

# China's Path Toward International Commercial Arbitration: Efforts, Divergences, and Prospects

GEORGE KHOUKAZ\*

- I. INTRODUCTION
- II. HISTORY OF ARBITRATION IN CHINA
  - A. *Chinese Cultural Support for Arbitration*
  - B. *State Commissions' Monopoly Over Arbitration*
  - C. *Adoption of the Arbitration Law*
- III. CHINESE ARBITRATION LAW AND THE UNCITRAL MODEL LAW
  - A. *Introduction*
  - B. *Validity of the Arbitration Agreement*
  - C. *Ad Hoc Arbitration in China*
  - D. *Enforcement of Award and the Public Policy Exemption*
- IV. PROPOSAL FOR FUTURE AMENDMENTS IN CAL
  - A. *Relaxing & Broadening the Writing Requirement*
  - B. *Ad Hoc Arbitration*
  - C. *Public Policy Defense*
- V. CONCLUSION

---

\* George Khoukaz is an associate in the Kansas City office of Husch Blackwell LLP. George is a member of the firm's Corporate, Mergers & Acquisitions, and Securities practice group, where he advises domestic and international clients on complex commercial and capital market transactions, as well as on corporate formation and governance matters.

## I. INTRODUCTION

When it opened its doors to international trade in 1979, the People's Republic of China (the "PRC") soon became a major world trade partner,<sup>1</sup> and a large number of foreign companies had a growing interest in trading and investing in China. Naturally, commercial disputes followed soon thereafter, and parties started thinking about a viable and predictable system to resolve their disputes effectively.<sup>2</sup> China's new economic policies and its accession to the World Trade Organization (the "WTO") in 2001<sup>3</sup> sped up its legal reform process.<sup>4</sup> From an academic perspective, some law scholars believe that the legal reforms resulted in a more transparent and fair litigation system.<sup>5</sup> However, in the legal practical world, there still is suspicion and distrust about the Chinese legal system and its courts.<sup>6</sup> Therefore, alternative dispute resolution mechanisms—arbitration in particular—were seen as a viable alternative to litigation.<sup>7</sup>

In China, as in other countries, there usually are four ways to solve a legal dispute: negotiation, mediation or conciliation, arbitration, and litigation.<sup>8</sup> It is well known that negotiation and mediation are not enforceable (these methods rather rely on the good will of the parties). Litigation is costly and time-consuming; furthermore, the enforcement of national court's judgments abroad is rather difficult and risky. Business parties, therefore, turn to arbitration to resolve their cross-border commercial disputes.<sup>9</sup>

This Article focuses on the evolution of Chinese law relating to international commercial arbitration. In particular, this paper will compare and contrast China's current arbitration law to the UNCITRAL Model Law (the "Model Law") and highlight the points of divergence between the two. In

---

<sup>1</sup> Ge Liu, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539, 539 (1995).

<sup>2</sup> Xiao Xiaowen, *Incorporation of UNCITRAL Model Law on International Commercial Arbitration: In Perspective of China*, 9 FRONTIERS L. CHINA, 82, 83–84 (2014).

<sup>3</sup> *China and the WTO*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/china_e.htm) (last visited Nov. 14, 2016).

<sup>4</sup> *Id.*

<sup>5</sup> See CHRISTIAN KRAFT, *JOINING THE WTO: THE IMPACT OF TRADE, COMPETITION AND REDISTRIBUTIVE CONFLICTS ON CHINA'S ACCESSION TO THE WORLD TRADE ORGANIZATION* 273 (2007); see also Xiaowen, *supra* note 2, at 83.

<sup>6</sup> See ZHENG YONGNIAN, *GLOBALIZATION AND STATE TRANSFORMATION IN CHINA* 189–95 (John Ravenhill ed., 2004); see also Xiaowen, *supra* note 2, at 83.

<sup>7</sup> Xiaowen, *supra* note 2, at 83.

<sup>8</sup> Liu, *supra* note 1, at 539.

<sup>9</sup> *Id.* at 539–40.

