257(5).
\(^{493}\) Ibid ch 22 257(6).
\(^{494}\) \textit{Notice of the Commission of Politics and Law of the CPC Central Committee and the Supreme
People’s Court on Regulating the Case-Closing Standards for the Intensive Clearing and Enforcement of
Long-pending Cases} (People’s Republic of China) Political and Legislative Affairs Committee of the
Communist Party of China Central Committee and the Supreme People’s Court, 19 March 2009 art
3(j)(i).
\(^{495}\) Ibid.
\(^{496}\) Ibid art 3(j)(ii).
hearing on whether the party against whom the award is enforced has any eligible assets for enforcement.\textsuperscript{497} The enforcement process will be resumed if the hearing reveals that the party against whom enforcement is sought does have eligible assets for enforcement.\textsuperscript{498} If the enforcement proceedings are terminated and it is later found that the party against whom the award is invoked does in fact have eligible assets, the applicant for enforcement may submit a new application.\textsuperscript{499} It is therefore clear that while early termination of enforcement proceedings is a possibility, parties wishing to enforce an arbitral award in China can rest assured that if assets of the defendant are located, they will have ample opportunity to recommence enforcement proceedings.

\section*{Time Limits for Enforcement}

Despite attempts by the Chinese regulators to identify a timeframe for enforcement of arbitral awards, much confusion still exists as to the deadline for enforcement. Prior to 1998, it was not uncommon for courts to just sit on applications for enforcement or to simply accept the case but then never decide whether to either enforce or refuse to enforce an award.\textsuperscript{500} This was because the PRC laws and regulations failed to impose any deadlines whatsoever on the acceptance of the case, the decision to enforce or refuse enforcement of an award, or the completion of enforcement.\textsuperscript{501}

However, in 1998 the \textit{Provisions of the Supreme People’s Court on the Issue concerning Fees Collection and Review Period for Recognition and Enforcement of Foreign Arbitration Awards}\textsuperscript{502} were enacted, article 4 of which provides that if a people’s court accepts an application for enforcement, it must render a decision on enforcement within two months of accepting the application.\textsuperscript{503} It further goes on to say

\textsuperscript{497} Ibid.
\textsuperscript{498} Ibid.
\textsuperscript{499} Ibid art 3(k).
that unless special circumstances exist, the enforcement shall be completed within six months of the decision being rendered.\textsuperscript{504}

Moreover, the article expressly provides that where a case is referred to the Supreme People’s Court, that court must render its decision within two months of accepting the case.\textsuperscript{505} However, despite this strict timeframe, in past cases the Supreme People’s Court has not made its decision with the two month period.\textsuperscript{506} In a survey carried out by one commentator,\textsuperscript{507} out of 55 refusal cases referred to the Supreme People’s Court for determination on enforcement: the shortest case took 201 days from the date on which the application was filed to the date on which the Supreme People’s Court rendered its decision;\textsuperscript{508} the longest case took 3,948 days.\textsuperscript{509}

In contrast to the overall eight month timeframe identified above, article 1 of the *Provisions of the Supreme People’s Court on Certain Time Limits for Disposition Enforcement Cases by the People’s Court*, which applies equally to foreign-related and foreign arbitral awards, provides that where the person against whom an award is invoked has assets available for the enforcement, the case shall generally be concluded

\textsuperscript{500} Peerenboom, above n 332, 36.
\textsuperscript{501} Peerenboom, Seek Truth, above n 342, 288.
\textsuperscript{503} Ibid art 4.
\textsuperscript{504} Ibid.
\textsuperscript{505} Ibid.
\textsuperscript{506} Peerenboom, above n 332, 38.
\textsuperscript{507} Wunschheim, above n 301, 168.
within six months of the initiation of the case. It is unclear why a total of eight months (plus any period of suspension) is given for enforcement under the Provisions of the Supreme People’s Court on the Issue concerning Fees Collection and Review Period for Recognition and Enforcement of Foreign Arbitration Awards yet only six months is given under the Provisions of the Supreme People’s Court on Certain Time Limits for Disposition Enforcement Cases by the People’s Court.

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510 Provisions of the Supreme People’s Court on Certain Time Limits for Disposition Enforcement Cases by the People’s Courts (People’s Republic of China) Supreme People’s Court, 31 December 2006 art 1.
In short, it is argued here that the above analysis of the procedure for the enforcement of foreign-related and foreign arbitral awards in the PRC clearly demonstrates that there is a need for reform of this system to ensure that it is reliable, predictable and transparent from the perspective of foreign investors. In this context, the key areas for reform of the enforcement procedure are identified below along with a number of recommendations, which, if enacted, in the author’s view will go a long way to creating a procedure for the enforcement of foreign and foreign-related arbitral awards in the PRC that is reliable, predictable, transparent, easy to follow and that therefore provides confidence to foreign entities seeking to enforce arbitral awards in China. In turn, it is argued that the combination of these factors will encourage and promote China as a leading arbitral jurisdiction, which will ultimately assist China in achieving its position as the leader of the global economy.

1 Reform of the Application for Enforcement Process

The above analysis has shown that there are a number of flaws in the current procedure for making an application for enforcement of a foreign-related or foreign arbitral award. This section offers suggested ways in which the procedure may be reformed.

(a) Parties to the Enforcement Application

With respect to the parties against whom an arbitral award may be enforced, it was argued in this section IV that Chinese law goes too far in allowing enforcement against other members of a group of companies, who are not party to the arbitration agreement. It is recommended that the approach ought to be limited to cases in which the other
member of the group of companies, against whose assets the award is being enforced, were either also party to the arbitration agreement, or who at least took part in the arbitration proceedings.

(b) *Court with Competent Jurisdiction*

With respect to the court to which a party can make an application for enforcement of an arbitral award, this section IV has shown that the main difference between China’s two regimes is that a party seeking to enforce a foreign arbitral awards lacks a choice as to the court to which it may make its application.\(^{511}\) It is argued that the distinction between the regimes needs to be removed and the two regimes need to be harmonized.

It appears that the best way to achieve harmonisation of the two regimes would be to provide a party enforcing a foreign arbitral award with the same choice of enforcing courts as a party enforcing a foreign-related arbitral award. There are three main reasons for this: (a) arguably, the lack of choice of a party seeking to enforce a foreign arbitral award contravenes article III of the New York Convention;\(^{512}\) (b) harmonising the two regimes will enhance the predictability, certainty and transparency of the enforcement system; and (c) if the party applying for enforcement of an arbitral award is given the choice of where to apply for enforcement, it appears less likely that ‘entrustment’ will need to take place as, given the choice, a party is more likely to choose a court in the jurisdiction in which it believes it has the best chance of successfully enforcing the award i.e. the jurisdiction in which the defendant’s assets are located.

\(^{511}\) See section IV.A.2 above.

\(^{512}\) New York Convention art III.
(c) *Form and Content of an Application for Enforcement*

With respect to the application for enforcement itself, it is clear that Chinese law fails to provide any specific requirements for the content of, or the supporting documentation attached to, the application. While there are a number of generally accepted requirements for an application for enforcement, surveys have shown that there is no consistency between the approaches taken by the people’s courts, and that some judges do not even know the requirements of their own courts. As such, it is argued here that specific form and content requirements need to be set for an application for enforcement to make such requirements clear, unambiguous and consistent amongst all people’s courts.

(d) *Time Limits for Making an Application for Enforcement*

With respect to the time limit for making an application for enforcement of an arbitral award, while the current position is that the party making the application has two years to do so, there are two main areas of ambiguity: (a) it is not clear when the time limit begins to run i.e. whether time begins to run from the date of the award or from the date on which the parties receive the award; (b) it appears that the two year time limit may be extended but the circumstances for granting an extension are not made expressly clear. It is argued here that reforms need to be made to expressly set out when time begins to run and to identify the nature of the circumstances in which an extension of time may be granted.

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514 *Civil Procedure Law 2013* ch 20 art 239.
515 See section IV.A.(a) above.
516 See section IV.A.(b) above.
In the author’s view, time ought to begin to run from the final date stated in the award on which the parties may perform their obligations pursuant to the award, or failing an indication of that date, from the date the award was made. This approach will ensure that where a timeframe is provided in the award for performance, the party applying for enforcement is able to give the party against whom the award is invoked sufficient opportunity to comply with its obligations without having to fear that, if that party fails to perform such obligations, the timeframe for seeking enforcement through a court will expire. Where the award does not state a timeframe for compliance, there appears to be too much uncertainty and room for error in determining when the parties actually received the award therefore having time begin to run from the date of the award provides certainty.

In keeping with the PRC’s obligation under the New York Convention to enforce foreign arbitral awards, which fall within the Convention, unless one of the grounds set out in article V of the New York Convention is made out, it is argued here that the circumstances in which a party may apply for an extension of time to make its application for enforcement ought to be quite broad. However, to have a predictable system in which foreign investors can have confidence, it is argued that the nature of such circumstances ought to be identified in PRC law. It is suggested that such circumstances should encompass special circumstances that resulted in the applicant being justifiably unable to make its application within the relevant timeframe. This should encompass situations for example in which an application for set aside has been made in the country where the award was made.
(e) **Decision to Accept or Reject an Application for Enforcement**

With respect to a people’s court’s decision to either accept or reject an application for enforcement, it is argued here that reforms ought to be made because the consequences of a decision not to accept an application for enforcement are unclear. Can the party lodge a new application for enforcement? Is a decision not to accept an application for enforcement equivalent to a refusal to enforce an award? Should the Prior Reporting System be used for decisions not to accept an enforcement application? There are no obvious answers to these fundamental questions under the current Chinese law.

It is however argued here that, in the interests of achieving certainty and reliability of the Chinese enforcement system, while simultaneously adopting a pro-arbitration approach, primarily reforms ought to be made to the effect that a people’s court cannot refuse to accept an application for enforcement on the basis that one of the formalities for making such an application has not been complied with. Rather, the people’s court ought to accept the application and give the parties with the opportunity of to provide the additional information required.

If the primary approach suggested here is deemed to be too arbitration-friendly or too liberal, it is argued that the people’s courts ought to be permitted to refuse to accept an enforcement application, on the basis that the application fails to comply with the formal requirements, but such a refusal must be equivalent to a mere rejection of the application on a formal basis, and not to a decision to refuse to enforce an arbitral award. As such, the Prior Reporting System should not be used and an applicant must be allowed to resubmit the application in accordance with the formal requirements.
Reform of the Procedure for Dealing with Objections to Enforcement

There are a number of areas for improvement in the way in which the people’s courts deal with objections to the enforcement of an arbitral award, and as such there are a number of reforms suggested here.

(a) Timeframe For Making An Objection To Enforcement

The current position is that a party against whom recognition and enforcement of an arbitral award is sought has 10 days from the date on which it receives the notice of enforcement to lodge its objection. While such a strict timeframe is in line with the pro-arbitration approach that the PRC ought to take, it is argued here that this timeframe seems to be somewhat severe, given that the applicant for enforcement has two years in which to submit its application. To facilitate trust and confidence in the fairness of the process for enforcement of arbitral awards in the PRC, yet still maintain a pro-arbitration approach, it is recommended that this timeframe ought to be extended to at least one month from the date on which the defendant receives the notice of enforcement with provision for an extension of time in limited and exceptional cases.

(b) Hearing

With respect to an enforcement hearing, it appears that under the current law a hearing will only take place ‘where it is necessary’ but no guidance is given as to what constitutes ‘necessary’ in this situation. It is argued here that reforms to the current position need to be made to: (a) provide the parties with the opportunity to request a hearing on enforcement, particularly where the defendant has raised an objection, in which case the people’s court must grant such a request; and (b) provide the court with

See section IV.D above.
the discretion to order that a hearing will take place, in the absence of a request from a party to the proceedings, and define the circumstances in which the court ought to exercise such discretion. At the very least, in the author’s view, a people’s court must order a hearing where there is an objection to the enforcement of an arbitral award. After all, the right to be hearing is a fundamental procedure right recognised in all modern day jurisdictions. It is further argued that the 10 day timeframe in which the hearing must take place ought to be extended to give both parties the opportunity to fully prepare their case.

(c) Decision on Whether to Enforce An Arbitral Award

With respect to the decision on whether to enforce an arbitral award, it appears that there are two possible areas for reform. First, under the current PRC law, the enforcement officer has a 15 day timeframe in which he/she must provide his opinion on any objection to the enforcement of an award.\textsuperscript{518} It is unclear whether this opinion is the final decision of the people’s court on the objection, or whether it is simply the opinion of the enforcement officer for consideration by the people’s court: this position needs to be clarified. In any event, again while the PRC is encouraged to take a pro-arbitration approach to the enforcement of arbitral awards, it seems that such a strict and short timeframe is not sufficient to allow full and proper consideration of an objection to enforcement, and therefore is unlikely to provide confidence in the system for enforcement of arbitral awards. As such, it is recommended that this timeframe should be extended to at least one month, if the enforcement officer’s opinion is merely to be provided to the people’s court. A significantly longer period would be required if the enforcement officer’s opinion was to be the final decision on the objection.

\textsuperscript{518} See section IV.H above.
Second, the query arises as to whether the Prior Reporting System is the most effective and efficient system, which the PRC could have in place for review of decisions not to enforce an arbitral award. As has been explained above, the Prior Reporting System has been criticised for diminishing the independence of both the intermediate people’s courts and the higher people’s courts, yet at the same time has been praised for significantly bolstering the trust and confidence of foreign investors in the enforcement system in China, who previously worried about local protectionism affecting the enforcement of arbitral awards. While the timeframe in which the Supreme People’s Court makes decisions on the enforcement of arbitral awards is inconsistent, unpredictable and therefore perhaps in need of reform, in the author’s view, in the absence of a full appeal system from a decision of an intermediate people’s court, it is argued here that the Prior Reporting System is effective overall.

3 Reform to the Entrustment Process

With respect to the system of entrustment, it appears from the information available to the author, that this system is effective and should provide confidence to those entering into contracts with Chinese parties that the people’s courts will be co-operative with each other to ensure that enforcement is carried out. The only suggestion made here is that the process of entrustment could be simplified in order to avoid confusion between the entrusting court and the entrusted court: e.g. the process could be reformed to the effect that once enforcement is entrusted, the entrusted court has full jurisdiction over the enforcement and has the power to authoritatively decide any issues which may arise in the enforcement proceedings.

519 See section IV.H above.
Reform to the Provisions Regarding Suspension and Early Termination of
Enforcement Proceedings

With respect to suspension and early termination of enforcement proceedings, it appears
that the Civil Procedure Law 2013 and the supplementary notices and interpretations
clearly set out the circumstances in which the court may order the enforcement
proceedings to be suspended or terminated. The main flaw in the current law however
is that there appears to be no clear guidance as to the meaning of ‘other circumstances’
in which a people’s court may order suspension or early termination of an arbitral
award. It is suggested here that at the very least the Supreme People’s Court ought to
issue an opinion which provides clarification of the types of circumstances which will
fall within this broad category and that such circumstances should be limited in order to
provide predictability and confidence in the process for enforcement of arbitral awards.

Reform to the Time Limits for Enforcement

With respect to the overall timeframe in which a people’s court must enforce an arbitral
award, the analysis above has identified the distinction and contradiction between the
six month timeframe set out in the Provisions of the Supreme People’s Court on Certain
Time Limits for Disposition Enforcement Cases by the People’s Court and the eight
month timeframe set out in Provisions of the Supreme People’s Court on the Issue
concerning Fees Collection and Review Period for Recognition and Enforcement of

Provisions of the Supreme People’s Court on Certain Time Limits for Disposition Enforcement Cases
by the People’s Courts (People’s Republic of China) Supreme People’s Court, 31 December 2006 art 1.
Foreign Arbitration Awards, both of which apply to the enforcement of foreign arbitral awards.

In addition, as discussed above at section IV.N, there appears to be no consistency in the practice of the Supreme People’s Court with respect to the timeframe in which it renders a decision on the enforcement of an arbitral award. It is argued here that while a timeframe must be imposed to prevent the courts from simply sitting on, rather than acting on, an application for enforcement of an arbitral award, the current timeframe needs to be reformed: (a) to be consistent; and (b) to be achievable and thereby to encourage confidence of overseas parties in the enforcement system in the PRC. Perhaps a starting point would be for the Supreme People’s Court to conduct a survey to determine the average amount of time in which enforcement of foreign-related and foreign arbitral awards usually takes place and then to calculate an appropriate and achievable timeframe from there.

6 China’s Goal - One Simple Enforcement Law

Finally, it is no doubt clear from the explanation of the enforcement procedure contained in this section that the PRC law concerning the enforcement of arbitral awards is far from easy to follow. There is no one law on enforcement, rather a party seeking to either apply for enforcement of an arbitral award, or defend enforcement proceedings, must piece together the legal requirements from a number of laws, regulations and judicial interpretations, some of which are inconsistent. It is therefore the author’s final recommendation in this regard that the PRC should enact one simple

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enforcement law concerning the enforcement of foreign and foreign-related arbitral awards.

Further, it is argued here that such law should: (a) expressly state that the purpose of the law is to facilitate the enforcement of arbitral awards in a predictable, reliable, transparent and fair manner, taking into account the PRC’s obligation to enforce foreign arbitral awards in accordance with the New York Convention; (b) consolidate the current enforcement laws relating to arbitral awards; (c) implement the recommendations set out above and iron out any inconsistencies within the enforcement provisions; and (d) eradicate the distinction and disparity between the enforcement of foreign-related and foreign arbitral awards to create one, simple, independent, impartial and fair enforcement system.

V. GROUNDS FOR REFUSING RECOGNITION AND ENFORCEMENT OF FOREIGN-RELATED AND FOREIGN ARBITRAL AWARDS

The Civil Procedure Law 2013 sets out the grounds on which the people’s courts may refuse to enforce a foreign-related arbitral award, while the New York Convention sets out the grounds on which the people’s courts may refuse to recognise and enforce a foreign arbitral award. Although Chinese law contains two separate regimes for the enforcement of foreign-related and foreign arbitral awards, the grounds on which a people’s court may refuse to enforce a foreign-related arbitral award under article 274 of the Civil Procedure Law 2013 do, to a certain extent, reflect the grounds on which a court may refuse to recognise and enforce an arbitral award under article V of the New York Convention. However, certain significant differences do exist.
The aim of this section V is to identify the similarities and differences between the grounds on which a people’s court may refuse to enforce a foreign-related arbitral award and a foreign arbitral award respectively, in order to assess whether reform is needed and, if so, to provide recommendations as to the kind of reforms which ought to be made. To that end, this chapter: compares the grounds for refusal under the *Civil Procedure Law 2013* with those set out under the New York Convention; analyses the people’s courts’ interpretation and application of each of the grounds in light of international best practice and jurisprudence; and, based on the comparison and analysis identifies reforms which, in the author’s view, ought to be made to China’s enforcement system.

A  **BURDEN OF PROOF AND THE COURT’S DISCRETION**

Both article V of the New York Convention and article 274 of the *Civil Procedure Law 2013* establish the burden of proof in enforcement cases and set out the boundaries of the court’s power in determining whether to refuse the enforcement of an arbitral award.

1  **Burden of Proof**

Article V of the New York Convention and article 274 of the *Civil Procedure Law 2013* both set out grounds for non-enforcement for which the burden of proof lies on the defendant in the enforcement proceedings, and grounds for non-enforcement which the court has the power to invoke, even in the absence of any proof from any of the parties to the enforcement proceedings.

Article V(1) of the New York Convention states:

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522 New York Convention art V(1); *Civil Procedure Law 2013* ch 26 art 274.
523 New York Convention art V(2); *Civil Procedure 2013* ch 26 art 274(1).
recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that ... 524

The article then goes on to list a number of exhaustive grounds for refusing recognition and enforcement of a foreign arbitral award. 525 It is clear from the express words of article V(1) of the New York Convention that the party against whom an arbitral award is invoked, and who wishes to challenge the enforcement of the award, first must request that the enforcing court refuse to recognise and enforce the award, 526 and second must prove that one or more of the grounds set out in that article is fulfilled. 527 The burden is therefore on the defendant to enforcement proceedings to raise an objection and to prove that one of the grounds for refusal is made out. 528 As Born point out:

524 New York Convention art V(1).
526 New York Convention art V(1).
there appears to be virtually no reported authority, from any jurisdiction, contradicting
the view that the Convention allocates the burden of proof under Article V to the award-
debtor, not the award-creditor.\textsuperscript{529}

Similarly, although not using identical language, article 274 of the \textit{Civil Procedure Law
2013} provides:

\begin{quote}
[a] people's court shall, after examination and verification by a collegial panel of the
court, make a written order not to allow the execution of the award rendered by an
arbitral organ of the People's Republic of China handling cases involving foreign
element, if the party against whom the application for execution is made furnishes proof
that...\textsuperscript{530}
\end{quote}

By use of the words ‘if the party against whom the application for execution is made furnishes proof that’, article 274 makes it clear that, in line with article V(1) of the New
York Convention, it also places the burden of proof on the defendant to the enforcement
proceedings to prove that one of the grounds for refusing enforcement is made out.

Furthermore, article V(2) of the New York Convention states:

\begin{quote}
[r]ecognition and enforcement of an arbitral award may also be refused if the competent
authority in the country where recognition and enforcement is sought finds that...\textsuperscript{531}
\end{quote}

Under this article, an enforcing court can make enquiries into the matters set out in
article V(2) of the New York Convention \textit{ex officio}, even if neither party to the dispute
has raised an objection based on either of these grounds.\textsuperscript{532}

Similarly, the second paragraph of article 274 of the \textit{Civil Procedure Law 2013
provides:

\begin{quote}
\textsuperscript{529} Born, above n 299, 3420.
\textsuperscript{530} \textit{Civil Procedure Law 2013} ch 26 art 274.
\textsuperscript{531} New York Convention art V(2).
\textsuperscript{532} New York Convention art V(2)(a); Born, above n 299, 3418; Nacimiento, above n 528, 205; Di Pietro, above n 9, 96.
[i]f a people’s court determines that the enforcement of an award will ...\textsuperscript{533}

The article then goes on to set out a further ground for non-enforcement. As such, this second paragraph is in line with article V(2) of the New York Convention in that it also provides the court with the ability to refuse to enforce an arbitral award, even in circumstances where the defendant does not raise an objection or furnish proof on the matters set out in that paragraph.

2 Court’s Discretion

With respect to the court’s discretion to either enforce or refuse to enforce an arbitral award, the English, Spanish, Chinese and Russian texts\textsuperscript{534} of the New York Convention provide that the enforcing court ‘may’ refuse to recognise and enforce an arbitral award thereby providing the enforcing court with discretion to the effect that, even if the party proves that a ground for refusal exists, the enforcing court can still exercise its discretion to uphold and enforce the award.\textsuperscript{535} The French version of the Convention does not contain such discretion\textsuperscript{536} but in practice only a minority of countries have interpreted article V(1) of the New York Convention as leaving the enforcing court with no discretion.\textsuperscript{537}

\begin{thebibliography}{9}
\item\textsuperscript{533} \textit{Civil Procedure Law 2013 ch 26 art 274}.
\item\textsuperscript{534} Jan Paulsson, ‘May or Must Under The New York Convention: An Exercise in Syntax and Linguistics’ (1998) 14(2) \textit{Arbitration International} 227, 227.
\item\textsuperscript{536} Born, above n 299, 3427-3428; Kröll, \textit{Awards in Germany’} above n 527, 165; Paolo Michele Patocchi, ‘The 1958 New York Convention – The Swiss Practice’ in \textit{The New York Convention of 1958} (ASA Special Series No 9, 1996) 145, 166.
\item\textsuperscript{537} Born, above n 299, 3427-3428; Paulsson, above n 534, 228-9; Azeredo da Silveira and Laurent Lévy, above n 290, 643.
\end{thebibliography}
However, in contrast, article 274 of the *Civil Procedure Law 2013* uses the word ‘shall’, thereby making it mandatory for the enforcing court to refuse to enforce an arbitral award, where the defendant proves that a ground for refusal is made out, or where the Court determines that the award is contrary to the social and public interest of China. This inconsistency between the court’s discretion under the New York Convention, and its obligation under article 274, must be eradicated to bring China’s national law in line with the New York Convention. This is particularly so if China is to adopt a pro-arbitration approach to the enforcement of arbitral awards in China.

**B INCAPACITY OF A PARTY**

Most international conventions, and indeed most national arbitration laws, provide that a court may refuse to recognise and enforce an arbitral award if a party to the arbitration agreement was under some incapacity. Article V(1)(a) of the New York Convention expressly provides that a court may refuse to recognise and enforce an arbitral award where:

> [t]he parties to the agreement referred to in article II, were, under the law applicable to them, under some incapacity...

While lack of capacity is expressly stated as a ground for refusing recognition and enforcement under the New York Convention, whether such a ground exists under Chinese law is debatable as there is no express provision in Chinese law that

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538 *Civil Procedure Law 2013* ch 26 art 274.
539 See for example New York Convention art V(1)(a); UNCITRAL Model Law art 36(1)(a).
541 New York Convention art V(1)(a); UNCITRAL Model Law art 36(1)(a); Poudret and Besson, above n 541, 863.
542 New York Convention art V(1)(a).
specifically allows a people’s court to refuse to enforce an award on the basis that a
party lacked capacity.\[^{543}\] This section therefore considers how the incapacity ground
is interpreted and applied under the New York Convention, whether such a ground exists
under Chinese law and finally looks at China’s experience with the incapacity ground to
determination whether reforms ought to take place.

1  **Interpretation of The Incapacity Ground Under The New York Convention**

While on the international arbitration scene the lack of capacity ground has been rarely
invoked,\[^{544}\] the interpretation of article V(1)(a) of the New York Convention requires
explanation and clarification.

(a)  **Legal Capacity or Legal Representation?**

Prior to the negotiations relating to the draft text of the New York Convention, the
concept of capacity under the Geneva Convention\[^{545}\] concerned the appropriateness of
the legal representation of a party to arbitration proceedings, and *not* a flaw in capacity
affecting the validity of the arbitration agreement.\[^{546}\] However, under article V(1)(a) of
the New York Convention, capacity is concerned with the legal ability of a person to
enter into a binding legal relationship of his or her own free will.\[^{547}\] Any limitations on
this ability, which prevent a person from entering into certain legal relationships, will

\[^{543}\] Wunschheim, above n 301, 251.
\[^{544}\] Andrew Tweedale and Keren Tweedale, *Arbitration of Commercial Disputes: International and
English Law and Practice* (Oxford University Press, 2007) 13, 15; Lew, Mistelis and Kröll, above n 535,
26-72.
\[^{546}\] Ibid art II; United Nations, *Committee on the Enforcement of International Arbitral Awards –
Summary Record of the sixth meeting, 6th mtg*, UN Doc E/AC 42/SR 6 (29 March 1955) 3-5; United
Nations, *Recognition and Enforcement of International Arbitral Awards – Report of the Secretary-
General, 21st sess*, Agenda Item 8, UN Doc E/2822 (31 January 1956) 22.
\[^{547}\] Born, above n 299, 3490; C. Ignacio Suarez Anzorena, ‘The Incapacity Defence Under The New York
Convention’ in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration
Agreements and International Arbitral Awards The New York Convention in Practice* (Cameron May,
2008) 615, 621.
render the person under an incapacity.\textsuperscript{548} Although there has been debate as to whether the concept of incapacity under the New York Convention applies to legal entities,\textsuperscript{549} the general consensus is to answer that question in the affirmative.\textsuperscript{550}

(b) \textit{Time At Which Capacity Is Determined}

There is also a temporal element that the objecting party must satisfy to bring itself within the realm of article V(1)(a) of the New York Convention. Article V(1)(a) does not expressly indicate the relevant time at which the party must be under some incapacity.\textsuperscript{551} However, the focus of article is on whether the party raising the incapacity objection had capacity to enter into the arbitration agreement.\textsuperscript{552} Such an interpretation is derived from the wording of the article, which refers to the ‘parties to the Agreement’ as opposed to the ‘parties to the arbitral procedure’.\textsuperscript{553} This issue was considered in the context of bankruptcy in two United States cases.

