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Enforcing Online Arbitration Agreements for Cross-Border Consumer Small Claims in China and the United States

By PHILIP JOHNSON*

I. Introduction

It seems indisputable that the economic relationship between the world’s two largest economies, the United States and China, is of paramount importance for the global economy. China’s economic development since the 1970s has been unprecedented in numerous ways, one of which is the enormous expansion in recent years of business conducted through the Internet, electronic commerce (“e-commerce”), which amounted to $684 billion in 2010. Similarly, in the United States, online retail sales alone are expected to grow exponentially to $248.7 billion in 2014, a 60% increase from 2009.

This Article focuses on contracts that govern simple, low value

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2. There is no concrete, universally agreed upon definition of “e-commerce.” See Aashit Shah & Parveen Nagree, Legal Issues of E-Commerce, available at www.nishithdesai.com/Research-Papers/Legal_issues_ecom.pdf. However, “e-commerce” in this Article refers to business transactions between parties where a good or service is sold online.


e-commerce transactions and the disputes that commonly arise from them, such as payment disputes, disputes over receipt or non-receipt of an item, and disputes regarding the nature and/or quantity of the goods/services purchased, amongst others.\(^5\)

Although its analysis is applicable to business-to-business and consumer-to-consumer disputes, this Article focuses primarily on business-to-consumer disputes that arise out of the millions of simple transactions that involve little more than a consumer purchasing goods/services listed for sale online by a business.

E-commerce raises a host of legal issues distinct from everyday commerce.\(^6\) One of the most problematic aspects of e-commerce has been the area of contracts between Internet sites and their users.\(^7\) Specifically, the issue of one-sided adhesion contracts,\(^8\) whereby users manifest consent to the non-negotiable, boilerplate terms of a standardized contract by clicking a box and/or typing (e.g., “I agree”), has generated a significant amount of scholarship.\(^9\) These contracts, commonly referred to as “click-wrap” agreements, are now found in virtually every e-commerce agreement.\(^10\)

The enforceability of arbitration clauses found within commercial contracts formed by click-wrap agreements has been the


\(^6\) See generally TOSHIYUKI KONO ET AL., SELECTED LEGAL ISSUES OF E-COMMERCE (2002).


\(^8\) An adhesion contract has been defined as “(1) a printed form of many terms; (2) drafted by one party; (3) who routinely enters such transactions; (4) offered on a take-it-or-leave-it basis; (5) signed by the adherent; (6) who is not a repeat player; (7) whose principal contract obligation is that payment of money of money to the contract drafter.” Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 HARV. L. REV. 1174, 1177 (1983).


\(^10\) See Streeter, supra note 9.
basis of much of this scholarship, as well as numerous lawsuits. Arbitration clauses are contractual provisions that mandate all or certain disputes arising between the contracting parties be resolved through arbitration. A recurrent criticism of arbitration clauses in consumer contracts is that they are unfairly one-sided, so consumers routinely agree to them due to necessity, not genuine assent. Many argue that this criticism applies with extra force to commercial e-contracts due to the practical realities of Internet use, namely, that click-wrap agreements are almost universally drafted on a "take-it-or-leave-it" basis, are rarely read by the non-drafting party, and negotiation with the drafting party is almost always impossible.

Nonetheless, as e-commerce continues its exponential growth worldwide, the prevalence of click-wrap agreements in e-commerce contracts tags along due to, among other things, the speed and convenience that they provide for businesses and consumers alike. Because this growth seems inevitable, e-commerce policymakers around the world in both the private and public sectors have responded by passing numerous pieces of legislation to recognize and uphold the validity of click-wrap agreements and e-


14. See Davis, supra note 11.


signatures. 17

For instance, China’s Electronic Signature Law (ESL), which became effective in 2005, is one of the newest of these laws, 18 whereas the United States’ Electronic Signatures in Global and National Commerce Act (a.k.a., “e-Sign”), passed in 2000, was one of the first. 19 The explicit purpose behind both laws is to improve and foster e-commerce by, among other things, validating the use and legal enforceability of e-signatures. 20 Both laws therefore recognize as fully enforceable click-wrap agreements in international transactions between businesses in their respective countries and their foreign clients, provided the agreement’s terms meet the requirements the statutes impose.