## CHINA'S PATH TOWARD INTERNATIONAL COMMERCIAL ARBITRATION

order to do that, this Article first briefly address the evolution of China's law since the initiation of the modern Chinese State following the Communist revolution in 1949. The Article then tackles the inconsistencies between the Chinese arbitration law and the Model Law. Based on these inconsistencies, the Article finally addresses reform efforts by the Chinese State and makes reform suggestions for a more coherent and reliable system.

### II. HISTORY OF ARBITRATION IN CHINA

#### A. *Chinese Cultural Support for Arbitration*

China's deep-rooted traditions promote friendly dispute resolution, which differ from the West's tradition of litigation.<sup>10</sup> Three factors influence the Chinese leniency toward dispute resolution instead of litigation: "the Confucian philosophy, the unavailability and inadequacy of the court system, and a social structure that emphasized small, stable units."<sup>11</sup>

The Chinese social concept of *ii* perceives individuals as members of a community where the responsibilities of each individual are defined by his or her place in society. This special categorization of one's responsibilities to the group led to the establishment of unspoken social norms of behavior and classifications of proper conduct.<sup>12</sup> A breach of *ii*'s harmony leads to individual shame and social dishonor.<sup>13</sup> A disruption of harmony that led to litigation was so severe that it was seen as a personal failure; a Chinese proverb states: "In death avoid hell, in life avoid the law courts."<sup>14</sup>

Stemming from this understanding of the importance of dispute resolution in the Chinese culture, the following two subsections will briefly address the evolution of the Chinese arbitration law.

#### B. *State Commissions' Monopoly Over Arbitration*

In China, arbitration used to be closely associated with the courts, and this close connection is reflected in the fact that arbitration rules are found in

---

<sup>10</sup> TANYA KOZAK, INTERNATIONAL COMMERCIAL ARBITRATION/MEDIATION AT CIETIC (CHINA INTERNATIONAL TRADE AND ECONOMIC ARBITRATION COMMISSION) 16 (1998).

<sup>11</sup> *Id.* at 18

<sup>12</sup> Tema Yang, Address at The China Corporate Challenge: Dispute Resolution—Mediation, Arbitration and Litigation (Nov. 18, 1998).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

the Chinese Code of Civil Procedure (the “CPL”).<sup>15</sup> Up until 1994, there was no special arbitration law in China, and both local and foreign arbitration proceedings were regulated by the laws of different commercial institutions and State agencies, such as the China Foreign Trade Arbitration Commission (the “CFTAC”), among others.<sup>16</sup> Most of the rules adopted by these commissions were inconsistent and did not reflect the nature of arbitration as internationally recognized.<sup>17</sup>

CFTAC was created by the Chinese government in 1954<sup>18</sup> and acquired jurisdiction to resolve foreign trade disputes relating to “contracts, agreements, and/or other documents between disputing parties.”<sup>19</sup> However, since at the time only a small number of such transactions existed, CFTAC was not particularly active and arbitrated only thirty-eight cases between 1956 and 1979.<sup>20</sup> As a result, the commission underwent few changes throughout the years, resulting in a more expanded scope of jurisdiction—covering all disputes arising from international economic and trade transactions—and the adoption of a new name: The China International Economic and Trade Arbitration Commission (the “CIETAC”).<sup>21</sup>

### C. Adoption of the Arbitration Law

The adoption of the Chinese Arbitration Law (“CAL”) in 1995 was the noteworthy landmark development in Chinese arbitration law.<sup>22</sup> Up until this point, international arbitration proceedings were no more than proceedings controlled and conducted by local commissions (such as the CIETAC mentioned above).<sup>23</sup> The *Arbitration Act of the People’s Republic of*

<sup>15</sup> The Chinese Code of Civil Procedure is called the “Civil Procedure Law,” hence the abbreviation “CPL.” The latest amendment took effect in January 2013. See Xiaowen, *supra* note 2, at 85.

