Procedural Perils:
China’s Supreme People’s Court on the Enforcement of
Awards in International Arbitration

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I. INTRODUCTION

When foreign companies do business in the People’s Republic of China (PRC), they often receive the advice to refer disputes with their Chinese counterparts to arbitration. The PRC’s modern legal system is young, with continued systemic problems.1 If negotiations allow for arbitration outside of Mainland China, therefore, companies may press for a dispute

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1 Cf. GU WEIXIA, ARBITRATION IN CHINA: REGULATION OF ARBITRAL AGREEMENTS AND PRACTICAL ISSUES 183, 191, 196 (2012) (describing some of the problems that foreign parties might encounter when using the courts, such as local government influence and lack of legal knowledge). In a survey conducted by Price Waterhouse Coopers and Queen Mary University of London, respondents saw China as the country with the most risk of non-enforcement. Respondents also gave examples of difficulties they encountered when seeking to enforce their awards. Price Waterhouse Cooper & Queen Mary University of London, International Arbitration: Corporate Attitudes and Practices 2008, 11, PRICE WATERHOUSECOOPERS.http://www.pwc.co.uk/forensic-services/publications/international-arbitration-2008.html [hereinafter Price Waterhouse Coopers, International Arbitration].
resolution clause that puts them on neutral ground in places such as Stockholm, Hong Kong, and Singapore.\(^2\) Often, however, the relative bargaining positions of the parties dictates settling for arbitration within Mainland China.\(^3\) Choice of seat carries significant implications if the foreign party must rely on the PRC courts to enforce an award, a matter of acute concern.\(^4\) PRC law treats foreign-related cases, that is, cases possessing some foreign element, differently from domestic cases.\(^5\)

It is not evident which awards will fare better or worse in this process. On the one hand, instances of lack of professionalism and local protectionism by trial judges suggest PRC courts may improperly address New York Convention cases and may show favoritism towards local arbitration commissions.\(^6\) On the other, PRC arbitration law offers a

\(^{2}\) Michael J. Moser & Peter Yuen, \textit{Arbitration Outside China in MANAGING BUSINESS DISPUTES IN TODAY’S CHINA: DUELING WITH DRAGONS} 87, 89-90, 96 (Michael J. Moser, ed.2007). Stockholm has traditionally been a seat for arbitrations against communist state-owned enterprises.


\(^{5}\) See MinshiSusong Fa (Yi beixiuding) ([Civil Procedure Law (Revised)]) [Civil Procedure Law (Revised)] (promulgated by Order No. 44 of the President of the People’s Republic of China, April 9, 1991, revised by the Standing Committee of the National People’s Congress Oct. 10, 2007, effective Jan. 4, 2008) arts. 259-60,19 P.R.C. LAWS 215, 278.

number of openings to attack domestic awards that the New York Convention does not. International commercial arbitration’s acceptance of private ordering, and concomitant emphasis on property and contract potentially conflict with the Chinese legal system’s insistence that law conform itself to the broad aims of the Party. Domestic commissions might find themselves subject to extra scrutiny in this regard.

Providing an equally favorable enforcement environment constitutes a key obligation of the New York Convention, but gauging compliance proves difficult. Although the PRC courts now make more decisions publically available, they have not regularly published decisions in “foreign-related” matters such as the enforcement of international arbitral awards. Reports of Supreme People’s Court (SPC) replies offer more information. The SPC often plays a significant role in legal reform in the PRC, and generally supports the development of international commercial arbitration within the country. Through the prior-reporting system, the SPC reviews all decisions by lower courts that involve a refusal to enforce an award, to revoke an award, or to order re-arbitration.

No requirements exist for the SPC to publish its responses in all cases and without access to inside information, knowing what proportion it publishes remains impossible. Therefore, the published replies may represent an inaccurate picture of the SPC’s decisions. Even so, the SPC reveals useful cues about its reasoning through its selection of cases that it deems worthy of publication. The decisions that it chooses to publish communicate the court’s concerns with arbitration and enforcement to a recent SPC guidance, see Jie Zheng, Competition Between Arbitral Institutions In China—Fighting for a Better System? (Oct. 16, 2015), Kluwer Arbitration Blog, http://kluwerarbitrationblog.com/blog/2015/10/16/competition-between-arbitral-institutions-in-china-fighting-for-a-better-system/; Matthew Townsend, New Judicial Guidance on the CIETAC Split—Closure After Three Years of Uncertainty (Aug. 5, 2015) Kluwer Arbitration Blog, http://kluwerarbitrationblog.com/blog/2015/08/05/new-judicial-guidance-on-the-cietac-split-closure-after-three-years-of-uncertainty/.