The growth of e-commerce has predictably resulted in a proportional growth of online disputes, 21 which take countless forms and require different resolution mechanisms. Although dozens of new Internet-specific methods of dispute resolution, aptly termed “Online Dispute Resolution” (ODR), have emerged, 22 this Article focuses on online arbitration. Although e-commerce is inevitable and will almost certainly continue absent an effective ODR mechanism, ODR should accelerate its growth by effectively resolving disputes, which should minimize risk for consumers and foster trust in e-commerce, all of which will maximize customer loyalty and profits for businesses. Online arbitration is becoming an increasingly common method for resolving transnational commercial disputes between businesses and clients located in


different countries.\textsuperscript{23} The past decade has witnessed an explosion of companies, agencies, and individuals across the world who perform ODR.\textsuperscript{24} Specifically, a number of these entities specialize in the rapidly developing and emerging field of online arbitration of international consumer-business disputes.\textsuperscript{25} The Chinese government’s international commercial arbitration agency, the China International and Economic Arbitration Commission (CIETAC), has recognized the growing import of online arbitration in transnational e-commerce disputes, and recently promulgated the Online Arbitration Rules to foster the promotion of online arbitration of e-commerce disputes.\textsuperscript{26} In fact, "CIETAC is one of the few arbitral institutions in the world to introduce specific online arbitration rules."\textsuperscript{27}

To better understand the challenges and issues this Article attempts to address, a hypothetical may be in order. Say you own a United States company that conducts e-commerce with Chinese citizens, or a Chinese company conducting e-commerce with American citizens, where each transaction amounts to, at most, only a few hundred dollars. You have come to the decision that you want to place an arbitration clause in your e-business’s click-wrap agreement that mandates online arbitration. Ensuring this is a smart decision requires a comprehensive analysis of whether it is legally sound. How will you ensure the clause’s enforceability? What laws apply, and what are their shortcomings? What will be your client’s and your potential legal options should a dispute arise?

The primary focus of this Article is to assess online arbitration under Chinese and U.S. law in the context of click-wrap agreements. It provides a comparative overview of the applicable laws with a particular focus on contemporary legislative developments. In it, I

\textsuperscript{23} Id. at 954.


\textsuperscript{27} John Choong, CIETAC promulgates new Online Arbitration Rules, PRACTICAL LAW Co. (June 24, 2009), http://dispute.practicallaw.com/7-386-3129?source=relatedcontent.
will discuss the following: (1) an overview of online arbitration and why businesses may or may not want such an online arbitration clause; (2) the enforceability of online arbitration clauses under U.S. and Chinese law; and (3) an important development in the field of online arbitration.

II. Online Arbitration: An Overview

To foster the continued growth of international e-commerce, an effective and legally enforceable international dispute resolution system for consumers must be created. Online dispute resolution is the most promising method of effectively doing so.

This is especially true for international business-to-consumer disputes. Indeed, for the overwhelming majority of transnational e-consumers, online dispute resolution is the only feasible option. The reason for this is a matter of practicality: challenging an arbitration agreement or an award made pursuant thereto is expensive, time-consuming, and difficult.28 In the context of small value, transnational consumer sales, legal recourse is clearly cost prohibitive. Online dispute resolution offers a viable alternative to litigation and provides numerous advantages to consumers and businesses alike.29 Specifically, when employed properly, it offers parties to a dispute a speedy and cost-effective method to resolve the dispute. Additionally, in the case of breach of an e-contract, ODR diminishes consumer risk while simultaneously augmenting consumer trust and confidence by making adequate redress possible. In the transnational consumer context, ODR’s transparency, efficacy, and simplicity maximize ADR’s benefits in unprecedented ways.30

Online forms of alternative dispute resolution (ADR) first arose in 1996.31 To date, the vast majority of ODR services provide mediation, which has left online arbitration relatively

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undeveloped. This is most likely due to the fact that the average cost of arbitration is significantly more than the average amount involved in e-commerce disputes, which has made mediation a much more preferable option of dispute resolution. Nonetheless, when mediation fails, "online arbitration may be the only feasible option in cases where the low value of the transaction effectively bars the consumer from seeking redress or where one or more of the parties cannot afford to travel abroad." Online arbitration can take many forms. As an initial matter, it must be noted that the definition of arbitration (and thus online arbitration) is somewhat amorphous. There are disagreements and variations as to the definition of arbitration, but it is generally accepted to mean:

... a method, relying on the parties' agreement, of dispute resolution by individuals selected directly or indirectly by the parties and vested with the authority to adjudicate in lieu of national courts, by a decision which has effects similar to a judgment.

Online arbitration, therefore, is arbitration that takes place exclusively through the use of the Internet and digital technology. The defining element of arbitration that sets it apart from other forms of ADR is that an arbitrator, a third-party neutral, imposes a final decision after both parties have fully presented their case. Online arbitration is primarily a combination of mediation, negotiation, and the essential characteristics of arbitration: the use of a neutral third-party arbitrator and a binding final decision. Very few cases are ever settled by arbitration in a strict sense. Online arbitration is distinct from other forms of arbitration only in that the

33. See JULIA HÖRNLÉ, CROSS-BORDER INTERNET DISPUTE RESOLUTION 252-56 (2009).
38. See Gilliéron, supra note 21, at 309.
parties utilize the Internet and digital technology to perform and communicate during the arbitral proceeding. In most cases, the decision is legally enforceable by either party, although the parties may, in some cases, agree to make it non-binding. However, an arbitrator's decision is often effectively binding regardless because contesting an arbitrator's decision can be prohibitively expensive and/or difficult.