The first decision was that of the United States Supreme Court in New York in \textit{Corcoran et al v AIG Multi-line Syndicate Inc.}\textsuperscript{554} AIG Multi-line Syndicate commenced arbitration against Union Indemnity Insurer of New York (\textit{Union Indemnity}).\textsuperscript{555} Union Indemnity was however insolvent and Corcoran had been appointed as liquidator.\textsuperscript{556} Corcoran applied to the United States Supreme Court in New

\begin{footnotes}
\begin{enumerate}
\item Anzorena, above n 547, 621.
\item New York Convention art V(1)(a).
\item Born, above n 299, 3490; Anzorena, above n 547, 631.
\item New York Convention art V(1)(a).
\item \textit{Corcoran et al v AIG Multi-line Syndicate, Inc} 539 NYS 2d 630 (Sup. Ct. N.Y. 1989).
\item Ibid.
\item Ibid.
\end{enumerate}
\end{footnotes}
York to prevent arbitration on the grounds, *inter alia*, that Union Indemnity was under an incapacity as it was now insolvent and therefore could not take part in arbitration proceedings.\(^{557}\) In support of its application, Corcoran relied upon the incapacity ground in article V(1)(a) of the New York Convention.\(^{558}\) Based on the use of the past tense contained therein, the Court held that the incapacity must relate back to the time that the parties entered into the arbitration agreement.\(^{559}\)

To the contrary, in *Corcoran v Adra Insurance Co Ltd*\(^{560}\) (decided only a year later) a higher court from the same jurisdiction came to the exact opposite conclusion.\(^{561}\) The Court found that the relevant time for determining incapacity was at the time of the arbitration proceedings and, as such, subsequent liquidation affecting one of the parties was sufficient to make out the incapacity objection under article V(1)(a) of the New York Convention.\(^{562}\)

It is argued that this latter interpretation is flawed and that the decision of the New York Supreme Court should be preferred. This is because the court in the latter case relied upon the questionable premise that the drafters of the New York Convention were concerned, under the incapacity ground, to ensure that parties were properly represented during arbitration proceedings.\(^{563}\) However, as has already been concluded above, it is now well established that this is *not* the concern of the incapacity ground.\(^{564}\) Rather, the

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\(^{557}\) Ibid, 636.
\(^{558}\) Ibid.
\(^{559}\) Ibid.
\(^{561}\) Ibid 696.
\(^{562}\) Ibid 701.
\(^{563}\) Anzorena, above n 547, 632.
\(^{564}\) Born, above n 299, 3490; Anzorena, above n 547, 621.
incapacity ground is concerned with the legal ability to enter into an arbitration agreement.\footnote{Anzorena, above n 547, 621.}

\begin{enumerate}[(c)]
\item \textit{Law Applicable To Capacity}
\end{enumerate}

The final point to consider interpreting article V(1)(a) of the New York Convention is the law applicable to determining capacity. The article itself provides that the party must be under an incapacity ‘under the law applicable to them’.\footnote{New York Convention art V(1)(a).} When Professor Sanders introduced the provision, he explained that capacity would be ‘determined only according to the law governing [the party’s] personal status and not the law applicable to the award’.\footnote{United Nations Economic and Social Council, \textit{United Nations Conference on International Commercial Arbitration – Summary Record of the Twenty-Fourth Meeting}, UN Doc. E/CONF26/SR 24 (12 September 1958) 7.}

Some commentators on the New York Convention have argued against interpreting ‘to them’ as a reference directly to the personal law of the parties, but rather have preferred to interpret ‘to them’ as a reference to the conflict laws of the forum, the application of which will determine the law applicable to the capacity of the party in question.\footnote{Born, above n 299, 3488-9; Anzorena, above n 547, 634.}

Regardless as to which approach is taken, eventually either the law of the place of incorporation (following common law tradition)\footnote{Blackaby et al, above n 9, 96 [2.36].} or the law of the seat of the relevant legal entity (following civil law tradition)\footnote{Poudret and Besson, above n 541, 243 [271]; Lew, Mistelis and Kröll, above n 535, 118 [6]-[51]; \textit{Dalmine S.p.A v M & M Sheet Metal Forming Mach. AG}, Italian Corte di Cassazione, 23 April 1997 reported in (1999) XXIV Yearbook of Commercial Arbitration 709.} will be applicable to the defendant’s capacity. However, following the European Court of Justice’s decision in \textit{Uberseering BV v Nordic Construction Company}\footnote{\textit{Uberseering BV v Nordic Construction Company} [2002] ECR 1-9919.} it appears that the weight of authority is in
favour of applying the law of the place of incorporation to govern the capacity of a legal entity.

2 Injection of Incapacity Ground under Chinese Law

As Chinese law does not expressly recognise incapacity as a ground on which enforcement of an arbitral award can be refused, commentators argue that no such ground exists. However, under Chinese law an arbitration agreement will be null and void, where one party to it has no (or limited) capacity for civil conduct. Capacity is therefore a requirement of a valid arbitration agreement under Chinese law. On this basis, the alternative view is that where an arbitration agreement is subject to Chinese law, the lack of capacity of a party forms the basis on which enforcement of an arbitral award may be refused, due to the invalidity of the arbitration agreement. In this regard, Chinese law does contemplate incapacity as a ground on which enforcement of a foreign-related arbitral award may be refused, however, its application is limited to circumstances in which the arbitration agreement is subject to Chinese law. Where a foreign law applies to the validity of an arbitration agreement, a party seeking to rely on incapacity as a ground for non-enforcement could only do so if the foreign law applicable to the arbitration agreement contained provisions to the effect that the arbitration agreement is invalid if a party lacked the capacity to conclude it.

574 Ibid.
576 For discussion of the potential laws applicable to the validity of an arbitration agreement see Born, above n 299, 472-635.
(a) Legal Capacity Or Legal Representation?

In line with the approach taken in article V(1)(a) of the New York Convention, it appears that any incapacity under Chinese law also relates to the legal capacity of the parties to the arbitration agreement, rather than to whether the parties are properly represented.\(^{577}\) However, contrary to international interpretation of the New York Convention, it appears that the Chinese courts will interpret article V(1)(a) of the New York Convention as also applying to circumstances in which a party was not properly represented.\(^{578}\)

(b) Time At Which Capacity Is Determined

Chinese law is silent on the relevant time at which the party in question must have the necessary capacity. Indeed, article 17 of the Arbitration Law 1995 appears to be conflicting: it states that an arbitration agreement will be null and void if one party that ‘concluded’ the arbitration agreement ‘has’ no capacity.\(^{579}\) The use of the past tense of ‘concluded’ lends itself to a conclusion that the relevant time for determining capacity is at the time the parties entered into the arbitration agreement. Such a conclusion is in line with the interpretation of article V(1)(a) of the New York Convention.\(^{580}\) The use of the present tense ‘has’, on the other hand, lends itself to the conclusion that the relevant time for determining capacity is at the time when lack of capacity is relied on. It appears that the people’s courts have provided no guidance on this issue, although in

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580 See section V.B.1.(b) above.
the cases where capacity has been raised, the issue was whether the party had the capacity to conclude the arbitration agreement. 581

(c) Law Applicable To Capacity

Chinese arbitration law provides no guidance as to the law applicable to capacity. It is therefore necessary to turn to Chinese conflict of laws principles, which essentially provide that the *lex personalis* applies to a person’s capacity. 582 With respect to a legal person, capacity for civil conduct is determined by the law of its own country, which is the country where the legal person is registered. 583 China therefore follows the common law approach to determining the law applicable to capacity, which approach is accepted by Contracting States to the New York Convention. 584

3 China’s Experience With The Incapacity Ground

To the author’s knowledge, China has had very little experience with the incapacity ground either under article V(1)(a) of the New York Convention, or as a basis for arguing that there is no valid arbitration agreement under article 274 of the Civil Procedure Law 2013. In fact, the author has been able to locate only three decisions in which a party argued against enforcement of a foreign or foreign-related arbitral award


584 See section V.B.(c) above.
in China on the basis of a lack of capacity to conclude the contract containing the arbitration agreement.

In *Glencore International PLC v Chongqing Machinery Importing & Exporting Co*\(^{585}\) Glencore International PLC (*Glencore*) sought enforcement of an award rendered by the London Metal Exchange against Chongqing Machinery Importing & Exporting Co (*Chongqing*).\(^{586}\) Chongqing argued against enforcement of the award on the basis that a Mr Sun lacked the necessary authority to sign the arbitration agreement on its behalf.\(^{587}\) Chongqing relied on article V(1)(a) of the New York Convention but it is unclear as to whether it relied on the incapacity ground, or the invalidity of the arbitration agreement.\(^{588}\) Both the Intermediate People’s Court and the Higher People’s Court in Chongqing were inclined to refuse to enforce the award under article V(1)(a) of the New York Convention.\(^{589}\) The matter was referred to the Supreme People’s Court, which issued a Reply holding that Mr Sun had no authority to sign on behalf of Chongqing\(^{590}\) and therefore that the award should not be enforced in accordance with article V(1)(a) of the New York Convention.\(^{591}\)

Further, in *ED&F MAN Asia Pte Ltd v China Sugar and Alcohol Industry Corp Ltd*,\(^{592}\) the Sugar Association of London rendered an award in favour of ED&F MAN Asia Pte

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587 Ibid.

588 Ibid.

589 Ibid.


591 Ibid.

592 *ED&F Man Asia Pte. Ltd v China Sugar and Alcohol Industry Corp Ltd*, Reply of the Supreme People’s Court, 1 July 2003 [2003] Min Si Ta Zi No. 3 and the Beijing Higher People’s Court Request
Ltd (ED&F) against China Sugar and Alcohol Industry Corporation Ltd (China Sugar), which in turn commenced enforcement proceedings in the Beijing Intermediate People’s Court.  

China Sugar objected to enforcement on the basis of article V(1)(a) of the New York Convention. It argued it lacked civil capacity to enter into the contract because it did not have the required authority under Chinese law to import the relevant merchandise. The Beijing Intermediate People’s Court rejected China Sugar’s argument and held that it did have the requisite capacity and as such recognition and enforcement of the award would not be refused under article V(1)(a) of the New York Convention. The Beijing Higher People’s Court agreed and stated that ‘[t]he China Sugar Group as a legal person has contracting capacity.’ Unfortunately, the Supreme People’s Court failed to even consider the incapacity argument in its Reply, but nonetheless opined that the arbitral award must be recognised and enforced. While it is unclear why the Supreme People’s Court failed to even mention the incapacity ground, the case serves as a positive example of the people’s courts’ willingness to enforce arbitral awards even in the face of objections from the parties.

The most recent Chinese case to consider the incapacity ground is JCD Co. Ltd v Zhongshan Gangyuan Industry Co. Ltd, decided by the Zhongshan Intermediate People’s Court in 2008. A tribunal constituted by the Japan Commercial Arbitration
Association in Tokyo rendered an award in favour of JCD Co. Ltd (JDC) which sought enforcement in the Zhongshan Intermediate People’s Court. The defendant (Gangyuan) objected on the basis of both article V(1)(a) and V(1)(d) of the New York Convention. With respect to article V(1)(a), Gangyuan argued that its lawyer had no authority to enter into an arbitration agreement, which stipulated the Japan Commercial Arbitration Association as the relevant institution, on its behalf and therefore Gangyuan was under a incapacity.

The Zhongshan Intermediate People’s Court rejected Gangyuan’s argument. The Court started its decision correctly by holding that whether Gangyuan’s lawyer had the relevant capacity to enter into the new arbitration agreement was a matter to be determined by Japanese law, as the lex personalis of the lawyer. However, as Gangyuan failed to submit any proof of the content of Japanese law in this respect, the Court applied Chinese law. It found, on the basis of the power of attorney provided, that the lawyer had acted within the scope of its power and therefore was not under an incapacity for the purpose of article V(1)(a) of the New York Convention.

In the author’s view, this case prima facie serves as a good example of the way in which the Chinese courts ought to apply article V(1)(a) of the New York Convention. This is because: first, the court determined that the law applicable to the lawyer was the lex personalis and this is in line with how ‘the law applicable to them’ under article V(1)(a) of the New York Convention should be interpreted; and second the court sought to place the burden on Gangyuan to prove that the lawyer was under some incapacity.

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600 Ibid.  
601 Ibid.  
602 Ibid.  
603 Ibid.  
604 Ibid.  
605 Ibid.  
606 Ibid.  
607 See section V.B.1.(a) above.
which again is in line with the pro-arbitration, pro-enforcement thrust of the New York Convention. However, the court’s approach in applying Chinese law in the absence of proof as to the requirements of capacity under Japanese law is definitely questionable, particularly given that the New York Convention does not provide power to an enforcing court to default to its own laws in the absence of proof by the defendant as to the content of foreign law.

4 Summary Comments on the Incapacity Ground

The above analyses shows that the major difference between article V(1)(a) of the New York Convention and article 274 of the Civil Procedure Law 2013 is that the latter does not provide the incapacity of a party as a ground for non-enforcement of an arbitral award. While capacity is a requirement of a valid arbitration agreement under Chinese law, as discussed above, problems will arise where a dispute is to be resolved by a Chinese arbitral institution (and therefore where enforcement in China will fall under the article 274 regime) but where the law applicable to the arbitration agreement is a foreign law. As such, it is recommended that the article 274 regime be brought in line with the provisions of article V(1)(a) of the New York Convention. This will add to the predictability of the Chinese regime for the enforcement of arbitral awards and will in turn enhance China’s appeal as an arbitration destination of choice.

Further, the cases discussed above highlight that China has had mixed success with the incapacity ground under the New York Convention: in the first case (decided in 2000), the Supreme People’s Court erroneously refused to enforce the award on the basis that a lack of representation constituted a lack of capacity for the purposes of article V(1)(a) of
the New York Convention; in the second case (decided in 2003), the Supreme People's Case utterly failed to consider the ground, despite the fact that it had been raised by the party seeking to resist enforcement; and in the third case (decided in 2008), the Supreme People’s Court in the first instance correctly determined the law applicable to capacity in accordance with the requirement of article V(1)(a) of the New York Convention, but then quickly defaulted to apply Chinese law to the question of capacity in the absence of proof as to capacity requirements under Japanese law – this is clearly erroneous. The Chinese courts have much work to do to ensure that they hand down decisions that are in line with international interpretation and application of the New York Convention.

C INVALIDITY OF THE ARBITRATION AGREEMENT

In addition to the incapacity ground, article V(1)(a) of the New York Convention also provides that a court may refuse to recognise and enforce a foreign arbitral award where the arbitration agreement is invalid under the applicable law. Contrastingly, article 274(1) of the Civil Procedure Law 2013 only provides that a people’s court must refuse enforcement of a foreign-related arbitral award where there is no arbitration agreement. The express words of the provisions are as follows:

611 New York Convention art V(1)(a).
612 Civil Procedure Law 2013 ch 26 art 274(1).
<table>
<thead>
<tr>
<th>Article V(1)(a) of the New York Convention</th>
<th>Article 274(1) of the Civil Procedure Law 2013</th>
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<td>The said agreement is not valid under the law to which the parties have subjected it or, failing an indication thereon, under the law of the country where the award was made.</td>
<td>The parties have not stipulated any clause regarding arbitration in their contract or have not subsequently reached a written agreement on arbitration.</td>
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The overall concept of the two provisions appears to be the same in that they both aim to provide a mechanism for refusing enforcement where there is no valid foundation for the arbitration,\(^{613}\) i.e. where there is no valid arbitration agreement. However, it is argued here that the black letter words of article 274(1) of the Civil Procedure Law 2013 are much more narrow than article V(1)(a) of the New York Convention, as they do not take into account situations where an arbitration agreement exists but is invalid. The following sections consider the invalidity ground in further detail and analyse China’s experience with this ground to date.

1    Interpretation of Article V(1)(a) of The New York Convention

While article V(1)(a) of the New York Convention appears to be simple and clear on its face, the application of that article is riddled with intricacies. This section delves into these intricacies to establish how article V(1)(a) of the New York Convention ought to be interpreted and applied.

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\(^{613}\) As to the role of the arbitration agreement as the foundation of arbitration, see Blackaby et al, above n 9, 84 [2.01].
(a) **Formal Requirements Under Article II of The New York Convention**

The reference in article V(1)(a) of the New York Convention to the ‘said agreement’\(^{614}\) is a reference to the arbitration agreement specified in article II of the New York Convention,\(^{615}\) which sets out the form requirements of a valid arbitration agreement.\(^{616}\) Paragraph (1) of article II of the New York Convention provides that an arbitration agreement is:

>a]n 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.\(^{617}\)

Article II(2) of the New York Convention then goes on to state that:

>[t]he 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.\(^{618}\)

The requirements of article II prevail over any form requirements of national law relating to the formal validity of an arbitration agreement,\(^{619}\) unless the requirements of a given national law are more favourable to arbitration than the requirements of article II of the New York Convention.\(^{620}\) As such, it is clear that the invalidity ground covers

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\(^{614}\) New York Convention art V(1)(a).

\(^{615}\) New York Convention art II.


\(^{617}\) New York Convention art II(1).

\(^{618}\) New York Convention art II(2).


\(^{620}\) New York Convention art VII; Nacimiento, above n 528, 225.
arbitration agreements which fail to comply with the relevant formal requirements and which are therefore deemed to be invalid.

(b) **Law Applicable To The Validity Of The Arbitration Agreement**

Although the principle of party autonomy allows parties to agree on the law applicable to the material or substantive validity of their arbitration agreement,\(^ {621}\) in practice, this rarely occurs.\(^ {622}\) It is well established that in the absence of a designation by the parties of the law applicable to the material or substantive validity of an arbitration agreement, under article V(1)(a) New York Convention the law of the seat will apply, being the law of the country where the award was made.\(^ {623}\) There are very few exceptional cases in which the courts have refused to apply the default law of the seat to determine the validity of the arbitration agreement for the purpose of article V(1)(a) of the New York Convention.\(^ {624}\)

In practice, enforcing courts are rarely presented with an objection to enforcement based on material or substantive invalidity of an arbitration agreement under article V(1)(a) of the New York Convention.\(^ {625}\) This appears to be because the formal requirements of

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\(^{621}\) Poudret and Besson, above n 541, 142 [178]; Lew, Mistelis and Kröll, above n 535, 120 [6]-[59]; see UNCITRAL Model Law art 28(1).

\(^{622}\) Lew, Mistelis and Kröll, above n 535, 120 [6]-[59].


\(^{624}\) Born, above n 299, 3466; *Sarhank Group v Oracle Corporation*, 404 F.3d 657 (2nd Cir. 2005).

validity, as set out in article II of the New York Convention, are closely related to the fundamental basis of an arbitration agreement, being the party’s consent to be bound by such an agreement and therefore most matters of ‘invalidity’ for the purposes of article V(1)(a) of the New York Convention are dealt with in the context of formal requirements, rather than in the context of material or substantive validity under the law of the seat.\textsuperscript{626}

(c) \textit{Standard Approach to Article V(1)(a) of The New York Convention}

There is a standard approach which enforcing courts ought to take in determining an objection to enforcement based on article V(1)(a), regardless as to whether the objection is based on formal or substantive invalidity. In this regard, the first point to note is that the enforcing court’s power to review the arbitral tribunal’s decision on the validity of the arbitration agreement is broad.\textsuperscript{627} To determine whether it has jurisdiction, an arbitral tribunal will have already verified the existence of an arbitration agreement in the arbitral proceedings.\textsuperscript{628} The role of the enforcing court therefore is to decide the matter \textit{de novo} based on the facts and evidence presented by the parties in the enforcement proceedings:\textsuperscript{629} the enforcing court is not bound by any finding of the arbitral tribunal with respect to the validity of the arbitration agreement.\textsuperscript{630} As the UK


\textsuperscript{627} Born, above n 299, 3474.

\textsuperscript{628} Born, above n 299, 3476 – 3478; Kröll, \textit{Recognition and Enforcement of Awards}, above n 626, 221.


Supreme Court stated in *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*:631

[t]he starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question.632

While there are a few limited decisions633 which fly in the face of this approach (and which instead chose to limit the scope of review of a decision on the validity of arbitral awards), it is well established that a *de novo* review is the appropriate approach to take.634

The second point to note is that in both applying the formal requirements of article II of the New York Convention (or the more favourable national law requirements), and in applying the relevant law applicable to the substantive validity of an arbitration agreement, the courts must take a pro-arbitration approach and must interpret the arbitration agreement broadly, provided that the parties’ intent to arbitrate is evident.635

The degree to which a court will take a pro-arbitration approach does vary from country to country: on what some may deem as the extreme side, in *HKL Group Co Ltd v Rizq* 631 *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

632 Ibid [160].
633 *Nicor International Corporation v El Paso Corporation* 292 F.Supp.2d 1357, 1370-71 (S.D. Fla. 2003); Case No. 86, Oberlandesgericht Cologne, 26 October 2004 reported in (2005) XXX Yearbook of Commercial Arbitration 574, 575; *Aloe Vera of America Inc. v Asianic Food (S) Pte. Ltd* [2006] SGHC 78, 63 (Singapore High Court); *Jiangxi Provincial Metal & Minerals Import and Export Corporation v Sulanser Company* [1995] 2 HKC 373 (Hong Kong Court of First Instance).
634 Born, above n 299, 3475.
635 Kröll, *Recognition and Enforcement of Awards*, above n 626, 1061 [66]; Nacimiento, above n 528, 228.
the Singapore High Court recently held that an arbitration agreement, which specified a non-existent arbitral institution, was valid and must be given effect. While it is not argued that enforcing courts need to go this far, it is argued here that enforcing court must adopt a pro-arbitration approach.

2 Interpretation of Article 274(1) of the Civil Procedure Law 2013

(a) The Position Pre-2006

Article 274(1) of the Civil Procedure Law 2013, and indeed article 260(1) of the 1991 version, both expressly provide a ground for refusing enforcement of a foreign related arbitral award where there is no arbitration agreement but do not expressly mention the situation in which an arbitration agreement exists but is invalid. In the 1992 case of *Hangzhou Yanan Road Branch of the Agricultural Bank of China v Shenzhen Zhenghua Industrial Co Ltd*, the defendant sought to resist enforcement of the arbitral award on the ground that the arbitration agreement was invalid, because it merely stipulated a place of arbitration and did not designate an arbitral jurisdiction. The Shenzhen Intermediate People’s Court, and later the Guangdong Higher People’s Court, were inclined to refuse enforcement of the arbitral award and therefore referred the case to the Supreme People’s Court. The Supreme People’s Court issued a Reply stating that the invalidity of an arbitration agreement does not equal the non-existence of an arbitration agreement, and therefore the lower people’s courts must enforce the arbitral

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636 *HKL Group Co Ltd v Rizq International Holdings Pte. Ltd* [2013] SGHCR 08.
637 Ibid [9].
639 Ibid.
640 Ibid.
award. It is therefore clear that under the old article 260(1) of the Civil Procedure Law 1991, the people’s courts would enforce an arbitral award invalid arbitration agreement.

(b) The Position Post-2006

The position changed in 2006 when article 18 of the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China" was introduced. This article states:

[f]or the purposes of Item (1) of Paragraph 1 of Article 58 of the Arbitration Law, that "no arbitration agreement has been reached" means that the parties concerned have failed to reach an arbitration agreement. A situation in which an arbitration agreement is determined invalid or repealed should be deemed as "no arbitration agreement has been reached".

The Supreme People’s Court therefore confirmed that an invalid arbitration agreement will fall within the ambit of article 274(1) of the Civil Procedure Law 2013, thereby bringing the ground set out in that article in line with invalidity ground set out in article V(1)(a) of the New York Convention.

(c) Law Applicable To The Arbitration Agreement

With respect to the law applicable to the validity of the arbitration agreement in a foreign-related arbitration, Chinese law provides a number of options namely: the law

641 Ibid.
642 Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China" (People’s Republic of China) Supreme People’s Court, 23 August 2006 art 18.
643 Ibid art 18.
as agreed by the parties; the law of the place of arbitration, or Chinese law, where the parties have neither chosen an applicable law nor chosen the place of arbitration.

The first two options set out here are in line with the approach taken by article V(1)(a) of the New York Convention, however the default application of Chinese law appears to be unique. In practice, the law applicable to an arbitration agreement in a foreign-related arbitration must be either the law chosen by the parties or Chinese law. This is because if the parties select a foreign place of arbitration, the arbitration will be deemed to be foreign as opposed to foreign-related according to Chinese arbitration law.

(d) **Formal Requirements Under Chinese Law**

Where the law applicable to the arbitration agreement in a foreign-related arbitration is Chinese law, article 16 of the *Arbitration Law 1995* sets out the formal requirements for validity, namely that the arbitration agreement is concluded in some written form before or after the dispute arises, that it expresses an intention to apply for arbitration, sets out the matters to be referred to arbitration and designates an arbitration commission.

(i) **Other Written Form**

The *Arbitration Law 1995* does not define or explain what is meant by the phrase ‘other written form.’ However, article 11 of the *Contract Law of the PRC* provides that the

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644 Ibid art 16.
645 Ibid.
646 Ibid.
647 See section V.C.I.(b) above.
648 See however Wunschheim, above n 301, 238 who argues that the law applicable to the arbitration agreement must be Chinese law if the arbitration is to be foreign-related.
650 Ibid art 16(1).
651 Ibid art 16(2).
652 Ibid art 16(3).
653 Ibid.
term ‘in writing’ refers to any form which is capable of tangibly representing its content i.e. written instruments, letters, and electronically transmitted documents such as emails, facsimiles, telegrams and telexes.\textsuperscript{654} In addition, article 1 of the Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the "Arbitration Law of the People’s Republic of China" confirms that ‘in other written forms’ includes in the form of ‘a written contract, letter, or electronic data text (including telegram, telex, facsimile, electronic data interchange, and e-mail).’\textsuperscript{655} Such an approach is consistent with article II of the New York Convention.\textsuperscript{656}

(i) \textit{An Intention To Apply For Arbitration}

A arbitration agreement, which provides the parties with the choice of either submitting their dispute to arbitration or filing a suit in the relevant court, will be invalid \textit{unless} one of the parties commences arbitration and the other party fails to commence an action in the relevant court.\textsuperscript{657} In addition, the express requirement that the arbitration agreement must show an intention of the parties to arbitrate their disputes has led to a number of cases in which the invalidity of an arbitration agreement has been raised, based on the argument that the person signing the arbitration agreement did not have the necessary authority to do so and as such the arbitration agreement did not evince the intention of the true party to arbitrate.\textsuperscript{658}


\textsuperscript{655} \textit{Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the "Arbitration Law of the People’s Republic of China"} (People’s Republic of China) Supreme People’s Court, 23 August 2006 art 1.

\textsuperscript{656} See New York Convention art II; section V.C.1 above.

\textsuperscript{657} \textit{Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the "Arbitration Law of the People’s Republic of China"} (People’s Republic of China) Supreme People’s Court, 23 August 2006 art 7.

\textsuperscript{658} See \textit{China National Foreign Trade Transportation (Group) Corporation Nanjing Branch}, Reply of the Supreme People’s Court, 11 September 2001 [2000] Jianotazi No. 11 and Request of the Hubei Higher People’s Court [2000] Egaofa No.231 (unreported in English); \textit{HK European Asia Technology Co v
(ii) **Matters To Be Referred To Arbitration**

With respect to the requirement that the arbitration agreement must set out the matters which the parties agree to submit to arbitration, this requires the parties to set out the scope of the arbitration agreement. To assist in determining the scope of an arbitration agreement, article 2 of the *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China"* provides that:

> [i]f parties concerned generally agree that the arbitrable matters shall be disputes arising from a contract, then all disputes arising from the formation, validity, modification, assignment, performance, liability for breach, interpretation, or rescission of the contract may be deemed arbitrable matters.\(^{659}\)

As such, it appears that in theory the people’s courts ought to take a broad approach to determining the scope of an arbitration agreement.

(iii) **Designation of An Arbitration Institution**

With respect to the requirement that the parties designate an arbitration commission to resolve their disputes, this provision is specific to Chinese law.\(^{660}\) Where an arbitration agreement fails to specify either the scope of that agreement or an arbitration institution, the arbitration agreement will be null and void unless the parties are able to reach a

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\(^{660}\) Wunschheim, above n 301, 243.
supplementary agreement on these points.\textsuperscript{661} Chinese law does not recognise the concept of ad hoc arbitration.\textsuperscript{662}

(e) Material or Substantive Validity Under Chinese Law

Where Chinese law governs the material or substantive validity of the arbitration agreement, article 17 of the \textit{Arbitration Law 1995} provides that an arbitration agreement shall be null and void where: (a) the agreed matters for arbitration exceed the range of arbitrable matters as specified by law; (b) a party that concluded the arbitration agreement has no capacity for civil conducts or has limited capacity for civil conducts; or (c) one party coerced the other party into concluding the arbitration agreement.\textsuperscript{663}

With respect to (a) it is argued here that the approach of Chinese law in rendering an arbitration agreement invalid, on the basis that a matter is non-arbitrable, is contrary to the approach taken to the invalidity ground in article V(1)(a) of the New York Convention, which is not concerned with whether the subject matter of the dispute is arbitrable.\textsuperscript{664}

With respect to (b) and as we have seen above, the incapacity of a party as a basis for refusing enforcement of an arbitral award is in line with overall approach taken by the New York Convention.\textsuperscript{665} However, as Chinese law intertwines capacity and invalidity of the arbitration agreement as one ground for refusing enforcement of an arbitral

\textsuperscript{661} \textit{Arbitration Law 1995} ch III art 18.
\textsuperscript{663} \textit{Arbitration Law 1995} ch III art 17.
\textsuperscript{664} Nacimiento, above n 528, 220.
\textsuperscript{665} See section V.B above.
award, the Chinese approach does differ from that taken in the New York Convention.666

With respect (c) where an arbitration agreement will be null and void when one party has coerced the other party into concluding the arbitration agreement, this requirement stems from article 54 of the Contract Law of the PRC, which provides that a contract can be avoided where a party used fraud or coercion or took advantage of the other party’s vulnerability in order to make that party enter into a contract contrary to the true intention of that party.667 This point is not so express in the New York Convention.

3   China’s Experience With The Invalid Arbitration Agreement Ground

It appears that invalidity of the arbitration agreement is of the most often invoked grounds on which a defendant argues that a people’s court must refuse to recognise and enforce an arbitral award.668 In a survey of 97 Chinese cases (including domestic cases) surveyed by Clarisse von Wunschheim, the invalidity ground was invoked in 31 cases.669 This section considers some of the situations in which it has been invoked.

(a) Lack of Distinction Between the Arms of Article V(1)(a) of the New York Convention

As discussed above, the Supreme People’s Court ruled against enforcement of the arbitral award in Glencore International PLC v Chongqing Machinery Importing & Exporting Co670 in reliance on article V(1)(a) of the New York Convention. However,

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666 Ibid.
668 Wunschheim, above n 301, 250.
669 Ibid.
670 Glencore International PLC v Chongqing Machinery Importing & Exporting Co, Reply of the Supreme People's Court, 19 April 2001 [2001] Min Si Ta Zi No. 2 (Westlaw China); Request of the
while the Supreme People’s Court denied enforcement on the basis of the invalidity of
the arbitration agreement, it appears that the central issue rested on the incapacity arm
of article V(1)(a). As is the case with many of the Replies of the Supreme People’s
Court, it would be useful if it had set out the specific ground on which it relied and
distinguished between the two arms of article V(1)(a) of the New York Convention.

