

COMMERCIAL ARBITRATION IN HONG KONG AND CHINA: A COMPARATIVE ANALYSIS

BENJAMIN P. FISHBURNE, III* & CHUNCHENG LIAN**

1. INTRODUCTION

On July 1, 1997, Hong Kong will end its 150-year history as a colony of the United Kingdom and become a Special Administrative Region of the People's Republic of China.¹ The reversion of sovereignty will cause the people of Hong Kong to undergo profound changes in many aspects of their lives. In fact, many changes have already occurred since the signing of the Joint Declaration in 1984.²

As the time for reversion nears, the world awaits the handover with mixed feelings of excitement and anxiety. Despite China's pledge to keep Hong Kong's current capitalist system and lifestyle unchanged for the next fifty years and its willingness to grant Hong Kong a high degree of autonomy under Chinese rule,³ the international legal and business communities are concerned about Hong Kong's future as a major international commercial arbitration center. While the ultimate answer to this question may depend upon a variety of factors, this Article attempts to evaluate the future of commercial arbitration in Hong Kong by comparing the arbitration systems currently available in Hong Kong and

* Partner, Winston & Strawn, Washington, D.C.

** Senior Attorney, Winston & Strawn, Washington, D.C.

¹ See Joint Declaration on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 1985 Gr. Brit. T.S. No. 26 (Cmd. 9543) [hereinafter Joint Declaration].

² See, e.g., Keith B. Richburg, *Months Before Transfer, Hong Kong and China Already Closely Linked*, WASH. POST, Jan. 26, 1997, at A1.

³ See The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Apr. 4, 1990 [hereinafter Basic Law], reprinted and translated in [2 Special Zones and Cities 1985-1994] China Laws for Foreign Bus. (CCH) ¶ 100-010; Joint Declaration, *supra* note 1. The Basic Law will serve as the mini-constitution of the Hong Kong Special Administrative Region after the transition.

China.

2. HISTORICAL BACKGROUND AND STATUTORY FRAMEWORK

2.1. *Hong Kong*

Until the early 1980s, the law governing commercial arbitration in Hong Kong closely followed the English model.⁴ In addition to its common law tradition, Hong Kong's principle arbitration statutes were largely drawn from the English statutory provisions governing commercial arbitration.⁵ Commercial arbitrations in Hong Kong, as in London, were subject to the "special case" or "case-stated" procedure.⁶ Under the special case procedure, a court could force an arbitrator to submit a point of law for judicial determination.⁷ Arbitral awards rendered in Hong Kong, like those in England, were thereby subject to review on the legal merits by the local courts.⁸

In 1982, Hong Kong enacted a new Arbitration Ordinance as part of its ongoing legal reform.⁹ In order to make Hong Kong a more attractive venue for international arbitrations, the 1982 Arbitration Ordinance adopted many features desired by the international legal and business communities.¹⁰ Among other changes, the 1982 Arbitration Ordinance abolished the special case procedure.¹¹ In addition, the 1982 Arbitration Ordinance

⁴ See KENNETH R. SIMMONDS & BRIAN H.W. HILL, *Arbitration Law in Hong Kong*, in [Commercial Arbitration Law in Asia and the Pacific] Int'l Com. Arb. (Oceana Publications) No. 2.3, at 1 (Oct. 1990).

⁵ See *id.*

⁶ W. LAURENCE CRAIG ET AL., *Hong Kong Law*, in [International Chamber of Commerce Arbitration] Int'l Com. Arb. (Oceana Publications) No. 5, § 34.01, at 595 (Jan. 1990).

⁷ See *id.*

⁸ See *id.*

⁹ See Arbitration Ordinance, 1982, ch. 341 (H.K.) [hereinafter 1982 Hong Kong Arbitration Ordinance], reprinted in [Commercial Arbitration Law in Asia and the Pacific] Int'l Com. Arb. (Oceana Publications) No. 4, H.K.1 (Sept. 1987); CRAIG ET AL., *Hong Kong Law*, *supra* note 6, § 34.01, at 595.

¹⁰ See CRAIG ET AL., *Hong Kong Law*, *supra* note 6, § 34.01, at 595; SIMMONDS & HILL., *supra* note 4, at 1.