There are numerous benefits and drawbacks of online arbitration, some of which are blatant while others are exceedingly subtle. One major advantage of online arbitration is that the parties may choose the law that governs the arbitral proceedings. While not every country recognizes the validity of pre-dispute arbitration clauses in consumer contracts, most countries do, including both the United States and China. Businesses conducting e-commerce in the United States and China could, therefore, choose to pursue arbitration under the laws of either China or the United States, or pursuant to a number of online arbitration institutions' rules.

As it stands, Chinese consumers and businesses conducting transnational e-business are often effectively left with no meaningful methods of resolving disputes that arise out of an e-commerce transaction that cannot be resolved informally between the parties. Arbitration conducted by government institutions does not currently provide an effective solution to resolve e-disputes because of various obstacles, including the cost and (lack of) speed of arbitration, and well as problems with obtaining personal jurisdiction over the parties and determining which law should control. Companies around the world conducting e-business have unfortunately utilized this reality to the consumer's detriment,

39. See id.
40. See generally Schmitz, supra note 36.
41. See, e.g., CODE CIVIL [C. CIV.] art. 2061 (Fr.) (providing that a pre-dispute arbitration agreements only valid if in a contract for "professional activities" in France).
implementing dispute resolution procedures that are unnecessarily costly and time-consuming. Furthermore, repeat players (i.e., businesses that conduct numerous online transactions) must take into account that their credibility is at risk without an effective, consumer-friendly ODR procedure.\textsuperscript{45} Repeat players must foster a positive reputation to ensure their long-term success and should therefore avail themselves of the benefits of online dispute resolution, namely, online arbitration, which can solve the vast majority of business-to-consumer disputes.

ODR is a mechanism that provides efficient, fair, low cost, and adaptable solutions to resolve disputes in the global e-commerce market.\textsuperscript{46} Legislators and courts in China and the U.S. alike have recognized the benefits both online and in-person arbitration provide. Although some courts have refused to enforce mandatory arbitration clauses,\textsuperscript{47} ODR tends to allay the main concerns these courts have. Specifically, critics of arbitration argue it is not an adequate substitution for litigation and consumers are unfairly disenfranchised of their right to seek legal redress.\textsuperscript{48} Thus, both scholars and governments have paid a significant amount of attention to the implications ODR poses for consumer rights and due process, especially binding online arbitration.\textsuperscript{49} This concern is belied by the realities of low-value consumer transactions: consumers generally do not care about their rights and due process so long as they get the benefits of the transaction for which they bargained. That is, provided that consumers receive the full value of the goods/services for which they paid within the time they expect to receive them, disputes are unlikely to arise. Accordingly, ODR's goal is to provide a mechanism that ensures an effective way for consumers to receive the benefits of the bargain and/or to receive their money back.

\textsuperscript{46} Xu Junke, Development of ODR in China, 42 No. 3 UCC L. J. ART 2.
\textsuperscript{47} See Bates supra note 13.
\textsuperscript{48} See, e.g., the proposed Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009), available at http://www.thomas.gov/cgi-bin/query/z?c111:H.R.1020 (arguing that "[m]andatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions").
This Article assumes online arbitration is the most economically feasible option and that litigating small claims would be financially impractical for consumers due to the high transaction-to-legal costs ratio involved. This assumption is based on the fact that, as global e-commerce has grown, more e-companies have turned to online dispute resolution as their best option for settling transnational e-commerce disputes.\(^{50}\) To foster this development, businesses, consumers, courts, and arbitral institutions must ensure online arbitration agreements are valid and enforceable.

III. The Enforceability of Arbitration Clauses in Transnational Commercial Click-Wrap Agreements

The validity and enforceability of arbitration clauses in transnational commercial agreements has been discussed extensively. However, the emergence and continued growth of online arbitration (and online ADR in general) has added a novel element to the analysis of the enforceability of, and defenses against, online arbitration clauses.

Arbitration clauses in international commercial contracts are generally enforceable;\(^{51}\) however, there is no universal legally sufficient model or all-purpose arbitration clause to ensure their enforceability. Nonetheless, a number of international and national arbitration institutions have promulgated standardized arbitration clauses that they recognize as enforceable, provided the requirements that allow them to hear the dispute are met.\(^{52}\) Moreover, most national and international laws provide a presumption in favor of enforcing international arbitration agreements.\(^{53}\) Accordingly, both China and the United States recognize and generally enforce arbitration agreements found in


\(^{51}\) Upwards of 90% of international contracts provide for arbitration. DRAHOZAL, supra note 32, at 287.


international commercial agreements so long as the necessary prerequisites are met.