8 See Cohen, supra note 3, at 563 (relating the impression that there are currently particular problems enforcing these domestic, foreign-related awards).


10 On this point see Gu, supra note 1, at 162-63.

11 See infra, Part II.

12 On these difficulties, see CLARISSE VON WUNSCHHEIM, ENFORCEMENT OF COMMERCIAL ARBITRAL AWARDS IN CHINA § 9.6 (2013).
wider audience than one reached only by internal circulars. The audience for these replies includes the rest of the judicial system. It may also include Party and government officials as well as lawyers and the businesses themselves. Published replies provide valuable resources to both academics trying to understand arbitration in the PRC and practitioners trying to gauge the chances that an Intermediate People’s Court (IPC) judge will enforce an award. Although practitioners cannot control all the factors that will affect a court’s willingness to hear their claim, they can frame it in a way that avoids pitfalls marked out in the SPC’s public pronouncements.

Several previous authors have discussed the enforcement of arbitral awards in China for an English-speaking audience. Dr. Clarisse von Wunschheim’s detailed study is the most comprehensive work to date, describing a generally arbitration-friendly environment, but with a far lower rate of enforcement than official reports suggest. Lan-fang Fei considered whether the SPC helped to bring consistency to enforcement and stem what many criticized as widespread favoritism to local companies in local courts, concluding that the SPC indeed succeeded in doing so. A still more recent study by Professors Roger Alford, Julian Ku, and Bo Xiao collects information from the Peking University database, surveying 48 New York Convention cases that reached the SPC on the issue of enforcement. This Comment contributes to the growing literature by comparing the SPC’s rulings on non-enforcement of foreign-related awards rendered by domestic tribunals and non-enforcement of awards rendered abroad in hopes of shedding some light on a question with particular importance for choice of seat.

This Comment relies primarily on published referrals in the Guide to Foreign Related Commercial and Maritime Trials, which collects many of the prior reporting system answers. At the time, only published referrals up to 2011 were available, along with some from 2012. Where possible, I refer to the English translations of these texts. With the help of a research assistant, I compiled a list of these cases, including the reasons the SPC provided for enforcing or not enforcing the award. I compared referrals from different years, and also compared the reasons offered by the SPC for confirming non-enforcement. The explanations for decision provided by the SPC are typically limited and syllogistic, but at least

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14 Lan-fang Fei, A Case Study of the Reporting Mechanism of International Arbitration in China, 5 CONTEMP. ASIA ARB. J. 83, 86, 100 (2012).

15 Alford, Ku, & Xiao, supra note 4, at 12.

16 WAN E’XIANG, GUIDE TO FOREIGN-RELATED COMMERCIAL AND MARITIME TRIALS, No.22 Vol., 24 (2011). But see infra, Part III.A.

17 See Fei, supra note 14, at 97-98.
include references to the specific legal provision rendering the award deficient, allowing some analysis of the court’s reasons and comparison across cases.

Commentators have often remarked on the PRC’s bad reputation for enforcing awards, including favoritism to domestic parties and arbitral institutions. However, recent SPC cases show a more complicated pattern than simple favoritism towards domestic awards. Although the SPC rejects only a slightly higher percentage of New York Convention awards than domestic foreign-related awards, its reasons for doing so differ. The SPC often rejects New York Convention awards for procedural violations, while domestically issued, foreign-related awards face rejection more frequently on challenges to the arbitral tribunal’s jurisdiction. This latter result is unsurprising; tribunal jurisdiction and the timing of challenges to it present some of the thorniest issues in PRC arbitration law. The prevalence of procedural pitfalls for New York Convention award holders is more unexpected. One possible reason for this difference may be that holders of awards rendered abroad lack the opportunity to present evidence they complied with New York Convention rules.

II. OVERVIEW OF THE PRIOR REPORTING SYSTEM

The Arbitration Law of the People’s Republic of China, which went into effect in 1995, and its Civil Procedure Law, last revised in 2012, both govern arbitration and the enforcement of arbitral awards. The PRC distinguishes between domestic and foreign-related cases. The category of foreign-related cases is broader than simply “foreign” cases. It includes all cases with a foreign element, that is, when “(1) One or both parties are foreign entities, foreign legal persons, or stateless; (2) The subject matter of the contract is located in a foreign country; or (3) The act which gives rise to modifies, or extinguishes the rights and obligations under the contract occurs in a foreign country.”

