The Texture Study of Commercial Arbitration Rules in China from the U.S. Perspective

Sanghan Wang*

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Introduction

Since China began its economic reforms in the late 70s, foreign investment in China has reached over US$ 80 billion, with more than 134,000 joint ventures and wholly foreign owned enterprises.[1] With the

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* Columbia University School of Law

1) 1994 World Bank Investment Report. *See also*, Liu Litian, *Helping Each Other, Benefitting Each Other, and Developing Together*, Peoples Daily (Overseas Edition), Dec. 20, 1994, at 2.

increase in foreign investment and international transactions has been a corresponding increase in the number of international commercial disputes between Chinese and foreign parties. The number of international disputes arbitrated in China has nearly tripled in the past three years. Over 700 new cases were recorded last year, compared with approximately 500 in 1993 and 270 in 1992.[2] Presently, Chinese arbitration rules are scattered among 14 laws, 82 administrative regulations and 190 local laws.

China started its international commercial arbitration practice in 1956, with the establishment of the Foreign Trade Arbitration Commission (FTAC), renamed the China International Economic and Trade Arbitration Commission (CIETAC) in 1989. CIETAC is the only arbitration commission handling foreign related commercial arbitration in China. China has endorsed international arbitration as a means of dispute resolution in an effort to create a legal framework for foreign investment. The Law of the PRC on Sino-Foreign Joint Equity Enterprises as well as the Foreign Economic Contract Law of the PRC specifically recognizes the right of parties to agree to resolve their disputes through arbitration.[3]

Since then, several organizations in the Chinese government have taken steps to facilitate the increasing number of arbitrations in the PRC. The National People's Congress adopted the final Civil Procedure Law in 1991, which included a number of Articles related to international arbitration. CIETAC adopted Articles of Association and Ethical Rules for its arbitrators in 1993. The China Council for the Promotion of International Trade (CCPIT) adopted new arbitration rules

2) *Arbitration Disputes Triple in Three Years*, South China Morning Post, p.4 (Dec. 1, 1994).

3) Katherine Lynch, *Special Report: Scrutinising Justice in Asias Arbitration Centres*, 2 Asian Law Journal 9, at 10. (1994).

in 1994. And, finally, the National People's Congress adopted the new Arbitration Law which became effective in 1995. The intention of the new law is to harmonize the arbitration rules, standardize existing arbitral practice and conform it to international norms. The law, which comprises 80 articles, applies to domestic and foreign-related arbitration proceedings. It will govern hearings in the China International Economic and Trade Commission (CIETAC) as well as those conducted under the auspices of the local commissions of the State Administration of Industry and Commerce (SAIC). With respect to CIETAC proceedings, the new law includes an entire chapter (Chapter VII) on foreign-related arbitration. In addition, the Law introduces a new national arbitration organ, the China Arbitration Association (CAA), which will be a non-governmental organization to supervise all arbitration commissions (including CIETAC) and enforce self-discipline among the arbitration commissions. CIETACs original function was to administer disputes between foreign companies and Chinese legal persons. The new Arbitration Law expands CIETACs jurisdiction to also include disputes between foreign companies themselves.

Alongside the international dispute-oriented arbitration system is the domestic economic contract arbitration system which is run by the Economic Contracts arbitration Commissions, administrative organs managed by he State Administration of Industry and Commerce and its local offices. As a matter of practice, it is generally considered compulsory to take domestic economic contract disputes, which do not involve international elements, to arbitration. If the losing party is not satisfied with the award, it can appeal to the superior body of the original arbitral body that made the first award. After this the party also has the right to initiate a lawsuit with a court.

Also, there are other special arbitration systems specifically for

dealing with labor disputes, copyright infringements, technology contracts and securities disputes. These systems are administrative and government controlled. There is also a separate China Maritime Arbitration Commission which is empowered to make awards on maritime disputes involving a foreign party.

This paper will briefly examine and outline the various procedures, special problems and recent developments in Chinese arbitration. In particular, it will concentrate on foreign-related arbitration and its shortcomings and offer some suggestions for improvement.

CIETAC Rules of Procedure

The Arbitration Law provides that arbitration may only be commenced if the parties have concluded an agreement to arbitrate.[4) CIETAC proceedings are initiated by a claimants submission of a written application. The application must include a copy of the arbitration agreement, which provides the basis for CIETACs jurisdiction over the matter, as well as the facts of the case and the main points of dispute; the claimants claim and the relevant documentary evidence on which his claim is based; the source of the evidence and the names and addresses of witnesses. [5)] The claimant must also appoint an arbitrator or request that one be appointed and pay the arbitration fee in advance to the arbitration commission (a sliding percentage of the amount in dispute).