A. Defenses Against Enforcement under the New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (a.k.a. the "New York Convention") "provide[s] common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards."\(^{54}\) The Convention, to which both the United States and China are signatories, provides a means for the recognition and enforceability of international arbitration clauses and foreign arbitral awards.\(^{55}\) Under the New York Convention, the enforceability of an arbitration clause and a corresponding arbitral award is therefore ultimately determined by either (1) the laws of the jurisdiction the parties to the contract have agreed upon, (2) the laws of the country where the judicial seat of arbitration is, or (3) the laws of the locality of the court establishing the validity of the arbitration agreement.\(^{56}\)

The Convention also provides an exhaustive list of seven defenses against their enforcement and recognition. Five are properly described as procedural defenses\(^{57}\) while two are substantive.\(^{58}\) When a defense is asserted, the law of the seat (i.e., jurisdictional location) of arbitration controls. Although the parties may choose the seat of arbitration and thus which country's law would apply, this Article limits its discussion to defenses under Chinese and U.S. law.\(^{59}\) In doing so, this Article focuses on the three


56. New York Convention, art. V; see also BUSINESS DISPUTES IN CHINA 80 (2009).

57. Lu, supra note 55, at 769.

58. Id. at 770.

59. Under the New York Convention, parties may choose the "seat of arbitration," which is the jurisdiction where the arbitration is considered to have taken place. Thus, the arbitration itself and any issued award are governed by the seat's applicable laws. Moreover, because the Internet is borderless, proposed legislation would make the seat of arbitration the vendor's country. See U.N. COMM'N ON INT'L TRADE LAW, Possible Future Work on Online Dispute Resolution in
defenses that pose the toughest questions for recognition and enforceability of online arbitration clauses and corresponding arbitral awards: (i) invalidity, (ii) inadequate due process, and (iii) void as against public policy.\textsuperscript{60}

This Article concludes that the revolutionary and unique nature of the Internet and online arbitration should render the defenses the New York Convention provides, as presently understood, unavailing in the context of business-to-consumer contracts. They should, however, still be available to ensure the legitimacy of online arbitration agreements and the arbitration process they contemplate.

1. Invalidity

The defense that an arbitration agreement is invalid is based on general contract law principles: the agreement will be deemed invalid if, \textit{inter alia}, there is inadequate assent, if a party is incapacitated, or if the agreement is otherwise illegal.\textsuperscript{61}

\textit{a. China}

Pursuant to Article 128 of China's Contract Law, international commercial agreements mandating arbitration are generally enforceable under Chinese law provided a few conditions are met.\textsuperscript{62} That is, they must comply with China's Arbitration Law.\textsuperscript{63} Before


60. I do not discuss the four remaining New York Convention defenses because they do not apply to this Article. \textit{See generally} Lu, supra note 55, at 769-70. The defense of inarbitrability of the matter does not apply because consumer disputes are indisputably arbitrable under Chinese and U.S. law. The defense that the award is nonbinding does not apply because this Article is limited to agreements that would provide for binding awards. This Article assumes two remaining defenses – that the arbitral award would be limited to the scope of the agreement; that the arbitration panel would be composed according to the agreement and would use proper procedure – would not apply as the arbitrators would conduct the proceedings according to the agreement's terms. Moreover, these defenses are intensely fact-specific and cannot be analyzed in the absence of a specific arbitration clause and specific alleged violation.

61. \textit{See New York Convention, art. V(1)(a).}


63. \textit{Arbitration Law} (promulgated by the Standing Comm. Nat'l People's
the Chinese government will even recognize an arbitration agreement, however, it must (1) be a written agreement between the parties to arbitrate\(^{64}\) (2) any and all claims that may arise out of the contract\(^{65}\) that are (3) legally capable of settlement by arbitration\(^{66}\) and (4) the agreement itself must be valid and enforceable under the law of the chosen forum.\(^{67}\)

These prerequisites are easily satisfied by foreign companies conducting cross-border online sales with Chinese citizens. First, arbitration is permissible because contracts governing cross-border sales are by definition "foreign-related."\(^{68}\) Second, the Electronic Signature Law explicitly states that "signed" e-contracts are fully enforceable. Third, the businesses must simply draft the agreement broadly enough to cover "any and all disputes arising out of or related to the transaction." Lastly, the businesses must decide which online arbitration institution and laws the online arbitral proceeding will utilize.

Although complying with the Contract Law should pose no problems for e-commerce between firms, a glaring and seemingly insurmountable problem exists for enforcement of arbitral awards that arise out of business-to-consumer contracts. Chinese courts refuse to enforce arbitral awards that do not arise out of a "contractual or non-contractual commercial legal relationship."\(^{69}\) China's reservation to this right under the New York Convention, known as the "commercial reservation," has been interpreted to apply to business-to-consumer contracts. That is, arbitration awards granted pursuant to a business-to-consumer contract are per se unenforceable in Chinese courts.\(^{70}\) Unless and until China amends this stance, arbitral awards issued pursuant to a business-to-

\(^{64}\) New York Convention, art. II(1).

\(^{65}\) Id. art. II(3).

\(^{66}\) Id.