(b) Invalidity of Incorporated Arbitration Agreements

It is widely accepted that arbitration agreements can be incorporated by reference into a
contract. In fact, as Born states ‘incorporation of an arbitration agreement should
present few difficulties with regard to formal validity.’ While the New York
Convention is silent on the issue of incorporation of arbitration agreements by
reference, it is accepted that the New York Convention does not require a specific
reference to the relevant arbitration agreement in order for it to be incorporated.
Rather, a general reference will suffice. However, despite this general approach to
the New York Convention, the people’s courts came to the exact opposite conclusion in
two cases concerning article V(1)(a) of the New York Convention.

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671 Ibid.
672 Born, above n 299, 818.
675 Born, above n 299, 820.
In *Future E.N.E Co v Shenzhen Grain (Group) Co*, the defendant sought to resist enforcement of the arbitral award on the basis that an arbitration agreement, allegedly incorporated into a bill of lading from a charter party, did not constitute a valid arbitration agreement. The Guangzhou Maritime Court declined to enforce the arbitral award under article V(1)(a) of the New York Convention based on the fact that the alleged incorporation of the arbitration agreement, through the bill of lading, did not constitute an agreement in ‘written form’ for the purposes of article II of the New York Convention. The Court provided very little reasoning for its decision. However, it appears that it took a strict approach to the interpretation of the written requirement in article II of the New York Convention which, in the author’s view, is contrary to the pro-arbitration approach of the New York Convention.

In a similar, but perhaps more interesting case, the Supreme People’s Court also refused to enforce an arbitral award on the basis of the invalidity of an arbitration agreement allegedly incorporated into a charter party. In *Hanjin Shipping Co Ltd v Fuhong Oil Co Ltd*, the bill of lading expressly provided that it was to be used with charter parties, referred to a specific charter party contract and stated that all terms and conditions of that charter party, including the applicable law and arbitration clause, were to be incorporated into the bill of lading.

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679 Ibid.

680 Ibid.


682 Ibid.

683 Ibid.
The Guangzhou Maritime Court was inclined to refuse to enforce the award on the basis of invalidity of the arbitration agreement and therefore referred the matter to the Guangzhou Higher People’s Court. 684 That Court found that the arbitration agreement was invalid under article V(1)(a) of the New York Convention because the parties had not concluded a ‘written arbitration agreement’ for the purposes of article II of the New York Convention. 685 The Court further found that the applicant to the enforcement proceedings had failed to establish the link between the bill of lading, the arbitration clause contained in the charter party and the parties involved. The case was then referred to the Supreme People’s Court in accordance with the Prior Reporting System. 686

The Supreme People’s Court held that enforcement of the award must be refused on the basis that the arbitration agreement was invalid for the purposes of article V(1)(a) of the New York Convention. 687 This was because the bill of lading failed to give any further details on the charter party contract, and Hanjin had failed to establish that the charter party it relied on was the same charter party referred to in the bill of lading, which neither Hanjin nor Fuhong was a party to. 688

It appears that the real issue in this case was not whether there was an arbitration agreement ‘in writing’ as such for the purposes of article II of the New York Convention, but rather whether the arbitration agreement contained in the charter party was validly incorporated into the bill of lading so as to be a valid arbitration agreement between the parties. While insufficient information is provided in the published decisions to enable the author to form a view as to the correctness of the court’s

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684 Ibid.
685 Ibid.
686 Ibid.
687 Ibid.
688 Ibid.
decision in this regard, it appears that the decision ought to be at least criticised for its approach to the questions to be answered.

First, the Guangzhou Maritime Court seems to have taken the strict approach towards the New York Convention, which it took in the early case of Future E.N.E Co v Shenzhen Grain (Group) Co.689 Second it appears from the Supreme People’s Court’s Reply, that the Court placed the burden on Hanjin, as the enforcing party, to prove that the arbitration agreement it had relied on was valid. This is clearly contrary to the standard international approach taken towards article V(1)(a) of the New York Convention which, as discussed above, places the burden on the defendant to enforcement proceedings to prove that one of the grounds set out in article V(1) is made out and, even if a ground is made out, provides the enforcing court with the discretion to still enforce the arbitral award.690

(c) Invalidity of An Ad Hoc Arbitration Agreement

Article V(1)(a) of the New York Convention has also be considered by the people’s courts in the context of an ad hoc arbitration agreement. As discussed above, Chinese law does not recognise the concept of ad hoc arbitration.691 In Zublin International GmbH v Wuxi Woke General Engineering Rubber Co Ltd,692 a dispute arose in relation to the performance of a construction contract, which simply stated ‘Arbitration ICC Rules, Shanghai’.693 The claimant (Zublin) commenced arbitration before the ICC

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690 See section V.A above; New York Convention art V(1)(a).
691 Zhang, above n 662, 366; Tao, Salient Features, above n 662, 812; Xia, above n 662, 21.
693 Ibid.
International Court of Arbitration. Before the tribunal, the defendant (Wuxi) argued that the tribunal did not have jurisdiction because the arbitration agreement on which Zublin relied was invalid as it failed to specify an arbitral institution. Zublin then requested the Basic People’s Court in the Wuxi New Technology District to confirm the validity of the arbitration agreement. While these court proceedings were pending, the ICC tribunal rendered a final award in favour of Zublin, who commenced enforcement proceedings in the Wuxi Intermediate People’s Court of Jiangsu Province.

While the enforcement proceedings were pending, the Basic People’s Court issued its decision on the validity of the arbitration agreement, holding that: (a) as the parties had not selected a law applicable to their arbitration agreement, Chinese law applied as the seat of the arbitration was Shanghai, and (b) an arbitration agreement must specify an arbitral institution to administer the arbitration, and because the arbitration agreement failed to do so, it was invalid. This decision was later confirmed by the Supreme People’s Court. Almost two years after the Supreme People’s Court ruled on the validity (or lack thereof) of the arbitration agreement, the Wuke Intermediate People’s Court handed down its decision not to enforce the arbitral award. First, the Court made it clear that the arbitral award was a ‘non-domestic’ award for the purposes of

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694 Ibid.
695 Ibid.
696 Ibid.
697 Ibid.
698 Ibid.
699 Ibid.
701 Letter of Reply of the Supreme People’s Court to the Request for Instructions on the Case concerning the Application of Zublin International GmbH and Wuxi Woke General Engineering Rubber Co., Ltd. for Determining the Validity of the Arbitration Agreement (People’s Republic of China) Supreme People’s Court, 8 July 2004 (Westlaw China).
article I of the New York Convention because it had ultimately been rendered by the ICC International Court of Arbitration’s Secretariat in Paris and was therefore a French award. Second, the Court determined that the arbitration agreement was invalid based on the previous ruling of the Supreme People’s Court on the validity of the arbitration agreement. The author has been unable to find any ruling by a Higher People’s Court in the Jiangsu Province on the enforcement of this arbitral award. However, such court ought to have ruled on the matter in accordance with the Prior Reporting System.

The decisions of the people’s courts in this case have been heavily criticised amongst commentators.\(^{703}\) One of the major criticisms centres on the determination that the arbitral award was ‘non-domestic’ for the purposes of article I of the New York Convention because it was rendered under the auspices of the ICC.\(^{704}\) Two issues arise here. First, as discussed above, China made the reciprocity reservation when it acceded to the New York Convention, to the effect that it would only apply the New York Convention to the recognition and enforcement of awards made in another Contracting State.\(^{705}\) As such, the people’s courts erred in applying the New York Convention to the enforcement of this arbitral award: as the seat of the arbitration was Shanghai, the award ought properly to be considered as a foreign-related award, to which the enforcement provisions of the Civil Procedure Law 2008 ought to have applied. Second, if the arbitral award was properly a French award, then the Chinese courts had no power to rule on the validity of the arbitration agreement or to set aside the arbitral award as the

\(^{703}\) Wunschheim, above n 301, D-66; Jingzhou Tao, Salient Issues, above n 662, 825.


\(^{705}\) See section III.D.2.(c) above.
French, not Chinese, courts would have had supervisory jurisdiction over the proceedings.  

A further criticism is levelled more generally at the requirement that the arbitration agreement must specify an arbitral institution. Shortly after the Supreme People’s Court’s decision in this case, the ICC published an announcement on its website advising parties concluding arbitration agreements, which select China as the seat, to specify the ICC International Court of Arbitration as the arbitral institution in order to avoid the arbitration agreement being deemed invalid by the Chinese courts.

(d) Validity of Arbitral Awards Rendered by ‘Foreign’ Arbitral Institutions In China

The 2009 decision of the Ningbo Intermediate People’s Court in Duferco S.A v Ningbo Arts & Crafts Import & Export Co., Ltd marked a turning point in Chinese case law under the New York Convention from the approach previously taken in Zublin International GmbH v Wuxi Woke General Engineering Rubber Co Ltd.

The defendant (Ningbo) opposed the application for enforcement of the arbitral award on the basis that the arbitration agreement was invalid because the intention of the arbitration agreement was not to submit the dispute to the ICC, but rather to submit it to CIETAC. The Ningbo Intermediate People’s Court rejected Ningbo’s arguments and

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706 Ibid.
enforced the award.\textsuperscript{712} The Court found that the award was a non-domestic award and was therefore subject to the provisions of the New York Convention.\textsuperscript{713} It went on to find that the arbitration agreement was valid.\textsuperscript{714} This was the first ICC award rendered in mainland China that has been recognised and enforced by the Chinese courts.\textsuperscript{715}

While this decision ought to be praised for the pro-arbitration approach taken, the Chinese courts must again be criticised for their classification of the arbitral award as ‘non-domestic’ and therefore for the application of the New York Convention rather than the \textit{Civil Procedure Law 2008}. As discussed above, as China made the reciprocity reservation when it acceded to the New York Convention, the New York Convention cannot be applied to awards rendered in China (such as this one).

\textbf{(e) Formal Requirements Under the New York Convention}

In \textit{Concordia Trading B.V v Nantong Gangde Oil., Ltd}\textsuperscript{716} the Supreme People’s Court had the opportunity to consider the formal requirements of an arbitration agreement under article II of the New York Convention. The parties had entered into three contracts for the sale and purchase of soya bean oil, although only the claimant (\textit{Concordia}) actually signed the sales contracts.\textsuperscript{717} All three contracts contained an arbitration clause, which provided that any disputes would be submitted to arbitration in accordance with the rules of the Federation of Oils, Seeds and Fats Association (\textit{FOSFA}) in London.\textsuperscript{718} When a dispute arose, Concordia filed an application for arbitration with FOSFA, which ultimately resulted in an arbitral tribunal rendering an

\textsuperscript{712} Ibid 349.
\textsuperscript{713} Ibid.
\textsuperscript{714} Ibid 350.
\textsuperscript{715} Tao, \textit{Salient Issues}, above n 662, 825.
\textsuperscript{717} Ibid.
\textsuperscript{718} Ibid.
award in favour of Concordia. Concordia then applied for enforcement of the award under the New York Convention in the Nantong Intermediate People’s Court.

The defendant (Nantong) opposed the enforcement proceedings on the basis that, amongst other things, the parties had not agreed in writing to the terms of the agreements, including the arbitration clauses, and that communications between the parties failed to provide sufficient evidence to demonstrate that an agreement in writing existed. It appears that Nantong’s argument was based on the fact that it had not signed any of the sales contracts. The Nantong Intermediate People’s Court was inclined to refuse enforcement of the award on the basis that there was no agreement in writing in accordance with article II of the New York Convention. The case was passed to the Jiangsu Higher People’s Court then to the Supreme People’s Court, both of which confirmed that the court must refuse recognition and enforcement of the award on the basis that an arbitration agreement could not be implied under article II of the New York Convention, and insufficient evidence had been submitted to establish that there was an agreement in writing between the parties in the three sales contracts.

Although information as to the details of the courts’ reasoning for refusing enforcement is limited, it appears that the Chinese courts took a strict and narrow approach to the signing element of the in writing requirement under article II of the New York Convention to find that there was no valid arbitration agreement. It goes without saying that such a strict approach is not in line with the international approach taken to the

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719 Ibid.
720 Ibid.
721 Ibid.
722 Ibid.
723 Ibid.
724 Ibid.
Further, it again appears that the Chinese courts placed the burden on the applicant to enforcement proceedings to prove that a valid arbitration existed, rather than on the defendant to those proceedings to prove that the arbitration agreement, which the FOSFA tribunal had held to be valid, was in fact invalid. Again, this is clearly contrary to the approach taken by Contracting States to the New York Convention.726

4 Summary Comments On The Invalidity of The Arbitration Agreement Ground

An analysis and comparison of the interpretation and application of article V(1)(a) of the New York Convention and article 274(1) of the Civil Procedure Law 2013 shows that there are broad similarities between the two provisions. However subtle differences do exist which, in the author’s view, ought to be eradicated to bring Chinese law in line with the international best practice set out in the New York Convention: for example, article 274(1) of the Civil Procedure Law 2013 ought to expressly refer to the invalidity of the arbitration agreement and the requirement under Chinese law, that an arbitration agreement must designate an arbitral institution, ought to be withdrawn. Further, the discussion of the case law above shows that the Chinese courts need to take a more pro-arbitration approach to the enforcement of arbitral awards and, in particular, to stay away from adopting overly strict interpretations of form requirements.

D PROCEDURAL FAIRNESS

Both article V(1)(b) of the New York Convention and article 274(2) of the Civil Procedure Law 2013 relate to what in the common law world is known as ‘procedural

725 See section V.1.(a) above.
726 See section V.A.1 above.
fairness’, ‘natural justice’ or ‘due process’, and in civil law jurisdictions is known as ‘principle de la contradiction’, ‘égaleité des parties’ or ‘rechtliches Gehör’.

The articles provide as follows:

<table>
<thead>
<tr>
<th>Article V(1)(b) of the New York Convention</th>
<th>Article 274(2) of the Civil Procedure Law 2013</th>
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<tbody>
<tr>
<td>The 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.</td>
<td>The defendant is not duly notified of the appointment of the arbitrators or the arbitration proceedings, or the defendant fails to express his defence due to reasons for which he is not held responsible.</td>
</tr>
</tbody>
</table>

It is clear from the express words of each of these articles that they both aim to protect a defendant in enforcement proceedings who was either not given the relevant notice of the appointment of an arbitrator or who was unable to present his case in some way.

While article V(1)(b) of the New York Convention uses the words ‘proper notice’, article 274(2) of the Civil Procedure Law uses ‘duly notified’ to refer to the manner in which the party against whom the award is invoked must have been given notice of the appointment of an arbitrator or of the arbitration proceedings. It appears that in

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731 New York Convention art V(1)(b); Civil Procedure Law 2013 ch 26 art 274(2).
practice there is little difference between these two phrases. The interpretation and practical application of these articles will be considered in the following sections.

1 Interpretation of Article V(1)(b) of the New York Convention

It is well established that article V(1)(b) of the New York Convention is to be interpreted narrowly, with the result being that it has seldom been invoked successfully. In fact, a survey of 136 reported court decisions over the past 35 years concerning an alleged violation of article V(1)(b) shows that the article was successfully invoked in only 10% of cases. The survey found that only where the parties had effectively been denied an opportunity to be heard would a challenge based on article V(1)(b) of the New York Convention be successful.

(a) Scope of Article V(1)(b) of the New York Convention

While there is no universal definition of what constitutes procedural fairness or due process, it is agreed that it at least requires the parties are treated equally with regard to the appointment of arbitrators and are given an equal opportunity to be heard. This

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734 Ibid.


736 Verbist, above n 733, 683.

737 Rubino-Sammartano, above n 535, 717.

is evidenced in article 18 of the UNCITRAL Model Law, which requires that ‘the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case’. 739

Consistent with the pro-arbitration approach towards recognition and enforcement of arbitral awards, article V(1)(b) of the New York Convention limits a challenge to the recognition and enforcement of an award, on the grounds of a violation of procedural fairness, to circumstances in which the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the proceedings, or was otherwise unable to present his case. 740 Even then, article V(1)(b) is still to be reserved for only the most serious breaches of procedural fairness in only the most extreme cases. 741

(b) Meaning of ‘Proper Notice’

Prior to 1955, only the failure to give any notice at all was a ground for refusing recognition and enforcement of an arbitral award. 742 However, in 1955 the First Committee on the Enforcement of International Awards determined that such notice


739 UNCITRAL Model Law art 18.
740 New York Convention art V(1)(b).
741 Born, above n 299, 3531-3534; Jana, Armer and Kranenberg, above n 735, 233; see also Consorcio Rice SA de CV (Mexico) v Briggs of Cancun, Inc 82 F. Appx. 359, 364 (5th Cir. 2003); Karaha Bodas Co v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, Queens Bench Alberta, 9 December 2004 reported in (1995) XXX Yearbook of Commercial Arbitration 488; Somera Holding BV v Cukurova Holding AS 895 F.Supp.2d 513, 518 (S.D.N.Y 2012); Abu Dhabi Investment Authority v Citigroup, Inc. WL 789642, 7 (S.D.N.Y 2013); Reynolds v Lomas WL 4497358, 3 (N.D. Cal. 2012); Kanoria v Guinness [2006] 2 All ER (Comm) 413, [26]; Paklito Investment Ltd v Klockner East Asia Ltd, Hong Kong Court of First Instance, 15 January 1993 reported in (1994) XIX Yearbook of Commercial Arbitration 664, 672.
must be in ‘due form,’ must be in writing and must give the parties notice of the appointment of the arbitrators.\textsuperscript{743}

Since the adoption of the New York Convention in 1958, courts of Contracting States have interpreted ‘proper notice of the appointment of the arbitrators’ to be a notice that includes the names of the arbitrators so that parties may challenge an arbitrator if he or she is not impartial or independent.\textsuperscript{744} In \textit{Holargos Shipping Corporation v Hierros Ardes S.A.},\textsuperscript{745} the Spanish Supreme Court refused to recognise and enforce an arbitral award because there was insufficient proof that the defendant had been notified of the appointment of the arbitrator, and further because the arbitrator had failed, in his first notice, to identify the disputed issues and gave the defendant only one week to present a defence.\textsuperscript{746}

Further, ‘proper notice ... of the arbitration proceedings’ is interpreted as requiring that notice of the arbitration proceedings be given to a defendant’s last known address, as is often required by institutional arbitration rules.\textsuperscript{747} Courts of Contracting States have indeed refused to recognise and enforce arbitral awards where there was no attempt to locate the party’s last known place of business, permanent residence or mailing address.\textsuperscript{748} German courts have however taken a narrower view and have held that, without proof of a reasonable inquiry to locate the defendant, notification cannot be based on the concept that a document is deemed to have been received at the last known

\textsuperscript{744} Born, above n 299, 3506.
\textsuperscript{746} Ibid 453–454.
address.\textsuperscript{749} In general, courts are reluctant to require strict and formal compliance with notice provisions, provided there is evidence to show that the party did in fact receive the notice of arbitration.\textsuperscript{750}

With respect to timing of a notice under article V(1)(b) of the New York Convention, the courts have generally not imposed a specific time limit.\textsuperscript{751} Rather, the question that the enforcing court must answer is: on the facts of this case, did the parties have the ability to participate in the arbitration? In answering this question, the Italian courts, for example, have held that the court must ascertain whether the defendant has been notified of the proceedings in due time so as to allow it to be able to present its case.\textsuperscript{752}

Further, the burden is on the defendant seeking to rely on article V(1)(b) of the New York Convention to show that he suffered some prejudice as a result of not receiving ‘proper notice’ either of the appointment of an arbitrator or of the arbitration proceedings.\textsuperscript{753}

(c) \textit{Meaning of ‘Otherwise Unable To Present His Case’}

Article V(1)(b) of the New York Convention fails to provide any guidance as to the meaning of ‘otherwise unable to present his case.’ However, Born has asserted that this phrase has extended the procedural fairness ground only to ‘cases in which


Further, courts in Contracting States have held that a party is unable to present its case where: an arbitral tribunal has based its decision on facts and evidence that the defendant had no opportunity to contest;\footnote{\textit{C v Dr Vladimir Z}, Austrian Oberster Gerichtof, 31 March 2005 reported in (2006) \textit{Yearbook of Commercial Arbitration} 583, 584-585.} the claimant and the arbitral tribunal had both failed to forward documents submitted by the claimant to the defendant;\footnote{\textit{G.W.L. Kersten & Co. BV v Société Commerciale Raoul-Duval et Cie}, Gerechtsof Amsterdam, 16 July 1992 reported in (1994) XIX \textit{Yearbook Commercial Arbitration} 708, 709.} documents were submitted after the hearing and were not sent to the defendant;\footnote{\textit{Rice Trading (Guyana) Ltd v Nidera Handelscompagnie BV}, Gerechtsof The Hague, 28 April 1998 reported in (1998) XXIII \textit{Yearbook of Commercial Arbitration} 731, 733–734.} the arbitral tribunal heard from an expert on technical issues without informing the parties;\footnote{\textit{Chrome Resources v Leopold Lazarus}, Swiss Federal Tribunal, 8 February 1978 [1980] SJ 65.} and the defendant had not been given the opportunity to comment upon evidence, in the form of expert reports, relied upon by the tribunal in rendering its award.\footnote{\textit{Paklito Investment Ltd v Klockner East Asia Ltd}, Hong Kong Court of First Instance, 15 January 1993 reported in (1994) XIX \textit{Yearbook of Commercial Arbitration} 664, 671–672.}

Moreover, across New York Convention jurisdictions, it is recognised that the fact that the defendant was unable to present its case is not enough to fall within article V(1)(b) of the New York Convention.\footnote{\textit{Jana, Armer and Kranenberg}, above n 735, 251.} Rather, the defendant must show that it has suffered some prejudice as a result of being unable to present its case.\footnote{Case 9 Sch 08/98, Oberlandesgericht Cologne, 22 June 1999 reported by German Institution for Arbitration <www.dis-arb.de>; \textit{P.T. Reasuransi Unum Indonesia v Evanston Insurance Corporation}, United States District Court, 21 December 1992 reported in (1994) XIX \textit{Yearbook of Commercial Arbitration} 788, 790; \textit{Compagnie des Bauxites de Guinee v Hammermills Inc.}, United States District Court, 29 May 1992 reported in (1993) XVIII \textit{Yearbook of Commercial Arbitration} 566, 571; \textit{Rosso e Nero Gastrostättenbetriebs GmbH v Almendrera Industrial Catalana S.A. (ALICSA)}, Spanish Tribunal Supremo, 27 January 2004 reported in (2004) XXXII \textit{Yearbook of Commercial Arbitration}, 597, 600; \textit{Scandlines AB and Scandlines Danmark A/S v Ferrys del Mediterráneo, S.L.}, Spanish Tribunal Supremo, 8 October 2001 (2007) XXXII \textit{Yearbook of Commercial Arbitration} 555, 564-565.} By way of example, the German courts require that the defendant to enforcement proceedings seeking to rely on
this ground describe precisely how the violation affected the content of the award and specify what the defendant would have stated had it been given an opportunity to be heard.\textsuperscript{762}

The final point to note here is that, in general, enforcing courts will reject an argument made under article V(1)(b) of the New York Convention where the defendant has been given the opportunity to participate in the arbitration.\textsuperscript{763} A party alleging that it has not been able to present its case must show that its failure to participate in the proceedings did not result from its own conduct.\textsuperscript{764} A defendant’s inability to present its case has been held to be the defendant’s own fault in the following types of circumstances: where the defendant has repeatedly postponed a hearing or failed to comply with relevant timeframes,\textsuperscript{765} where a party has an unproven financial inability to attend the hearing,\textsuperscript{766} and where the defendant is aware of a procedural irregularity during the arbitral proceedings but fails to raise an objection.\textsuperscript{767}

(d) Law Applicable To Determining A Violation of Article V(1)(b) of the New York Convention

One of the more complicated questions in relation to article V(1)(b) of the New York Convention is what law is applicable to determining whether a violation of due process


\textsuperscript{764} Jana, Armer and Kranenberg, above n 735, 253.


\textsuperscript{767} Hebei Import & Export Corp. (R. China) v Polytek Engineering Company Ltd, (Hong Kong), Hong Kong Court of Final Appeal, 9 February 1999 reported in (1999) XXIV Yearbook of Commercial Arbitration 652, 668, 673, 376.
has occurred: the law of the place where the arbitration took place; the law of the country of enforcement;\(^768\) or an internationally uniform standard derived directly from the jurisprudence on article V(1)(b) itself?\(^769\) Despite the fact that the article provides no guidance as to the applicable law, courts across jurisdictions have tended to uniformly apply the law of the enforcing country to determine whether there has been a violation of article V(1)(b) of the New York Convention\(^770\) but such courts have recognised that they must only be concerned with the ‘minimum standards’ of procedural fairness.\(^771\)

2 Interpretation of Article 274(2) of the Civil Procedure Law 2013

Article 274(2) of the Civil Procedure Law 2013 is in line with article V(1)(a) of the New York Convention in that it provides a ground for non-enforcement where the defendant was not duly notified of the appointment of an arbitrator or of arbitral proceedings.\(^772\) While article 274(2) uses the words ‘duly notified’ as opposed to ‘proper notice,’ the author has found no authority to suggest that these phrases carry any significant difference.

Further, at first glance, article 274(2) of the Civil Procedure Law 2013 appears to be more restrictive than article V(1)(b) of the New York Convention as it limits the circumstances in which a party can rely on its inability to present its case to those in


\(^769\) Born, above n 299, 3498-3506.


\(^772\) Civil Procedure Law 2013 ch 26 art 274(2).
which the inability was ‘due to reasons for which he is not held responsible.’

However, the discussion above of the interpretation of ‘otherwise unable to present its case’ under article V(1)(b) of the New York Convention shows that in any event, a party cannot rely on this ground where that party’s inability to present its case is due to the party’s own fault. It is therefore argued here that there is little, if any, difference between the requirements and interpretation of article 274(2) of the Civil Procedure Law 2013 and article V(1)(b) of the New York Convention. The only real difference lies in the express wording of the articles.

3 China’s Experience with the Procedural Fairness Ground

In a survey carried out by Clarisse von Wunschheim of over 97 Chinese enforcement cases, the lack of procedural fairness ground was invoked in 22 cases and was only successful in six instances (most of which concerned domestic arbitral awards).

(a) Where The Defendant Was Not Given Proper Notice of The Arbitration Proceedings or of The Appointment of An Arbitrator

To the author’s knowledge, the first case in which the people’s courts dealt with an objection to enforcement under article V(1)(b) of the New York Convention was *International Transport Contractors Management BV v Shantou Guangao Trade Co.*

In this case, International Transport Contractors Management BV (*International Transport*) commenced arbitration proceedings against a ship’s owners, as well as a number of entities that owned goods on board the ship, for payment of a salvage

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773 Ibid.
774 See section V.D.1 above.
775 Wunschheim, above n 301, 257.
reward. When International Transport commenced enforcement proceedings against the owners of the goods, a Chinese company (Guangao), objected to enforcement of the award on a number of grounds, including that it had not received any notice whatsoever concerning the arbitration and therefore had not had the opportunity to participate in the proceedings and to defend its rights. The Court requested International Transport to provide evidence to show the method and time of service of the arbitration notice, as well as detailed name and contact details of the owners of the shipped goods. Neither the arbitral tribunal, nor the law firm representing China Pacific Insurance, were in possession of the detailed names and addresses of the owners of the goods as all notices had been sent only to the lawyers, International Transport and China Pacific Insurance. The Court recognised that the New York Convention applied to the award and went on to find that article V(1)(b) of the New York Convention was satisfied because: (a) there was a lack of clarity regarding the parties to the award in that it was not possible to specifically identify each of the defendants; and (b) Guangao had never been served with any notice with respect to the arbitration and could not properly be deemed to have been represented by China Pacific Insurance or its lawyers. The Court therefore refused to recognise and enforce the arbitral award.

In the author's view this decision is in line with international practice concerning the application of article V(1)(b) of the New York Convention. This is because, while the pro-arbitration bias of the Convention ought to be invoked where possible, it should not

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777 Ibid.
778 Ibid.
779 Ibid.
780 Ibid.
781 Ibid.
782 Ibid.
783 Ibid.
operate to undermine a party’s fundamental right to procedural fairness, namely the right to be heard. It is well established that article V(1)(b) of the New York Convention should only be successfully invoked in the most serious circumstances: circumstances in which a party is not informed of the arbitration proceedings and is not given any opportunity to participate in such proceedings constitute ‘serious’ cases according to international practice under the New York Convention.

Further, there have been a small number of cases in which the Supreme People’s Court has refused to enforce an arbitral award on the basis that the defendant to the enforcement proceedings was not given proper notice of the appointment of an arbitrator. By way of example, in *Cosmos Marine Management S.A v Tianjin Kaiqiang Trade Co Ltd*, the defendant to enforcement proceedings sought to resist enforcement on the basis that it had not been properly notified of the arbitration proceedings or of the appointment of an arbitrator under article V(1)(b) of the New York Convention. In the circumstances, the claimant (*Cosmos*) had nominated an arbitrator and sent an email to the defendant (*Kaiqiang*) notifying it of the appointment of the arbitrator and requesting that Kaiqiang itself appoint an arbitrator within 14

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788 Ibid.
days. When Kaiqiang failed to respond, Cosmos sent another email to Kaiqiang extending the deadline for the appointment of its arbitrator by a further seven days. Kaiqiang again failed to respond so Cosmos sent another email, this time through a third party, requesting Kaiqiang to appoint an arbitrator. When Kaiqiang again failed to respond, the arbitrator, which Cosmos had appointed, acted as a sole arbitrator in accordance with the default provisions of the Arbitration Act 1996 (UK).