The agreement to arbitrate must be in writing and may take the

4) Arbitration Law of the PRC, *promulgated on August 31, 1994, effective on September 1, 1995*, by the 9th Session of the Standing Committee of the 8th National People's Congress, Art. 4.
5) *Id.* Art. 21 and Art. 23.

form of an arbitration clause in the contract or some other written form that qualifies as an agreement to arbitrate (such as an application for arbitration by one party and an affirmative response by the other party). If there is no provision for the arbitrable matters or the arbitration commission, or such provisions are not clear in the contract, and the parties are unable to reach an agreement, the arbitration agreement will be deemed void.[6] According to the Arbitration Law, if the parties have concluded a valid arbitration agreement, the people's courts may not hear the case. If one party brings an action to the people's court, and the other submits the arbitration agreement to the PRC court prior to the first hearing, then the court must dismiss the case.[7]

Arbitration can be conducted in Beijing, where CIETACs head commission is located, or in Shanghai or Shenzhen, where there are subcommissions. Upon the request of the parties, and with the consent of CIETAC, arbitration can also be conducted in other parts of China.

After CIETAC determines that the application is complete and it has proper jurisdiction over the matter, the secretariat of the Arbitration Commission will send notice and a copy of the claimants application, the official Arbitration Rules, a list of arbitrators and the arbitration fee schedule to the respondent.[8] Twenty days after the receipt of the notice, the respondent must appoint an arbitrator from the approved list or authorize the chairman of the arbitration commission to do so.[9] The respondent also has 45 days to submit his

6) *Id.* Art 18.
7) *Id.* Art. 26.
8) China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules, *adopted on* March 17, 1994, by the First Session of the Standing Committee of the Second National Congress of the China Council for the Promotion of International Trade (China Chamber of International Commerce). Art. 15.

defence and documentary evidence and 60 days to file a counterclaim and pay arbitration fees associated with the counterclaim.[10]

After each party selects an arbitrator from the list, both parties either jointly select or have the Chairman of CIETAC select the chief arbitrator.[11] (This procedure is similar to the United States AAA rules for a tripartite arbitration.) The three member arbitral tribunal then fixes a date for a hearing and notifies the parties at least 30 days prior to the date.[12] The arbitration hearings are confidential unless both parties request a hearing to be held in an open session.[13] The parties must submit evidence in support of their positions either in writing or at the hearings, and the arbitration tribunal may conduct its own investigations and collect evidence and appoint experts on its own initiative.[14] Contrary to domestic court procedure which forbids foreigners from representing clients in court, a party may be represented by either Chinese or foreign attorneys.[15]

According to one account, fact-finding dominates the arbitral process.[16] In fact, they commented that there seems to be little questioning of one side by counsel for the other and that the tribunal has an overemphasis on "seeking truth through facts".[17] CIETAC awards rarely contain detailed discussions of the application of specific legal principles and instead are generally based on what the tribunal

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9) *Id.* Art. 16
10) *Id.* Art. 17 and Art. 18.
11) Arbitration Law, Art. 31.
12) Arbitration Rules, Art. 33.
13) Arbitration Law, Art. 40.
14) *Id.* Art. 43.
15) Arbitration Rules, Art. 22.
16) Stanley B. Lubman and Gregory C. Wajnowski, *International Commercial Dispute Resolution in China: A Practical Assessment*, 4 The American Review of International Arbitration 107, 138 (1994).
17) Lubman, *supra* note 16, at 128.

has decided is a fair and reasonable solution from its analysis of the facts of the case.[18] The emphasis on fact-finding also makes the proceedings more difficult when the Chinese parties possess a low level of legal sophistication. If the tribunals are passive and allow the parties to present competing versions of the factual and legal issues without probing the parties about disputed facts, this passivity may combine with the foreigner's difficulty in gathering facts from an often impenetrable Chinese bureaucracy.

For example, according to the foreign claimant in an arbitration dispute over defective canned foodstuffs, the arbitrators viewed the hearing as an occasion for assembling all statements about any of the facts in the case, but applied no standard of relevance nor did the arbitrators question irrelevant and unsubstantiated statements by the respondent. Apparently conclusory denials by the respondent were treated on the same level as substantiated evidence offered by the claimants.[19] However, CIETAC is not alone in international arbitration institutions in not providing clear rules of procedure. UNCITRAL also does not provide detailed evidentiary rules nor does it clarify a specific standard of proof.