\(^{67}\) Id.


\(^{69}\) See JINGZHOU TAO, ARBITRATION LAW & PRACTICE IN CHINA 188 (2008).

\(^{70}\) Junke, supra note 46, at n.6.
consumer contract will remain unenforceable as invalid. If it does so, as it should (discussed more fully infra), businesses would have no trouble drafting valid and enforceable online arbitration clauses under Chinese law.

b. United States

The United States has also adopted the "commercial reservation"; however, it is unclear whether international consumer contracts satisfy the definition of "commercial." Given the fact that U.S. courts interpret the term broadly to incorporate a number of other less obviously "commercial" contracts, it is reasonable to conclude that low value consumer transactions would constitute commercial activity under the Convention. Indeed, American courts interpret "commercial" to mean any legal relationship with a business purpose.

Chapter 2 (the Convention Act) of the Federal Arbitration Act of 1925 implements the New York Convention as enforceable in U.S. courts.\textsuperscript{71} American courts have "an obligation"\textsuperscript{72} to enforce international arbitration agreements and arbitration awards\textsuperscript{73} that fall under the ambit of the New York Convention because of the "strong federal policy in favor of arbitration" that applies "with special force in the field of international commerce."\textsuperscript{74} The validity of an international commercial arbitration agreement under American law is contingent on the same aforementioned elements the New York Convention requires.\textsuperscript{75} Thus, an online arbitration provision between Chinese and U.S. citizens will be valid so long as other defenses against recognition and enforcement the Convention provides do not apply.\textsuperscript{76}

2. Inadequate due process

The New York Convention provides that an arbitral award is unenforceable if the arbitration proceedings violate the enforcing

\textsuperscript{71} 9 U.S.C. §§ 201-8.
\textsuperscript{72} InterGen N.V. v. Grina, 344 F.3d 134, 141 (1st Cir. 2003).
\textsuperscript{73} Karaha Bondas Co. v. Perushan Pertambangan Minyak, 364 F.3d 274 (5th Cir. 2004), cert. denied, 543 U.S. 917 (2004).
\textsuperscript{74} Restoration Pres. Masonry v. Grove Europe, Ltd., 325 F.3d 54, 60 (1st Cir. 2003).
\textsuperscript{75} See supra Part III.A.
\textsuperscript{76} 344 F.3d at 141; see also New York Convention, arts. IV-VI.
state’s standards of due process. The essence of the defense is that the party attempting to compel arbitration did not give the party asserting the defense a fair opportunity to be heard. This generally manifests when a party to the arbitration is unable to present its case and or did not have sufficient notice of the rules that would govern the arbitral proceeding. These standards are intentionally vague so as to give countries and parties to arbitration broad discretion in crafting arbitration to fit their needs. The defense is normally asserted under three circumstances: (1) if the party opposing enforcement was not present at the arbitration proceeding; (2) the tribunal prevented a party from presenting evidence; (3) the tribunal did not allow the party opposing enforcement an opportunity to object to the proceedings.

a. China

The due process defense under Chinese law is intensely fact-specific, but encompasses the general notion that parties to arbitration have the right to be heard and to present their case. This principle assumes that the parties agreed to arbitration and that the arbitrator will act according to the parties’ terms to ensure that the process is fair and that the arbitrator is neutral. In Dongfeng Shipping Co., Ltd. v. Zhongguo Waiyun General Group, an award was set aside because one of the parties had not been given proper notice that the agreed-upon arbitrator had resigned and the other party redesignated their own arbitrator without consulting or telling the other. The Supreme People’s Court found this a clear violation of the basic principle of arbitration that each party must be given adequate notice of events concerning the proceedings.

77. New York Convention, art. V(1).
78. Lu, supra note 55, at 762.
79. Id.
82. See id.
84. Id.
In *Jiajun Development Co., Ltd. v. Beijing Jinyu Group Co., Ltd.*, the plaintiff, a Hong Kong company, filed an application against the respondent, a Beijing-based company, to set aside an arbitral award in favor of the respondent. The plaintiff argued that the arbitral tribunal violated his right to be heard when it refused to hold a second hearing based on new evidence.

*Mai Ping v. Jiangyin Hailian Trading Co., Ltd.*, was initiated by the plaintiff, a Canadian company, against the respondent, a Chinese company. The court refused to set aside an arbitral award that the plaintiff argued was invalidly issued. Importantly, the court was unconvinced by the plaintiff's argument that the award exceeded the scope of disputes subject to arbitration pursuant to the parties' contract. The court found that so long as one valid arbitration agreement was formed between the parties, disputes arising from or relating to issues covered by subsequent agreements that reference the initial agreement were arbitrable. Further, the court gave the arbitral tribunal almost absolute discretion in conducting the proceedings and deferred to its factual and legal conclusions.