The Tianjin Maritime Court was inclined to refuse enforcement of the arbitral award on the basis of article V(1)(b) of the New York Convention and submitted the case to the Tianjin Higher People’s Court. This Court found that the evidence submitted by Cosmos, being the email notifications sent to Kaiqiang, evidenced notice of the appointment of an arbitrator and of the proceedings but that Cosmos should have provided further evidence to show that Kaiqiang actually received the emails. The Court held that, as Cosmos had failed to prove that Kaiqiang had received the emails, it had to conclude that Kaiqiang did not receive them and therefore that it had not been properly notified of the arbitration proceedings or of the appointment of an arbitrator under article V(1)(b) of the New York Convention. The Court submitted the case to the Supreme People’s Court, which ultimately approved the refusal to recognise and enforce the arbitral award.

This decision, as with many others that are discussed in this paper, ought to be severely criticised for its focus on the evidence brought forward by the applicant to enforcement proceedings. Placing the burden of proof on the applicant to the enforcement

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789 Ibid.
790 Ibid.
791 Ibid.
792 Ibid.
793 Ibid.
794 Ibid.
795 Ibid.
796 Ibid.
proceedings is utterly contrary to the express wording, and the object, of article V(1) of
the New York Convention, which is to place the burden of proof on the party raising the
objection to prove to the court that the ground on which it relies is made out.\textsuperscript{797} Even
then, the New York Convention provides the enforcement court with the discretion to still
enforce the award.\textsuperscript{798} In circumstances, such as in this case, where the applicant to
enforcement proceedings proves that it sent notification, but does not prove actual
receipt by the other party, it is completely at odds with the pro-enforcement thrust of
article V(1)(b) of the New York Convention, and indeed with the case law established
by other Contracting States,\textsuperscript{799} to simply infer that the notifications were not received.
Moreover, the case of \textit{Shenzhen Mawan Electricity Co Ltd v Runhue Development Co
Ltd}\textsuperscript{800} deserves a special mention as it dealt with the non-enforcement of a foreign-
related arbitral award under the old version of article 274(2) of the \textit{Civil Procedure Law
2013}. In the enforcement proceedings, the defendant (\textit{Runhue}) argued against the
enforcement of the arbitral award on the ground, amongst other, that the arbitral tribunal
had failed to send all relevant notices and documents to Runhue’s correct address, to the
effect that until the initiation of the enforcement proceedings, Runhue had been
completely unaware of the arbitration proceedings or the arbitral award.\textsuperscript{801}
The Changsa Intermediate People’s Court considered declining to enforce the award
therefore it referred the case to the Hunan Higher People’s Court.\textsuperscript{802} The Court
supported the Changsa Intermediate People’s Court’s decision to decline to enforce the

\textsuperscript{797} New York Convention art V; see section V.A.1 above.
\textsuperscript{798} See section V.A.2 above.
\textsuperscript{799} See section V.D.1
\textsuperscript{800} \textit{Shenzhen Mawan Electricity Co Ltd v Runhue Development Co Ltd}, Reply of the Supreme People’s
Court, 8 May 2008 [2008] Min Si Ta Zi No. 1 and Request of the Hunan Higher People’s Court, 20
Summaries on Arbitration} (Kluwer Law International).
\textsuperscript{801} Ibid.
\textsuperscript{802} Ibid.
award on the basis, amongst others, that Runhue had not been duly served with all necessary notices, and was not given proper notice of the appointment of an arbitrator because all notices had been sent to the incorrect address.\(^{803}\) The case was therefore referred to the Supreme People’s Court. The Supreme People’s Court first confirmed that the case should be dealt with in accordance with the provisions relating to foreign-related arbitral awards because Runhue was a company registered in Hong Kong.\(^{804}\) The Supreme People’s Court held that the lower courts were correct to decline enforcement on the basis that Runhue had not been duly notified of the proceedings or of the appointment of an arbitrator because both CIETAC and the arbitral tribunal had used the incorrect address.\(^{805}\) This decision is in line with the interpretation and application of article V(1)(b) of the New York Convention, which is intended to apply only in exceptional circumstances where, as is the case here, a party was unaware of the arbitration proceedings or of the award.\(^{806}\)

(b) Where A Party Was Unable To Present His Case

*Shin-Estu Chemical Co., Ltd. v Jiangsu Zhongtian Technical Corp Ltd*\(^{807}\) presents a good example of a case in which the Chinese courts have refused to recognise and enforce an arbitral award under article V(1)(b) of the New York Convention on the basis that a party was unable to present its case. The defendant to the enforcement proceedings (*Zhongtian*) sought to resist enforcement of a foreign arbitral award on the ground, amongst others, that the tribunal breached the principle of equal treatment of

\(^{803}\) Ibid.
\(^{804}\) Ibid.
\(^{805}\) Ibid.
\(^{806}\) Ibid.
\(^{807}\) See section V.D.1 above.

the parties by failing to allow Zhongtian the same amount of time for oral argument as it allowed to the claimant (Shin-Estu).\textsuperscript{808}

The Nantong Intermediate People’s Court was inclined to refuse enforcement of the arbitral award. The case was then referred up to the Jiansu Higher People’s Court, which agreed with the decision of the Nantong Intermediate People’s Court but on the basis that the tribunal’s failure to afford equal treatment to the parties fell within article V(1)(d) of the New York Convention, which deals with procedural irregularities.\textsuperscript{809} It seems odd that the Court appears not to have considered this argument to also fall within the ambit of article V(1)(b) of the New York Convention, which, as set out above, deals with situations in which a party was unable to present his case.

In any event, the case was referred to the Supreme People’s Court for the final decision on enforcement. Unfortunately, the Supreme People’s Court failed to consider the points raised by Zhongtian. Instead, the Supreme People’s Court first found that the tribunal’s failure to render an award within the five week timeframe set out in article 53.1 of the Japan Commercial Arbitration Association Commercial Arbitration Rules constituted grounds for refusing recognition and enforcement of the award under article V(1)(d) of the New York Convention.\textsuperscript{810} Second, the Supreme People’s Court found that the tribunal’s failure to notify the parties of the period of time during which it would make an arbitral award, as required by the Japan Commercial Arbitration Association Commercial Arbitration Rules,\textsuperscript{811} constituted grounds for refusing

\textsuperscript{808} Ibid.
\textsuperscript{809} Ibid; see New York Convention art V(1)(d).
\textsuperscript{810} Ibid.
\textsuperscript{811} Japan Commercial Arbitration Association, Commercial Arbitration Rules art 53.2.
recognition and enforcement of an arbitral award under article V(1)(b) of the New York Convention.\textsuperscript{812}

It again seems somewhat odd that the Court chose to rely on article V(1)(b) of the New York Convention to provide relief for the tribunal’s failure to inform the parties that it had failed to render its award on time. As set out above, article V(1)(b) of the New York Convention is concerned with situations in which a party is not given proper notice of the appointment of an arbitrator, or of the arbitration proceedings, or is in some other way unable to present his case.\textsuperscript{813} Given that article 53.2 of the Japan Commercial Arbitration Association Arbitration Rules only places an obligation on the arbitrators to inform the parties of the period of time in which it will render its award after the proceedings are closed,\textsuperscript{814} it is difficult to imagine a situation in which one of the parties may be ‘unable to present his case’ because the tribunal has not informed him of its failure to render an award within a specific timeframe. As such, it seems that the reasoning of the Supreme People’s Court is somewhat flawed, and arguably employs an incorrect interpretation and application of article V(1)(b) of the New York Convention.

4 \textit{Summary Comments On The Procedural Fairness Ground}

An analysis of article V(1)(b) of the New York Convention and article 274(2) of the \textit{Civil Procedure Law 2013} shows that, while the provisions are worded slightly differently, the overall interpretation is similar. In addition, the decisions analysed above clearly show that both the lower Chinese courts and the Supreme People’s Court have made attempts over the years to make enforcement decisions in line with the

\textsuperscript{812} Ibid.
\textsuperscript{813} See section V.D.1 above.
\textsuperscript{814} Japan Commercial Arbitration Association, Commercial Arbitration Rules art 53.2.
correct, pro-arbitration approach towards article V(1)(b) of the New York Convention. However, there still remain a number of flaws and inconsistencies in the Supreme People Court’s decisions which need to be ironed out with an increasing understanding of how article V(1)(b) of the New York Convention ought to be interpreted and applied.

E  MATTERS FALLING OUTSIDE THE SCOPE OF THE ARBITRATION

Article V(1)(c) of the New York Convention and article 274(4) of the Civil Procedure Law 2013 both provide a ground for refusing recognition and enforcement of an arbitral award where the matters dealt with in the award fall outside the scope of the arbitration.815 The articles state:

<table>
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<tr>
<th>Article V(1)(c) of the New York Convention</th>
<th>Article 274(4) of the Civil Procedure Law 2013</th>
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<tbody>
<tr>
<td>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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be</td>
<td>The matters decided by the arbitration exceed the scope of the arbitration agreement or the authority of the arbitration institution.</td>
</tr>
</tbody>
</table>

815 New York Convention art V(1)(c); Civil Procedure Law 2013 ch 26 art 274(4).
recognised and enforcement.

It is clear from the express words of the two articles that the purpose of each is to allow a court to refuse enforcement of an arbitral award, where the award deals with matters that fall outside the scope of either the arbitration agreement or the matters submitted to arbitration. However, there are a number of subtle difference in the express wording, interpretation and application of these articles, as is discussed below.

1 Interpretation of Article V(1)(c) of The New York Convention

Article V(1)(c) of the New York Convention is not concerned with the validity of an arbitration agreement.\(^{816}\) Rather, it is intended to operate where a valid arbitration agreement exists but where one or more matters, which the parties have submitted to arbitration, fall outside the scope of the submission to arbitration or the arbitration agreement.\(^{817}\) The underlying principle behind article V(1)(c) is that arbitration is consent-based and therefore an arbitral tribunal is not entitled to exercise any more power than that which the parties have consented to in the arbitration agreement.\(^{818}\)

(a) Meaning of ‘Submission to Arbitration’

Interestingly, article V(1)(c) of the New York Convention provides that the enforcing court may refuse recognition and enforcement of an arbitral award where the award

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818 Born, above n 299, 3541; Port, Bowers and Noll, above n 816, 274.
deals with a difference not contemplated by, or falling within, ‘the terms of the submission to arbitration’ or matters which are ‘beyond the scope of the submission to arbitration.’\textsuperscript{819} The first key question in interpreting article V(1)(c) of the New York Convention is therefore what is meant by the phrase ‘submission to arbitration’ and what is the difference between the ‘terms of the submission to arbitration’ and ‘the scope of the submission to arbitration’?

In line with the pro-arbitration bias of article V of the New York Convention, courts have interpreted the phrase ‘submission to arbitration’ broadly to include not only the matters, which the parties formally submitted to the arbitral tribunal for determination, but also matters that fall within the scope of the arbitration agreement.\textsuperscript{820} It therefore appears that ‘the terms of the submission to arbitration’ is to be interpreted as a reference to the formal submission of matters to the tribunal\textsuperscript{821} and ‘submission to arbitration’ is to be interpreted more broadly as a reference to the scope of the arbitration agreement.\textsuperscript{822} The result is that courts will generally not recognise a defence under article V(1)(c) of the New York Convention in cases where an arbitral award determines matters, which the parties arguably did not submit to arbitration, but which

\textsuperscript{819} New York Convention art V(1)(c).
\textsuperscript{822} Ibid.
are within the scope of the arbitration agreement, so long as the formal submission to arbitration did not expressly limit the arbitral tribunal’s mandate.\textsuperscript{823}

In determining whether an award deals with matters which were not within the scope of the submission to arbitration, an enforcing court ought not to conduct a merits review of the case.\textsuperscript{824} In fact, there is a presumption that the arbitral tribunal acted within its power.\textsuperscript{825} The Bermuda Court of Appeal stated as follows in the famous case of \textit{Sojuznefteexport (SNE) v Joc Oil Ltd}:\textsuperscript{826}

\>[t]he American decisions establish that if there has been a Convention award under the New York Convention, there is a presumption that the tribunal acted within its power and that the award is valid and regular. They also indicate that the burden of discharging the presumption resting on the defendant is a heavy one.\textsuperscript{827}

Further, in \textit{Corporation Transnational de Inversiones S.A de C.V v STET International, Sp.A},\textsuperscript{828} the Supreme Court of Canada stated:

\>[i]n cases where an arbitral tribunal’s jurisdiction is called into question, an applicant must overcome ‘a powerful presumption’ that the tribunal acted within its powers.\textsuperscript{829}


\textsuperscript{826} \textit{Sojuznefteexport (SNE) v JOC Oil Ltd}, Bermuda Court of Appeal, 7 July 1989 reported in (1990) XV \textit{Yearbook of Commercial Arbitration} 384.

\textsuperscript{827} Ibid, 396.


\textsuperscript{829} Ibid.
In practice, it is therefore very difficult for a party seeking to rely on article V(1)(c) of the New York Convention to do so successfully.  

(b) Partial Enforcement of An Award

The second part of article V(1)(c) of the New York Convention allows for partial enforcement of an arbitral award, provided that the part, which is found to be outside the scope of the submission to arbitration, can be separated from that which falls properly within the scope. While the use of the word ‘may’ appears to provide the courts with the discretion as to whether to enforce the part of the award that is within the scope of the submission to arbitration, commentators have gone so far as to say this is mandatory and therefore that the court must enforce that part of the award which is not caught by article V(1)(c). In practice, courts of Contracting States are more than willing to enforce that part of the award that is not affected by article V(1)(c) of the New York Convention.

2 Interpretation of Article 274(4) of the Civil Procedure Law 2013

In contrast to article V(1)(c) of the New York Convention, which refers broadly to matters that exceed the scope of the ‘submission to arbitration,’ article 274(4) of the Civil Procedure Law 2013 provides two separate bases on which the award may be deemed to contain decisions on matters that exceed the scope: the award may exceed the

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830 Born, above n 299, 3545.
scope of either the arbitration agreement or the authority of the arbitration institution. Further, article 274(4) of the Civil Procedure Law 2013 does not expressly recognise the possibility of partial enforcement.

(a) **Meaning of ‘Scope of the Arbitration Agreement of the Authority of the Arbitration Institution’**

Matters, which fall outside the scope of the arbitration agreement, are those that the parties did not agree in their arbitration agreement to refer to arbitration. On the other hand, matters, which are considered to fall outside the scope of the authority of the arbitration institution, are those that are excluded from the authority of the arbitration institution according to the institution’s arbitral rules. The focus here on the authority of the arbitration institution, as opposed to an arbitral tribunal, can be attributed to the fact that ad hoc arbitration is not recognised under Chinese law. In fact, under Chinese law, an arbitration agreement, which submits a dispute to an ad hoc arbitration, will be invalid under article 16 of the Arbitration Law 1995. Despite what appears, in writing, to be a difference in the approach taken by the New York Convention and the Civil Procedure Law 2013, commentators have argued that in practice there is little difference between the requirements of the two.

(b) **Partial Enforcement Under the Civil Procedure Law 2013**

Article V(1)(c) of the New York Convention provides more detail than that contained in article 274(4) of the Civil Procedure Law 2013 in that it sets out how the court must

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834 Civil Procedure Law 2013 ch 26 art 274(4).
835 Wunschheim, above n 301, 260.
836 Ibid.
839 Wunschheim, above n 301, 261.
deal with an award that contains decisions on matters which were submitted to arbitration and decisions on matters which were not submitted to arbitration: in other words it deals with partial enforcement of arbitral awards.\textsuperscript{840} Contrastingly, the \textit{Civil Procedure Law 2013} is silent as to how a people’s court ought to deal with such a situation.

However, article 19 of the \textit{Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the Arbitration Law of the People’s Republic of China}\textsuperscript{841} provides:

[w]here a party concerned alleges that an arbitrated matter under an arbitration award exceeds the scope of its arbitration agreement and applies to have the award vacated, the people’s court shall vacate the section of the award that is beyond the agreement’s scope after having verified, through examination, that the allegation is supported by facts. If that section is non-severable from the remaining arbitrated matters under the award, the people’s court shall vacate the entire award.\textsuperscript{842}

This provision makes it clear that, in regards to a set aside application, the people’s courts have the power to set aside only that part of the award, which exceeds the scope of the arbitration agreement, provided that that part of the award is separable from the rest.

\textsuperscript{840} New York Convention art V(1)(c).
\textsuperscript{841} \textit{Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the Arbitration Law of the People’s Republic of China} (People’s Republic of China) Supreme People’s Court, 23 August 2006.
\textsuperscript{842} Ibid art 19.
The same approach is taken in article 277 of the *Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China*[^843] which provides:

[i]f the matters being arbitrated are partly within the scope of the arbitration agreement and partly outside the scope of the arbitration agreement, the people’s court shall order not to enforce the matters that are outside the scope of the arbitration agreement.[^844]

While it therefore appears, by the express words of the two articles identified above, that partial enforcement of an arbitral award is permitted (and in fact is mandated), the court in *Chengdu Zhongshan Knives Development Institutional v Chengdu Zhongshan Ruibo Knives Co. Ltd*[^845] determined that only part of the award dealt with matters that fell outside the scope of the arbitration agreement but still refused to enforce the entire award.[^846] This decision appears to be completely contrary to the provisions of the law and in fact is not representative of the approach taken by the Supreme People’s Court in the other published cases on point, as detailed below.[^847]

Despite what therefore appears to be a bump in the Chinese court’s otherwise smooth road in the application of article V(1)(c) of the New York Convention, it is clear in fact that the approach of the PRC to partial enforcement of arbitral awards, where part of the award is outside the scope of the submission to arbitration, is similar, if not the same, as the approach taken under article V(1)(c) of the New York Convention.[^848]


[^844]: Ibid art 277.


[^846]: Ibid.

[^847]: See section V.E.3 above.

China appears to have relatively little experience with this ground for non-enforcement, with the invalidity of the arbitration agreement, irregularity of the arbitration procedure, and public policy grounds being more popular choices for parties seeking to resist enforcement of an arbitral award. However, the Chinese courts have refused to enforce foreign arbitral awards on the basis of excess scope where an award was made against a non-signatory to the arbitration agreement, where the award dealt an issue that did not arise from the contract in which the arbitration agreement was contained, and where the award was deemed to be beyond the scope of the arbitration institution’s authority.

(a) Where The Award Is Made Against A Non-Signatory To The Arbitration Agreement

Chinese courts have held that where an award is made against a non-signatory to the arbitration agreement, the award will be deemed to address matters that are outside the scope of the submission to arbitration and therefore recognition and enforcement will be refused under article V(1)(c) of the New York Convention. To the author’s


852 Gerald Metals Inc v Xianhu Smelting Plant & Xianhu Hengxin Copper Industry Cop Ltd, Reply of the Supreme People’s Court, 12 November 2003 [2003] 4th Chamber Min Si Ta Zi No 12 and Request of the
knowledge, the first decision in this regard was *Gerald Metals Inc. v Xianhu Smelting Plant & Xianhu Hengxin Copper Industry Cop Ltd.*

A US company, Gerald Metals Inc. (*GMI*) had entered into a contract with a Chinese smelting company, Xianhu Hengxin Corp Ltd (*Xianhu*). When Xianhu failed to pay pursuant to the terms of the contract, GMI initiated arbitration proceedings against Xianhu and against another Chinese copper production company, Wuhu Hengxin Copper Industry Group Ltd (*Wuhu*). The tribunal subsequently issued an arbitral award, which ordered both respondents to pay a combined total of USD5.7 million to GMI along with interests and costs. GMI then, of course, commenced enforcement proceedings in the Anhui Higher People’s Court.

Wuhu specifically objected to enforcement of the arbitral award against it under article V(1)(c) of the New York Convention, on the basis that it was not a party to the arbitration agreement and therefore the arbitral tribunal had exceeded its scope by rendering an award against Wuhu. The Anhui Higher People’s Court agreed with Wuhu and therefore referred the case to the Supreme People’s Court. The Supreme People’s Court approved the Higher People’s Court’s decision, save to say that it only refused to enforce that part of the award that related to Wuhu: in other words, the

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854 Ibid.

855 Ibid.

856 Ibid.

857 Ibid.

858 Ibid.
Supreme People’s Court ordered partial enforcement of the award to the effect that those parts which related to matters within the tribunal’s scope were still enforced.\textsuperscript{859}

While the decision can be viewed in a positive light, given the Supreme People’s Court’s willingness to order partial enforcement of the award, the Court’s finding in relation an excess of scope under article V(1)(c) of the New York Convention is concerning. This is because, as is detailed above at section V.E.1, the purpose of article V(1)(c) is \textit{not} to deal with non-enforcement of arbitral awards based on the non-existence or invalidity of the arbitration agreement, rather it is to deal with cases in which there is a valid arbitration agreement between the parties but for some reason the tribunal has exceeded its scope.\textsuperscript{860} A Lithuanian court has indeed gone so far as to say that it would be contrary to public policy to refuse to enforce an award under article V(1)(c) of the New York Convention without deciding whether there is a valid arbitration agreement.\textsuperscript{861} As such, it is argued here that the Supreme People’s Court ought to have refused recognition and enforcement of the award properly on the basis of article V(1)(a) of the New York Convention.

A similar decision was reached under the old version of article 274(2) of the \textit{Civil Procedure Law 2013} in \textit{Dongxun Investment Co Ltd v Guangxi Yulin Hengtong Co., Ltd. and Guangxi Yulin City Government}.\textsuperscript{862} The Government of Yulin City objected

\textsuperscript{859}Ibid.
to the enforcement of the award on the basis that it was merely the guarantor and was not a party to the arbitration agreement, contained in a joint venture agreement, and therefore the arbitral tribunal had exceeded the scope of its authority by rendering an arbitral award against it.  

The Yulin Higher People’s Court and the Guanxi Higher People’s Court were both inclined to refuse to enforce the award. In turn, the Supreme People’s Court confirmed that, because there was no CIETAC arbitration agreement in the guarantee, the CIETAC tribunal had exceeded the scope of its authority in rendering an award against the Government of Yulin City. On this basis, the Supreme People’s Court confirmed partial enforcement of the award, holding that the portion of the award which related to the Government of Yulin City could not be enforced.

While it is interesting, and comforting, that the people’s courts took the same approach to the enforcement of a foreign-related arbitral award as they did to the enforcement of a foreign arbitral award against a non-signatory, it is once again concerning that the people’s courts chose not to enforce the award based on article 274(4) of the Civil Procedure Law 2013, rather than on the basis of article 274(1), the invalidity ground. There is no case law to suggest that this approach is strictly incorrect under Chinese law, but it is argued here that in accordance with the interpretation given to article V(1)(c) of the New York Convention, so too should article 274(1) Civil Procedure Law 2013 be limited to circumstances of excess scope, and not to the non-existence of an arbitration agreement.

863 Ibid.
864 Ibid.
865 Ibid.
866 Ibid.
(b) Where The Award Dealt With Matters Outside The Scope of The Arbitration Agreement

To the author’s knowledge, there is one case in which the Supreme People’s Court has properly held that enforcement of an arbitral award must be refused where it dealt with matters that were not within the scope of the arbitration agreement. In *Hemofarm DD, MAG International Trade Co, Sulame Median Co and Jinan Hemofarm Joint Venture v Jinan Yongning Pharmaceutical Company Ltd*, a Serbian company (*Hemofarm*), MAG International Commerce Company (*MAG*), Sulame Media Co Ltd (*Sulame*) and Jinan Yongning Pharmaceutical Co Ltd (*Yongning*) had entered into a joint venture agreement, which provided for any disputes to be governed by Chinese law and to be resolved by arbitration in Paris in accordance with the ICC Arbitration Rules.

In 2002, Yongning initiated four court proceedings before the Jinan Intermediate People’s Court against the joint venture in relation to a lease agreement, signed between Yongning and the joint venture. Hemofarm, MAG and Sulame opposed the proceedings on the basis that the arbitration agreement contained in the joint venture agreement was broad enough to encompass a dispute in relation to the lease, as this was in essence related to the joint venture agreement itself. The court found against the parties on this point and proceeded to issue three judgments in favour of Yongning, which resulted in the freezing of the joint venture’s bank assets and products.

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868 Ibid 1.
869 Ibid 3.
870 Ibid.
871 Ibid.
Unsurprisingly, Hemofarm, MAG and Sulame then commenced arbitration proceedings under the joint venture agreement. They asserted that Yongning had breached the dispute resolution provisions of the joint venture agreement by referring the lease disputes to the Chinese courts, and therefore that the tribunal must order Yongning to pay compensation to them because the freezing order had prevented the joint venture from operating, and had therefore deprived them of their income. The arbitral tribunal ultimately found that Yongning had not, per se, violated the joint venture agreement by referring the lease dispute to the Chinese courts. However, the tribunal also found that its requests for the court to grant provisional measures, in the form of freezing the joint ventures’ assets, did constitute a breach of Yongning’s contractual obligations under the joint venture agreement. It found that this breach had in turn caused direct and substantial damage to the other joint venture participants and had resulted in the joint venture being closed. When the tribunal therefore ordered Yongning to pay compensation to the claimants in the amount of around USD 6.5 million, Hemofarm, MAG and Sulame subsequently filed for enforcement of the ICC award before the Jinan Intermediate People’s Court.

Before the enforcing court, Yongning requested that enforcement be denied on three grounds, including that the arbitral tribunal had exceeded the scope of its authority by rendering the award against Yongning. The Jinan Intermediate People’s Court was inclined to refuse to enforce the award. It reasoned that the arbitral tribunal had exceeded the scope of its authority, in the sense of article V(1)(c) of the New York

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872 Ibid.
873 Ibid 4-5.
874 Ibid 6.
875 Ibid.
876 Ibid.
877 Ibid 6-7.
878 Ibid 7.
879 Ibid 7-8.
Convention, because the arbitration clause in the joint venture agreement was only binding on the parties to the joint venture agreement, and did not apply to disputes against the joint venture itself. The Supreme People’s Court later confirmed the correctness of this decision and added that the lease dispute did not fall within the scope of the arbitration agreement contained in the joint venture agreement.

This case arguably falls within the category of cases in which a Chinese enforcing court refused to enforce an award against a non-signatory on the basis of article V(1)(c) of the New York Convention. However this is unclear from the Supreme People’s Court’s Reply. Rather, the Supreme People’s Court seemed to rely on the fact that the lease dispute as a whole was outside the scope of the arbitration clause in the joint venture agreement. Unfortunately there is insufficient information available to form a view as to the correctness of the court’s decision in this case. Suffice it to say therefore that the decision seems to be in line with the Chinese courts’ rather liberal application of article V(1)(c) of the New York Convention.

(c) *Where The Award Dealt With Matters Beyond The Authority Of the Arbitration Institution*

The final situation, considered in this paper in relation to the outside scope ground, is where the Chinese courts have refused to enforce a foreign-related arbitral award on the basis that the matters dealt with in the award were beyond the authority of the arbitration institution. In *Misuer Co Ltd v Shenzhen Guangxia Culture Industry Co, Ningxia Islamic International Trust Co and Shenzhen Xingqing Electronics Co*, the

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880 Ibid.
881 Ibid 1.
882 *Misuer Co Ltd v Shenzhen Guangxia Culture Industry Co, Ningxia Islamic International Trust Co and Shenzhen Xingqing Electronics Co*, Decision of the Guangdong Higher People’s Court, 19 May 2011 and
arbitral tribunal was constituted under the CIETAC Arbitration Rules 2000 and issued an award, which contained a decision on tort related liabilities.\textsuperscript{883} Initially, the defendant made several unsuccessful attempts to have the people’s courts refuse to enforce the award on the basis that the award exceeded the scope of the authority of the arbitration institution.\textsuperscript{884} However, the defendant was successful in the Guangdong Higher People’s Court, where the Court held that enforcement must be refused because the award dealt with tortuous liability, which was beyond the scope of CIETAC’s authority.\textsuperscript{885}

In 2002, the case was referred to the Supreme People’s Court, which confirmed that enforcement must be refused because, by dealing with tort related liabilities, the arbitral award exceeded the scope of article 2 of the CIETAC Arbitration Rules 2000.\textsuperscript{886} The Supreme People’s Court’s decision in this regard is questionable given that article 2 of the CIETAC Arbitration Rules 2000 provides that CIETAC is entitled to administer ‘disputes arising from economic and trade transactions whether contractual or non-contractual in nature.’\textsuperscript{887} Moreover, in a previous Supreme People’s Court’s Reply in \textit{Jiangsu Materials Group Light Industry Textile Ltd v (HK) Topcapital Holdings Ltd & (Canada) Prince Development},\textsuperscript{888} the Court held that tortuous actions fall within the scope of article 2 of the CIETAC Arbitration Rules 2000.\textsuperscript{889} Nonetheless, the Shenzhen Intermediate People’s Court complied with the Supreme People’s Court’s Reply and in

\begin{flushleft}
\textsuperscript{883} Ibid.
\textsuperscript{884} Ibid.
\textsuperscript{885} Ibid.
\textsuperscript{886} Ibid.
\textsuperscript{889} Ibid.
\end{flushleft}
November 2003 rendered a decision not to enforce the award.\textsuperscript{890} However, in a strange turn of events, in October 2010 (seven years later), the Shenzhen Intermediate People’s Court resumed the enforcement proceedings and ultimately proceeded to enforce the award in 2011.\textsuperscript{891} The Guangdong Higher People’s Court agreed with this decision.\textsuperscript{892} Little comment can be made on the Chinese courts’ decision in this regard except that it is unique and lacks any justifiable explanation.

5 \textit{Summary Comments On The Outside Scope Ground}

The discussion above shows that: first, there are significant differences in the drafting of article V(1)(c) of the New York Convention and article 274(4) of the \textit{Civil Procedure Law 2013}; second, there is a severe disjunct between the application of the outside scope ground by Contracting States to the New York Convention and by the Chinese courts; and third decisions of the Supreme People’s Courts are inconsistent.

The first of these issues is relatively simple to resolve. It is argued here that the Chinese legislature ought to remove the reference to authority of the arbitration institution from article 274(4) of the \textit{Civil Procedure Law 2013} and draft in a provisions to expressly mandate partial enforcement of arbitral awards. These changes will bring article 274(4) of the \textit{Civil Procedure Law 2013} in line with international best practice.