As for issues involving choice of law, the CIETAC rules provide no guidance on the law to be applied by the arbitrators to a commercial dispute and Chinese law also adopts the view that parties have autonomy in choosing the applicable law in international contacts (Except in the case of foreign direct investment where Chinese law must be applied to joint ventures in accordance with the Law of the PRC on Sino-Foreign Joint Equity Enterprises.).[20] Under UNCITRAL

18) *Id.*
19) *Id.* at 140.
20) Foreign Economic Contract Law of the PRC, Art. 5 at φ-550(5).

rules, if there is no choice of law clause specified in the contract, the arbitrators decide on the appropriate substantive law to be applied to the dispute.[21] China's Supreme People's Court has established conflicts rules which are generally based on the most significant contacts involved in the transaction and are applied when the parties have not provided for a choice of law clause in the contract.[22]

One further complication arises when unpromulgated or internal rules which are unpublished are invoked in contract disputes. The phenomenon of unpublished laws which nonetheless are binding on transactions is not unique to China. The Soviet Union also had a practice of applying law to which no one had access. Although in an effort to ease trade disputes with the United States, the Chinese foreign trade ministry, MOFTEC, has publicly committed itself to promulgating previously internal rules, CIETAC has not refused to apply such internal rules in disputes and it is likely that parties with access to such rules will continue to invoke them in arbitration proceedings.[23]

Conciliation

One main feature of arbitration in the PRC is that conciliation is an integral part of the process. Conciliation may be conducted as a separate procedure or as part of the arbitration process.[24] Both parties

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21) J Stewart McClendon, *Arbitration Clauses in International · Contracts*, International Handbook on Commercial Arbitration, 1994, at 133.

22) Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law, *reprinted in* CCH at φ -555.

23) James V. Feinerman, *The Quest for GATT Membership*, 1992 China Bus. Rev., May-June, at 24-27

24) Ma Rui, *Alternative Forms of Dispute Resolution in Chinese Commercial Transactions*, New Zealand Law Journal, May 1994, at 188.

must agree to conciliation that is conducted during arbitration.[25] The Beijing Conciliation Center was established in 1987 solely for the purpose of conducting conciliation between claimants and respondents with disputes in China. Currently, about 50% of arbitration cases brought before CIETAC are concluded by conciliation.[26]

Articles 46 - 51 of the Arbitration Rules specifically authorize the tribunal to conduct conciliation during the arbitral process. If the parties agree to settle their dispute through conciliation, the arbitrators would make an agreement of settlement or an award. These documents are equally enforceable. However, if either party changes their mind about the agreement of settlement before signing for receipt of the document, the arbitrators will make an award on the dispute based on their own judgment.[27]

Summary Procedure

These simplified procedures are applicable to all disputes involving less than RMB 500,000 and to disputes involving larger amounts where both parties agree.[28] The Arbitration Commission appoints a single arbitrator to hear the case, or an arbitrator that the parties both agree upon.[29] The time for the respondent to submit his defence and evidence as well as any counterclaims is shortened to 30 days from the receipt of notice of arbitration.[30] It is also at the

25) Arbitration Rules. Art. 46.
26) Robert C.H. Lee, *Arbitration in the PRC: Now a Viable Option? CIETAC's New Rules Make Arbitration More Effective and Efficient*, East Asian Executive Reports, Vol. 16, no. 9, Sept. 15, 1994, at 6.
27) Arbitration Law Art 51.
28) Arbitration Rules. Art. 64.
29) *Id.* Art. 65.
30) *Id.* Art. 66 and Art. 68.

discretion of the sole arbitrator to hear the case only on the basis of written materials or to hold an oral hearing in addition to written materials and evidence.[31] If a hearing is held, the parties will receive only 10 days notice and generally only one hearing will be held unless it is determined that two hearings are necessary.[32] If one of the parties does not comply with the summary proceedings, the arbitrator nonetheless has the ability to render an arbitral award.[33] An award must then be made within 30 days of the date of the hearing, or if the case is examined on the basis of written materials, within 90 days from the appointment of the arbitrator.[34] The United States AAA has similar expedited arbitration procedure for claims that do not exceed $25,000. Those procedures also have set time limits on scheduled hearings, reduced time limits for rendering awards, and telephone notice rather than written notice.