In the same year that the Arbitration Law passed, the SPC announced that it would establish the prior-reporting system. Originally, the system covered only decisions not to enforce an award, but the court expanded it a few years later to include decisions setting aside an award.

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19 GU, supra note 1, at 23, 59.
21 Fei, supra note 14, at 84. The SPC was responding to several particularly bad enforcement decisions by lower courts. Id. at 85, 85 n.6. (describing protectionist decisions of lower courts, which rejected awards based on a broad definition of public policy).
22 Id. Fei’s discussion suggests that cases in which a court orders rearbitration do
Parties wishing to enforce either a domestic arbitral award or a New York Convention award can file an application for enforcement with the courts. For New York Convention or foreign-related awards, the award holder will typically file such an application directly with the IPC in a provincial capital, because the case contains a foreign element.\(^\text{23}\) Refusal to enforce the award by a court of any level triggers the reporting system for foreign and foreign-related awards.\(^\text{24}\) The Intermediate People’s Court (IPC) must then report the case to the Higher People’s Court (HPC), a provincial-level body. If the HPC also declines to enforce the award, the HPC must then report the case to the SPC for the final decision. The same will happen if the IPC agrees to enforce the award, but the HPC overturns that decision on appeal. Along with enforcement cases, the SPC also receives referrals of cases in which the lower court revoked an arbitral award at the request of the award debtor, or in which the lower court decided to order re-arbitration.

Reporting happens automatically, by way of letter, without party control or involvement.\(^\text{25}\) The publically available decisions from the reporting system essentially contain instructions in which the SPC gives its opinion to the HPC, which will in turn instruct the IPC how to render judgment.\(^\text{26}\) Sometimes the SPC will append the letter that it received from the HPC, setting out the facts of the case and the HPC’s preliminary legal

\(^{23}\) In 2004, the regulations on these types of cases were tightened to withdraw jurisdiction from the Basic People’s Courts and most Intermediate People’s Courts. Zhong & Yu, supra note 6, at 418. Prior to 2004, major foreign-related cases had to go to an IPC at first instance. JUDICIAL INTERPRETATION NO. 22, 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, July 14, 1992, para. 2, available at http://www.cietac.org/index/references/Laws/47607cb9b0f4987f001.cms (English translation by CIETAC staff).

\(^{24}\) Fei, supra note 14, at 84.

\(^{25}\) GU, supra note 1, at 169 ("The parties are neither notified about the ‘report’ nor have a chance to participate in the hearing held by the higher level people’s court."); see Fei, supra note 14, at 98.

\(^{26}\) Id. at 163.
views. Even the published cases reflect orders issued between judges and
do not always set out the court’s reasoning on every point.

By centralizing review of enforcement and insuring scrutiny from
the PRC’s highest court, the system may help to address concerns foreign
parties might have about relying on Chinese courts for enforcement. PRC
courts receive their funding from the local government, a fact that raises
concerns about local protectionism. Judicial training is also uneven.
Requiring parties to file directly in the IPC or HPC and requiring reporting
to the SPC manages risk from incorrect lower court judgments
bureaucratically. The 2012 amendment to the Civil Procedure Law added
another tool to this arsenal, requiring a written ruling whenever a court
refuses to enforce an award. These requirements do not necessarily lead
to enforcement in individual cases, because local courts can still refuse to
accept a case to begin with, or execute an order sluggishly or not at all,
and because defendants quickly move their assets while litigation is
pending, but the system can influence lower court decisions in future
cases.

III. SPC REPLIES: COMPARING NEW YORK CONVENTION AND DOMESTIC
FOREIGN-RELATED CASES

At the time of this writing, the SPC had made 37 published New
York Convention referrals and 60 foreign-related referrals through the
prior reporting system between 2000 and 2011 available in the
yearbooks. The SPC’s decisions show a small, but likely insignificant

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27 See, e.g., Reply of the Supreme People’s Court Regarding the Request for
Instruction on the Non-Recognition of the Award No. 73/23-06 Issued by the Mongolia
National Arbitration Court 8 December 2009, [2009] Min Si Ta Zi No. 46 and Reply of
the Supreme People’s Court regarding Jiangsu Higher People’s Court’s Request for
Instruction on the Recognition and Enforcement of a Foreign Arbitral Award by the
Applicant Singapore Yideman Asian Co. Ltd., 12 June 2003, [2001] Min Si Ta Zi No. 43,
ry=*&autolevel1=1&jurisdiction=12.