The second issue identified above is more difficult to resolve. It is argued here that the Supreme People’s Court, and the lower Chinese courts, must make great efforts to educate themselves as to, and foster a detailed understanding of, how article V(1)(c) of the New York Convention, and the Convention in general, is interpreted by other


\textsuperscript{891} Ibid.

\textsuperscript{892} Ibid.
Contracting States. Only when this action is taken can the Chinese courts truly begin to render decisions that are in line with the international approach taken.

Finally, the third issue identified above can be resolved if the Chinese courts develop a precedent system to ensure that their decisions are consistent. The lack of consistency, not only between courts of different levels, but more concerning between the Supreme People’s Court’s own decisions only impedes China’s efforts to develop a reputation for having a reliable and predictable system for the enforcement of foreign arbitral awards.
Article V(1)(d) of the New York Convention and article 274(3) of the Civil Procedure Law 2013 both provide a basis for refusing enforcement of an arbitral award where there was an error in either the composition of the arbitral tribunal or the arbitral procedure. The articles provide:

<table>
<thead>
<tr>
<th>Article V(1)(d) of the New York Convention</th>
<th>Article 274(3) of the Civil Procedure Law 2013</th>
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<tbody>
<tr>
<td>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.</td>
<td>The formation of the arbitration panel or the arbitration procedure is not in conformity with rules of arbitration.</td>
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While these provisions are similar, in that they both deal with the composition of the arbitral tribunal and the arbitral procedure, the difference lies in the legal basis for determining whether there were any errors in the composition of the arbitration tribunal or the arbitral procedure. This issue is discussed in the following sections.

1. Interpretation of Article V(1)(d) of the New York Convention

Article V(1)(d) of the New York Convention is said to have played a major role in the establishment of a legal framework for international arbitration proceedings. The role

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893 Born, above n 299, 3559.
played by this article and its interpretation is discussed in detail in the following sections.

(a) **Applicable ‘Law’**

Under article V(1)(d) of the New York Convention, the agreement of the parties, or failing such an agreement, the law of the country where the arbitration took place, will determine the composition of the arbitral tribunal and the arbitral procedure.\(^894\) It is well established that the agreement of the parties (and therefore party autonomy) takes precedence over the law of the country where the arbitration took place.\(^895\) It is for this reason that this article is said to have established the legal framework for international arbitration proceedings.\(^896\)

There are a number of ways in which the parties may have agreed on how the tribunal will be composed and/or the arbitral procedure. First, and probably most commonly, the parties may have chosen a set of institutional rules to govern their arbitration (such as the Arbitration Rules of the International Chamber of Commerce or the Arbitration Rules of the London Court of International Arbitration). In such a case, the chosen institutional rules are considered to be part of the parties’ agreement\(^897\) and the Contracting States to the New York Convention are obliged to respect this choice of law.\(^898\) Second, the parties may have developed their own set of rules, independent of any institutional rules or national legal system.\(^899\) Regardless as to how the parties can

\(^894\) New York Convention art V(1)(d).


\(^896\) Born, above n 299, 3559.


\(^898\) Haas, above n 525, [65].

\(^899\) New York Convention art V(1)(d).
be said to have agreed on the relevant rules, the parties’ agreement will prevail over the
law of the country in which the arbitration took place, provided that such an agreement
does not breach any of the mandatory laws of the seat of arbitration (in which case the
arbitral award risks being set aside and subsequently refused enforcement under article
V(1)(e) of the New York Convention).\textsuperscript{900}

In the absence of an agreement between the parties, the law of the place where the
arbitration took place applies.\textsuperscript{901} The choice here of the law of the place ‘where the
arbitration took place’ is less specific than that seen in other article V provisions, which
refer to the law of the country ‘where the award was made’ i.e. the law of the seat.\textsuperscript{902}
The choice of law provision referring to ‘where the arbitration took place’ is unclear,
because arbitrations can take place in more than one country. To clear up any potential
inconsistency that may exist between the article V provisions, the courts of Contracting
States have interpreted the choice of the law ‘where the arbitration took place’, in line
with article V(1)(a) and V(1)(e) of the New York Convention, as a reference to the law
of the country where the award was made.\textsuperscript{903}


\textsuperscript{901} New York Convention art V(1)(d).

\textsuperscript{902} See for example New York Convention arts V(1)(a), (e).

(b) *It’s A Question of Degree*

In line with the pro-arbitration, pro-enforcement bias of the New York Convention, the courts in many (if not all) Contracting States require there to be a substantial defect in the composition of the arbitral tribunal or the arbitral procedure in order for article V(1)(d) of the New York Convention to be successfully engaged.\(^904\) As Born states:

> [i]t is clear that a serious violation of the procedural law of the arbitral seat is necessary in order to justify non-recognition of an award under Article V(1)(d). It is insufficient to deny recognition of an award that a minor or incidental violation of the procedural law occurred.\(^905\)

Some commentators have argued that a ‘substantial defect’ is one which is cause for setting aside the award in the country where the award was made.\(^906\) This view however seems to give undue weight to the law of the seat in enforcement matters. Another, and in the author’s view preferable, approach is to consider whether the defect in the composition of the arbitral tribunal or in the arbitration procedure had a material impact on the outcome of the arbitration\(^907\) i.e. would the outcome of the arbitration be different, had the procedural irregularity not have occurred? This prevailing view accords with the pro-enforcement bias of the New York Convention.

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\(^904\) Born, above n 299, 3581.
\(^905\) Ibid.
\(^906\) Nacimiento, above n 900, 297.
\(^907\) Ibid, 297-298; Born, above n 299, 3582; 41, X SA v Y, Swiss Federal Tribunal, 28 July 2010 reported in (2011) XXXVI Yearbook of Commercial Arbitration 337 [17]; Case No. 411, Oberlandesgericht Karlsruhe, 14 September 2007 reported in (2008) XXXIII Yearbook of Commercial Arbitration 541, 546; Case No. 82, Oberlandesgericht Bayern, 23 September 2004 reported in (2005) XXX Yearbook of Commercial Arbitration 568, 57; Pacific China Holdings Ltd v Grand Pacific Holdings Ltd [2011] HKCFI 424, 102-03 (Hong Kong Court of First instance); Pacific China Holdings Ltd v Grand Pacific Holdings Ltd [2012] HKCU 971 (Hong Kong Court of Appeal).
(c) **Contemporaneous Objection**

A further key point to note in the practical application of article V(1)(d) of the New York Convention is that the courts of Contracting States are extremely reluctant to refuse to enforce an arbitral award in circumstances where the party seeking to rely on this article failed to raise its objection to the composition of the arbitral tribunal or the arbitral procedure contemporaneously, during the course of the arbitration proceedings. Where a party fails to raise the objection during the proceedings, it is estopped from relying on the procedural irregularity at the enforcement stage.

(d) **Composition of The Arbitral Tribunal**

Given the high burden placed on a party wishing to invoke article V(1)(d) of the New York Convention, it is unsurprising that this ground has rarely been successfully invoked. Cases in which a party has successfully relied on article V(1)(d) include where one party has dominated the procedure for appointing the arbitrators. That said, there will be no defect in the composition of the arbitral tribunal where a party has simply failed to exercise its own rights during the composition process e.g. where a party has failed to nominate an arbitrator. A further example of a situation in which the ground has been successfully invoked is where an arbitrator is incapacitated due to health or legal issues.

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909 Ibid.

910 Kröll and Kraft, above n 897, 1061.


912 Nacimiento, above n 900, 290.
However, courts have refused to uphold objections based on article V(1)(d) of the New York Convention in a multitude of circumstances. One of the common situations that arises is where an arbitral authority enjoys unfettered discretion to appoint an arbitrator – in such circumstances, a party may not invoke article V(1)(d) to argue that the appointed arbitrator does not have the relevant qualifications.913 Further examples include: the invalidity of an arbitrator’s contract does not, in itself, provide a basis for the operation of article V(1)(d) of the New York Convention, particularly where the parties have signed the contract;914 and the expiration of the time period for rendering an arbitral award does not provide a basis for non-enforcement because there is no substantial defect which would lead to a different outcome had the award been rendered on time.915

(e) Arbitral Procedure

Again the high burden placed on a party seeking to invoke article V(1)(d) of the New York Convention has led to only small number of cases existing in which the article has successfully been invoked on account of a procedural irregularity.916 Cases in which it has been successfully invoked include where:

- in violation of the parties’ express agreement or request, the tribunal refuses to hold an oral hearing (however, the success of such an argument depends on whether the

914 Nacimiento, above n 900, 290.
915 Ibid.
outcome of the element of the case on which no oral hearing was held would have been different had a hearing been held);\textsuperscript{917}

- the language of the arbitration is different to that agreed to by the parties;\textsuperscript{918}
- the tribunal imposes unrelated conditions on procedural requirements e.g. by allowing the admission of additional evidence on the condition that the parties accept the tribunal’s position on fees;\textsuperscript{919}
- the arbitrators have applied the incorrect law to the merits of the dispute;\textsuperscript{920} and
- the arbitral tribunal failed to provide reasons for the award, despite the fact that the parties had expressly agreement that the award would contain reasons.\textsuperscript{921}

2 Interpretation of Article 274(3) of the Civil procedure Law 2013

The express wording of article 274(3) of the Civil Procedure Law 2013 is somewhat different to article V(1)(d) of the New York Convention. However, of greater concern is the fact that the Chinese courts have consistently adopted a very lenient approach to the interpretation of these provisions, resulting in a number of cases of non-enforcement of arbitral awards, based on relatively minor procedural irregularities. These issues are considered in detail below.

(a) Applicable Law

In contradistinction to article V(1)(d) of the New York Convention (which looks primarily to the parties’ agreement to determine the procedure that the tribunal ought to

\textsuperscript{917} Nacimiento, above n 900, 293.
\textsuperscript{918} Ibid.
\textsuperscript{919} Ibid.
\textsuperscript{920} Kröll and Kraft, above n 897, 1061.
\textsuperscript{921} Nacimiento, above n 900, 296.
have followed), under article 274(3) of the *Civil Procedure Law 2013*, the formation of the arbitral tribunal and the arbitral procedure is analysed in the context of the rules of the arbitration, even where such rules set forth a procedure that is different to that agreed to by the parties.\textsuperscript{922}

Commentators have argued that the focus of the *Civil Procedure Law 2013* on the arbitration rules reflects the Chinese attitude to arbitration, which is essentially that the *Arbitration Law 1995* and the institutional rules take precedence over the agreement of the parties.\textsuperscript{923} Under Chinese law, the parties must select a specific arbitration institution, which in turn leads to the application of the relevant institutional arbitration rules.\textsuperscript{924} Institutional rules in China have a widely compulsory character and only allow for limited party autonomy.\textsuperscript{925} As such, the parties’ agreement only comes into play where the *Arbitration Law 1995* and the relevant arbitration rules are silent on a matter.\textsuperscript{926} This is a complete contrast to the approach taken under the New York Convention, and indeed is contrary to the consensual nature of arbitration.

(b) *The Question of Degree*

Neither the New York Convention nor the *Civil Procedure Law 2013* provide any guidance as to how substantial the procedural irregularity must be before the court will refuse to enforce the arbitral award. As set out above, courts of Contracting States require a substantial defect which has in some material way affected the outcome of the arbitration.\textsuperscript{927} However, and contrastingly, the Chinese courts take a much broader approach to what constitutes a procedural defect for the purposes of article 274(3) of the

\textsuperscript{922} *Civil Procedure Law 2013* ch 26 art 274(3).
\textsuperscript{923} Wunschheim, above n 301, 267.
\textsuperscript{924} Ibid.
\textsuperscript{925} Ibid.
\textsuperscript{926} Ibid.
\textsuperscript{927} See above section V.F.1.(b) above.
Civil Procedure Law 2013, with the result that this article is often regularly invoked successfully.\textsuperscript{928}

3 China’s Experience With The Procedural Irregularity Ground

Due to China’s approach in insisting on compliance with procedural requirements set out in the relevant arbitral rules, China’s experience in applying the procedural irregularity ground is somewhat greater than that of many other Contracting States. The cases discussed in this section demonstrate the willingness of the Chinese courts to refuse to recognise and enforce arbitral awards on the grounds of procedural irregularities, even where the same results may not be forthcoming from other New York Convention courts.

(a) Irregularity In The Composition Of The Arbitral Tribunal

In 2004 in Bunge Agribusiness Singapore Pte. Ltd v Guangdong Fengyuan Food & Oil Group Company Ltd,\textsuperscript{929} the defendant to the enforcement proceedings (Fengyuan) sought to resist enforcement of an award rendered by FOSFA on the basis, amongst others, that one of the arbitrator’s, Mr Plug, had been incorrectly appointed.\textsuperscript{930} While the Yangjiang Intermediate People’s Court and the Guangdong Higher People’s Court found against Fengyuan on this point, the Supreme People’s Court, in an utterly unreasonable decision, ruled that FOSFA failed to provide prior notice to Fengyuan of the appointment of Mr Plug and as such article V(1)(d) of the New York Convention

\textsuperscript{928} Wunschheim, above n 301, 271.
\textsuperscript{930} Ibid.
was made out. The decision of the Supreme People’s Court in this regard is highly disappointing for a number of reasons: first, it is only three paragraphs long and provides minimal details; second, it fails to deal with the other two grounds for objection raised by Fengyuan (i.e. public policy and ‘not yet binding’); third it disregards the opinions of the lower courts; and fourth, it is once again contrary to the pro-enforcement bias of the New York Convention.

Further, in *DMT S.A. v Chaozhou City Huaye Packing Materials Co., Ltd. & Chaozhou County Huaye Packing Materials Co., Ltd.*, the defendant (*Chaozhou County*) argued that the appointment of the presiding arbitrator, Mr John Savage, was not in accordance with the agreement of the parties, or with the procedural rules, for the following reasons.

- The parties had agreed that the presiding arbitrator should be a resident of Singapore, should be very familiar with Chinese laws (as well as with the United Nations Convention on the International Sales of Good), and should be familiar with European law (in particular French Law). Chaozhou County argued that Mr Savage did not fulfil these requirements because he was not a resident of Singapore and was not familiar with Chinese law.

- Mr Savage lacked independence because: (a) he was a British national; (b) the UK and France are two important member states of NATO and the European Union; (c) citizens from one country do not need a visa to go to the other country; (d) the two

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931 Ibid.
933 Ibid 3-4.
934 Ibid.
countries have close connections historically; and (e) Mr Savage lived in France for 12 years and had close connections to France.\textsuperscript{935}

- The Court of Arbitration did not consult with the Singaporean National Committee of the ICC in relation to the appointment of the presiding arbitrator but instead followed a suggestion from the British National Committee.\textsuperscript{936}

- Chaozhou County had raised objections to the appointment of Mr Savage during the course of the arbitration but the ICC had failed to respond.\textsuperscript{937}

The Chaozhou Intermediate People’s Court found that the appointment of the presiding arbitrator was not in accordance with the agreement of the parties because there was no proof that Mr Savage was a resident of Singapore or that he was familiar with Chinese law.\textsuperscript{938} The Court further held that Mr Savage had close connections with France and that, in breach of the Arbitration Rules of the International Chamber of Commerce, the ICC had failed to take these into account when appointing Mr Savage as the presiding arbitrator.\textsuperscript{939} As such, the Court was inclined to refuse to enforce the entirety of the award and so referred the matter to the Guangdong Higher People’s Court.\textsuperscript{940}

The Guangdong Higher People’s Court came to a different conclusion. It found that the parties had reached an agreement on the relevant qualifications of the presiding arbitrator but that Mr Savage satisfied the agreed qualifications.\textsuperscript{941} The Court found that Mr Savage was a resident of Singapore as he had lived and worked there for two years and that there was insufficient proof to show that he was not familiar with Chinese law

\textsuperscript{935} Ibid.
\textsuperscript{936} Ibid.
\textsuperscript{937} Ibid.
\textsuperscript{938} Ibid 7-8.
\textsuperscript{939} Ibid.
\textsuperscript{940} Ibid.
\textsuperscript{941} Ibid 8-9.
or that he lacked the requisite degree of independence.\textsuperscript{942} Accordingly, the Court was inclined to enforce the award as against Chaozhou County.\textsuperscript{943}

On referral to the Supreme People’s Court, the Court agreed with the decision and rationale set forth by the Guangdong Higher People’s Court.\textsuperscript{944} The Court agreed that Chaozhou Country had failed to foster sufficient proof that Mr Savage lacked the relevant qualifications to act as the presiding arbitration or that he lacked independence.\textsuperscript{945}

This case is positive in terms of the PRC courts’ application of the New York Convention: the court imposed a high burden on Chaozhou County in establishing its grounds for non-enforcement under article V(1)(d) of the New York Convention and decided to enforce the award on the basis that Chaozhou County was unable to meet the burden of proof. This is clearly in line with the pro-enforcement approach taken by other Contracting States to the New York Convention.\textsuperscript{946}

The Supreme People’s Court reached a similar decision in \textit{I. Schroeder KG (Gmbh & Co) v Jiangsu Huada Food Industry Co., Ltd},\textsuperscript{947} where the Zhenjiang Intermediate People’s Court held that the defendant to the enforcement proceedings had failed to adduce sufficient evidence to prove that it had not been given notice of the appointment of the arbitrators or of the arbitration procedure.\textsuperscript{948} The Supreme People’s Court

\textsuperscript{942} Ibid.
\textsuperscript{943} Ibid.
\textsuperscript{944} Ibid 1.
\textsuperscript{945} Ibid.
\textsuperscript{946} See sections V.A.1 and V.F.1.(b) above.
\textsuperscript{947} \textit{I. Schroeder KG (Gmbh & Co) v Jiangsu Huada Food Industry Co., Ltd}, Zhenjiang Intermediate People’s Court, 5 November 2009 reported in WunschARB, \textit{Chinese Court Decision Summaries on Arbitration} (Kluwer Law International).
\textsuperscript{948} Ibid.
however decided to enforce the award because the defendant had failed to discharge its burden of proof.\(^{949}\)

(b) *Failure To Render A Decision On Jurisdiction*

The Chinese courts have refused to enforce an arbitral award where the arbitral institution failed to render a decision on jurisdiction. In *Zhanyu Development Co Ltd v Fujian Liming Hotel Co Ltd*,\(^{950}\) Zhanyu Development Co Ltd (*Zhanyu*) submitted a request for arbitration to CIETAC.\(^{951}\) Before the first hearing of the arbitral tribunal, the defendant (*Liming Hotel*) made written submissions to the Shenzhen Branch of CIETAC objecting to the jurisdiction of the arbitral tribunal.\(^{952}\) CIETAC failed to make a decision on the objection.\(^{953}\) Liming Hotel then reiterated its objections to jurisdiction before the arbitral tribunal and again the arbitral tribunal did not render a decision on jurisdiction, but instead dealt with the jurisdictional points in its final award, which it rendered in Zhanyu’s favour.\(^{954}\)

When Zhanyu sought enforcement of the award before the Fuzhou Intermediate People’s Court, Liming Hotel objected on the basis that CIETAC’s and/or the arbitral tribunal’s failure to render an award on jurisdiction, prior to the final award, constituted a procedural irregularity for the purposes of the then article 260(1)(3) of the *Civil Procedure Law 1991*.\(^{955}\) The Intermediate People’s Court was inclined to deny enforcement of the award and therefore referred the case up the ladder and eventually to

\(^{949}\) Ibid.  
\(^{951}\) Ibid.  
\(^{952}\) Ibid.  
\(^{953}\) Ibid.  
\(^{954}\) Ibid.  
\(^{955}\) Ibid.
the Supreme People’s Court. The Supreme People’s Court agreed with the lower courts and held that enforcement of the award was to be denied on the basis of the following:

[t]he Commission did not make a decision on the objection in accordance with the law. When the first hearing commenced, Liming explicitly resubmitted its objection to the validity of the arbitration clause, thus signifying that it did not waive its rights to raise an objection thereto. The Commission still did not make a decision on that objection. The arbitral tribunal continued to try the case and subsequently made an arbitration award. The abovementioned arbitration proceedings were deemed to have violated the relevant arbitration rules and constituted a breach of the law. Pursuant to Item (3) under Paragraph 1 of Article 260 of the Civil Procedure Law, it was determined that the enforcement of the Commission’s Award ([98] Shen Guo Zhong Jie Zi No. 106) should be denied.

It is clear from the above passage that the Supreme People’s Court deemed the failure of the CIETAC Commission to constitute a breach of the CIETAC Arbitration Rules and of the ‘law’. However, the decision of the Supreme People’s Court is somewhat unhelpful in that it utterly fails to specify which provision(s) of the CIETAC Arbitration Rules the Commission has breached, let alone, which law it has breached.

A review of the CIETAC Arbitration Rules 2000 (which were in force at the time of the arbitration) shows that under article 6(1), the Commission is entitled to determine the existence and effectiveness of arbitration agreements and its jurisdiction over cases. Further, under article 6(2) of the CIETAC Arbitration Rules 2000, the Commission may

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956 Ibid.
957 Ibid.
make a decision on jurisdiction on the basis of *prima facie* evidence, but is entitled to review and revise that decision in the event that evidence is adduced by either party during the course of the arbitration proceedings which conflicts with the Commission’s decision.\textsuperscript{959}

While it appears that the Supreme People’s Court may have based its decision to refuse enforcement of the arbitral award on the basis of article 6 of the CIETAC Arbitration Rules 2000, the precise language of article 6 does not necessarily support the finding of the Supreme People’s Court: the Commission is ‘entitled’ not *obliged* to render a decision on jurisdiction;\textsuperscript{960} and it ‘may’ not *shall* make a decision based on *prima facie* evidence.\textsuperscript{961} In addition, there is no provision of the *Arbitration Law 1995*, which places an obligation on CIETAC to render any award on jurisdiction, therefore it seems the finding of the Supreme People’s Court is erroneous in this regard.

Given the questionable basis on which the Supreme People’s Court made its decision to deny enforcement of the arbitral award, this case is demonstrable of the PRC’s overzealous insistence on compliance with procedural rules, even in the face of the strong pro-enforcement approach which ought to be taken by the court of Contracting States to the New York Convention.

(c) Failure To Select A ‘Qualified’ Appraisal Institute

In one of the more interesting and obscure decisions on enforcement in China, the Supreme People’s Court refused to enforce a foreign-related arbitral award under the then article 260(3) of the *Civil Procedure Law 1991* on the basis that an appraisal institute did not have the required qualification under Chinese law. In *Clinton*  

\textsuperscript{959} Ibid art 6(2).  
\textsuperscript{960} Ibid art 6(1).  
\textsuperscript{961} Ibid art 6(2).
Clinton Engineering Limited v Guangzhou Dongjun Real Estate Co Ltd, Clinton Engineering Limited (Clinton) referred a dispute against Guangzhou Dongjun Real Estate Co Ltd (Dongjun) to the Foshan Arbitration Commission in China. The arbitral tribunal rendered an award in favour of Clinton based partly on an expert opinion given by an appraisal institute chosen by the tribunal.

When Clinton commenced enforcement proceedings before the Guangzhou Intermediate People’s Court, Dongjun objected on the basis that the tribunal had failed to select a qualified appraisal institute and that this was a breach of the applicable procedural rules. The Intermediate People’s Court agreed with Dongjun that the appraiser was not qualified under Chinese law to act as an appraiser and was therefore inclined to refuse to enforce the award. The Guangdong Higher People’s Court agreed and added that under article 44 of the Arbitration Law 1995, the arbitral tribunal was permitted to designate an appraisal institute but that this power was confined within the scope of duly qualified appraisal institutes i.e. one that was qualified under Chinese law. The Supreme People’s Court later agreed with this decision and rationale.

While again this decision is in line with the PRC’s approach to insisting on compliance with procedural requirements, whether the decision is in line with the law is

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963 Ibid.
964 Ibid.
965 Ibid.
966 Ibid.
967 Arbitration Law 1995 ch IV art 44.
969 Ibid.
questionable. In the author’s view, a plain and literal reading of the express words of article 44 of the *Arbitration Law 1995*, leaves no room for an interpretation so broad as to incorporate a requirement that the appraisal institute must be qualified under Chinese law. The article provides as follows:

> [i]f the arbitration tribunal considers that a special issue requires appraisal, it may refer the issue for appraisal to an appraisal department agreed on by the parties or to an appraisal department designated by the arbitration tribunal.\(^\text{970}\)

No mention is made of any Chinese qualification being necessary. Such an interpretation is overly restrictive both in light of the express words of this article and in light of the fact that the imposition of a Chinese qualification requirement necessarily prevents foreign appraisers being appointed. This is somewhat discouraging given that the *Arbitration Law 1995* is intended to apply to both domestic and foreign-related arbitrations and thus potentially puts foreign parties at a disadvantage in circumstances where the issue requiring appraisal may not be China specific and may well be better appraised by an overseas institution.

(d) *Failure of An Arbitrator to Participate In The Proceedings*

A further issue that has arisen a number of times before the Chinese courts is whether the lack of participation by an arbitrator in the proceedings constitutes a procedural irregularity, for which enforcement of an arbitral award can be refused. In *First Investment Corporation (Marshall Island)*,\(^\text{971}\) the Supreme People’s Court answered the question in the affirmative. The Court found that the fact that one of the arbitrators had failed to participate in part of the arbitration proceedings and in the rendering of the

\(^{970}\) *Arbitration Law 1995* ch IV art 44.

final award, because he was under criminal investigation in China, constituted a procedural irregularity for the purposes of article V(1)(d) of the New York Convention.972 This was because: (a) the arbitration agreement expressly provided for a three member tribunal and therefore it was intended that three arbitrators would participate in the proceedings the entire way through; and (2) the Arbitration Act 1996 (UK) (which was the law of the seat) provided the appropriate procedure for dealing with situations in which a member of the tribunal could no longer perform his duties and that procedure had not been followed.973 The Chinese courts’ decisions in this regard appear to be legally sound given the gravity of the failure of the arbitrator to participate in the proceedings.

A similar conclusion was reached by the Supreme People’s Court in Leroy Merlin v Tianjin Companies.974 In this case, prior to the award being rendered, one of the members of the tribunal (Mr Wang) was arrested and imprisoned in China.975 Shortly thereafter, the other arbitrators rendered an award stating that Mr Wang had not signed the award because of his dissenting opinion.976 A number of months later, the ICC revoked Mr Wang’s appointment and decided that the arbitration could proceed with only two arbitrators.977 The defendants (Tianjin Companies) protested against this decision and requested the appointment of a new arbitrator to decide on their application for correction of the award.978 The remaining two arbitrators then issued a decision.

972 Ibid.
973 Ibid.
975 Ibid.
976 Ibid.
977 Ibid.
978 Ibid.
rejecting the Tianjin Companies’ request to correct the award.\footnote{979} The claimants sought enforcement of the award before the Tianjin Intermediate People’s Court.\footnote{980}

The Tianjin Companies objected to the enforcement of the award on the basis, amongst others, of article V(1)(d) of the New York Convention.\footnote{981} In this regard, they argued that the ICC, and the arbitral tribunal, had both breached articles 11 and 12 of the Arbitration Rules of the International Chamber of Commerce by failing to appoint a new arbitrator to replace Mr Wang.\footnote{982} Similarly to the defendant in the First Investment Case above, the Tianjin Companies argued that the arbitration agreement expressly provided for three arbitrators to be appointed and therefore three arbitrators must be on the tribunal through the entirety of the arbitration procedure, including for the purposes of rendering an award.\footnote{983} The claimants argued, in response, that the ICC had discretionary power to decide whether or not to appoint a replacement arbitrator.\footnote{984}

It appears that the Tianjin Intermediate People’s Court was inclined to refuse to enforce the award and therefore referred the case on to the Tianjin Higher People’s Court.\footnote{985} This Court did not delve into the details of the Tianjin Companies’ arguments but instead was content that there had been a violation of article V(1)(d) of the New York Convention because: (1) the arbitration agreement provided for three arbitrators and, in breach of this requirement, the award had only been rendered by two arbitrators; and (2) the ICC had breach article 12(3) of the Arbitration Rules of the International Chamber of Commerce by failing to replace Mr Wang.\footnote{986}
The Supreme People’s Court agreed with the Tianjin Higher People’s Court and declined to enforce the award.987 While the Court agreed that, because the arbitration agreement provided for three arbitrators, three arbitrators must be appointed until the end of the arbitration, the Court also added that articles 27 and 28 of the Arbitration Rules of the International Chamber of Commerce provide that the award must be signed by the arbitral tribunal, and that since only two members of the tribunal signed the award, this requirement had been breached.988

The Supreme People’s Court’s decision in this regard is in line with its approach taken in previous cases, namely the First Investment Case discussed above. This fact alone portrays this case in a positive light as it is encouraging that the Supreme People’s Court is at least attempting to render consistent decisions based on the enforcement grounds set forth in the New York Convention.