<sup>16</sup> *Id.*

<sup>17</sup> See Marie Kidwell & James Brown, *China: A Perspective on International Arbitration in China, Recent Developments and CIETAC Arbitration*, 20 CONST. L.J. 253, 254–61 (2004).

<sup>18</sup> Liu, *supra* note 1, at 540.

<sup>19</sup> *Id.*

<sup>20</sup> TAO CHUNMING & WANG SHENGCHANG, CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION—PROCEDURE, THEORY, AND PRACTICE 3–8 (1992).

<sup>21</sup> Liu, *supra* note 1, at 541.

<sup>22</sup> The 9th Session of the Standing Committee of the 8th National People's Congress adopted the Arbitration Law of the PRC on August 31, 1994; see Liu, *supra* note 1, at 551.

<sup>23</sup> Li Hu, *Introduction to Commercial Arbitration in China* 1, 2 (2002), available at [https://www.softic.or.jp/symposium/open\\_materials/11th/en/LiHu.pdf](https://www.softic.or.jp/symposium/open_materials/11th/en/LiHu.pdf) (last visited May 21, 2019).

## CHINA'S PATH TOWARD INTERNATIONAL COMMERCIAL ARBITRATION

*China*, the first arbitration act of the PRC, was enacted in late 1994 and adopted in 1995.<sup>24</sup> The Chinese Arbitration Act (the “CAA”) revolutionized arbitration in China.<sup>25</sup> In many ways, the CAA came to supplement and enforce China’s accession to the New York Convention in 1987, promoting the implementation of international arbitral principles.<sup>26</sup>

Despite China’s attempts to modernize its arbitration system and provide a solid and stable base for foreign investments and trade, Chinese arbitration law kept some “Chinese features.”<sup>27</sup> These features, which will be discussed below, obstruct the effective application of the New York Convention.

### VI. CHINESE ARBITRATION LAW AND THE UNCITRAL MODEL LAW

#### A. Introduction

This section will focus on three points of inconsistency between the Chinese law and the Model Law recommendations. The three points will cover different stages in the arbitral process. This section first addresses the requirements of a valid arbitration agreement under Chinese law; it then tackles the prohibition on ad hoc proceedings in China; and finally, the last subsection covers the public policy exemption under the Model Law and the New York Convention.

Before delving into the details, a brief explanation of the Model Law is necessary to understand its relevancy and the reason for which this Article is relying on the Model Law when addressing Chinese arbitration law. The Model Law’s role is “to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.”<sup>28</sup> It covers all stages of the arbitral process from the agreement to arbitrate up to the enforcement of the award.<sup>29</sup> It reflects worldwide consensus on key aspects of international arbitration practice, having been accepted by a significant number of States.<sup>30</sup>

---

<sup>24</sup> *Id.* at 1.

<sup>25</sup> *Id.* at 2.

<sup>26</sup> KUN FAN, *ARBITRATION IN CHINA—A LEGAL AND CULTURAL ANALYSIS* 9 (2013).

<sup>27</sup> *Id.*

<sup>28</sup> *UNCITRAL Model Law on International Commercial Arbitration* (1985), U.N.

COMM’N INT’L TRADE LAW,

[https://uncitral.un.org/en/texts/arbitration/modellaw/commercial\\_arbitration](https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration) (last visited May 21, 2019).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

## B. *Validity of the Arbitration Agreement*

The Model Law impliedly adopts a pro-arbitration bias.<sup>31</sup> It allows different types of writings and does not require a strict reading of an arbitration agreement.<sup>32</sup> CAL requires otherwise: according to CAL's relevant provisions, an arbitration agreement must be specific and valid in the sense that the subject matter of the dispute should be arbitrable.<sup>33</sup> Furthermore, CAL states that if an arbitration agreement is not precise and clear enough, and the parties fail to reach an understanding afterwards as to the meaning of their agreement, then the arbitration agreement shall be deemed void and invalid.<sup>34</sup> In this sense, if the parties fail to agree on the scope of their arbitration agreement or fail to designate an arbitration commission, then Chinese courts will consider the agreement void despite the parties' clear initial intentions to arbitrate the dispute rather than go to litigation.<sup>35</sup> CAL judges the validity of an arbitration agreement too harshly and fails to honor the parties' intent to arbitrate. U.S. Contract law, for example, may adopt a relaxed interpretation of a contract (including an arbitration agreement) and "*fill in the gaps*" as long as there is a clear common intention by the parties. That is not the case when Chinese courts assess the validity of arbitration clauses.