While these and other cases may give some guidance, the ultimate reality concerning due process and the enforcement of foreign-rendered arbitral awards in China is that the Chinese courts have been notoriously inconsistent, unpredictably selective, far from transparent, and generally frustrating. Therefore, in the event that China begins to consider consumer transactions to fall under the ambit of the New York Convention, it is difficult to speculate how its courts would receive applications to enforce awards made pursuant to an online arbitration agreement. Nonetheless, given the Chinese courts' general deference to arbitrators, inadequate due process should not be a valid defense so long as the parties had a reasonable opportunity to present their case.

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86. See TAO, supra note 69, at 183-84.
88. See TAO, supra note 69, at 183-84.
89. *Id.*
90. *Id.* at 186.
91. *Id.*
b. United States

The rationale behind enforcing or refusing to enforce a foreign-rendered arbitral award is the same under both American and Chinese law. That is, the due process defense is only successful when a party is unable to present its case or was precluded from effectively doing so due to a lack of adequate notice.\textsuperscript{93} American courts have narrowly construed the defense and thus focus on the overall result in determining whether the trial was fair. Accordingly, arbitral tribunals are afforded wide discretion in conducting the proceedings.

The leading case where the defense was unsuccessfully asserted on grounds that the party opposing enforcement could not properly present its case is \textit{Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier}.\textsuperscript{94} The court held that the party's due process rights were not violated when the arbitral tribunal refused to reschedule a hearing because one important witness was unavailable.\textsuperscript{95} Similarly, a party's refusal to participate\textsuperscript{96} or failure to object to a proceeding's procedures\textsuperscript{97} waives a party's ability to assert the due process defense.

There is only one case where an American court refused to enforce a foreign-rendered arbitral award on the grounds that the arbitral proceedings violated a party's due process rights. In \textit{Iran Aircraft Industries v. Avco Corp.}, the tribunal told the respondent, Avco, that the evidence to support their claims had to be submitted by affidavit.\textsuperscript{98} In deciding their award, however, the tribunal based their decision solely upon other forms of evidence and refused to consider affidavits.\textsuperscript{99} The court found this effectively precluded Avco from presenting any relevant evidence, which was a clear due process violation.\textsuperscript{100}

\textsuperscript{94} 508 F.2d 969 (2d Cir. 1974).
\textsuperscript{95} Id. at 975.
\textsuperscript{98} 980 F. 2d 141 (2d Cir. 1992).
\textsuperscript{99} Id.
\textsuperscript{100} Id.
Although it is more developed and discernible than China's jurisprudence, the due process defense under American law is nonetheless relatively underdeveloped and unorganized. As it stands, so long as a party has a relatively reasonable ability to present its case and participate in the arbitral proceedings, U.S. courts will determine that the party's due process rights have not been violated.

In the context of small consumer claims, online arbitration makes it possible for all parties to present their case with virtually no cost from wherever they are located because all of the relevant evidence - receipts, emails, pictures, live testimony - can be presented instantaneously via email or online platforms. Indeed, millions of disputes are resolved each year entirely through automated ODR technology, often with little or no human interaction. Moreover, due to the simple nature of small value business-to-consumer transactions, parties should have no trouble being able to present their cases. Given these aspects of online arbitration, it is reasonable to conclude that any due process defense against online arbitration will fail under American law.

3. Public Policy

Article V(2)(b) of the New York Convention affords enforcing countries the right to refuse to enforce a foreign-rendered arbitral award if doing so would be contrary to its public policy. This defense has been the most discussed and litigated one, primarily because it often overlaps with the other defenses, namely due process/improper procedure and non-arbitrability.

a. China

In April, 2000, the Supreme People's Court (SPC) of China issued a directive that no lower court was to refuse to enforce an arbitration award on the grounds of public policy without its approval. This rendered any decision by lower Chinese courts refusing to enforce an arbitration award due to public policy

101. See Inoue, supra note 80, at 257-58.
concerns immediately appealable to the SPC.104

To date, the SPC has only upheld one court’s decision to refuse an arbitration award due to public policy.105 This occurred in *Hemofarm DD, MAG Int’l Trading Co. v. Jinan Yongning Pharma. Co., Ltd.* In that case, the Supreme People’s Court refused to enforce an award granted by the International Chamber of Commerce’s arbitration commission on the ground that the award conflicted with previous decisions rendered by another Chinese court regarding the same dispute.106 The court’s opinion, however, implied Chinese courts generally will not rely on the public policy exception to enforcement.