28 Fei, supra note14, at 97.

29 Id. at 183.

30 See id. at 189-90 (describing efforts to improve judicial education).

31 Discussion at New Tendency Towards Arbitration Friendliness in the New
tendency-toward-arbitration-friendliness-new-cpl-amendments-china (last updated Nov.
21, 2012).

32 See Fei, supra note14, at 100.

33 I am including both New York Convention awards and Hong Kong awards
because the regime for enforcement of Hong Kong awards mirrors that of the New York
Convention. Compare Convention on the Recognition and Enforcement of Arbitral
disparity in how many New York Convention and domestic foreign-related awards are enforced in whole or in part, as well a growing willingness on the part of the SPC to refuse to enforce awards. More significant than any numerical disparity are the courts’ different reasons for refusing to enforce awards. New York Convention awards are typically rejected on procedural grounds. Domestic awards tend to be rejected over problems of arbitral jurisdiction. In a majority of both foreign and foreign-related cases between 2000 and 2011, outcomes in the yearbook cases did not favor the party seeking enforcement. Recent cases appear somewhat more favorable to enforcement under the New York Convention. One might expect these results even if courts enforce awards most of the time—the reporting system reveals only the most problematic cases.

In the set of referrals I considered between 2000 and 2011, the SPC ordered enforcement in around 38% of New York Convention cases and 45% of foreign-related cases. However, the absolute numbers are small enough that the differences are likely not to be terribly meaningful. Historically, New York Convention award holders experienced one particularly bad year as compared with domestic foreign-related award holders. In 2009, the record shows the SPC enforces no New York Convention awards. In the same year, the SPC told lower courts to enforce PRC awards in roughly seventy-five percent of the known cases. In 2008, the percentages equaled about zero and twenty percent, respectively—still very bleak for those with foreign awards.

Decisions in the early part of the decade are less frequent, with the SPC publishing more referrals in later years, and also finding more cases in which it agreed with the lower courts that the award should not be enforced. For foreign-related cases, this scrutiny started earlier, in 2003. For New York Convention cases the SPC started confirming non-enforcement more frequently in 2007. Between 2007 and 2011, the yearbooks show enforcement rates for cases reaching the SPC at around 30% for both groups. The numbers may not reflect worse enforcement overall, however, because it might reflect a greater rate of compliance with

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Awards, art. V, June 7, 1959, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1959)and Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region, para. 7, June 21, 1999, available at http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandmutual2e.pdf. For the same reason, I do not include replies relating to Hong Kong awards from periods not governed by the Joint Agreement. Macau, China’s second SAR, also has an arbitration center and a similar agreement on mutual enforcement, but I was unable to find any published replies relating to Macau awards.

34 Alford, Ku, and Xiao found non-enforcement in 21 of 48 New York Convention cases. Id.

35 A set of 38 and 60 cases respectively.
the reporting system. It could also reflect a more difficult enforcement environment as part of the general slowdown of legal reform in China.36

The rates reported here and by other authors differ substantially from those reported by the SPC. One Justice, Song Jianli, put the number of referrals received on New York Convention cases at 64 in a 2013 speech at Columbia Law School.37 Justice Song stated that the SPC rejected 24 awards, but that 40 others received enforcement from the SPC.38 Previously, SPC Justice Yang claimed that between 2000 and 2006, the PRC courts enforced New York Convention awards 78% of the time, and foreign-related cases 96.15% of the time.39 The difference between these numbers may reflect the fact that Justices Song and Yang were referring to enforcement in the country as a whole, including IPC and HPC orders. Cases in which the IPC or HPC decides for enforcement never reach the SPC. Moreover, Justice Yang’s aggregate statistics reflect a greater disparity between New York Convention and foreign-related award enforcement than does the overall sample. This suggests that parties seeking to enforce New York Convention awards may initially face more difficulty, but any disparity lessens among the cases that go to the SPC.

Counts by other outside researchers are closer to my own. Von Wunschheim’s count, which includes some cases that did not reach the SPC, shows higher rates—around 58.33% of foreign-related awards and 58.9% of New York Convention awards in her sample were enforced in whole or in part.40 However, her sample includes cases in which lower courts ordered enforcement, as well as SPC cases, so one would expect slightly higher rates. Professors Alford, Ku, and Xiao report that the SPC allowed lower courts to refuse enforcement in 21 of 48 New York Convention cases, which would amount to whole or partial enforcement in 56% of cases.41