The strict interpretation of arbitration agreements in China was enforced soon after the adoption of CAL in 1995. In 1996, the Chinese Supreme Court took a case in which the parties have agreed to arbitrate their dispute in the *China Council for the Promotion of International Trade* (the "CCPIT").<sup>36</sup> However, since CCPIT is not an arbitration institution and the parties failed to subsequently agree on one, the Supreme Court deemed the arbitration void despite the parties' intention to arbitrate their dispute.<sup>37</sup> Interestingly, an identical agreement might be enforced in other countries (such as Hong Kong) despite its faults and missing details.<sup>38</sup>

Another important difference between CAL and the Model Law relates to the type of writings that are deemed valid. In general, both CAL and

---

<sup>31</sup> See generally *id.*

<sup>32</sup> See *id.* at art. 7.

<sup>33</sup> Xiaowen, *supra* note 2, at 93.

<sup>34</sup> *Id.*; see also CHINESE ARBITRATION LAW art. 18 (1995) (amended 2006) [hereinafter "CAL"].

<sup>35</sup> Lisa A. Kloppenberg & Zhao Xiuwen, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 437–38 (2006).

<sup>36</sup> *Id.* at 438.

<sup>37</sup> *Id.*

<sup>38</sup> NEIL KAPLAN ET AL., HONG KONG AND CHINA ARBITRATION: CASES AND MATERIALS 221–24 (1994).

## CHINA'S PATH TOWARD INTERNATIONAL COMMERCIAL ARBITRATION

the Model Law require the arbitration agreement to be in writing.<sup>39</sup> However, under the Model Law, a writing is valid if (1) it is either included in the larger contract or is part of a separate writing; (2) the content of the writing is recorded in any accepted form; or (3) the agreement to arbitrate is found in an exchange of communication between the parties, which could be accessed in the future when needed.<sup>40</sup> The Model Law thus allows for a number of options that shall be deemed as valid "writings."

Unfortunately, CAL does not follow suit. It adopts a very restricted requirement: an agreement to arbitrate should be in writing and shall include the arbitration clauses provided in the contract and any other written form of agreement concluded before or after the dispute providing for submission to arbitration.<sup>41</sup> Subsequently, CAL limits the Model Law's options to one only, providing local courts with a heightened ability to reject requests for arbitration, which goes against the intent of the parties and the aspirations of the Model Law.

### C. *Ad Hoc Arbitration in China*

Internationally, ad hoc arbitral proceedings are permitted as much as institutional arbitrations are.<sup>42</sup> Even though the Model Law does not explicitly address ad hoc proceedings, it does encourage parties' autonomy to shape their proceeding in a way that suits them.<sup>43</sup> In China, ad hoc arbitration is prohibited, and parties are required to appoint an arbitral institution.<sup>44</sup> By requiring the parties to submit to an arbitral institution, Chinese law is taking away the flexibility and benefits associated with arbitration vis-à-vis litigation. For example, ad hoc arbitration can be used to limit the State's influence over arbitral institutions (in arbitration).<sup>45</sup> Foreign parties arbitrating in China may

---

<sup>39</sup> See UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 7(2) (U.N. COMMISSION ON INT'L TRADE L. 1985) (amended 2006) [hereinafter UNCITRAL MODEL LAW]; see also CAL, *supra* note 34, at art. 16.

<sup>40</sup> See UNCITRAL MODEL LAW, *supra* note 39, at art. 7(3)–(6).

<sup>41</sup> Xiaowen, *supra* note 2, at 93.

<sup>42</sup> Kloppenberg & Xiuwen, *supra* note 35, at 435.