Because the public policy defense has been limited to such a precise, fact-specific application, it is somewhat difficult to gauge its potential against online arbitration agreements without significant conjecture. Nonetheless, it is more difficult to imagine what a successful public policy defense against online arbitration would entail. Online arbitration will provide Chinese consumers and businesses more access to dispute resolution at lower (or no) costs with quicker, more efficient resolution. And, as mentioned supra, there is no alternative to online arbitration in an overwhelming amount of small consumer claims (unless one believes *caveat emptor* is a viable alternative). Instead of buying and selling products entirely at their own risk, online arbitration gives consumers and businesses a means to resolve disputes that, in many cases, would otherwise go unresolved. Thus, online arbitration agreements should not violate Chinese public policy under the New York Convention in the absence of conflicting decisions issued to resolve the same dispute.

b. United States

The public policy defense has been asserted to challenge both the recognition and the enforcement of arbitral awards in U.S. courts. However, it has had very limited success. Indeed, American courts consider it applicable only “when ‘enforcement would violate the forum state’s most basic notions of morality and justice.’”107

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104. *Id.*
106. *Id.*
Accordingly, American courts have construed the defense exceedingly narrowly to foster the Convention’s pro-arbitration purpose.108 Thus, “an arbitration clause governed by the New York Convention will be unenforceable for public policy grounds only if the party opposing the clause can demonstrate that the public policy at issue is stronger than the already strong public policy favoring international arbitration.”109

The applicability of the public policy defense was muddled by the assertion of the defense in conjunction with the “null and void” defense under the Convention.110 That is, contracts requiring arbitration as well as awards made pursuant to them have been challenged in the United States – with varying degrees of success – as null and void on the grounds that their recognition and/or enforcement would violate public policy.111 While the defense was generally unsuccessful, some courts found the defense applicable to render contracts void as against public policy, primarily on the grounds that they were unconscionable.112

In the context of international arbitration, the public policy defense the New York Convention provides has only been successful when important statutory rights have been waived.113 Indeed, U.S. courts hold an arbitration agreement violates public policy under the New York Convention “only when award enforcement would violate the most fundamental notions of justice.”114 As discussed, customers engaged in cross-border, small claims commercial disputes by and large have no access to effective


110. New York Convention, art. II(3).


112. See, e.g., Carnival Corp., 573 F.3d at 1113.

113. See DiMercurio v. Sphere Drake Ins., Plc., 202 F.3d 71, 79-81 (1st Cir. 2000); Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148, 1158 (9th Cir. 2008).

justice, and a global ODR system would create a dispute resolution mechanism that not only comports with "fundamental notions of justice," but provides justice where it generally does not exist otherwise. Given this context and the extremely limited success of the public policy defense, online arbitration agreements should not be unenforceable as against U.S. public policy. Indeed, agreements that provide a fair online arbitration system for low value commercial transactions should be per se enforceable.

In spite of these obstacles, an analysis of the defenses the New York Convention provides is necessary because of the current worldwide efforts by both scholars and government officials to establish an institution to resolve international small claims (discussed in more detail infra). To add further legitimacy to these efforts, any proposed institution that purports to resolve such a dispute should, as a threshold matter, ensure any agreement between the parties that would grant the institution jurisdiction over the dispute is legally valid. Although a new, different international agreement could of course govern the institution and the disputes it would hear, the New York Convention currently controls over international arbitration agreements. To date, 147 countries have adopted the Convention. More importantly, it already provides a comprehensive legal framework for determining the validity and enforceability of arbitration agreements that drew on contracts jurisprudence from around the world. Because the New York Convention has been described as one of the most successful private international law agreements, any adopted institution should adopt its provisions, specifically, its defenses to enforcement.

IV. Promising Developments: "The Model Law"

Currently, the processes and outcome of online arbitration for small value claims are overwhelmingly one-sided in the favor of vendors because of the lack of feasible alternatives for consumers to seek legal redress. In the context of small value claims, vendors, therefore, can decide how they wish to resolve disputes with their customers guided primarily by the constraints of the marketplace.

While many forms of online arbitration exist, they are cost-prohibitive for consumers' low-value disputes. History and common sense dictate that the doctrine of *caveat emptor* is not a good policy for the consumer. Accordingly, "only after users of online marketplaces can obtain redress will the real potential of e-commerce be achieved." The international legal community has recognized this bottleneck effect that the lack of effective dispute resolution mechanisms available to consumers has had on international e-commerce. Recognizing that "the need for an appropriate legal framework that is supportive of an conductive to the practice of e-commerce has been identified as a prerequisite for the growth of e-commerce in general," a number of scholars, practitioners, policymakers, and consumer advocates have collaborated to draft legislation that would permit signatories to join an international system to provide both businesses and consumers with adequate legal redress for claims that arise out of small value international commercial transactions.