37Cohen, supra note 3, at 564.
38Id.
40Id. Fei is measuring something else—changes the SPC makes to the lower court judgments—and also includes a number of cases that are not from the prior reporting system in her count. She indicates that the SPC disagreed with a lower court’s judgment setting aside a foreign related award in around 83% of cases. Fei, supra note 14, at 88. However, changing the decision does not necessarily mean partially enforcing the award.
41Alford, Ku, & Xiao, supra note 4, at 12. These authors were able to identify around 10 cases not included in my survey that were likely decided between 2011 and 2014, which would be on par with trends in referrals over the past several years.
A. The Reasons for Non-Enforcement

As the SPC itself readily points out, it very rarely refuses to enforce an award on the basis of public policy and even enforced an award based on an agreement the Chinese party illegally entered into. The reasons for refusal of enforcement, for both foreign and foreign-related cases, seem typically procedural. What one might characterize as gateway questions on the applicability of the arbitration clause to the dispute, the competence of the tribunal, and the identification of one’s opponent tend to dominate the reasons why awards are not enforced or “revoked” by the SPC.

1. New York Convention Cases

Many awards the courts refused to enforce appear to suffer from basic procedural defects. In some cases, the SPC ordered the awards enforced despite such problems. Fei states that the SPC often corrected lower courts’ attempts to respond to substantive problems through procedural means. But the lower courts have good reason to seize on procedural means to refuse enforcement, as the SPC has ratified a significant number of cases that show a strict approach to procedural defects.

The SPC most often confirms a decision to refuse enforcement by citing Articles V(1)b and V(1)d of the New York Convention. Article V(1)b has to do with notice to the defendant. Raised in 11 cases, it constitutes the most common claim made in the set of cases represented here. The court confirmed non-enforcement in 7 of the 11 cases. One seemingly successful strategy in a number of cases entails not replying to communications seeking participation in the arbitration, such as those involving appearances at a hearing or the appointment of an arbitrator. Article V(1)d also provides grounds for non-enforcement in a

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42 Fei, supra note 14, at 95 (describing the SPC’s decision to enforce an award despite the parties’ violation of PRC investment regulations).

43 Fei, supra note 14, at 89-90.

44 Alford, Ku, and Xiao detail two cases that fit this description, in which the Chinese party simply failed to appear and the arbitrators rendered a default judgment. Alford, Ku, & Xiao, supra note 4, at 14-15. In another reported case, the Chinese party had simply changed its name, and the foreign counterpart failed to provide satisfactory proof that the company was, in fact, the same one it had contracted with. Id. at 16.

growing number of cases, 8 in my sample. This article allows a national court to refuse to enforce an award due to defects in tribunal composition and was a basis for non-enforcement in 7 of the 8 cases. Other commonly raised problems were incapacity of one of the parties and violations of public policy, but the SPC only confirmed non-enforcement for public policy reasons once. Award-holders were far more likely to lose over issues of notice and tribunal composition than for other reasons.

The problems that the SPC chooses to highlight are thus problems of communication, in which the Chinese party alleged that it had no notice of proceedings, or no notice that it needed to appoint an arbitrator. These problems in communication lead to procedural irregularities, which then becomes the basis for a denial of enforcement. In focusing on these procedural issues, the SPC appears to mirror the concerns of the Chinese business community, which sometimes suspects a negative bias from arbitration abroad.

2. Foreign-Related Cases

Questions of jurisdiction continue to derail enforcement of domestic foreign-related awards. Chinese law does not allow tribunals to exercise Kompetenz-Kompetenz, or jurisdiction to decide who has jurisdiction. Therefore, they cannot rule on the validity of the arbitration clause. Instead, the Arbitration Law reserves that decision for the arbitral commission or for the courts. If a party refers the question to a court, that proceeding will take precedence over the commissions. The referrals discussed here, however, all challenged award enforcement, and not a commission’s jurisdiction at the outset of arbitration.

This Comment’s count of enforcement cases includes primarily cases under Article 71 of the 1995 Arbitration Law, in which defendants in enforcement cases responded that the Civil Procedure Law rendered an award defective. It also includes several cases under Article 70 of the Arbitration Law, in which the losing parties preemptively challenged an award as failing to conform to the Civil Procedure Law and referrals under Article 61 of the law, which consist of cases in which the court

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46 Convention on the Recognition and Enforcement of Arbitral Awards, art. V(1)(d), June 7, 1959, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1959) (tribunal composition “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”.)