<sup>43</sup> See generally UNCITRAL MODEL LAW, *supra* note 39.

<sup>44</sup> CAL, *supra* note 34, at art. 16.

<sup>45</sup> In institutional arbitration there is a set of tested procedural rules, and the process is supervised by professionals familiar with the rules of the institution. This leads to a decreased risk of procedural error. Furthermore, the appointment of arbitrators and the fixing of fees is easier under institutional arbitration. Ad hoc arbitration, on the other hand, provides different benefits. It is usually cheaper, more flexible to the parties' interests, and potentially more flexible in that it involves fewer people. Ad hoc arbitration may, however, result in unpredictability since the applicable rules may not be fully tested and may not cover every dispute that might arise. See G.B. BORN, INTERNATIONAL

have an interest in escaping the Chinese State's influence, and ad hoc arbitration would have been a tempting option for them. However, the State's prohibition of ad hoc proceedings takes away this option—thus undermining the importance of arbitration as the preferred method for settling commercial disputes—which may cause foreign parties to become reluctant to interact with their Chinese counterparts.

An interesting point could be raised in this context: even though ad hoc arbitration is prohibited in China, foreign-made ad hoc awards might still be enforced in China under the New York Convention (although the risk of Chinese courts refusing enforcement is still substantial). It is important to know where the seat of the arbitration is to determine whether the Chinese prohibition on ad hoc proceedings applies or not. If the seat of the arbitration is not in China, then the party seeking enforcement in China might be able to do that under the New York Convention (as long as the country in which the seat is located is a signatory party to the Convention, and no other reason for *vacatur* exists).<sup>46</sup>

#### D. *Enforcement of Award and the Public Policy Exemption*

“Public policy is a very unruly horse, and once you get astride it you never know where it will carry you.”<sup>47</sup> Public policy has been compared to an “unruly horse” because of its untamed and unpredictable nature. The concept of public policy is usually better recognized under Article V(2)(b) of the New York Convention<sup>48</sup> (the “Convention”), which provides that enforcement of an award may be denied if the courts of the enforcing country find the “recognition or enforcement of the award [. . .] contrary to the public policy of that country.”<sup>49</sup> However, the focus here is on the Model Law's recommendations which, under Article 36, provide an identical ground for refusing the enforcement of an award that violates the public policy of the enforcing country.<sup>50</sup> Therefore, the overlap between the Convention and the Model Law should not be interpreted as the author is mixing between the two;

---

COMMERCIAL ARBITRATION 150 (2d ed. 2014); *see also* C. VON WUNSCHHEIM, ENFORCEMENT OF COMMERCIAL ARBITRAL AWARDS IN CHINA 56 (2010); HAN JIAN, THEORY AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION LAW 243–48 (2000).

<sup>46</sup> Fujian Production Material Co., v. Jingge Hangyun Co. Ltd., (1995) Fa Han No. 135 (China).

<sup>47</sup> Richardson v. Mellish (1824) 130 ER 294, 303 (Eng.).

<sup>48</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. COMMISSION ON INT'L TRADE L. art. V(2)(b). (1958).

<sup>49</sup> *Id.*

<sup>50</sup> *See* UNCITRAL MODEL LAW, *supra* note 39, at art. 36(b)(ii).



## CHINA'S PATH TOWARD INTERNATIONAL COMMERCIAL ARBITRATION

the overlap is simply due to the compatibility between the Convention and the Model Law and the fact that they supplement each other.

The difficulty with the public policy concept lies in the fact that it is not defined by either the Convention or the Model Law; rather, each country is left to interpret public policy on its own. Therefore, a key issue in arbitral enforcement is to tame the horse in order to establish a more predictable framework. Interestingly, following China's ratification of the Convention in 1987 (and the subsequent incorporation of Article V(2)(b) into the Chinese Civil Procedure Law),<sup>51</sup> the term "public policy" has been avoided in favor of the term "social and public interests."<sup>52</sup> So how do Chinese courts interpret it?