Further, and contrary to the views expressed by other authors on this case,989 it appears that the decision is in line with general principles of international arbitration: for example, the arbitration agreement provided that the arbitration would take place in Switzerland (hence the parties chose Switzerland as the seat of the arbitration) and the Supreme People’s Court confirmed that this was a Swiss award, not a French award. In addition, while it is recognised that the parties chose the Arbitration Rules of the International Chamber of Commerce to govern the dispute, they also expressly chose to have three arbitrators to decide that dispute. As such, and again contrary to the view expressed by other authors on this point,990 the agreement of the parties ought to prevail

987 Ibid.
988 Ibid.
989 See for example: Wunschheim, above n 301, App D-104.
990 See for example: Wunschheim, above n 301, App D-105.
to the extent that it does not contradict a mandatory provision of the law of the seat.\textsuperscript{991}

To the extent that there is any inconsistency between the agreement of the parties and the procedural rules chosen, the express agreement of the parties ought to take precedence over the rules.\textsuperscript{992}

(e) Notification of A Hearing Date and Methods of Delivery

The final basis considered in this paper, on which the Chinese courts have refused to enforce an arbitral award on account of a procedural irregularity, is where a failure of the tribunal to notify a party of the hearing date was held to be a ground for non-enforcement under article V(1)(d) of the New York Convention. In \textit{North American Foreign Trade Corporation v Shenzhen Laiyingda Co Ltd, Shenzhen Laiyingda Technology Co Ltd, Shenzhen Cangping Import & Export Co Ltd and Shezhen Light Industry Import & Export Co Ltd},\textsuperscript{993} the claimant (\textit{NAFTC}) commenced arbitration with the International Centre for Dispute Resolution (\textit{ICDR}). After accepting the case, the ICDR appointed a sole arbitrator and in January 2005 the parties discussed and agreed on the procedural timetable.\textsuperscript{994} The hearing dates were set for 25 to 27 May 2005.\textsuperscript{995} On 21 March 2005, NAFTC requested a postponement of the hearing date, to


\textsuperscript{992} Born, above n 299, 3572.


\textsuperscript{994} Ibid 4.

\textsuperscript{995} Ibid.
which the defendants (*Shenzhen Companies*) objected.\footnote{996}{Ibid.} On 5 July 2005, the arbitrator sent a fax to all parties setting the hearing date to 16 August 2006.\footnote{997}{Ibid.} The Shenzhen Companies failed to appear at the hearing.\footnote{998}{Ibid.} The sole arbitrator therefore rendered a default award on 4 October 2005, which he sent to the Shenzhen Companies by registered mail on 6 October 2005.\footnote{999}{Ibid.} When the award was returned to the ICDR, the sole arbitrator re-sent the award to the Shenzhen Companies at an address provided by NAFTC.\footnote{1000}{Ibid.} NAFTC sought enforcement of the award before the Shenzhen Intermediate People’s Court.

The Shenzhen Companies objected to enforcement on the grounds that: (1) they did not receive the notice of the new hearing date and that, in any event, the decision by the arbitrator to postpone the hearing was in breach of the procedural rules; and (2) they did not receive the arbitral award and therefore the method of delivery used by the arbitrator was also in breach of the procedural rules.\footnote{1001}{Ibid 5.} The Shenzhen Intermediate People’s Court found that the arbitrator’s extension of the hearing date was not a breach of the procedural rules and that transmission of the notice of the change in hearing date by fax was in accordance with the procedural rules.\footnote{1002}{Ibid.} From the information available, it seems that the court failed to consider the Shenzhen Companies’ objections on the basis of the method of transmission of the award. In any event, the court was inclined to enforce the arbitral award and so referred the case to the Guangdong Higher People’s Court.
The Guangdong Higher People’s Court produced a detailed opinion on the matter and agreed with the lower court’s decision to enforce the award. The Guangdong Higher People’s Court further added the following points.

- Under the ICDR International Arbitration Rules, the arbitrator has the power to manage the arbitration procedure and therefore has the power to change the hearing date if needed. As the parties in this case had not contracted out of these provisions of the ICDR International Arbitration Rules, the arbitrator had not breached the rules by changing the hearing date.

- The arbitrator’s use of registered mail, followed by delivery of the arbitral award to an address for the Shenzhen Companies that had been provided by NAFTC, was not a breach of article 18 of the ICDR International Arbitration Rules.

- This case does not meet any of the requirements of any of the grounds set out in article V of the New York Convention and therefore the award must be enforced.

The Guangdong Higher People’s Court requested the Supreme People’s Court to confirm its decision. In turn, the Supreme People’s Court confirmed that the arbitration procedure was in compliance with the applicable arbitration rules, to which all of the

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1003 Ibid 6.
1004 ICDR International Arbitration Rules arts 16 and 20. 
1006 Ibid.
1007 Ibid.
parties agreed, and that none of the grounds set forth in article V of the New York Convention were applicable.\textsuperscript{1008}

The decision by the Supreme People’s Court, and in particular by the Guangdong Higher People’s Court, is certainly a positive one as it provides comfort that while the Chinese courts are keen to insist upon procedural compliance, they will not take a formalist approach to procedural requirements, such as delivery methods, in the event that they have not had a material impact on outcome of the overall case.

4 Summary Comments on the Procedural Irregularity Ground

It is clear from the above analysis that while both article V(1)(d) of the New York Convention and article 274(3) of the \textit{Civil Procedure Law 2013} allow a court to refuse enforcement of an arbitral award on the basis of procedural irregularities, the approach taken to determining any non-conformity is different under the two regimes: the New York Convention focuses on the agreement of the parties, while the \textit{Civil Procedure Law 2013} focuses on the arbitration rules; the New York Convention adopts a restrictive pro-enforcement approach to the application of the irregularity ground, while the \textit{Civil Procedure Law 2013} adopts a broader interpretation, choosing instead to foster a policy in favour of insisting on strict compliance with procedural arbitration rules rather than of letting procedural irregularities slide in favour of enforcing arbitral awards. It appears that the Chinese courts also adopt their more restrictive approach in cases concerning the enforcement of New York Convention awards, which, in many instances, results in China departing from the approach taken by other Contracting States to the New York Convention.

\textsuperscript{1008} Ibid 1.
Article V(1)(e) of the New York Convention provides relief from enforcement of an arbitral award in circumstances where the award is not yet binding or has been set aside.\textsuperscript{1009} No such express provision appears in Chinese law, although some commentators argue that in practice such a ground still exists.\textsuperscript{1010} The following sections analyse the interpretation of article V(1)(e) of the New York Convention, discuss the position under Chinese law and provide commentary on China’s experience with this grounds for refusing recognition and enforcement of an arbitral award.

1 \textit{Interpretation of Article V(1)(e) of The New York Convention}

Article V(1)(e) of the New York Convention provides essentially that enforcement of an arbitral award may be refused where it has not yet become binding on the parties, or it has been set aside:

[t]he 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, the award was made.\textsuperscript{1011}

It is clear that article V(1)(e) of the New York Convention therefore provides two bases on which a court may refuse to enforce an arbitral award.

With respect to the first basis, that the award has not yet become binding on the parties, the New York Convention is silent on what constitutes ‘binding’. The meaning of this word has been the subject of much debate, with one commentator stating that ‘the

\textsuperscript{1009} New York Convention art V(1)(e).
\textsuperscript{1010} See section V.G.2 below.
\textsuperscript{1011} New York Convention art V(1)(e).
meaning of this term has always been a mystery.'\textsuperscript{1012} However, the prevailing view appears to be that ‘binding’ means that no further arbitral appeals are available.\textsuperscript{1013} The fact that recourse may be had against the award to the courts of the seat of arbitration does not prevent the award from having its binding effect.\textsuperscript{1014} As Aksen stated:

\begin{quote}
[t]he award will be considered ‘binding’ for the purposes of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact that recourse may be had to a court of law does not prevent the award from being ‘binding’.\textsuperscript{1015}
\end{quote}

With respect to the second basis, that the award has been set aside at the place at which the award was made (or under the law of the country where the award was made), the express words of this article are clear and unambiguous. However, the interpretation and application of this ground is very controversial.\textsuperscript{1016} The controversy arises over different views taken towards the role of the law and the courts at the seat of the arbitration in the enforcement of arbitral awards in other jurisdictions.

On the one hand, some commentators argue for a literal interpretation of article V(1)(e) of the New York Convention, to the effect that if an award is set aside at the place of, or under the law of, the seat of the arbitration, the enforcing court must set it aside.\textsuperscript{1017} Commentators in support of this view argue that, by agreeing to arbitrate in a given jurisdiction, parties subject their dispute, and the resulting award, to the laws and courts

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\textsuperscript{1012} Born, above n 299, 3610.
\textsuperscript{1014} Ibid; Case No. 25, Bundesgerichtshof, 8 October 1981 reported in (1983) VIII Yearbook of Commercial Arbitration 366, 368-69.
\textsuperscript{1017} Born, above n 299, 3622; see also Petrochilos, above n 730, 336.
\end{flushleft}
of that jurisdiction, so that if the award is set aside at the seat then the enforcing court should refuse to recognise the award.\textsuperscript{1018} In a similar vein, Albert Jan van den Berg has drawn attention to the Latin maxim \textit{ex nihilo nihil fit} to argue that because the effect of annulment is that the arbitral award no longer exists, there remains nothing for the enforcing court to enforce.\textsuperscript{1019} A further argument in support of this view is that enforcement of an award, which has been annulled at the place of arbitration, goes against principles of international respect and comity, which have been fundamental to the success of international arbitration.\textsuperscript{1020}

Contrastingly, advocates of the enforcement of arbitral awards, despite annulment at the place of arbitration, argue that refusal to recognise and enforce an award because it has been annulled at the place of arbitration potentially will lead to the grounds for refusing recognition and enforcement being indirectly extended to include ‘all kinds of particularities of the arbitration law of the country of origin.’\textsuperscript{1021} This is because national legislatures are free to determine the grounds on which arbitral awards rendered within their jurisdiction may be set aside.\textsuperscript{1022} This is especially so given that the New York Convention does not lay down any criteria for \textit{vacatur} at the place of arbitration. Given the many and divergent grounds for setting aside arbitral awards around the world and given the intention behind the New York Convention to establish one, predictable, reliable regime for the enforcement of arbitral awards, this argument that the enforcing court should still continue to enforce an arbitral award, even if it has been


\textsuperscript{1020} Di Pietro and Platte, above n 729, 174.


\textsuperscript{1022} Lew, Mistelis and Kröll, above n 535, 717 [26]-[102].
set aside at the seat (provided that no other article V ground is made out), clearly has weight.

Further, from the early United States decision in *In Re Arbitration of Certain Controversies Between Chromalloy Aeroservices and The Arab Republic of Egypt*, it appeared that the United States was following the French approach. However from a string of more recent decisions, it now appears that the United States courts will not readily grant recognition and enforcement of an arbitral award that has been annulled at the place of arbitration, rather the United States courts will analyse the circumstances to determine whether a finding of *vacatur* is permissible under the New York Convention.

At the other end of the spectrum is the German approach in which the enforcing courts base their decision on the award’s status at the seat of arbitration. This is because according to the German view, ‘the award is inextricably linked with the judicial regime of the country where the award was made’. As such, a German court will not enforce an award that has been annulled at the seat of arbitration.

It can therefore be seen from the analysis above that there is a great difference between the courts of Contracting States to the approach taken to enforcement of awards that

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1030 Freyer, above n 1016, 775.
1031 Ibid 784.
1032 Ibid.
have been set aside at the place of arbitration. This clearly begs the question: what does the Chinese law say?

2  Article What of the Civil Procedure Law 2013?

In contradistinction to article V(1)(e) of the New York Convention, the Civil Procedure Law 2013 does not expressly provide the court with the power to refuse enforcement of an arbitral award on the basis that the award has not yet become binding or that the award has been set aside at the place where it was made. Despite this lack of an express provision for non-enforcement in this regard, commentators diverge on their views as to whether Chinese law still allows a court to refuse to enforce an arbitral award on the basis that either it has not yet become binding or that it has been set aside.\(^\text{1034}\)

Clarisse von Wunschheim argues that, notwithstanding the silence in Chinese law on these two points, the lack of a binding arbitral award does constitute a practical hurdle to enforcement under Chinese law.\(^\text{1035}\) Wunschheim points to article 201 of the Civil Procedure Law 2008 (now article 224 of the Civil Procedure Law 2013), which essentially states that only ‘legally effective’ judgments can be enforced, to argue that the people’s courts will not accept an application for enforcement of an award which is not yet binding on the parties.\(^\text{1036}\) Further, Wunschheim points to article 233(2) of the Civil Procedure Law 2008 (now 257(2) of the Civil Procedure Law 2013), which provides that a court may terminate enforcement proceedings where the award has been repealed, to argue that enforcement proceedings will be terminated where an arbitral award has been set aside.\(^\text{1037}\)

\(^{1034}\) Wunschheim, above n 301, 275; Zhou, above n 572, 447.
\(^{1035}\) Wunschheim, above n 301, 275.
\(^{1036}\) Ibid.
\(^{1037}\) Civil Procedure Law 2013 ch 22 art 257(2); Wunschheim, above n 301, 275.
Contrastingly, Jian Zhou argues that there is no provision under Chinese law which allows a court to refuse to enforce an arbitral award on the basis that either the award has not yet become binding or has been set aside. In this regard, one considers whether the arguments raised in favour of still enforcing arbitral awards that have been set aside at the seat, despite the express words of the article V(1)(e) of the New York Convention, could be used to support the argument that Chinese law does not permit a court to refuse to enforce an award that has been set aside.

In the author’s view, strictly speaking, there is no ground under Chinese law, equivalent to article V(1)(e) of the New York Convention, upon which a court may refuse to enforce an arbitral award on the basis that either the award has not yet becoming binding or has been set aside. However, as Wunschheim points out, the lack of a binding arbitral award, and the fact that an award has been set aside, can both serve as obstacles to enforcement: the lack of a binding arbitral award can result in a people’s court rejecting the application for enforcement; and the fact that an award has been set aside can lead to a people’s court terminating enforcement proceedings.

3 China’s Experience with the ‘Not Yet Binding or Set Aside Ground’

To the author’s knowledge there are only three cases in which the ‘not yet binding’ ground has been considered by the Chinese courts, and there are no cases in which the ‘set aside’ ground has been considered.

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1038 Jian Zhou, above n 572, 447.
1039 Civil Procedure Law 2013 ch 19 art 224.
1040 Ibid ch 22 art 257(2).
In *Bunge Agribusiness Singapore Pte Ltd v Guangdong Fengyuan Food & Oil Group Company Ltd*[^1^], while the Supreme People’s Court’s ultimate decision was based on article V(1)(d) of the New York Convention, the courts considered article V(1)(e). Before the Yangjiang Intermediate People’s Court, Fengyuan argued that the award had not yet become binding on the parties because He Qian, to whom the award was delivered, was not the designated recipient for Fengyuan (rather it ought to have been delivered to Feixiong Yao), and the delivery person was Dihuang Song, an agent of Bunge.[^2^] The Court found that applicant was unable to prove that He Qian was an employee of Fengyuan, and that delivery of the award by the claimant’s agent was not in accordance with Chinese civil procedure law.[^3^] On this basis, the Court found that the award had not yet become binding on the parties and therefore was inclined to refuse to enforce the award on the basis of article V(1)(e) of the New York Convention.[^4^]

The reasoning of the Yangjiang Intermediate People’s Court seems to be wholly flawed for a number of reasons. First, the Court made no attempt to ascertain the meaning of ‘binding’ for the purpose of article V(1)(e) of the New York Convention. Second, the Court paid no attention to the fact that, regardless as to the specific person who received the award, Fengyuan had received a copy of the award. Third, it wrongly placed the burden on the applicant to show that the person to whom the award was delivered was an employee of Fengyuan. This is completely contrary to the requirements of the New York Convention, which firmly place the burden on the party resisting enforcement of


[^2^]: Ibid 3.

[^3^]: Ibid 5.

[^4^]: Ibid.
an award to establish that the grounds set out in article V(1)(e) of the New York Convention are made out. Fourth, in no way can the decision be said to echo the pro-enforcement bias of the New York Convention, instead, the only echo that resounds is that of a pro-Chinese party approach. Fifth, the Court’s reliance on the Civil Procedure Law 1991 to determine the manner in which the award ought to have been delivered to Fengyuan is incorrect – such a procedure is governed by the law of the seat of the arbitration and the designated procedural rules i.e. the FOSFA Rules in this instance.

On referral to the Guangdong Higher People’s Court, the Court held that the award ought not to be enforced as it had not yet become binding on the parties. 1045 Again, the decision of the Guangdong Higher People’s Court in this regard seems to be utterly flawed – it ignores the pro-enforcement bias of the New York Convention, it wrongly places the burden of proof on Bunge, as the applicant for enforcement, and it lacks any commercial or practical basis (given that FOSFA could ultimately arrange for the award to be re-delivered correctly and then the enforcement process could start again). This case demonstrates a fundamental lack of understanding of the New York Convention provisions by the people’s courts and also serves to demonstrate the inconsistency of approaches taken as between courts of different levels. It is because of cases like this that this paper calls for a reform of the enforcement system in China.

In contrast, in 2007, in *I. Schroeder KG (GmbH & Co) v Jiangsu Huada Food Industry Co., Ltd*, 1046 the defendant to the enforcement proceedings (Huada Foods) objected to recognition and enforcement of the award on the grounds that, as Huada Food had allegedly not received due notices concerning the appointment of the arbitrators or of

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1045 Ibid 6-7.
the arbitration proceedings, there were ample grounds for refusal under article V(1)(d) and V(1)(e) of the New York Convention. The Zhenjiang Intermediate People’s Court was not persuaded. It found, correctly, that Huada Foods bore the burden of proving that it had not received notice of the appointment of the arbitrators or of the arbitral proceedings or that for some other reason the award had not yet become binding on it. Huada Foods had failed to meet that burden and therefore the Court continued to enforce the award. This decision can only been seen in a positive light – the Court’s insistence upon Huada Foods meeting its burden of proof is consistent with the interpretation and application of the New York Convention by other Contracting States.

4 Summary Comments on The Not Yet Binding or Set Aside Ground

It is clear from the discussion above that China has very little experience with the ‘not yet binding’ ground, and no experience of enforcement of awards that have been set aside at the place where the award was made. Of the cases in which the ‘not yet binding’ ground has been invoked, the Courts have adopted confused and contradictory interpretations. While the interpretation and application of this ground under the New York Convention is in itself the subject of much debate, if China is to become a role model for other arbitration states, it needs to bring the provisions of its Civil Procedure Law 2013 in line with the requirements of the New York Convention. In essence, the ‘not yet binding’ and ‘set aside’ grounds need to be incorporated into the provisions of the Civil Procedure Law 2013 relating to the enforcement of foreign-related arbitral awards.

1047 Ibid.
1048 Ibid.
1049 Ibid.
The concept of arbitrability refers to whether a dispute is capable of settlement by arbitration. A dispute must be capable of settlement by arbitration for the arbitration agreement to be valid and, in turn, for an arbitral tribunal to have jurisdiction. Redfern and Hunter summarised the rationale for the non-arbitrability doctrine when they stated that:

it is precisely because arbitration is a private proceeding with public consequences that some types of disputes are reserved for national courts whose proceedings are generally in the public domain.

The aim of the non-arbitrability doctrine is therefore to keep those matters, which are considered to be of a public interest, in the public domain of the national courts. This section looks at the non-arbitrability refusal ground under article V(2)(a) of the New York Convention, seeks to determine whether a similar ground exists for the non-enforcement of foreign-related arbitral awards under Chinese law, looks at China’s experience with this ground to date, and provides recommendations for reform.

1 **Interpretation of Article V(2)(a) of the New York Convention**

Article V(2)(a) of the New York Convention expressly allows the enforcing court of a Contracting State to refuse to enforce a foreign arbitral award where:

[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country.
Under this article, an enforcing court can make enquiries into the arbitrability of a dispute *ex officio*, even if neither party to the dispute has raised an objection to enforcement based on arbitrability.\(^{1054}\)

While the concept of arbitrability is posited in the New York Convention,\(^{1055}\) the Convention does not set a criterion for what constitutes an arbitrable matter and what does not.\(^{1056}\) This is because article V(2)(a) of the New York Convention provides that the difference must be capable of settlement by arbitration according to the ‘law of that country.’\(^{1057}\) It seems undisputed that the enforcing court is bound by its own *lex fori* and, as such, must determine whether an award has violated any rules of its own country in relation to arbitrability.\(^{1058}\)

As arbitrability is determined by national laws,\(^{1059}\) the types of disputes considered to be non-arbitrable for the purposes of article V(2)(a) of the New York Convention differ from state to state.\(^{1060}\) However, the general principle adopted by most states is that matters that involve such sensitive public policy issues should be resolved by state courts and not by arbitration.\(^{1061}\) As Born points out:

> the types of disputes which are nonarbitrable nonetheless almost always arise from a common set of considerations. The nonarbitrability doctrine rests on the notion that some matters so pervasively involve “public” rights and concerns, or interests of third

\(^{1053}\) New York Convention art V(2)(a).

\(^{1054}\) New York Convention art V(2)(a); Di Pietro, above n 9, 96.

\(^{1055}\) New York Convention arts II(1), V(2)(a).

\(^{1056}\) Poudret and Besson, above n 541, 283 [331].

\(^{1057}\) New York Convention art V(2)(a).

\(^{1058}\) Born, above n 299, 3694; Di Pietro, above n 9, 109; Poudret and Besson, above n 541, 286 [335]; Piero Bernardini, ‘The Problem of Arbitrability in General’ in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards The New York Convention in Practice* (Cameron May, 2008) 503, 516; Poudret and Besson, above n 541, 286 [335].

\(^{1059}\) Blackaby et al, above n 9, 124 [2]-[114]; Poudret and Besson, above n 541, 282 [331].

\(^{1060}\) Lew, Mistelis and Kröll, above n 535, 199 [9]-[35]; Blackaby et al, above n 9, 124 [2]-[116].

\(^{1061}\) Born, above n 299, 994; Lew, Mistelis and Kröll, above n 535, 188 [9]-[2]; Blackaby et al, above n 9, 123 [2]-[113].
parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by “private” arbitration should not be given effect.\textsuperscript{1062}

Further, a narrow view is generally taken to the scope of non-arbitrable matters due to the pro-arbitration approach taken by tribunals and courts.\textsuperscript{1063} The United States Supreme Court set the trend for widening the scope of arbitrable matters in \textit{Scherk v Alberto-Culver Co},\textsuperscript{1064} where it held that a dispute concerning alleged violations to the \textit{Securities Exchange Act 1934} (US) was arbitrable.\textsuperscript{1065} The same court later held, in the landmark case of \textit{Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc.},\textsuperscript{1066} that anti-trust disputes are arbitrable.\textsuperscript{1067} In doing so, the Court stated that

the utility of the [New York] Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they would normally think of as their own.\textsuperscript{1068}

It further added that ‘it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration’.\textsuperscript{1069}

It is therefore clear that while arbitrability, for the purposes of article V(2)(a) of the New York Convention, is governed by the laws of the place where the enforcing court is located, the approach taken by the enforcing courts is a narrow one, favouring the enforcement of arbitral awards. As one commentator stated ‘arbitrability is the rule, inarbitrability is the exception.’\textsuperscript{1070} The result is that in recent times, most national

\begin{footnotes}
\item\textsuperscript{1062} Born, above n 299, 994.
\item\textsuperscript{1063} Ibid 3701; Lew, Mistelis and Kröll, above n 535, 99 [9]-[36].
\item\textsuperscript{1064} \textit{Scherk v Alberto Culver Co} 417 US 506 (U.S. Sup. Ct. 1974).
\item\textsuperscript{1065} Ibid 510.
\item\textsuperscript{1066} \textit{Mitsubishi Motors Corp v Soler Chrysler-Plymouth} 473 US 614 (U.S. Sup. Ct. 1985).
\item\textsuperscript{1067} Ibid 614.
\item\textsuperscript{1068} Ibid 639.
\item\textsuperscript{1069} Ibid.
\end{footnotes}
courts have been unwilling to determine matters as non-arbitrable.\textsuperscript{1071} Examples of matters that have been considered non-arbitrable under article V(2)(a) of the New York Convention include disputes involving criminal matters, marriage, succession, bankruptcy (although this is controversial),\textsuperscript{1072} trade sanctions, some competition claims, consumer claims, employment grievances, and in certain circumstances intellectual property matters.\textsuperscript{1073}

2 \hspace{0.5cm} \textit{Article What of the Civil Procedure Law 2013?}

Contrastingly to article V(2)(a) of the New York Convention, there is no express provision under Chinese law that allows the people’s courts to refuse to enforce a foreign-related arbitral award on the basis that the subject matter of the dispute is non-arbitrable. However, commentators, such as Wunschheim, argue that non-arbitrability under Chinese law does still lead to the non-enforcement of an arbitral award.\textsuperscript{1074} This argument is based on two points. First, under article 17(1) of the \textit{Arbitration Law 1995}, an arbitration agreement will be null and void if ‘[t]he agreed matters for arbitration exceed the range of arbitrable matters as specified by law’.\textsuperscript{1075} On this basis, a party wishing to invoke the non-arbitrability of a dispute to avoid enforcement of a foreign-related award would need to argue that the arbitration agreement was invalid for the purposes of article 274(1) of the \textit{Civil Procedure Law 2013}.\textsuperscript{1076} However, such an argument could only be effective if the law applicable to the arbitration agreement was Chinese law, otherwise, article 17(1) of the \textit{Arbitration Law 1995} would not come in to

\textsuperscript{1071} Born, above n 299, 974.
\textsuperscript{1073} Ibid 3695.
\textsuperscript{1074} Wunschheim, above n 301, 278.
\textsuperscript{1075} \textit{Arbitration Law 1995} ch III art 17(1).
\textsuperscript{1076} \textit{Civil Procedure Law 2013} ch 26 art 274(1).
play. Second, it is argued that a lack of arbitrability could fall within the public policy ground set out under article 274 of the Civil Procedure Law 2013. While this argument may hold some weight, such an interpretation of ‘public policy’ would go against the interpretation developed and advance under the New York Convention, which expressly differentiates between the non-arbitrability and the public policy grounds.

Where an arbitration agreement is governed by Chinese law and the possibility of raising a non-arbitrability argument under the invalidity of the arbitration agreement ground, the boundaries of arbitrability under Chinese law are mainly posited in the Arbitration Law 1995. Article 2 of the Arbitration Law 1995 identifies the types of disputes that are arbitrable under Chinese law:

[c]ontractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organizations that are equal subjects may be arbitrated.

On a literal interpretation of this article, any disputes over rights and interests in property are arbitrable, so long as to the parties to the dispute are of equal footing. Disputes between parties who are not on equal footing are expressly non-arbitrable under Chinese law. Commentators argue that this definition of arbitrability also encompasses tort claims.

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1077 See section V.C.2 above.
1078 Wunschheim, above n 301, 278.
1079 Born, above n 299, 3694.
1081 Tao, Arbitration Law and Practice in China, above n 16, 65 [165].
On the other hand, article 3 of the *Arbitration Law 1995* expressly identifies those disputes that are non-arbitrable under Chinese law:

> the following disputes may not be arbitrated: (1) marital, adoption, guardianship, support and succession disputes; (2) administrative disputes that shall be handled by administrative organs as prescribed by law.\(^{1083}\)

It can therefore be said that article 3 prohibits arbitration of two types of disputes: first, those relating to personal rights; and second, those relate to administrative disputes arising from management by government, between government organs, or between government organs, social organisations and individuals.\(^{1084}\) This relatively narrow list of non-arbitrable disputes is in line with the approach taken by most Contracting States to the New York Convention to limit those disputes that are non-arbitrable to only those the subject matter of which concerns fundamental notions of public policy and for which the local courts have exclusive jurisdiction.\(^{1085}\)

Further, with respect to administrative disputes, article 11 of the *Administrative Procedure Law of the PRC 1990*\(^{1086}\) expressly provides exclusive jurisdiction to the people’s courts over disputes concerning the following:\(^{1087}\)

- administrative sanction, such as detention, fine, rescission of a license or permit, order to suspend production or business or confiscation of property;

- compulsory administrative measures, such as restricting freedom of the person or the sealing up, seizing or freezing of property;

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\(^{1083}\) *Arbitration Law 1995* ch I art 3.

\(^{1084}\) Tao, *Arbitration Law and Practice in China*, above n 16, 65 [166].

\(^{1085}\) See above at section V.H.1.


\(^{1087}\) Ibid art 3.
the infringement by an administrative organ of one’s managerial decision-making powers;

the refusal by an administrative organ to issue a permit or license, or the latter’s failure to respond to the application;

the refusal by an administrative organ to perform its statutory duty of protecting the rights of the person and of property, or the latter’s failure to respond to an application;

failure of an administrative organ to issue a pension according to law;

where an administrative organ is considered to have illegally demanded the performance of duties; and

infringement by an administrative organ upon other rights of the person and of property.

In addition, a number of specific Chinese laws address the issue of arbitrability. By way of example, article 2 of the Trademark Law of the PRC 1982\textsuperscript{1088} establishes the Trademark Review and Adjudication Board for the purposes of resolving trademark disputes and thereby prohibits trademark disputes from being referred to arbitration.\textsuperscript{1089}

In contrast, article 55 of the Copyright Law of the PRC 2010\textsuperscript{1090} expressly permits the


\textsuperscript{1089} Ibid art 2.

\textsuperscript{1090} Copyright Law of the People’s Republic of China (People’s Republic of China) National People’s Congress, 26 February 2010.
parties to refer copyright disputes to arbitration and prohibits parties referring a
copyright dispute to the people’s court where an arbitration agreement exists.1091

Further, article 77 of the *Arbitration Law 1995* provides:

[r]egulations concerning arbitration of labor disputes and agricultural contractor's
contract disputes arising within the agricultural collective economic organizations shall
be formulated separately.1092

In this regard, article 79 of the *Labor Law of the PRC 1995*1093 provides that labour
disputes must be submitted to an arbitral commission established by the government
specifically to deal with labour disputes.1094 Similarly, agricultural disputes are usually
resolved by local government departments or through the courts.1095

3 China’s Experience With The Non-Arbitrability Ground

Given that article 274 of the *Civil Procedure Law 2013* does not expressly provide non-
arbitrability as a ground for refusing recognition and enforcement of an arbitral award, it
is unsurprising that very few cases exist in which this ground has been invoked before
the people’s courts. However, as the following sections show, the people’s courts have
considered the non arbitrability ground under the New York Convention in relation to
disputes over an illegal futures transaction,1096 preservation matters,1097 succession1098
and standard contractual disputes.1099

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1091 Ibid art 55.
1094 Ibid.
(a) Arbitrability of Illegal Futures Transaction Dispute

In *ED&F MAN Asia Pte Ltd v China Sugar and Alcohol Industry Corp Ltd*, in addition to the invalidity of the arbitration agreement ground discussed above, China Sugar sought to resist enforcement of the arbitral award on the basis of article V(2)(a) of the New York Convention. It argued that the contract was a fraudulent futures contract therefore it could not constitute a contractual or non-contractual commercial relationship for the purposes of Chinese law and as such was not arbitrable. The decision rendered by the Beijing Higher People’s Court does not set out the details of the Beijing Intermediate People’s Court’s decision. However, the Beijing Higher People’s Court itself held that:

> [t]here is no such rule under Chinese law indicating that the illegal futures transaction contract does not have contractual or non-contractual commercial relationship.