47 GU, supra note 1, at 23.

48 Zhongcai fa, (仲裁法) [Arbitration Law], (promulgated by Order No. 31 of the President of the PRC, Aug. 31, 1994, effective Sept. 1, 1995), art. 71, 6 P.R.C. LAWS 91, 105. (allowing parties against whom enforcement is sought to present evidence that the procedures did not comply with Article 260 of the Civil Procedure Law).
ordered re-arbitration. These referrals originally started as enforcement cases, but the Arbitration Law allows courts to decide to order re-arbitration instead of simply ordering or refusing to order enforcement. The party seeking enforcement will probably view this result negatively, as re-arbitration would involve considerable time and expense even if that party could prevail again.

Unlike the New York Convention referrals, 20 of foreign-related referrals involve the claim that the arbitrators exceeded the scope of the arbitration clause, followed closely by claims that no arbitration clause governed the dispute under Articles 70 or 71 of the Arbitration Law, and that there was a defect in panel composition, raised in 18 cases each. The SPC accepted these arguments as reasons not to enforce awards the majority of times they were raised. The prevalence of these arguments may suggest that the SPC is more receptive to substantive arguments in the case of foreign-related referrals.

IV. PROCEDURAL PERILS IN ENFORCEMENT

One of the principal concerns of foreign observers of PRC arbitration law has been the more expansive definition that PRC courts might give to public policy, under which courts might strike down awards on grounds of public policy substantially broader than those used in other New York Convention countries. Those fears now appear unfounded as award debtors frequently invoke public policy, but the courts seldom apply it. The published cases back up the SPC’s claim that it rarely strikes down an award on public policy grounds. On the other

49 Id., art. 61 at 103.
50 14 of 20 times in the case of challenges to scope, 12 of 18 claims that no arbitration clause governed the matter, and 13 of 18 claims that panel composition was defective.
51 The New York Convention allows countries to refuse to enforce awards that violate their public policy, but does not offer a precise definition. Convention on the Recognition and Enforcement of Arbitral Awards, art. V(2)(b), June 7, 1959, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1959). The Civil Procedure Law states that courts should disallow enforcement if the award violates “the social or public interest.” Minshi Susong Fa (Yi beixiuding) (民事诉讼法 (已被修订)) [Civil Procedure Law (Revised)] (promulgated by Order No. 44 of the President of the People’s Republic of China, April 9, 1991, revised by the Standing Committee of the National People’s Congress Oct. 10, 2007, effective Jan. 4, 2008) art. 258, 19 P.R.C. LAWS 215, 279. Public policy is one of the most common defenses to enforcement, and the interpretation of this provision has been “erratic” at best. Alford, Ku, & Xiao, supra note 4, at 20-21. See also, Tao, supra note 4, at 829.
54 See Id.
hand, foreign parties seeking to enforce their awards face two distinct procedural perils. In New York Convention cases, they may be unable to show that the arbitral procedure itself was fair, leading the SPC to reject the award under Article V of the New York Convention. This focus on procedural defects not only defies expectations that public policy would be the source of enforcement problems, but also makes these awards different from domestic foreign related ones, which are more likely to fail due to lack of arbitral jurisdiction.

A. Fears Over Fairness: Strict Interpretation of Procedure Abroad

The published referrals also suggest that those seeking an enforceable arbitral award in China should worry less about public policy and worry more about procedure. The SPC’s rulings in New York Convention cases reflect Chinese companies’ concerns that arbitration tribunals abroad will not treat them fairly. Some of these concerns may relax as Chinese companies become more familiar with international practice. For now, a foreign party might reasonably see a non-response by a Chinese counterpart as a prelude to an enforcement challenge later. Those engaged in arbitration against a Chinese party may wish to take steps to create a trail of documents showing that they did in fact successfully communicate with their opponents.

Cases in which genuine communication problems prohibit parties from receiving adequate information of rights and obligations, or in which the claims hold the wrong subsidiary or company responsible, undoubtedly exist, but the situation invites abuse. The readiness of the SPC to refuse enforcement of default judgments removes one of the primary mechanisms by which a plaintiff can induce a reluctant defendant to appear for arbitration.

Parties may experience trouble in avoiding non-enforcement on these grounds due to problems of evidence. Evidence rules do not require proof of facts affirmed by an arbitral award, but they require authentication and verification of foreign evidence. These requirements entail authentication of the document by a notary public and verification by the Chinese embassy or consulate in the country of origin, as well as translation. Award holders may run into trouble providing foreign evidence of default. This additional requirement may explain why the courts do not often reject domestic default awards on similar grounds.