Qualifications of Arbitrators

Until 1989 all appointed arbitrators were Chinese residing in the PRC, but in that year 13 non-Chinese were added as part of Chinas efforts to make CIETAC arbitration more international and attractive to foreigners. Of these, nine were Hong Kong Chinese, Three American and one Singaporean. In 1994 the number of arbitrators not residing in China were expanded to 87. CIETAC selects the arbitrators based on their level of education, their experience in law, and recommendations from CIETAC members. The Chairman's Council of CIETAC interviews all potential arbitrators.

31) *Id.* Art 67
32) *Id.* Art. 69 and Art. 70.
33) *Id.* Art 71.
34) *Id.* Art. 73.

To be engaged as an arbitrator, at least one of the following five criteria must be satisfied:

(1) have been engaged in the arbitration business for eight years;

(2) have practiced law as an attorney for eight years;

(3) have been a judge for eight years;

(4) have been involved in legal research and teaching and have a senior professional title;

(5) be a businessperson with legal knowledge and senior professional titles or the equivalent.[35]

As stipulated in Article 15 of the law, all arbitration commissions are members of the China Arbitration Association which is a self-regulating organization of arbitration commissions. The Association has the right to supervise and discipline arbitrators.

The new Arbitration Law represents a substantial improvement over the 1994 CIETAC rules with respect to the grounds for mandatory withdrawal of arbitrators and challenges to the sitting of arbitrators. The Law provides that an arbitrator must withdraw and parties have a right to challenge an arbitrator in any one of the following situations:

(1) the arbitrator has a material or personal interest in the case;

(2) the arbitrator has a relationship with a party or his agent which may affect the impartiality of the arbitration; or

(3) the arbitrator has met privately with a party or agent of the party or has accepted an invitation to entertainment or a gift from a party or agent.[36]

35) Arbitration Law. Art. 13.
36) *Id.* Art. 34.

These provisions set forth concrete situations, unlike the Arbitration Rules which state that a party that suspects an arbitrator of impartiality must submit a written request for removal to the Commission stating the reasons. In addition there is the possibility of the arbitrator incurring legal and possibly criminal liability as well as being removed from the list of the Commission's arbitrators.[37] In the event of any dispute pertaining to an arbitrator's conduct, the chairman of the Arbitration Commission decides whether the arbitrator should be removed.[38]

CIETAC adopted the Ethical Rules for Arbitrators on April 6, 1993.[39] The Ethical Rules provide seventeen specific standards of conduct for the arbitrators. Most importantly the rules include:

(1) if an arbitrator has previously discussed a case with a disputing party or has provided advice to one of the parties, that arbitrator may not serve as an arbitrator in that case;

(2) except during mediation proceedings, an arbitrator may not meet with a party to discuss the case unless the other party is present;

(3) when arbitrators hold a hearing they should: (a) avoid partiality; (b) pay close attention to the form and method of posing questions and expressing opinions; (c) avoid reaching premature conclusions regarding key issues; and (d) avoid disputes or confrontation with the parties;

(4) the arbitrator should voluntarily withdraw from a case if he is a relative of a party, or has a relationship with a party involving a debt, property, money, business or commercial

37) Arbitration Law. Art. 38.

38) *Id.* Art. 36.

39) Huang Yanming, *The Ethics of Arbitrators in CIETAC Arbitrations*, Journal of International Arbitration 5, (1994).

cooperation.

Arbitration with a Foreign Party - Jurisdiction

CIETAC itself determines whether it will exercise jurisdiction over a dispute after an application has been submitted.[40] CIETAC's jurisdiction applies to domestic arbitration and also extends to arbitrations arising from disputes arising from economic, trade, transportation and maritime activities involving a foreign element.[41] Chapter VII, Articles 65-73 specifically deal with foreign-related arbitration. The disputes can be between foreign parties, a foreign and a Chinese party or solely Chinese parties.[42] The new Arbitration Law and Rules clarify jurisdictional questions for disputes involving Hong Kong or Taiwanese parties. Because China considers both Hong Kong and Taiwan as part of China, there had been uncertainty as to whether CIETAC would look to the identity of the parties or to the international or foreign nature of the dispute itself. Another difficulty for foreign investors is that joint ventures and wholly foreign owned enterprises in China are treated by the government as Chinese legal persons because they have registered with the authorities. Therefore, they are ineligible for international arbitration and must either litigate in the people's court's or submit to domestic arbitration. According to Tang Houzhi, Vice-Chairman of CIETAC, the debate in China over the future status of such enterprises will likely be resolved by the Chinese government within the year.[43]

The new Law empowers the Chinese Chamber of International

40) Arbitration Law. Art. 24.
41) *Id.* Art. 65.
42) *Id.* Art. 65 and Arbitration Rules. Art. 2.
43) *Arbitration Disputes Triple in Three Years, supra* note 2, at 4.