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1101 See section V.B.3 above.


1103 Ibid.

1104 Ibid 6 [1].
On this basis, the Court found that China Sugar could not rely on article V(2)(a) of the New York Convention to resist enforcement of the award.\textsuperscript{1105} On referral, the Supreme People’s Court agreed with this decision and added:

\textit{[t]he dispute arising from the performance of the contract is a commercial contractual relationship. Under Chinese laws, parties can choose to settle disputes of this kind by arbitration. … neither of the two grounds laid out in Article V(2) of the New York Convention concerning the subject matter of the difference and the public policy are present in this case.}\textsuperscript{1106}

The decisions of both the Beijing Higher People’s Court and the Supreme People’s Court in this regard are positive: the decisions are well reasoned and are in line with the approach of the courts of other Contracting States to broaden the scope of arbitrable matters in favour of arbitration.\textsuperscript{1107}

(b) \textit{Arbitrability of Matters Relating to Preservation Measures – A Question Left Unanswered}

One of the more interesting, and perhaps controversial, decisions of the Chinese courts on article V(2)(a) of the New York Convention is \textit{Hemofarm DD, MAG International Trade Co, Sulame Median Co and Jinan Hemofarm Joint Venture v Jinan Yongning Pharmaceutical Company Ltd.}\textsuperscript{1108} In addition to the ‘outside scope ground’ discussed above,\textsuperscript{1109} Yongning also objected to the enforcement of the arbitral award before the Jian Intermediate People’s Court on the basis of article V(2)(a) of the New York

\textsuperscript{1105} Ibid 6.
\textsuperscript{1106} Ibid 1.
\textsuperscript{1107} See section V.H.1 above.
\textsuperscript{1109} See section V.E.3.(b) above.
Convention (although the decision of the Shandong Higher People’s Court incorrectly refers to article 1(a)). Yongning argued that the right to apply for preservation measures was protected under the Civil Procedure Law 2008 and should never be subject to arbitration as such measures fall within the exclusive jurisdiction of the people’s courts.

The Jian Intermediate People’s Court found that, although the applicants had filed claims on the basis of disputes concerning the joint venture, the reason for the tribunal to award damages was based on preservation measures. As the enforcement of preservation measures falls within the exclusive jurisdiction of the people’s courts, the matter was not arbitrable. The Shandong Higher People’s Court agreed with the lower court and provided detailed reasons for its decision as follows:

- Article V(2)(a) of the New York Convention allows a court to refuse to recognise and enforce an arbitral award on the basis that the subject matter of the dispute is not capable of settlement by arbitration.
- Under article 2 of the Arbitration Law 1995, ‘only the disputes concerning contractual and commercial rights and obligations are capable of settlement by arbitration.’ The recognition and enforcement of arbitral awards under the New York Convention is limited to awards made out of commercial relationships.

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1111 Ibid, 6-7.
1112 Ibid 8.
1113 Ibid 9-10.
1114 Ibid.
• Yongning’s application for property preservation measures before the Chinese courts is within the scope of the Civil Procedure Law 2008. The dispute is neither related to the contract and property nor related to a contractual or commercial relationship. ‘A dispute of this nature is subject to the exclusive jurisdiction of the Chinese courts.’ 1115

• ‘Any objection to justice and legality of the procedural interim measures should be submitted to the competent court or the superior court. The tribunal does not have jurisdiction to arbitrate the relevant issue.’ 1116

The Supreme People’s Court later agreed with the Shandong Higher People’s Court that the award should not be enforced but came to this decision on the basis of article V(1)(c) and article V(2)(b) of the New York Convention, not on the basis of article V(2)(a). 1117 The reasons for the Supreme People’s Court’s lack of consideration of article V(2)(a) are unclear.

The decision of the Shandong Higher People’s Court, while not in favour of arbitration, is encouraging, namely as it is well considered and shows a solid understanding of the relevant laws and principles. However, the Reply of the Supreme People’s Court is somewhat disappointing: it is only five short paragraphs long (less than one page) and fails to consider many of the points raised by Yongning and addressed by the Higher People’s Court, including the arguments in relation to article V(2)(a) of the New York Convention. This therefore leaves a question as to whether the Supreme People’s Court actually agreed with the Higher People’s Court on this point. Such limbo is precisely why this paper argues for a higher degree of consistency as between the Chinese courts.

1115 Ibid.
1116 Ibid.
1117 Ibid, 1.
in their interpretation and application of the New York Convention and article 274 of the Civil Procedure Law 2013, and in particular for a higher level of detailed reasoning from the Supreme People’s Court in its Replies. In turn, this will assist in enhancing the predictability of the Chinese system which is appealing to foreign traders and investors who have relationships with Chinese entities.

(c) Non-Arbitrability of Succession Matters

In Wu Chunying v Zhang Guiwen the Chinese courts had the opportunity to take a stance on the arbitrability of succession matters. The case involved the enforcement of an arbitral award by Ms Wu, in which the tribunal had found that Ms Wu was the successor to her husband and that she was entitled to certain rights that he had held in relation to a limited liability company. The Binzhou Intermediate People’s Court was inclined to refuse to recognise and enforce the award under article V(2)(a) of the New York Convention because the matter related to inheritance, which is expressly non-arbitrable under article 3 of the Arbitration Law 1995.

The Shandong Higher People’s Court agreed with this decision and so referred the case to the Supreme People’s Court for approval. The Supreme People’s Court also agreed and found that the overall subject matter of the dispute was succession and therefore under article 3 of the Arbitration Law 1995, the dispute was not capable of

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1119 Ibid.
1120 Ibid.
1121 Ibid.
settlement by arbitration. Accordingly, the Court refused to recognise and enforce the award based on article V(2)(a) of the New York Convention.\textsuperscript{1122}

It appears, at first brush, that the finding of the people’s courts is correct as article 3 of the \textit{Arbitration Law 1995} expressly excludes inheritance matters from the realm of matters capable of settlement by arbitration. However, the lack of detail contained in the decisions of the courts makes it difficult to assess whether the courts were correct or whether, as may be the case, only part of the award dealt with a subject matter not capable of settlement by arbitration and as such, whether partial enforcement ought to have been ordered.

(d) \textit{Arbitrability of Contractual Dispute}

While not a particularly ground breaking decision, it is worth noting that in \textit{Closed Joint Stock Company Unicon v Suzhou Tianbao Industry & Trade Co. Ltd},\textsuperscript{1123} the Suzhou Intermediate People’s Court considered, \textit{ex officio}, whether the subject matter of the award was capable of settlement by arbitration and therefore whether any grounds existed for non-enforcement under article V(2)(a) of the New York Convention. The Court found that the dispute was of a commercial nature and therefore was arbitrable under Chinese law and did not fall within article V(2)(a) of the New York Convention. This is in line with the wording of article V(2) of the New York Convention, which expressly permits the courts to consider the grounds under this article, even if the party objecting to enforcement does not chose to raise them itself.\textsuperscript{1124}

\textsuperscript{1122} Ibid.
\textsuperscript{1124} New York Convention art V(2); see also section V.A.2 above.
The cases analysed above demonstrate that China’s track record, in relation to consideration of article V(2)(a) of the New York Convention, is a positive (albeit a very small) one: the decisions are clear and well considered in most cases; the courts have correctly and consistently referred to the arbitrability provisions of the Arbitration Law 1995, as well as to other relevant provisions providing exclusive jurisdiction to the Chinese courts; and in at least one case the court has considered article V(2)(a) of the New York Convention on its own accord, as permitted to do so by that article itself.

However, the key issue still remains that article 274 of the Civil Procedure Law 2013 fails to provide for lack of arbitrability as a ground for non-enforcement of a foreign-related award. While it is acknowledged that, in essence, arbitrability is a condition for a valid arbitration agreement under Chinese law, this still does not mean that Chinese law allows non-enforcement of a foreign-related arbitral award on the basis of a lack of arbitrability. This is because, a foreign-related arbitral award may have been made (for example by CIETAC or CMAC) on the basis of an arbitration agreement that is subject to a law other than Chinese law.\(^\text{1125}\)

Following a string of cases in which the Chinese arbitral commissions (and courts) were all too quick to incorrectly apply Chinese law to the validity of the arbitration agreement,\(^\text{1126}\) in 2006 the Supreme People’s Court issued the Interpretation of the

\(^{1125}\) For general commentary on the possible laws applicable to an arbitration agreement, see: Born, above n 299, 472–635; Blackaby et al., above n 9, [3.09]–[3.33]; for commentary on the Chinese approach, see Yongping Xiao and Weidi Long, ‘Enforcement of International Arbitration Agreements in Chinese Courts’ (2009) 25(4) Arbitration International 569, 575–578.

\(^{1126}\) See Xiao and Long, above n 1125, 576 citing Hubei High People’s Court’s Inquiries concerning the Validity of the Arbitration Clause in the Contract between Wuhan Hongshan Real Estate Co and Xingye Ltd (2004) Eminsizhongzi No. 33; Hainan High People’s Court’s Inquiries concerning the Validity of the Arbitration Clause in Vietnam Wanhua International Tour Co. v Hainan International Tour Ltd (2003) Qionglitazi No. 4; Guangdong High People’s Court’s Inquiries concerning the Validity of the Arbitration Clause in Yunwei Shipping Agent Ltd v Shenzhen Local Products and Tea Imports and Exports Co.
Supreme People's Court on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China",\textsuperscript{1127} Article 16 of which provides:

[w]ith respect to examining the validity of an arbitration agreement involving foreign elements, \textit{the law agreed upon by the parties shall apply}. If the parties have not agreed upon an applicable law but have agreed upon the place of arbitration, the law of that place shall apply. If the parties have agreed upon neither an applicable law nor the place of arbitration, or they fail to clearly agree upon the place of arbitration, the law of the court shall apply.\textsuperscript{1128}

(Emphasis added.)

It is therefore clear that Chinese law will only apply to the validity of the arbitration agreement if: (a) it is chosen by the parties, (b) the parties have agreed for China to be the place of the arbitration; or (c) the parties have failed to agree on the law applicable to the arbitration agreement or on the place of arbitration.\textsuperscript{1129}

Further, Article 5(3) of the 2012 CIETAC Arbitration Rules specifically contemplates a situation in which the law applicable to the arbitration agreement is a law other than Chinese law.\textsuperscript{1130} If a law other than Chinese law is applied to the validity of an arbitration agreement, the Chinese requirements as to a valid arbitration agreement (and

\textsuperscript{1127} Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China" (People’s Republic of China), Supreme People's Court, 23 August 2006.
\textsuperscript{1128} Ibid art 16.
therefore as to arbitrability) are rendered nugatory. As such, to add non-arbitrability to the grounds for non-enforcement under article 274 of the Civil Procedure Law 2013 is necessary to bring Chinese law in line with international best practice and in turn to make the Chinese system more predictable and appealing to those doing business in China.

I CONTRARY TO PUBLIC POLICY

Both article V(2)(b) of the New York Convention and article 274 of the Civil Procedure Law 2013 allow the enforcing court to refuse to enforce an arbitral award on public policy grounds. The articles provide as follows:

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<tr>
<th>Article V(2)(b) of the New York Convention</th>
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<tr>
<td>Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where the recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.</td>
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<tr>
<th>Article 274 of the Civil Procedure Law 2013</th>
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<tr>
<td>If a people’s court determines that the enforcement of an award will violate the social and public interest, the court shall make a ruling to disallow the enforcement of the arbitration award.</td>
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In the 1824 case of Richardson v Melisch, the court famously stated that ‘public policy is a very unruly horse and once you stride it, you never know where it will carry you’. This quote perfectly sums up the unpredictable nature of public policy.

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1131 Richardson v Melisch (1824) 2 Bing 229.
1132 Ibid 252.
arguments and it is for this reason that public policy is often viewed as the catch-all ground on which a party may try to resist recognition and enforcement of an arbitral award.\textsuperscript{1133} For this reason, this ground is one of the most often invoked. The following sections analyse the interpretation and application of the public policy grounds under the New York Convention and the \textit{Civil Procedure Law 2013} with a view to identifying necessary reforms to the Chinese system.

1 \hspace{1em} \textit{Interpretation of Article V(2)(b) of the New York Convention}

It is well established that the public policy ground under the New York Convention is to be interpreted extremely narrowly and restrictively,\textsuperscript{1134} used only in exceptional circumstances,\textsuperscript{1135} and sparingly.\textsuperscript{1136} This section analyses the precise wording of article V(2)(b) of the New York Convention and considers its interpretation in further detail.

(a) \textit{Public Policy of Which Country?}

The first question to be asked is which country’s public policy does the enforcing court have to have regard to in making a decision under article V(2)(b) of the New York Convention? The answer it simply, its own. Article V(2)(b) expressly states that recognition and enforcement of an award may be refused if a court of competent

\begin{footnotesize}
\textsuperscript{1133} Born, above n 299, 3650-3651.
\textsuperscript{1136} Ibid.
\end{footnotesize}
authority in the country in which enforcement is sought finds that the award is contrary to ‘the public policy of that country’ (emphasis added). As Born states:

[Although there is debate concerning the topic, there can be little doubt that the public policy which may be invoked to resist recognition of an award under Article V(2)(b) of the New York Convention … is national public policy. This is explicit in the text of Article V(2)(b), which refers to the public policy “of that country” (i.e. the judicial enforcement forum), as well as in the basic structure of Article V(2) as an exceptional escape device …

Consistent with this, the overwhelming weight of national court authority applies the public policies of the local judicial enforcement forum in recognition proceedings, in both common law and civil law jurisdictions.]

(b) Meaning of ‘Public Policy’

The second question is clearly, what does ‘public policy’ mean? According to Gaillard and Savage:

although Article V, Paragraph 2(b) is not explicit on this point, there is no doubt that the reference in that provision to public policy is in fact a reference to the international public policy of the host jurisdiction.

The courts in many jurisdictions have expressly confirmed that there is a distinction between international and domestic public policy and that for purposes of article V(2)(b) of the New York Convention, it is the international public policy that is relevant. Some legislatures have even gone so far as to expressly state that public

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1137 New York Convention art V(2)(b); Hanotiau and Caprasse, above n 1070, 801.
1138 Born, above n 299, 3652.
1139 Gaillard and Savage, above n 729, 996.
1140 Parsons & Whittemore Overseas Co. v Société Générale De L’Industrie Du Papier 508 F.2d 969, 973 (2d Cir. 1974); Ameropa AG v Havi Ocean Co. WL 570130, 2 (S.D.N.Y. 2011); National Oil Corporation v Libyan Sun Oil Corporation 733 F.Supp. 800, 819 (D. Del. 1990); Kashani v Tsann Kuen
policy for the purpose of article V(2)(b) of the New York Convention is interpreted as the international public policy of the forum state: for example, article 1520(5) of the revised *French Code of Civil Procedure* expressly refers to ‘international public policy’ as a ground for resisting enforcement of a foreign arbitral award.\(^{1141}\)

The next question then becomes how does one determine what constitutes the international public policy of a given state? While there is no definitive answer to this question, Born sets out three possible interpretations of what may constitute international public policy:

- First, international public policy may mean just that, ‘substantive norms derived from international sources and not from national law sources.’\(^{1142}\) This amounts to what has been called a ‘truly international public policy’ or ‘transnational public policy.’\(^{1143}\) However, Born goes on to say that the express wording of article V(2)(b) of the New York Convention cannot be reconciled with this interpretation as the article expressly refers to the public policy ‘of that country.’\(^{1144}\)

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\(^{1142}\) Born, above n 299, 3656.


\(^{1144}\) Born, above n 299, 3657 – 3658.
• Second, international public policy may mean principles of the enforcing state’s public policy that are consistent with international principles and that are also recognised as vital parts of public policy by numerous states.\textsuperscript{1145}

• Third, international public policy may mean notions of public policy of the enforcing country, which are intended to have international application.\textsuperscript{1146}

However, the precise interpretation of ‘international public policy’, in the context of article V(2)(b) of the New York Convention, does not present too much of a concern given that it has been repeatedly said that ‘public policy must be interpreted restrictively and does not encompass all the mandatory provisions of the State where the exequatur is requested’.\textsuperscript{1147} Rather, public policy under the New York Convention covers only the ‘forum state's most basic notions of morality and justice’.\textsuperscript{1148} This pro-arbitration approach, requiring a narrow interpretation of the public policy exception under article V(2)(b) of the New York Convention, is now well established.\textsuperscript{1149}

2 Interpretation of Article 274 of the Civil Procedure Law 2013

Before embarking on a discussion of what constitutes ‘social and public interest’ under article 274 of the \textit{Civil Procedure Law 2013}, the first point to draw attention to is that article 274 fails to expressly identify which country’s notions of ‘social and public

\begin{footnotes}
\item[\textsuperscript{1145}] Ibid 3657.
\item[\textsuperscript{1146}] Ibid 3665; see also \textit{Hebei Import & Export Corporation. (R. China) v Polytek Engineering Company Ltd. (Hong Kong)}, Hong Kong Court of Final Appeal, 9 February 1999 reported in (1999) XXIV Yearbook of Commercial Arbitration 652, 675.
\item[\textsuperscript{1147}] Hanotiau and Caprasse, above n 1070, 791; \textit{Parsons & Whittemore v Société Générale de l'Industrie du Papier (RAKTA)} 508 F 2d 969, 974 (2d Cir. 1974).
\item[\textsuperscript{1148}] \textit{Parsons & Whittemore v Société Générale de l'Industrie du Papier (RAKTA)} 508 F 2d 969, 973-974 (2d Cir. 1974).
\end{footnotes}
interest’ the enforcing court is supposed to have regard to. Given that this article relates only to foreign-related arbitral awards, it may seem obvious that the enforcing court must have regard to, and only to, Chinese notions of ‘social and public interest’. This however is not made expressly clear by article 274 of the Civil Procedure Law 2013 and perhaps leaves scope for a foreign party to argue that reference should be made to its own country’s notions of ‘social and public interest’. Such an argument would perhaps lack success, nevertheless it is a possibility which arises as a result of the vague wording of the Civil Procedure Law 2013.

Further, in contrast to the wording of the article V(2)(b) of the New York Convention (which refers expressly to public policy), article 274 of the Civil Procedure Law 2013 refers to ‘social and public interest.’\textsuperscript{1150} No definition or explanation is provided in Chinese legislation as to what constitutes ‘social and public interest.’\textsuperscript{1151} This issue is of major concern to foreign traders and investors in China, as Peerenboom stated:

\begin{quote}
[o]ne crucial issue that continues to haunt investors is the lack of guidance on how PRC courts are to interpret violations of ‘public policy’ … The fear has long been that the PRC courts would find that enforcement of virtually any award against a Chinese party would violate public policy or social public interest.\textsuperscript{1152}
\end{quote}

However, despite concerns, it is generally accepted that the phrase ‘social and public interest’ is to be interpreted narrowly, and only refers to a breach of the country’s

\textsuperscript{1150} Civil Procedure Law 2013 ch 26 art 274.


\textsuperscript{1152} Peerenboom, Seek Truth, above n 342, 288.
fundamental legal principles. In this regard, some Supreme People’s Court judges have opined that an award may be deemed to violate public policy where it:

- is in violation of the basic principles of the Chinese Constitution or of the Four Fundamental Principles of China (i.e. to adhere to the Socialist road, to adhere to the people’s democratic dictatorship, to adhere to the leadership of the Communist Party, and to adhere to Marxism-Leninism and Mao’s thought);

- will damage the sovereignty or State security of China;

- is in violation of fundamental principles of Chinese law; or

- is against the obligations that China undertook in the international treaties China concluded or against the publicly recognised principle of fairness or justice in international law.

In light of the above, and on the basis of the limited information available as to what constitutes ‘social and public interests’ in China, it appears that this phrase is broader than ‘public policy’ for the purposes of article V(2)(b) of the New York Convention. However, it seems, at least in theory, that the narrow interpretation that the Chinese courts ought to take to article 274 of the Civil Procedure Law 2013 is in line with the approach taken to article V(2)(b) of the New York Convention.

3 China’s Experience With The ‘Contrary to Public Policy’ Ground

Despite the vague wording of article 274 of the Civil Procedure Law 2013, and the lack of any interpretation issued from the Supreme People’s Court as to how either this

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1153 Wunschheim, above n 301, 283.
1154 Ibid.
article, or article V(2)(b) of the New York Convention, is to be interpreted, it appears that the PRC courts have frequently taken it upon themselves to consider whether the enforcement of an award would violate public policy and in most cases, have found the answer to be in the negative, resulting in the enforcement of the arbitral award.\textsuperscript{1156} The following sections analyse some of the Chinese cases that have considered the public policy grounds.

(a) \textit{A Breach of A Mandatory Chinese Law Will Not, Without More, Constitute A Breach of Public Policy}

In at least three decisions, to the author’s knowledge, the Supreme People’s Court has been asked to consider the issue of enforcement of arbitral awards where the subject matter of the award breached a mandatory provision of Chinese law.\textsuperscript{1157} The Supreme People’s Court has always tended to enforce arbitral awards despite their clash with mandatory Chinese law.\textsuperscript{1158}

In \textit{ED&F MAN Asia Pte Ltd v China Sugar and Alcohol Industry Corp Ltd},\textsuperscript{1159} discussed above,\textsuperscript{1160} China Sugar argued that the recognition and enforcement of the

\textsuperscript{1156} Chang, above n 1151, 490.
\textsuperscript{1158} Lanfang Fei, ‘Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach’ (2010) 26(2) \textit{Arbitration International} 301, 306.
\textsuperscript{1160} See sections V.B.3 and V.H.3.(b) above.
arbitral award would be contrary to the public policy of China because the contract was an unlawful futures contract under Chinese law.\textsuperscript{1161} It argued that because of the illegality of the contract, it contravened a mandatory prohibition under Chinese law and went against the basic legal system and social public interest of the PRC.\textsuperscript{1162} The Beijing Higher People’s Court agreed with China Sugar.\textsuperscript{1163}

However, in what is a short, but accurate decision, the Supreme People’s Court rejected China Sugar’s objections and ruled to enforce the arbitral award.\textsuperscript{1164} The Supreme People’s Court stated:

\begin{quote}
[t]he offshore future transaction conducted by China Sugar Group should be invalid under Chinese Laws. However, the violation of compulsory rules under Chinese law should not be equal to breaking Chinese public policy. Therefore, neither of the grounds laid out in Article V(2) of the New York Convention concerning the subject matter of the difference and the public policy are present in this case. ….the people’s court should recognise and enforce the arbitral award in this case.\textsuperscript{1165}
\end{quote}

The decision is clearly made in line with the interpretation of the article V(2)(b) of the New York Convention, discussed above,\textsuperscript{1166} and ought to be praised.

However, the same cannot be said for the Supreme People’s Court’s decision in \textit{Bunge Agribusiness Singapore Pte Ltd v Guangdong Fengyuan Food & Oil Group Company\textsuperscript{1167}}

\begin{footnotes}
\textsuperscript{1161} \textit{ED\&F Man Asia Pte. Ltd v China Sugar and Alcohol Industry Corp Ltd}, Beijing Higher People’s Court Request Jinggaofa [2003] No. 7 unofficial translation reported in \textit{The New York Convention Guide}\texttt{<www.newyorkconventionguide.org> 4}.
\textsuperscript{1162} Ibid.
\textsuperscript{1163} Ibid section 6.
\textsuperscript{1164} \textit{ED\&F Man Asia Pte. Ltd v China Sugar and Alcohol Industry Corp Ltd}, Reply of the Supreme People’s Court, 1 July 2003 [2003] Min Si Ta Zi No. 3 unofficial translation reported in \textit{The New York Convention Guide}\texttt{<www.newyorkconventionguide.org> 1}.
\textsuperscript{1165} Ibid.
\textsuperscript{1166} See section V.I.1 above.
\end{footnotes}
In this case, the Yangjiang Intermediate People’s Court completely failed to consider the public policy ground raised by Fengyuan: Fengyuan had argued that because China had recently placed a ban on the importation of Brazilian soy beans, the enforcement of the award would constitute a violation of public policy, yet the Yangjiang Intermediate People’s Court did not even mention this point. The Guangdong Higher People’s Court, however, found that because the ban on the importation of Brazilian soy beans did not expressly refer to the importation of soy beans from Bunge, the enforcement of the award did not constitute a violation of public policy for the purposes of article V(2)(b) of the New York Convention. While this decision is line with the necessary pro-arbitration approach, the efforts of the Guangdong Higher People’s Court were somewhat wasted given the subsequent ruling of the Supreme People’s Court. Disappointingly, the Supreme People’s Court utterly failed to consider the public policy argument (or even the points raised by the Guangdong Higher People’s Court in this regard) and instead chose to refuse recognition and enforcement of the arbitral award on the basis of a procedural irregularity, which it held fell within the ambit of article V(1)(d) of the New York Convention.

Further, and on a more positive note, the Supreme People’s Court enforced the arbitral award, despite objections under article V(2)(b), in Tianrui Hotel Investment Co., Ltd. v Bunge Agribusiness Singapore Pte. Ltd. v Guangdong Fengyuan Food & Oil Group Company Ltd.

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1169 Ibid 6.

Hangzhou Yiju Hotel Management Co., Ltd. When Tianrui Hotel Investment Co Ltd (Tianrui) attempted to enforce the arbitral award before the Hangzhou Intermediate People’s Court, Hangzhou Yiju Hotel Management Co Ltd (Yiju) objected on a number of bases, the primary one being that recognition and enforcement of the award would be contrary to public policy. In this regard, Yiju argued that the contracts entered into by Tianrui were designed to evade Chinese regulations and legal principles on the control of foreign companies’ access to franchising activities and therefore such illegal franchise activities posed serious harm to the economic order and sovereignty of China. The Hangzhou Intermediate People’s Court agreed with Yiju and found that, as the franchise agreement breached mandatory provisions of Chinese law, enforcement of the arbitral award would be contrary to public policy.

The Zhejiang Higher People’s Court, to which the case was referred, agreed with the lower court’s decision. However, it noted that while a violation of mandatory rules of Chinese law does not necessarily constitute a violation of public policy, the present deliberate circumvention of regulations relating to market access were considered to violate public policy.

The Supreme People’s Court overturned the decisions of the lower courts and ordered enforcement of the award. The Court found that according to Chinese law, a foreign entity intending to conduct franchising business had to enter into a commercial franchise agreement (which Tianrui had done) and then had to report such an agreement

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1171 Tianrui Hotel Investment Co., Ltd. v Hangzhou Yiju Hotel Management Co., Ltd. Reply of the Supreme People’s Court, 18 May 2010, and Request of the Zhejiang Higher People’s Court reported in WunschARB, Chinese Court Decision Summaries on Arbitration (Kluwer Law International).
1172 Ibid.
1173 Ibid.
1174 Ibid.
1175 Ibid.
1176 Ibid.
1177 Ibid.
to the competent authority (which Tianrui had not done).\footnote{Ibid.} However, the Court found that the requirement to report to a competent authority did not establish a mandatory pre-condition to the validity of a franchise agreement.\footnote{Ibid.} As such, there was no breach of Chinese law and enforcement of the arbitral award would not lead to a violation of public policy.\footnote{Ibid.}

The decision of the Supreme People’s Court is once again encouraging as it demonstrates the narrow interpretation taken towards article V(2)(b) of the New York Convention, which is line with the approach taken by other Contracting States. Further, while the Higher People’s Court came to the wrong conclusion, it is also positive that it did recognise that not all breaches of mandatory rules of Chinese law constitute a violation of public policy if an award is enforced. This again shows that in more recent times, the Chinese courts have improved their competency in interpreting and applying the New York Convention, and more generally, in taking a pro-arbitration approach to the enforcement of arbitral awards. However, it appears, at least from the available summary of this decision, that the Supreme People’s Court overlooked the other arguments as to non-enforcement that were raised by Tianrui. It seems to be a common theme that, in its Replies, the Supreme People’s Court picks the ground for non-enforcement that it deems to be the most important in a particular case and rules on that grounds alone.\footnote{See also for example the Supreme People’s Court’s decisions in Shin-Estu Chemical Co., Ltd. v Tianjin Xinmao Science & Technology JSCL, Reply of the Supreme People’s Court, 10 September 2008, reported in WunschARB, Chinese Court Decision Summaries on Arbitration (Kluwer Law International); Shin-Estu Chemical Co., Ltd. v Jiangsu Zhongtian Technology JSCL, Reply of the Supreme People’s Court, 3 March 2008 reported in WunschARB, Chinese Court Decision Summaries on Arbitration (Kluwer Law International).} This is a flawed practice that needs to be corrected.
(b) No Breach of ‘Social And Public Interest’ Where Enforcement of An Award Would Lead To Financial Detriment To PRC Government

*Shenzhen Baosheng Jinggao Environment Protection Development Co Ltd v Hefei City Bureau of Environmental Administration*\(^{1182}\) concerned the enforcement of a foreign-related arbitral award under the *Civil Procedure Law 1991*. When the applicant (*Baosheng*) initiated enforcement proceedings before the Hefei Intermediate People’s Court, the defendants objected to enforcement on the ground that there was an irregularity in the arbitration proceedings.\(^{1183}\) However, it appears that the Court proceeded to ignore the grounds for non-enforcement raised by the defendants and instead, decided that the award was contrary to public policy (or social and public interest) under article 260(2) of the *Civil Procedure Law 1991* (the predecessor to what is now article 274 of the *Civil Procedure Law 2013*).\(^{1184}\)

On referral, the Anhui Higher People’s Court did turn its mind to the grounds for non-enforcement raised by the defendants, but simply stated that insufficient evidence and misapplication of the law were not grounds for non-enforcement under article 260 of the *Civil Procedure Law 1991*.\(^{1185}\) In what is quite a unique finding, the Court found that whether the arbitral award was in breach of public policy was a factual issue which should be decided by the Hefei Intermediate People’s Court on consideration of the facts.\(^{1186}\)


\(^{1183}\) Ibid.