The other major issue in New York Convention referrals, violation of the arbitral commission’s rules, reflects the same fear of unfairness to Chinese parties, as well as Chinese arbitration’s uniquely commission-based mindset. It also treats the commission’s rules and procedures as


56 Id. at 441.
nearly equivalent to a court’s and, like a court’s, subject to review even when the tribunal itself finds no violation. The PRC court is then in the position of speaking for the commission in saying how to interpret its rules. The parties would not necessarily bargain for that venue, particularly in cases involving ad hoc tribunals adopting a specific set of rules. The concern may be that foreign tribunals are biased and foreign commissions, even when they are used, do not step in to control procedure and respond to bias.

Many other jurisdictions view procedural problems during the arbitration as the tribunal’s affair. They may apply a concept akin to res judicata to defer to the tribunal’s resolution of the issue. They may also use doctrines of waiver to insure that the complaining party brings the issue before the tribunal. For instance, Hong Kong courts, which regularly encounter China-related enforcements, show much less sympathy to similar procedural arguments. Several appellate cases involve situations similar to those that gave the SPC pause, where the arbitral tribunal acted in an irregular manner or the parties underwent considerable trouble constituting the tribunal. Hong Kong courts refused to do so.

57 Procedural rules influence courts, but their influence is circumscribed. See Gabrielle Kaufman-Kohler, Soft Law in International Arbitration: Codification and Normativity, 1 J. of Int’l Dispute Settlement 1, 15 (2010) (“soft law exercises a certain influence and is regarded with deference without being perceived as mandatory in the classic sense of the word.”)

58 See Weixia Gu & Xiaochu Zhang, The Keeneye Case: Rethinking the Content of Public Policy in Cross-Border Arbitration between Hong Kong and Mainland China, 42 Hong Kong L.J. 1001, 1012-14 (2012) (discussing Hong Kong courts’ shift to a liberal approach in enforcing awards and rejection of challenges to awards based issues such as irregular arbitration procedures involving an expert, champerty, and an illegal penalty clause).

59 See, e.g., Gao Haiyan v. Keeneye Holdings Ltd [2011] HKCA 459 ¶¶36-39 (enforcing award despite allegations relating to detention of some of the parties and an extremely irregular negotiation procedure); Hebei Import and Export Corporation v. Polytek Engineering Co., Ltd. [1999] HKCFA 40, ¶ 14 (enforcing award despite irregular conduct and possible ex parte communication by arbitrators). In their decisions, the Hong Kong courts mirror the English approach. See Minmetals Germany GmbH v. Ferco Steel Ltd. [1999] CLC 647, 657 (enforcing CIETAC award despite claimed procedural irregularities and inability of award debtor to present a case to the arbitrators).

60 In the Keeneye case, the award debtors alleged bias in a combined mediation-arbitration procedure before the Xi’an Arbitration Commission because one of the party-appointed arbitrators served as a mediator for the dispute. Weixia Gu & Xiaochu Zhang, supra note 63, 1005 (2012). The first instance court considered that this procedure raised the possibility of bias and refused to enforce the award. Id. at 1005-06. The Court of Appeals reversed, holding that the courts could not be in the position of second-guessing the parties’ choices. Gao Haiyan v. Keeneye Holdings Ltd. [2011] HKCA 459 ¶¶101-02.

Another recent Court of Appeals case further shows the Hong Kong court’s reluctance to entertain procedural challenges. Inspur Electronics is notable mainly for its interpretation of Hong Kong’s strict limits on parties’ ability to appeal an enforcement
Although the SPC has not “departed in a meaningful way” from common reasons for rejecting an award under Article V in other jurisdictions, rules of procedure and evidence may make foreign awards harder to enforce. SPC jurisprudence may also give the parties and the Chinese party in particular, an incentive to act out early in foreign arbitration proceedings, in the knowledge that a default award will present particular problems for their opponents.

B. Pathological Arbitration Clauses in China

The common grounds for rejection of foreign-related awards mirror some of those applied to New York Convention awards, such as failure to give adequate notice and problems in panel composition. But the SPC is more likely to endorse claims by the party resisting enforcement that the arbitration clause is invalid. Von Wunschheim suggests these claims constitute the most often used grounds for PRC courts to reject an award. She posits several reasons for this result, including local courts applying domestic arbitration law to foreign agreements, pathological arbitration clauses, and ignorance on the part of the parties. To these reasons, one can add the feedback effects of the SPC’s endorsement of this approach, particularly when paired with the court’s refusal to countenance public policy arguments. Part of the courts’ willingness to entertain these grounds may also stem from the lack of Kompetenz-Kompetenz of arbitral tribunals. Arbitral commissions have Kompetenz-Kompetenz, and CIETAC has sometimes delegated that power to its tribunals. However, the power given to courts to review this issue means that no default expectation of respect exists for a tribunal or commission ruling.