Commerce to organize the foreign-related Artibration Commission.[44] CIETAC is currently the only foreign-related arbitration commission and approximately half of its disputes involve joint-ventures in China and international import-export trade.[45]

Disputes involving government departments, however, are expressly excluded under the new law. Administrative disputes are not subject to arbitration. Such disputes may be submitted to the administrative tribunals of the Peoples Courts pursuant to the 1989 Administrative Procedure Law. In addition, marital, adoption, guardianship, support and succession disputes may not be arbitrated but instead must be handled by the people's courts.[46]

The State Council Securities Policy Committee appointed CEITAC to arbitrate over securities disputes. The types of disputes that can be settled through arbitration are limited to those among institutions or those between institutions and trading centers. Generally, Chinese courts do not have the expertise in terms of knowledge of the securities industry, integrity, fairness and transparency to handle securities disputes. Also courts have not had the chance to develop their own expertise, personnel or precedence in relation to foreign trade and investment matters.[47] Gao Xiqing, general counsel and director of public offerings at the China Securities Regulatory Commission (CSRC), China's securities market regulator, commented that China's courts lack the expertise and experience to deal with securities cases. In response, the CRSC is requiring all securities institutions to include a mandatory arbitration clause in any contract or agreement.[48]

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44) Arbitration Law. Art. 66.

45) Chi Shaojie, *Arbitration Mechanism to be Updated in China*, International Business Lawyer January 1995, at 18.

46) *Id.* Art. 3(1) and (2).

47) Dede Nickerson, South China Morning Post, February 16, 1995.

Awards

In general, a party to an arbitration proceeding under CIETAC may not institute legal proceedings in any Chinese court, other than to seek enforcement of an award.[49] Arbitration awards made by CIETAC are final and not subject to change or reversal by a court.[50] The majority of the tribunal renders the award. If there is no majority, then the chief arbitrator will decide the award.[51] During the course of the proceedings, the tribunal may also make an interlocutory or partial award on any issue at any time in the case.[52] The tribunal would apply to a local people's court for an order for interim relief.

In an effort to speed up the arbitral process, the new Arbitration Rules call for an award to be rendered within 9 months after the tribunal is formed.[53] In making the award, the tribunal will state the reasons upon which the award is based unless the award follows from a settlement agreement.[54] Article 53 gives the general basis from which the tribunal determines its award including: the facts of the case; the law and the terms of the contracts; international practices; and the principle of fairness and reasonableness.

Although CIETAC awards are confidential a few have been published recently. Mostly, the awards are likely to be very brief and conclusory rather than showing a legal analysis of the facts based on

48) Christine Chan, *Arbitration Rules Set for Securities*, South China Morning Post, October 15, 1994, at 3. *See also: Investors Should Avoid Chinese Courts*, USA Today (wire report), November 4, 1994, at 5A.
49) Arbitration Law. Art. 5 and Art. 62.
50) *Id.* Art. 9.
51) *Id.* Art. 53.
52) Arbitration Rules. Art. 52.
53) *Id.* Art. 52.
54) *Id.* Art. 54.

applicable law.[55] One observer suggested that the stated reasons are likely to be grounded in the facts and may not refer to applicable legal rules at all.[56] Another has noted that CIETAC is most concerned with balancing the equities and does not subsume the facts of the dispute under rules of law or international practice.

Judicial Review of Awards

The new Arbitration Law contains provisions that cover the judicial review of arbitration awards. These provisions supplement but do not displace, related provisions on domestic and foreign-related arbitration in the 1991 Civil Procedure Law. According to Article 58, parties seeking to set aside either domestic or foreign-related arbitration awards may only do so before the intermediate people's court at the place where the arbitration commission is located. This strict venue provision is different from the requirements to enforce an award (application to the people's court where the losing party resides). It appears as though this is intended to provide some control over the spurious rejection of arbitral awards by the people's courts in local regions.

Article 58 and 61 of the Arbitration Law grants courts the authority to set aside a CIETAC award under certain circumstances. The Article also permits, but does not require, a court to request the CIETAC tribunal to re-arbitrate the matter. If the tribunal refuses the court's request, the court's authority appears limited. The court may set aside an award, but does not have the power to make a

55) *Selected Awards of CIETAC (1963-1988)*, Publishing House of the People's University of China (1993).
56) Lubman, *supra* note 16, at 145.

modification. Thus, if the court believes that the award should be modified rather than set aside in its entirety, but CIETAC refuses to re-arbitrate the matter, the court is essentially powerless to modify the award.