Since Chinese statutory law does not provide a helpful interpretation of the term "social and public interests," one should turn to the court's holdings and judgments.<sup>53</sup> Throughout the years, the Chinese Supreme People's Court (the "SPC")—the highest court in China—provided some helpful interpretations as to the application of the term. Adopting a pro-enforcement orientation, the SPC established a vetting system in 1995, which required the lower courts to report to the Supreme Court in case the Supreme Court refuses to enforce an arbitration award.<sup>54</sup> In this context, it could be said that the SPC contributes to the interpretation of "social and public interests" through its "criticism and refusal of the lower courts' decisions, having the effect of limiting and actively discouraging the expansion of the 'social and public interests' exemption."<sup>55</sup>

In a landmark 2003 case, the SPC held that even though an award violates Chinese mandatory law, such a violation shall not be deemed in and of itself to equate a violation of Chinese public policy.<sup>56</sup> In other words, this case demonstrated that mandatory national law does not (and should not) equate with public policy, which calls for a narrower application of the exemption. The SPC's pro-enforcement holding could be compared to two well-known pro-arbitration U.S. decisions. In *Société Générale de l'Industrie du Papier* (better known as the RAKTA case), the U.S. Court of Appeals for the Second Circuit held that the public policy defense should be construed narrowly, and could be applied only where enforcement would violate the

---

<sup>51</sup> THE CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA art. 237. (1991).

<sup>52</sup> *Id.*

<sup>53</sup> Camilla Andersen et al., *The Unruly Horse in China: The Enforcement of Foreign Arbitral Awards and Public Policy*, 19 INT'L TRADE & BUS. L. REV. 72, 82 (2016).

<sup>54</sup> *Id.*

<sup>55</sup> Andersen, *supra* note 53, at 84.

<sup>56</sup> ED & F Man (H.K.) Co. Ltd., v. China Nat'l Sugar & Wines Grp. Corp., (Sup. People's Ct. July 1, 2003) (China); *see also* Andersen, *supra* note 53, at 85.

forum State's most basic notions of morality and justice.<sup>57</sup> In the *Mitsubishi Motors* case, the U.S. Supreme Court held that "the mere appearance of an antitrust dispute [which under U.S. law cannot be submitted to arbitration] does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted."<sup>58</sup>

This brief comparison between U.S. and Chinese interpretations of the public policy term aims to show that China is slowly moving toward a pro-arbitration attitude, which is compatible with international standards as illustrated in the U.S. cases. The pro-enforcement trend in Chinese law is, nevertheless, weakened and slowed-down by a couple of factors. First, the SPC's intervention in most enforcement matters is usually through "replies" and "letters" to the lower courts where the SPC *recommends* a certain outcome.<sup>59</sup> Meaning, the SPC's replies are not a source of law that must be relied on in future cases. However, in practice, the lower courts recognize the need to apply the recommendations due to the reality of the SPC's ability to overturn the judgment if it is appealed. The second factor is the lack of detailed reasoning in the SPC's replies and recommendations. The SPC does not provide its reasoning as to why it held a certain outcome, which makes it difficult for lower courts to understand the SPC's interpretation of the public policy term.<sup>60</sup> In this sense, the SPC is not laying the intellectual foundation for future interpretations by the Chinese court system.

### III. PROPOSAL FOR FUTURE AMENDMENTS IN CAL

This last section will make some reform proposals to the Chinese arbitration law that would help bring CAL closer to the Model Law recommendations. The proposal will cover the points addressed above, namely the form of the arbitration agreement, the issue of ad hoc arbitration, and the public policy defense to the enforcement of awards.

#### A. *Relaxing & Broadening the Writing Requirement*

As discussed above, CAL adopts a strict writing requirement, which does not reflect the Model Law's implicitly recommended pro-arbitration attitude. As the communication technology is developing at a fast pace, future amendment should take into consideration the different types of writing

---

<sup>57</sup> *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974).

<sup>58</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 632 (1985).

<sup>59</sup> Andersen, *supra* note 53, at 86.