Additionally, the 1995 Arbitration Law allows little room to reform an arbitration clause containing any flaws. For a time, the SPC appeared to loosen these restrictions by ordering arbitration and enforcement even when, for instance, one could infer the arbitration’s seat and commission from the context in which the parties made the contract. A few years later,

decision if the Court of First Instance (CFI) has not granted them leave to appeal. The underlying first instance case raised issues of jurisdiction, because the contract designated the CIETAC South China sub-commission, which has broken with CIETAC and is now the Shenzhen Court of International Arbitration and because the award holder could not produce the original contract. Guangdong Changhong Dianzi Youxian Gongsi (廣東長虹電子有限公司) [Guangdong Changhong Electronics Ltd.] v. Inspur Electronics (HK) Ltd. [2014] HKCFI 2403, ¶¶ 1, 5-11. Sidestepping the first issue, the CFI allowed the award holder to prove the existence of the contract through copies of the contract and other documentary evidence. Id ¶¶ 16-22, 25-27.

61 See Alford, Ku, & Xiao, supra note 4, at 24.

62 As that is the party against whom there will normally be enforcement in China.

63 Von Wunschheim, supra note 12, § 8:12.
however, it affirmed a more restrictive, formalist, position that it has maintained since.  

Finally, the relatively rapid, summary procedure often seen in PRC arbitration may not lend itself to investigation of the intent behind an ambiguous contract. As a result, award holders might operate at a disadvantage when trying to defend an award later. Sometimes, no room for ambiguity may exist because a formalist application of the law helps a favored local party. The lack of an earlier record can enable more manipulation of the outcome. Without a record of detailed testimony about the contract, and the circumstances of any changes, the tribunal’s choices narrow. When an enforcement case subsequently goes to court, the court sees a relatively summary and straightforward award and possibly a simple record to go with it.  

As issues become further distilled at later stages in the prior-reporting system, the system may be unable to correct for certain types of errors. Since reporting happens automatically, the parties do not have a chance to correct or supplement previous records. The SPC is not in a position to consider whether a party legitimately procedurally defaulted, or take evidence related to intent to arbitrate. To the extent these issues are the focus of lower court scrutiny, the prior-reporting system does not protect awards.

V. CONCLUSION

Many foreign observers feared that public policy would become a primary reason for PRC courts to reject arbitral awards, but the SPC’s record shows that it has sought to avoid rejecting awards on grounds of public policy, at least in the cases it publishes. If award holders can submit the enforcement suit, or if they face a revocation suit, the prior reporting system seems to offer a measure of protection against localism and judges who do not understand PRC arbitration law. Although the SPC seems to rule against the award holder more often in recent years, little publically available evidence supports the claim that a particularly hostile attitude exists towards New York Convention awards. However, determining that public policy does not create enforcement problems is not the same as saying that it is easy to enforce a foreign arbitration award in China.

The SPC still affirms non-enforcement in most publically available cases. The SPC seems particularly likely to refuse to enforce New York Convention claims on procedural grounds. Reviewing the arbitral tribunal’s determinations on procedural matters removes some of the flexibility that parties may hope to gain by arbitrating outside Mainland China. The advantages of choosing a different seat and different rules may

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64 Gu, supra note 1, at 68-69.

65 See Moser & Yuen, supra note 2, at 82 (discussing advantages and disadvantages of CIETAC arbitration).
well outweigh potential disadvantages in enforcement. But it requires a shift in mindset for situations in which an enforcement battle may arise. The non-Chinese party should worry less about public policy, and more about procedure, and should choose, as much as possible, to create a record that will make the tribunal’s choices understandable in a Chinese court.

The extent to which evidence rules make it more likely that PRC courts will reject award enforcement under Article V of the New York Convention requires further investigation. Attempts to improve compliance with the New York Convention by focusing on measures specific to arbitration may miss important problems for litigants. It may seem trite that the wider legal system affects award enforcement except for the time and attention lavished by Chinese legal reformers on protecting and improving the international arbitration system specifically as something apart from other civil litigation. However, as the SPC’s yearbooks once again show, scholars and counsel seeking to gauge the favorability of an enforcement environment must consider the wider legal system. In particular, those concerned with New York Convention compliance should consider how procedural rules and rules of evidence might disadvantage specific award holders.