The grounds for setting aside domestic arbitral awards differ from those for foreign related awards. Article 217 of the Civil Procedure Law sets out the circumstances for domestic awards, while those for foreign related awards are not mentioned. Chapter VII on foreign-related arbitration of the Arbitration Law simply states a reference to Article 260 of the Civil Procedure Law. This separation between domestic and foreign related awards has one very important consequence for foreign business. In the case of domestic awards, a people's court may deny the execution of an award on the grounds that the law was incorrectly applied. For foreign related awards, including CIETAC awards, there is no provision for judicial review of errors made by an arbitration tribunal. The grounds for vacating foreign-related awards are based on international practices embodied in Article V of the New York Convention and Article 34 of the UNCITRAL Model Law on International Commercial Arbitration.[57]

Validity of Arbitration Agreements

The Arbitration Law, Foreign Contract Law, and the Arbitration Rules all state that the arbitration clause exists independent of the other clauses contained in a contract. Furthermore, they provide that any modification, rescission, termination or revocation of the contract in dispute does not affect the validity of an arbitration clause or

57) Donald Lewis, *New Arbitration Law Brings Order to Dispute Settlement*.Asia Law 19, Nov. 1994, at 21.

agreement.[58)]

Under the new Arbitration Law, challenges to the validity of an arbitration agreement may be lodged with either an arbitration commission or the people's court. The latter has the power to make the final ruling.

The arbitration agreement will be void if any of the following situations exists:

(1) the agreed matters for arbitration exceed the scope of arbitrable matters as a matter of PRC law;

(2) one party has no civil capacity or limited civil capacity; or

(3) one party was coerced into signing the arbitration agreement.[59)]

The voidablility of arbitration agreements for lack of capacity is of special concern to a foreign company because under Chinese law, only those Chinese companies which have been approved by the government have the capacity to conclude foreign-related commercial contracts. Also, such companies may only operate within their registered scopes of business, otherwise the contracts they conclude will be invalid. Despite the principle of severability of arbitration clause and contract under the Arbitration Law and 1994 Rules, if the contract were declared void due to lack of capacity the arbitration clause would also be void.[60)]

Enforcement

Although the new Arbitration Law includes sections on the

58) Arbitration Law. Art. 19. and Arbitration Rules. Art. 5.

59) Arbitration Law. Art. 17.

60) Chew Farn Chyi, *New China Law on Commercial Arbitration*, Business Times. Feb. 9. 1995. at 11.

recognition and enforcement of domestic and foreign-related awards, these provisions add little to existing law. The new law refers to the Civil Procedure Law, and it is to that Chinese law that foreign investors have to look for guidance on the enforcement of arbitral awards.

China ratified the New York Convention in 1987 (with reciprocity and commercial reservations[61] *See also*, Joseph D. Pizzurro and Miriam K. Harwood, *Seeking Statisfaction of Arbitral Awards Issued Overseas: Foreign States Present Special Problems*, New York Law Journal, May 23, 1994, at S2.). Therefore, all CIETAC arbitral awards may be enforced against foreign parties pursuant to the terms of the convention. The recognition and enforcement of foreign arbitral awards in China is limited to awards made in other contracting states to the New York Convention, and awards made in states with which China has entered into a bilateral treaty concerning enforcement of awards. When a party seeks to enforce the award in the foreign country, it need only provide a duly authenticated original award or a duly certified copy thereof, as well as the original arbitration agreement or duly certified copy. However, if the non-prevailing party in the arbitration can prove the existence of at least one of the situations in which enforcement may be denied under Article 5 of the New York Convention, the foreign court may refuse to execute the arbitration award.[62]

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61) The commercial reservation means that the provisions of the New York convention cover only commercial disputes between parties, non non-commercial disputes such as administrative disagreements between foreign investors and PRC government ministries.

62) The five situations include: (1) invalid arbitration agreement; (2) no proper notice of the appointment of the arbitrator or of the arbitration proceedings, or unable to present the case; (3) the award rendered is beyond the scope of the submission to arbitration; (4) the arbitration procedure is not in accordance with the arbitration agreement; or (5) the award is not binding.

If the prevailing party in a foreign arbitration proceeding seeks to enforce the award in the PRC, the time limit for enforcement of an award when either of the parties is an individual is one year.[63] However, if neither party is an individual, the time limit is six months. This time period begins on the last day of the fixed period of time under which the award was executed. The United States allows a party to enforce an award within three years and the United Kingdom allows six years. The PRC period of time for filing an enforcement application is very short.