<sup>60</sup> *Id.* at 86–87.

## CHINA'S PATH TOWARD INTERNATIONAL COMMERCIAL ARBITRATION

documents, other than the traditional ones.<sup>61</sup> Therefore, a more relaxed CAL should allow an exchange of emails, for example, to qualify as a valid "writing." Another aspect that should be taken into consideration in future reform is the reference to arbitration clauses that are separate from the main contract. The Model Law accepts the validity of arbitration clauses that are incorporated by reference, provided that the reference is such as to make that clause part of the contract.<sup>62</sup>

### B. *Ad Hoc Arbitration*

CAL should be modified and revised to recognize ad hoc arbitration in China, which would better serve the interests of Chinese and foreign parties interested in dealing with Chinese businesses. China could rely on the experience of other countries in adopting a law that is compatible with the Model Law, the Convention, and Chinese national interests. In other words, the rules of ad hoc arbitration in CAL may be provided with some "modifications on the basis of legislative experiences and sophisticated practices from those countries of civil law and common law where ad hoc arbitration works well."<sup>63</sup>

CAL's incompatibility with international standards of practice in terms of ad hoc arbitral proceedings may undermine the finality of the awards and their enforceability. The validity and enforceability of an award is crucial for the disputants. CAL's prohibition on ad hoc proceedings creates an unpredictable standard by which an award made by an ad hoc tribunal risks not being enforced, while Chinese courts are required to enforce, under the Convention, such awards made in foreign territories.<sup>64</sup> The current law in China is not helpful in stimulating business interactions with Chinese parties, and it does not conform to international standards.

### C. *Public Policy Defense*

In order to improve the less-than-ideal situation in its courts, the PRC should work on developing a more predictable and coherent system in terms of interpreting and adopting the public policy exemption when addressing the enforceability of an arbitral award.<sup>65</sup> Doing so would work to the financial and commercial interests of the country.

---

<sup>61</sup> Xiaowen, *supra* note 2, at 101.

<sup>62</sup> UNCITRAL MODEL LAW, *supra* note 39, at art. 7.

<sup>63</sup> Xiaowen, *supra* note 2, at 103.

<sup>64</sup> Kloppenberg & Xiuwen, *supra* note 35, at 436.

<sup>65</sup> Andersen, *supra* note 53, at 92.

It is recommended that China adopts a structured review mechanism that requires the SPC's intervention whenever a lower-court decides to vacate or set aside a foreign-made award on public policy grounds.<sup>66</sup> The SPC's decision shall be binding on the lower courts, and be transmitted through a reversal order rather than an "opinion" or "recommendation."<sup>67</sup> Furthermore, the SPC's reversal orders should include a detailed analysis of the SPC's reasoning, which will allow for the development of Chinese literature relating to the public policy exemption. Lower courts could then rely on the SPC's reasoning in future cases. This review mechanism will effectively coordinate the relation between the courts and the Chinese arbitration law, work on fulfilling the aspirations of the Model Law, and avoid the regionally judicial conflicts regarding enforcement procedures of arbitral awards.

## VII. CONCLUSION

The dramatic growth in trade and commerce between Chinese and non-Chinese parties has, since the early 1980s, been accompanied with remarkable modifications to Chinese law and its arbitration law in particular. This slow process is illustrated by a number of noteworthy steps taken by China—such as its accession to the New York Convention and its adoption of a new arbitration law—which demonstrates its interest to join the international commercial system in place. This process is no way near its end though, and substantial work still needs to be done.

China's attempts to develop laws that conform to international standards and expectations have not always been fully adequate. A number of examples were addressed in this Article in order to highlight some of the areas where Chinese law falls behind the internationally-set standards. Furthermore, reform suggestions were made, and China must to take these (and many other) suggestions into consideration when making future legal reforms.

---

<sup>66</sup> Xiaowen, *supra* note 2, at 103.

<sup>67</sup> *Id.* at 104.

Copyright of Ohio State Journal on Dispute Resolution is the property of Ohio State Journal on Dispute Resolution and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.