\(^{1184}\) Ibid.

\(^{1185}\) Ibid.

\(^{1186}\) Ibid.
After discussion amongst the Judicial Committee of the Anhui Higher People’s Court, the case was referred to the Supreme People’s Court, which overturned the decisions of the lower courts (and the Judicial Committee) and ordered enforcement of the award.\textsuperscript{1187} The Court held that: (a) the award was a foreign-related award; (b) no procedural irregularity existed; and (c) the public policy ground set out in article 260 of the \textit{Civil Procedure Law 1991}:

\begin{quote}
was meant to protect the “fundamental legal order” of the country where enforcement was sought, and the fundamental legal order could not be considered violated merely because the equipment cost the government a large amount of money and was left unused.\textsuperscript{1188}
\end{quote}

On this basis, the Court concluded that the public policy ground was not made out.\textsuperscript{1189}

The decision of the Supreme People’s Court, to overturn those of the lower courts and to enforce the award, is very positive. Not only did the Court insist on a restrictive and narrow interpretation of the public policy ground, it also set out its reasoning and its interpretation of article 260 of the \textit{Civil Procedure Law 1991}. Detailed decisions of this kind are exactly what is needed in order for China to develop a consistent and predictable approach to the enforcement of arbitral awards.

\begin{itemize}
\item [(c)] \textit{Enforcement of An Arbitral Award In Breach of Chinese Courts’ Exclusive Jurisdiction}
\end{itemize}

One of the limited situations in which the Supreme People’s Court has refused to enforce an arbitral award, based on public policy under article V(2)(b) of the New York Convention, is where the award was rendered in breach of the exclusive jurisdiction of

\textsuperscript{1187} Ibid.
\textsuperscript{1188} Ibid.
\textsuperscript{1189} Ibid.
the Chinese courts. In *Hemofarm DD, MAG International Trade Co, Sulame Median Co and Jinan Hemofarm Joint Venture v Jinan Yongning Pharmaceutical Company Ltd*,¹¹⁹⁰ the Jinan Intermediate People’s Court held that ‘litigation is a constitutional right enjoyed by the citizens and legal persons of China’¹¹⁹¹ and therefore Yongning’s application for preservation measures was the enforcement of its procedural right.¹¹⁹²

On the basis that the tribunal had ignored the effective ruling of the Chinese court, the Jinan Intermediate People’s Court held that the tribunal’s decision constituted a denial of the effective judgment, challenged the judicial sovereignty of the courts and therefore violated the public policy of China.¹¹⁹³

Following referral, the Shandong Higher People’s Court agreed with the Jinan Intermediate People’s Court on the public policy point. The Court reasoned that:

> [t]he arbitral award in the present case violates the jurisdiction of the People’s Courts and is detrimental to the judicial sovereignty of our country.¹¹⁹⁴

In particular, the tribunal violated public policy by: (a) addressing the justice and legality of the application for preservation measures, in violation of the court’s authority to review such an application; (b) ruling that the litigation instituted by Yongning constituted a breach of the arbitration agreement, in violation of the court’s right to review objections to jurisdiction and in denial of the court’s jurisdiction to hear the case concerning the lease contract; (c) reviewing the lease between Yongning and the joint venture company when the Chinese court had already done the same and issued a

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¹¹⁹¹ Ibid section IV(4).

¹¹⁹² Ibid.

¹¹⁹³ Ibid.

¹¹⁹⁴ Ibid section V(3).
decision; and (d) ruling on litigation fees, in violation of the court’s authority to do the
same.\footnote{Ibid.}

On referral, the Supreme People’s Court held that:

\[\text{t}h\text{e ICC tribunal violated the judicial sovereignty of China and the jurisdiction of the Chinese courts by arbitrating disputes between Yongning and Jinan-Hemofarm concerning the lease contract, as a Chinese court had already made several civil orders concerning the disputes between Yongning and Jinan-Hemofarm and had made a civil ruling on the interim measures.}\footnote{Hemofarm DD, MAG International Trade Co, Sulame Median Co and Jinan Hemofarm Joint Venture v Jinan Yongning Pharmaceutical Company Ltd, Reply of the Supreme People’s Court’s, 2 June 2008 [2008] Min Si Ta Zi No. 11 unofficial translation reported in The New York Convention Guide <www.newyorkconventionguide.org>.

As such, the Court refused to recognise and enforce the arbitral award. The decision in
this regard is disappointing as the Supreme People’s Court failed to provide any real
details for its finding. In light of the very limited circumstances in which the public
policy ground ought to be relied upon, it would have been helpful had the Supreme
People’s Court set out the detailed reasons as to how it interpreted article V(2)(b) of the
New York Convention and why it found that article to be applicable. In this regard, and
in contradistinction, the reasons provided by the Shandong Higher People’s Court
(while questionable as to their correctness) are detailed and provide a good example as
to the how the Chinese courts should set out their reasoning in attempt to create a
predictable and transparent regime.
(d) *Lack of Fairness In The Outcome of The Award Does Not Constitute A Breach Of Public Policy*

The final situation considered by this paper concerning the public policy ground is where the Supreme People’s Court held that a lack of fairness in the outcome of the arbitral award does not constitute a violation of public policy.\(^{1197}\) *GRD Minproc Limited v Shanghai Flyingwheel Industry Co Ltd*\(^{1198}\) essentially centred on a dispute as to whether certain equipment for the recycling of used batteries complied with the relevant specification.

When the defendant (*GRD*) was successful in the arbitration, it commenced enforcement proceedings before the Shanghai No. 1 Intermediate People’s Court against the applicant to the arbitration (*Shanghai Flyingwheel*). *Shanghai Flyingwheel* argued, amongst other things, that recognition and enforcement of the award would be contrary to public policy as the dust concentration caused by the manufacturing process of the equipment would be harmful to both the environment and human health.\(^{1199}\) During the course of the proceedings, the Shanghai Preventative Medicine Association issued a report, which showed that the dust concentration was highly polluting.\(^{1200}\) The Court found that there was sufficient evidence to establish that the dust concentration exceeded the relevant safety standards and, as *Shanghai Flyingwheel* had legal obligations to protect its employees, it must stop using the equipment.\(^{1201}\) The Court further found that as this would cause substantial loss to *Shanghai Flyingwheel*, the

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\(^{1198}\) Ibid.

\(^{1199}\) Ibid.

\(^{1200}\) Ibid.

\(^{1201}\) Ibid.
award was contrary to the principles of fairness and therefore in violation of public policy for the purpose of article V(2)(b) of the New York Convention.\textsuperscript{1202} The Shanghai Higher People’s Court agreed with finding.\textsuperscript{1203}

However, the Supreme People’s Court overturned the decisions of the lower courts. It instead held that substantive fairness in the decision making process of the arbitral tribunal is irrelevant to determining whether recognition and enforcement of an arbitral award will contravene public policy for the purposes of article V(2)(b) of the New York Convention.\textsuperscript{1204} As such, the Court ordered that the award be enforced.\textsuperscript{1205}

The decision by the Supreme People’s Court is in line with what appears to be a growing trend of the Court to interpret the public policy ground narrowly (whether that be under the New York Convention or the \textit{Civil Procedure Law 2013}). In turn, this approach is in line with that taken by other Contracting States to the New York Convention. As such, the Court’s decision in this regard is only to be praised.

4 \textit{Summary Comments On The Public Policy Ground}

A review of the available decisions of the Chinese courts on the public policy ground (as it appears in article V(2)(b) of the New York Convention and in article 274 of the \textit{Civil Procedure Law 2013}) is positive and encouraging. It is clear that, while the lower courts may have some way to go in ascertaining the boundaries of this ground, the Supreme People’s Court has established a trend towards pro-enforcement and has cemented its view that this ground is to be interpreted very narrowly, and only in extreme circumstances.

\begin{footnotes}
\item[1202] Ibid.
\item[1203] Ibid.
\item[1204] Ibid.
\item[1205] Ibid.
\end{footnotes}
However, the key issues which seem to consistently arise are: (a) a general lack of detail in the Supreme People’s Court’s published reasons; and (b) a failure by the Supreme People’s Court to consider all of the grounds for non-enforcement that are raised by the party seeking to resist enforcement of an award. These two issues are easily resolved if the Chinese courts devote a little more time and attention to issuing fully reasoned and detailed decisions in relation to enforcement. The availability of such decisions is certain to ensure greater consistency of reasoning between the Chinese courts and in turn to enhance the predictability of the Chinese enforcement regime.

J REFUSAL PROVISIONS: IS THERE A NEED FOR REFORM?

On the basis of the above analysis of the so called ‘refusal provisions’ under article V of the New York Convention and article 274 of the Civil Procedure Law 2013, it is argued here that there is a need for reform of the Chinese enforcement system, if China is to succeed in having a predictable, reliable and transparent enforcement system that will support its charge to become the world number one economic power, and potentially the world’s global leader. Having answered the question as to whether reform is needed in the affirmative, the sections below first identify legislative reforms, which it is argued need to be put in place to bring the Chinese regime in line with the New York Convention, and second identify significant reforms, which it is argued need to take place on a practical basis, to bring China’s judicial practice regarding enforcement of foreign-related and foreign arbitral awards in line with the international best practice exhibited by courts of Contracting States to the New York Convention.
The above comparison of article V of the New York Convention and article 274 of the Civil Procedure Law 2013 shows that a number of key legislative reforms are necessary to bring the Chinese system for enforcement of foreign and foreign-related arbitral awards in line with international best practice. The following recommendations are made in this regard.

(a) *The Creation of One Uniform Set of Refusal Provisions*

The comparison under taken in this section V demonstrates that differences do exist between the wording and interpretation of article V of the New York Convention and article 274 of the Civil Procedure Law 2013. To eradicate these difference and hence to bring China’s system in line with international best practice, it is recommended that China create one set of uniform refusal provisions based on article V of the New York Convention.

It appears that the easiest way to achieve this goal would be for China to withdraw the reciprocity reservation that it made when it acceded to the New York Convention.\textsuperscript{1206} If China was to withdraw this reservation, the refusal provisions of the New York Convention would apply to the enforcement of foreign-related arbitral awards in China. As such, what are now termed as ‘foreign-related’ awards would be considered non-domestic for the purposes of article I of the New York Convention.\textsuperscript{1207}

It is argued here that to apply the New York Convention to both foreign and foreign-related arbitral awards would be to increase the predictability of the Chinese enforcement system and to increase the confidence of foreign investors in the Chinese

\textsuperscript{1206} See sections II.A.10, III.D.1.(e) and III.D.2.(c) above.

\textsuperscript{1207} New York Convention arts I, II.
enforcement process. In turn, it is likely that more foreign entities would be willing to
appoint Chinese arbitral institutions to resolve their disputes, with the comfort of
knowing that at the enforcement stage, the restrictive, pro-arbitration provisions of the
New York Convention would apply.

(b) Incorporation of ‘Missing’ New York Convention Grounds into the Civil Procedure
Law 2013

If the Chinese government is unwilling to withdraw the reciprocity reservation from its
application of the New York Convention, it is argued here that those article V New
York Convention provisions, which do not have an express comparable ground under
article 274 of the Civil Procedure Law 2013, ought to be incorporated into such law. In
particular, the incapacity ground, the ‘not yet binding or set aside’ ground, and the non-arbitrability ground ought to be drafted into article 274 of the Civil Procedure Law
2013. This will assist in bringing article 274 broadly in line with the refusal provisions
set out in the New York Convention, which in turn will enhance the predictability of the
Chinese enforcement regime and will make China more appealing as an arbitral
destination for foreign entities.

(c) Drafting Changes To Bring The Civil Procedure Law In Line With Article V of the
New York Convention

Through the analysis and comparison of wording of article V of the New York
Convention and article 274 of the Civil Procedure Law 2013, this section V has
identified a number of drafting differences between the two provisions. Again, if the
PRC is insistent upon maintaining a different system for the enforcement of foreign-

related arbitral awards (which it is urged against in this paper), this section V has identified a number of drafting changes which ought to be made. These are as follows.

(i) ‘May’ Not ‘Shall’

The analysis above in relation to the burden of proof and the court’s discretion in enforcement cases revealed that, in contradistinction to article V of the New York Convention, article 274 of the Civil Procedure Law 2013 mandates that an enforcing court must refuse to enforce an arbitral award where one of the grounds set out therein is made out. This, it is argued, is contrary to the pro-enforcement approach that must be taken if China is to promote itself as an arbitration-friendly jurisdiction and is to increase the confidence of foreign businesses in its enforcement system. As such, it is recommended here that the wording of article 274 of the Civil Procedure Law 2013 be changed to adopt the discretionary language of article V of the New York Convention.

(ii) Article 274(1) of the Civil Procedure Law 2013

It is argued here, and above, that to bring this provision in line with article V(1)(a) of the New York Convention, express reference must be made in article 274(1) of the Civil Procedure Law 2013 to the invalidity of the arbitration agreement. While it is acknowledged that the ground does already cover invalidity,\(^{1208}\) it does not do so expressly. It is argued here that such an express reference, in line with the New York Convention, will be encouraging to parties who are unfamiliar with the intricacies of the Chinese enforcement system, and who therefore may take the provisions on face value.

(iii) Article 274(4) of the Civil Procedure Law 2013

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\(^{1208}\) See section V.C.2 above.
The discussion on this provision above has shown that two significant drafting differences exist between article 274(4) of the Civil Procedure Law 2013 and article V(1)(c) of the New York Convention: (a) article 274(4) shifts the focus award from the scope of the arbitration agreement to the scope of the authority of the arbitral institution; and (b) article 274(4) does not expressly permit partial enforcement of arbitral awards.

With respect to (a), it is argued here that the reference to the authority of the arbitral institution ought to be removed from article 274(4). This is because the lack of recognition of ad hoc arbitral awards in China seems to be unique and therefore causes uncertainty in relation to the enforcement system in the minds of foreign entities doing business in China. The removal of this reference, and therefore the shift in focus back to the scope of the arbitration agreement and the tribunal’s authority, will bring article 274(4) in line with the New York Convention.

With respect to (b), while it has been recognised above that Chinese law does allow for the partial enforcement of arbitral awards, the provision in this regard is contained in article 19 of the Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the Arbitration Law of the People’s Republic of China1209 rather than in the Civil Procedure Law 2013. For ease of reference, it is recommended that such a provision be incorporated directly into article 274 of the Civil Procedure Law 2013. This is consistent with the approach taken under the New York Convention and would again enhance the transparency and predictability of the Chinese regime.

1209 Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the Arbitration Law of the People’s Republic of China (People’s Republic of China) Supreme People’s Court, 23 August 2006.
(iv) *Paragraph 2 of Article 274 of the Civil Procedure Law 2013*

As discussed above, the present drafting of the public policy exception under article 274 of the *Civil Procedure Law 2013* does not expressly identify which country’s public policy the enforcing court must have reference to when determining whether the enforcement of an arbitral award will be contrary to social and public interest. It is therefore recommended that this be made expressly clear so as to increase transparency of the enforcement system and so as to avoid confusion.

Moreover, it appears in practice that the only real difference between the meaning of ‘public policy’ under article V(2)(b) of the New York Convention and ‘social and public interest’ under article 274 of the *Civil Procedure Law 2013* is that the New York Convention is specifically concerned with international public policy of the enforcing State. However, given that this ground is one which causes foreign traders and investors specific concern when entering into relationships with Chinese parties, it is recommended here that article 274 be revised to reflect the wording of the New York Convention. In addition, so as to further ease concern over this ground for non-enforcement, it is recommended that the Supreme People’s Court issue an interpretation or an opinion setting out the cautious and restrictive manner in which this ground ought to be interpreted. Such measures, it is argued, will increase confidence of foreign entities in China’s enforcement system.

2   **Recommended Practical Reforms**

Moreover, and perhaps even more importantly than the legislative reforms identified above, the analysis undertaken in section V of this paper has revealed, on a number of occasions, that there is a desperate need for the Chinese courts to achieve:
• greater consistency in their approach towards the refusal provisions;
• greater predictability in the outcome of enforcement proceedings; and
• greater transparency in the Chinese courts’ decision making process.

To this end, the following reforms to the practical approach taken by the Chinese courts are recommended.

(a) **Doctrine of Precedent**

It is trite to say that common law regimes rely heavily on the doctrine of precedent, or *stare decisis*, to achieve consistency in the application of legal principles and also to ensure that bad decisions are not repeated.\(^{1210}\) As one commentator put it:

> [t]he value of the doctrine of precedent to the common law... is not simply that it ensures respect for past decisions but also that it ensures that bad decisions do not have to be repeated.\(^{1211}\)

However, this doctrine is not recognised by Chinese law.\(^{1212}\) In fact, it is extremely rare for a Chinese court judgment to ever refer to a judgment made in another case.\(^{1213}\) It is argued here that a fundamental change needs to occur in the mindset and practice of the Chinese courts, to the effect that they start to consider how the refusal provisions have been applied, not only by other Chinese courts, but also by the courts of other Contracting States to the New York Convention. This is particularly so as

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\(^{1211}\) Duxbury, above n 1210.


\(^{1213}\) Chen, above n 1212, 114.
commentators such as Born argue that the international arbitration community must follow a system of precedent in order to achieve predictability in the arbitral process.\textsuperscript{1214} There is a plethora of commentary and an abundance of cases in existence on the refusal provisions of the New York Convention – it is argued here that it is time for the Chinese courts to pay attention to this jurisprudence and to start making their decisions accordingly. In the author’s view, such a reform is key to enhancing the consistency of the Chinese courts’ enforcement decisions, as well as to achieving greater predictability. Both of these, it is argued, will enhance China’s reputation as a leading arbitral jurisdiction and will encourage entities to do business with China.

(b) \textit{Consideration of All Arguments Raised By The Parties}

A number of the decisions of the Chinese courts, and of the Supreme People’s Court in particular, demonstrate that the Chinese courts frequently fail to consider all of the arguments for non-enforcement that are raised by the parties.\textsuperscript{1215} Instead, it is a common practice for the courts to simply cherry pick the provisions which they seek to rely on and to only issue decisions in relation to those provisions or arguments. It is argued here that this cherry-picking practice needed to cease and henceforth, the

\textsuperscript{1214} Born, above n 299, 3820.

Chinese courts must consider all arguments raised by the parties. Such a reform is key to enhancing consistency and predictability of the Chinese enforcement regime, as well as to providing foreign parties with confidence in the Chinese court process.

(c) Reversing the Burden of Proof

A key theme running through many of the decisions of the Chinese courts, discussed in this section V, is the Chinese courts’ insistence that the applicant for enforcement of an arbitral award bear the burden of proving why the award ought to be enforced.\footnote{See Future E.N.E Co v Shenzhen Grain (Group) Co. Decision of the Guangzhou Maritime Court’s Decision, 18 January 2006 [2004] Guanghaifa Tazi No. 1 reported in WunschARB, Chinese Court Decision Summaries on Arbitration (Kluwer Law International); Concordia Trading B.V v Nantong Gangde Oil., Ltd, Reply of the Supreme People’s Court, 3 August 2009 [2009] Min Si Ta Zi No.22 published in (2009) Guide on Foreign-related Commercial and Maritime Trial; Bunge Agribusiness Singapore Pte. Ltd v Guangdong Fengyuan Food & Oil Group Company Ltd, Reply of the Supreme People’s Court, 25 June 2007 [2006] Min Si Ta Zi No. 41 and Request of Guangzhou Higher People’s Court, 17 November 2006 [2006] Yue Gao Fa Min Si Ta Zi No. 10 unofficial translation reported in The New York Convention Guide <www.newyorkconventionguide.org>.)\footnote{See section V.A.1 above.} However, as discussed above, such an approach is erroneous and is contrary to the express requirements of both the article V of the New York Convention and article 274 of the Civil Procedure Law 2013.\footnote{Ibid.} Both of these regimes expressly place the burden on the party seeking to resist enforcement of an award, to prove why and how one or more of the refusal provisions is made out (save for the public policy exception which the court may rule upon ex officio.).\footnote{Ibid.} As such, from a practical perspective, the Chinese courts need to reverse their approach in relation to the burden of proof of the refusal provisions, and start to set the bar for the defendant to enforcement proceedings, rather than the applicant. Such a reform is imperative to bring the Chinese approach in line with international best practice.
(d) *Taking a Pro-Arbitration Approach*

The decisions analysed in this section V show that, while the Supreme People’s Court has adopted a pro-arbitration approach in its application of the public policy ground in some cases,\(^{1219}\) the Chinese courts’ approach to the remaining refusal provisions is concerning. By way of example, the courts’ consistent refusal to enforce arbitral awards on the basis of procedural irregularities\(^ {1220}\) is of particular concern and is far from in line with the pro-arbitration, pro-enforcement bias of the New York Convention.\(^ {1221}\) As such, it is argued here that the Chinese courts ought to shift their approach to the interpretation and application of both article V of the New York Convention and article 274 of the *Civil Procedure Law 2013* in favour of an arbitration friendly approach.


\(^{1221}\) See section V.F.1 above.
(e) **Provision of Detailed Reasons**

The analysis of the decisions set out in this section V shows that the Chinese court decisions are very short and often fail to provide any detailed reasons, sometimes they fail to provide any reasons at all.\(^ {1222}\) As one commentator stated:

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\text{[t]he typical judgment of a Chinese court is short and does not set out line or steps of legal reasoning and logical analysis in a way as detailed as in the judgments of common law courts. Relevant statutory provisions may be referred to, but the precise relationship between them in their application to the case will not usually be discussed at length.}^{1223}
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It is argued here that the Chinese courts need to provide more detailed reasons in their judgments so that they can be fully understood and relied upon by in subsequent decisions. Again, such a reform to the practical way in which the Chinese courts go about enforcing arbitral awards will, it is argued here, lead to greater consistency, predictability and transparency in the enforcement process.

(f) **Accessibility of Court Decisions**

Finally, from a practical perspective, it is notoriously difficult to gain access to decisions of the Chinese courts, and in particular to English translations of such decisions.

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\(^{1223}\) Chen, above n 1212, 114.
decisions. This task has become slightly easier due to the availability of English summaries of the cases on the Kluwer Arbitration database, but the fact still remains that access to the full text of Chinese court decisions is hard to find. In this regard, it is suggested that the Chinese court decisions (or at least those of the Supreme People’s Court) ought to be made available on the Supreme People’s Court website in English as well as in Chinese. Such a reform will make it easier for foreign parties to access the decisions of the Chinese courts and to familiarise themselves with the approaches being taken. In turn, this will again enhance the transparency of the enforcement process in China.
VI. **CONCLUSION: A CALL FOR REFORM**

Despite China’s unprecedented economic advances over the past 25 years, there is no doubt that much sceptism still surrounds China’s regime for the enforcement of foreign and foreign-related arbitral awards. Allegations are still regularly made as to the Chinese system’s bias and the judiciary’s attitude towards, and practice of, local protectionism. However, section II of this paper has clearly demonstrated that China’s history of arbitration, its culture in favour of resolving disputes through arbitration and its current charge to become the global leader, together provide China with the potential to become a leading arbitral jurisdiction.

In addition, section III of this paper identified that the National People’s Congress, as the head of the Chinese legislature, and the Supreme People’s Court, at the head of the judiciary, both have a crucial role to play in bringing about the reforms that are necessary to elevate China to the position of a leading arbitral jurisdiction.

Further, section IV of this paper has identified numerous key reforms, which ought to be made to the procedure for the enforcement of foreign and foreign-related arbitral awards in China, in order to increase the confidence of foreign traders and investors in China’s enforcement system, including:

- that the application for enforcement process be amended to: (a) limit the parties against whom an award can be invoked so as not to impede the foundation of arbitration, consent; (b) provide parties seeking to enforce a foreign arbitral award with the same choice of enforcing court as parties seeking to enforce a

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1225 See section IV.O.1.(a) above.
foreign-related arbitral award;\textsuperscript{1226} (c) clearly establish the form and content requirements of an application for enforcement;\textsuperscript{1227} (d) clearly stipulate the time limit for making an application for enforcement;\textsuperscript{1228} and (e) expressly state that a decision to reject an application for enforcement is not equal to a decision to refuse to enforce an arbitral award and clarify the effect of a decision to reject an application for enforce;\textsuperscript{1229}

- that the process for dealing with an objection to enforcement of an arbitral award be amended to: (a) expressly set a timeframe for making an objection to the enforcement of an arbitral award;\textsuperscript{1230} (b) stipulate the situations in which a hearing will be deemed necessary;\textsuperscript{1231} and (c) extend the timeframe in which the enforcement officer has to form his opinion on any objection;\textsuperscript{1232}

- that the entrustment process be simplified so as to make it more appealing to foreign traders and investors e.g. it is suggested that the entrusted court be given full power to deal with the enforcement proceedings once it has been entrusted with a matter;\textsuperscript{1233}

- that the provisions on suspension and early termination of enforcement proceedings be amended to expressly describe the types of ‘other circumstances’ in which enforcement of an award may be suspended or terminated;\textsuperscript{1234}

\textsuperscript{1226} See section IV.O.1.(b) above.
\textsuperscript{1227} See section IV.O.1.(c) above.
\textsuperscript{1228} See section IV.O.1.(d) above.
\textsuperscript{1229} See section IV.O.1.(e) above.
\textsuperscript{1230} See section IV.O.2.(a) above.
\textsuperscript{1231} See section IV.O.2.(b) above.
\textsuperscript{1232} See section IV.O.2.(c) above.
\textsuperscript{1233} See section IV.O.3 above.
\textsuperscript{1234} See section IV.O.4 above.
that the time limits in which enforcement must take place be clearly identified so as to increase confidence in China’s system for the enforcement of arbitral awards;¹²³⁵ and

finally, that China create one, simple law to govern all aspects of the procedure for enforcement.¹²³⁶

As the procedure for the enforcement of foreign and foreign-related arbitral awards is governed by national law, it is imperative that China develops its own predictable, reliable and transparent procedure for enforcement that will boost the confidence of foreign parties doing business with Chinese entities.

Moreover, section V of this paper has identified a number of legislative, and perhaps even more importantly, practical reforms that it is argued must be put in place if China’s enforcement system is to be brought in line with the New York Convention. With respect to legislative reforms, section V.J.1 of this paper made the following key recommendations:

- that China create one, uniform system for the enforcement of both foreign and foreign-related arbitral awards by eradicating the distinction between the two;¹²³⁷

- that China incorporate the ‘missing’ provisions of article V of the New York Convention into article 274 of the Civil Procedure Law 2013 so as to ensure that the grounds for non-enforcement under article 274 properly, and expressly, reflect those set out under article V of the New York Convention;¹²³⁸ and

¹²³⁵ See section IV.O.5 above.
¹²³⁶ See section IV.O.6 above.
¹²³⁷ See section V.J.1.(a) above.
¹²³⁸ See section V.J.1.(b) above.
that China amend the drafting of the grounds for non-enforcement currently set out under article 274 of the Civil Procedure Law 2013 so as to bring this article expressly in line with article V of the New York Convention.1239

With respect to practical reforms, section V of this paper identified that there are serious errors and contradictions in the judiciary’s interpretation and application of the refusal provisions, both under the New York Convention and under the Civil Procedure Law 2013. As such, section V.J.2 of this paper made the following key recommendations as to practical reforms:

- that China establish and adhere to a doctrine of precedent;1240
- that the people’s courts consider all arguments raised by the parties in handing down their decisions;1241
- that the people’s courts reverse their approach to the burden of proof in enforcement cases and, in accordance with the requirements of article V of the New York Convention and article 274 of the Civil Procedure law 2013, place the burden on the defendant to enforcement proceedings to prove that a ground for non-enforcement is made out;1242
- that the people’s courts take a pro-arbitration approach to the enforcement of arbitral awards, in line with the requirements of the New York Convention and the approach taken by all other Contracting States;1243
- that the people’s courts provide detailed reasons for their decisions on enforcement so as to foster an understanding amongst members of the judiciary of the approach

1239 See section V.I.1.(c) above.
1240 See section V.I.2.(a) above.
1241 See section V.I.2.(b) above.
1242 See section V.I.2.(c) above.
1243 See section V.I.2.(d) above.
to be taken but also to enhance the transparency and reliability of the decision making process;\textsuperscript{1244} and

- that greater accessibility to the decisions of the people’s courts on enforcement be given.\textsuperscript{1245}

Through the recent launch of the 2012 CIETAC Arbitration Rules, and the implementation of the \textit{Civil Procedure Law 2013}, it is clear that the Chinese have turned their minds to arbitration, have begun to understand the importance of having a predictable, reliable and transparent arbitration process and have started to bring about the necessary change. This paper makes a call for further reform and urges the National People’s Congress to bring about the legislative changes identified in this paper, and urges the Supreme People’s Court and the rest of the judiciary to bring about the practical changes suggested, all of which are necessary if China is to take its place as the leader of the world economy and, perhaps, one day the global leader.

\textsuperscript{1244} See section V.J.2.(e) above.

\textsuperscript{1245} See section V.J.2.(f) above.


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