The party seeking enforcement should file an application for enforcement with the intermediate level Chinese court in the opposing party's locality, or the place where the property which is the subject of the enforcement action is located.[64]

If one party fails to perform the arbitration award, according to the new Arbitration Law, the other party may apply to the people's court where the losing party is located for enforcement. The people's court can rule to set aside the award if one of the circumstances of Article 217 of the Civil Procedure Law exists:

(1) there is no arbitration clause in the contract nor subsequent written agreement;

(2) matters decided in the award are beyond the scope of the agreement or are beyond the scope of the arbitral authority;

(3) the formation of the arbitral tribunal was not in accordance with the statutory procedure;

(4) the main evidence for ascertaining the facts was insufficient;

(5) the application of law was incorrect; or

(6) the arbitrators have committed embezzlement, accepted

63) Code of Civil Procedure, Ch. 21, Art 219.
64) *Id.* Ch. 29, Art. 269.

bribes, or made an award that perverted the law.

If a Chinese court decides not to enforce a CIETAC award, the parties may either re-arbitrate their case or commence judicial proceedings. However, in cases where a court denied enforcement because of the arbitration tribunal's composition, or because the award is contrary to the Chinese social and public interest, it is not clear whether Article 257 of the Civil Procedure Law grants a court jurisdiction. In addition, there are no provisions under the New York Convention or China's Civil Procedure Law which provide a remedy if a Chinese court refuses to enforce a foreign arbitration award pursuant to Article 5 of the New York Convention. Thus, it is unclear what remedy would be available other than an appeal to a higher Chinese court.

Foreign arbitral awards not governed by a convention or a bilateral treaty may be enforced upon application to the relevant people's court pursuant to Article 269 of the CPL. This article provides that foreign arbitral awards may be recognized and enforced by the Chinese people's court upon application by the foreign party on the basis of the principle of reciprocity. It is interesting to note that under Article 260 of the Civil Procedure Code which covers the setting aside of awards made by the foreign-related arbitration institution of the PRC, the court may also refuse to enforce an award for lack of notice to the opposing party or if the opposing party was unable to state his opinions due to reasons for which he is not responsible. In addition, situations (4), (5), and (6) of Article 217 for refusal of enforcement of domestic arbitration awards are not applicable to awards made by foreign-related arbitration institutions of the PRC.

Since China became a party to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, awards

obtained by a foreign party outside China against a chinese entity may be enforced by registration of the award and application to the Peoples Court to enforce the award. If one party asks a court to enforce an award while the other applies for the abrogation of the same, the court shall rule on suspension of the execution until the validity of the award is declared.[65] A party with a legally effective arbitration award from CIETAC may apply directly to a foreign court for enforcement. The party may only apply for enforcement, however, when the property subject to the award is not located in the PRC.

The first Chinese arbitration award enforced outside of the PRC was an award by CIETAC's Shenzhen Sub-Commission. This award was enforced in Hong Kong in 1989. Since then, approximately ninety arbitration awards have been enforced outside the PRC, including three in the United States.[66]

In cases where the losing party is a foreign company, the Chinese party often has to look outside China to enforce the award. One obvious place to look for assets has been Hong Kong, where the plaintiff has to apply to the Hong Kong courts for enforcement of a CIETAC award against assets in the colony. Hong Kong and China are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. The question of jurisdiction, however, will disappear once Hong Kong reverts to Chinese rule in 1997. Currently, under the Hong Kong Arbitration Ordinance (Chapter 341), section 44(1), enforcement of an award made in another convention country should only be refused in limited circumstances. The exceptions include where a party was not given the opportunity to

65) Arbitration Law. Art. 64.

66) Ge Liu and Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. Marshall L. Rev. 539, 563 (Spring 1995).

present its case and where either the composition of the tribunal or the procedure adopted was not agreed upon by the parties. Singapore is also a signatory to the New York Convention and has only within the last year had the opportunity to review and uphold a Chinese arbitration award.[67]

Most disturbing for foreign business are cases where Chinese courts have refused to enforce foreign arbitral awards against Chinese companies. In 1991, Revpower, a US-owned firm based in Hong Kong, filed an arbitration claim against SFAIC (Shanghai Far East Aero-Technology Import & Export Corporation) with the Stockholm Chamber of Commerce as provided in the arbitration clause of the contract. The tribunal rendered a unanimous award against SFAIC for $6 million plus interest in the breach of contract case. Revpower then moved to enforce the award by filing an action in the Shanghai Intermediate People's Court in Decemeber 1993. The court has refused to acknowledge the suit and has not begun proceedings and despite repeated diplomatic attempts no action has been taken by the court. In addition, SFAIC has been "secreting or divesting assets" in order to protect itself against Revpower's collection efforts.[68]

Problems and Suggestions for China's Arbitration System

(1) Due to the fact that hearings are private, arbitral awards are rarely published. The reasoning behind an award is also rarely fully explained. This makes the system less transparent and lacking in

67) Conrad Raj, *Singapore Court Upholds Chinese Arbitrators Decision*, Business Times, October 13, 1994, at 15.