Known as the "Draft Model Law for Electronic Resolution of Cross-Border E-Commerce Consumer Disputes" (hereinafter the "Model Law"), the proposal outlines a promising legal solution to foster the establishment of a global ODR system that will effectively resolve low-value transnational consumer disputes. (The specifics of the system itself and how, exactly, it would be implemented are


still being formulated.122) The Model Law would provide "a central clearinghouse, which, in conjunction with national consumer authorities and national administrators, maintains a single database of certified ODR providers . . . and acts as the central focal point for electronic communication among the parties.123 The arbitral proceeding the Model Law contemplates is basic arbitration simply performed online: the ODR provider picks a third-party neutral, who then issues a binding final decision based on the evidence and information that the parties submit electronically. Accordingly, every party who resolves their dispute through any institution governed by the Model Law will do so in the same jurisdiction — the Internet — and should therefore be subject to the personal jurisdiction of every signatory state to the Model Law, though it is unclear whether this is the case.124

The Model Law draws significantly from the experience and success eBay and PayPal have had with their online dispute resolution procedures.125 The ODR process begins with the "Initiation/Negotiation" phase where the buyer fills out a form describing the dispute/complaint. This is most promising aspect of the Model Law in that upwards of an estimated 80% of consumer complaints could feasibly be resolved at this stage, which is conducted entirely through the use of software and technology.126

122. See generally Rule et al., supra note 5, at 59.
123. Id. at 68.
124. Courts around the world have taken varying approaches to analyzing and asserting personal jurisdiction over foreign parties attempting to avoid enforcement of arbitral awards issued against them. Thus, whether issues of personal jurisdiction would present obstacles to enforcement of the agreements this paper contemplates is beyond its scope. For a discussion as to why personal jurisdiction should not be a threshold issue for courts enforcing awards under the New York Convention, see generally James E. Berger & Charlene Sun, Personal Jurisdiction and the New York Convention, available at www.kslaw.com/.../7-12ABAInternationalLitigationBerger Sun.pdf. The Internet offers a delocalized venue that should allay the concerns courts have in asserting jurisdiction over foreign parties in enforcing arbitral awards. Any proposed international legislation to establish a global ODR system should explicitly provide that all parties to agreements it covers are subject to the system's jurisdiction to avoid any potential jurisdictional issues.
126. See Steve Abernethy, Building Large-Scale Online Dispute Resolution &
This offers impressively low costs with high speed, efficiency, and consumer satisfaction. Part of the reason these aspects of ODR are possible is due to the fact that a significant amount of commercial e-disputes arise over issues concerning payment. The positive experiences countless individuals and companies have had with "chargebacks"\(^{127}\) suggest that they would be an important enforcement mechanism for a global ODR system.\(^{128}\)

Under the Model Law, if initial negotiation is unsuccessful, arbitration is the next option.\(^{129}\) The arbitral proceeding the Model Law contemplates is simply arbitration performed online: the ODR provider picks a third-party neutral, who then issues a binding final decision based on the evidence and information that the parties submit electronically.

There are a number of aspects of the Model Law that will provide consumers with significantly more protection for their online transactions than they currently receive. First, statistical and substantive evidence relating to ODR providers will be compiled and released annually.\(^{130}\) This will feasibly diminish the power of "repeat players" (i.e., parties that are involved in numerous, similar arbitrations), which is a recurring problem in commercial arbitration.\(^{131}\) Second, signatories to the Model Law will implement commonly agreed upon and reciprocal procedures that will control how the entire process occurs.\(^{132}\) Third, ODR providers will be required to report on every case and the national consumer protection authorities from member states will monitor and review

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130. Id. at 12.


132. Rule et al., supra note 5, at 12.
the processes to ensure compliance.\(^{133}\) Fourthly, the Model Law contemplates the process to be free for consumers.\(^{134}\)

All of these attributes of the Model Law will help to foster a global online marketplace and will give consumers a viable, effective option to resolve their transnational commercial e-disputes. To further these goals, the New York Convention should be revised to ensure that awards made pursuant to the Model Law are fully enforceable under it. The Model Law must also explicitly provide contracts made pursuant to e-signatures are valid and enforceable to ensure its applicability to them. Most importantly, China must change its stance on the commercial reservation and provide business-to-consumer contracts are fully enforceable under the New York Convention. In conjunction with the New York Convention, the added security the global ODR system the Model Law aims to establish will provide both consumers and businesses will allow the e-economy to maximize consumer satisfaction and businesses' profits around the world.

V. Conclusion

E-business is only going to continue to grow, but it will not reach its full potential provided consumers have a viable method of seeking redress for disputes with vendors. Online arbitration is a low-cost and efficient procedure that will effectively resolve the vast majority of disputes that arise from transnational e-commerce. However, there is currently no feasible or realistic option aside from ODR for consumers engaging in transnational e-commerce to achieve redress for disputes. The Model Law offers the most promising solution for establishing a global system that will give consumers, wherever they are located, the means to resolve disputes with vendors around the world. Similarly, businesses will be able to confidently assure their clients that any dispute that may arise between them will be resolvable, which will boost consumer confidence in vendors' favor. By revising the New York Convention to ensure awards made pursuant to the Model Law are enforceable, the international community will replace the current vacuum of consumer confidence in transnational commercial transactions with an effective dispute resolution model that will be available to any

\(^{133}\) Id. at 13.

\(^{134}\) Id. at 12.
consumer with an internet connection. Only with this added security will the international business community and consumers be able to fully harness everything that the Internet has to offer.