68) *The Revpower Dispute: Chinese Courts Allegedly Delay Enforcement of Foreign Award*, 6 World Arbitration and Mediation Report 146, July 1995.

predictability. If the awards were published with greater frequency and detail, parties could obtain greater guidance and confidence in CIETAC's proceedings.

(2) CIETAC's caseload has increased proportionately with rising foreign investment making for delays in receiving awards. Recent amendments to CIETAC's arbitration rules requiring tribunals to give an award within nine months and an increased number of available arbitrators should help to ease the strain of an increased caseload and speed the process.

(3) Although administrative fees for CIETAC are lower than the International Chamber of Commerce or the Stockholm Chamber of Commerce, foreign parties must also engage Chinese counsel as well as foreign counsel and devote expenses to translation and communications since the proceedings are held in Chinese. Travel expenses and fees for the hiring of experts also increase the cost for a foreign disputant.

(4) CIETAC limits the amount of costs that can be recovered to 10% of the amount received by the winning party.[69] The amount may be further reduced by CIETAC's tendency to apportion fees and costs according to the award itself. Thus, if the claim is for a small amount, some costs could be unrecoverable.

(5) Friction over power between the central government and local governments has led to strong local protectionism. Provinces and counties also discriminate politically and economically against other areas of China which can lead to difficulties in enforcing judgments in the courts of the losing party's jurisdiction. In addition, since CIETAC is completely autonomous from the judicial system, CIETAC cannot enforce awards after one is issued. CIETAC has no power or means to

69) Arbitration Rules. Art. 59.

order Chinese agencies or companies to comply with its awards. Also, the foreign claimant would need to engage a local lawyer thereby increasing costs.

(6) Since most Chinese standard form contracts and Chinses negotiators insist on arbitration in China, the option of a third-country forum for dispute resolution creates concerns for the neutrality of arbitration decisions. The background and training of arbitrators is important in considering the style and approach of each to the case. Since the Chinese party and the Chairman of CIETAC are likely to choose PRC citizens as arbitrators, tribunals will mostly be dominated by Chinese arbitrators. In the event of a deadlock among arbitrators, the opinion of the chief arbitrator who is appointed by the chairman of CIETAC, will form the basis of the award. Usually, the chief arbitrator is a Chinese national and in disputes involving a domestic Chinese defendant, the partiality of the arbitrator can be questionable. On the other hand, one advantage to having Chinese arbitrators, despite the lack of cultural neutrality found in other international arbitration institutions, is that the Chinese arbitrators are more likely to understand details of the Chinese bureaucracy better than their counterparts in Paris or Stockholm.

Foreigners are generally under tremendous pressure to agree to arbitrate in China.[70] One positive development can be cited in the fact that 162 Chinese companies and associations have become members of the International Chamber of Commerce (ICC) and have pledged to promote ICC rules for the conduct of trade. Under ICC rules, foreign companies would then be able to conduct arbitration in any country, in any language and under any national law.[71] Chinese participation in

70) *China's Arbitration Law Draws Mixed Response*, South China Morning Post, Nov. 28. 1994. at 20.

the ICC may also lead to easier enforcement of ICC awards and perhaps international arbitral awards in general.

(7) CIETAC's arbitration consists largely of fact-finding rather than legal interpretation. Arbitrators sometimes appear to use arbitral hearings to assemble statements about any of the facts in the case without distinguishing evidence from conclusion, trying to limit or focus arguments, or discussing competing allegations of fact. Also, Chinese law has few procedural rules and the courts and lawyers have little experience in procedural matters. Continued exposure to international arbitration methods is probably the only remedy to this difficulty.

(8) The New York Convention allows a court to refuse to enforce an award if it would violate public policy. In China, policy, or rather politics, heavily influences the application of law by the court system.

71) Jean-Charles Rouher, *Chinese Move on Arbitration*, Financial Times, at 12 (Jan. 6, 1995)