¹¹ See 1982 Hong Kong Arbitration Ordinance, *supra* note 9, § 23; CRAIG ET AL., *Hong Kong Law*, *supra* note 6, § 34.01, at 595. Three years earlier, in England, the Arbitration Act of 1979 abolished the "special case" procedure in order to increase London's importance as a situs for international arbitration. See W. LAURENCE CRAIG ET AL., *English Law in [International Chamber of*

distinguished domestic arbitrations and international arbitrations¹² and permitted foreign counsel to handle international arbitrations in Hong Kong on behalf of their clients.¹³ Also, for the first time, the 1982 Arbitration Ordinance listed conciliation as an alternative means of dispute resolution and permitted a conciliator to continue to serve as an arbitrator if the conciliation failed.¹⁴

In many ways, the 1982 Arbitration Ordinance represented the beginning of Hong Kong's movement away from English arbitration practice. On the other hand, the 1982 Arbitration Ordinance retained the parties' right to appeal an arbitration award to a court for judicial review and the jurisdiction of the court to determine any question of law arising in an arbitration.¹⁵ The 1982 Arbitration Ordinance, however, permitted parties to waive their right to appeal questions of law to the courts by inserting an exclusion or "vouching out" clause in their arbitration agreements.¹⁶ The provisions of the 1982 Arbitration Ordinance still apply to domestic arbitrations in Hong Kong.

Another substantial modification of Hong Kong arbitration law and further departure from English practice came with the adoption of the 1990 Arbitration Ordinance.¹⁷ Following the recommendation of Hong Kong's Law Reform Commission, the 1990 Arbitration Ordinance adopted the United National Commission on International Trade Law Model Law on International Commercial Arbitration ("UNCITRAL Model Law") as applicable law for international arbitrations.¹⁸ For domestic

Commerce Arbitration] Int'l Com. Arb. (Oceana Publications) No. 5, § 29.01, at 466-67 (Jan. 1990).

¹² See 1982 Hong Kong Arbitration Ordinance, *supra* note 9, §§ 1, 2F; CRAIG ET AL., *Hong Kong Law*, *supra* note 6, § 34.01, at 595.

¹³ See 1982 Hong Kong Arbitration Ordinance, *supra* note 9, § 20; CRAIG ET AL., *Hong Kong Law*, *supra* note 6, § 34.01, at 597.

¹⁴ See 1982 Hong Kong Arbitration Ordinance, *supra* note 9, § 2A; CRAIG ET AL., *Hong Kong Law*, *supra* note 6, § 34.01, at 596.

¹⁵ See 1982 Hong Kong Arbitration Ordinance, *supra* note 9, § 23A.

¹⁶ See *id.* § 23B.

¹⁷ See Arbitration Ordinance, 1990, ch. 341 (H.K.) [hereinafter 1990 Hong Kong Arbitration Ordinance], reprinted in Neil Kaplan & Tony Bunch, *Hong Kong*, Annex I, in 2 Int'l Handbook on Com. Arb. (Kluwer L. Int'l) Hong Kong (Aug. 1993); Kaplan & Bunch, *supra*, at 1.

¹⁸ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 34C; UNCITRAL MODEL LAW ON INTERNATIONAL ARBITRATION (1985) [hereinaf-

arbitrations, the 1990 Arbitration Ordinance retained the legal system established by earlier statutes.¹⁹ Thus, the 1990 Arbitration Ordinance created separate arbitration regimes for domestic and international arbitrations. Nonetheless, the two regimes are interchangeable. Parties to a domestic arbitration can agree to follow the UNCITRAL Model Law to resolve their dispute, and parties to an international arbitration can elect to follow the domestic arbitration system.²⁰

In addition to the legal system established by Hong Kong domestic law, international treaties form an integral part of Hong Kong arbitration law. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,²¹ to which Hong Kong became a party through the United Kingdom in 1977,²² is the most important of these international treaties. Under the New York Convention, a party to an arbitration may seek enforcement in Hong Kong courts of an arbitral award rendered in another party country.²³

The Hong Kong International Arbitration Centre ("HKIAC") was established in 1985 as a non-profit company limited by guarantee.²⁴ HKIAC is run by a management committee that is currently chaired by a High Court Judge.²⁵ Although a large

ter UNCITRAL Model Law], *reprinted in* ARON BROCHES, COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION app. A (1990); Kaplan & Bunch, *supra* note 17, at 1. For a comprehensive analysis of the UNCITRAL Model Law, see BROCHES, *supra*, and HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY (1989).

¹⁹ See Kaplan & Bunch, *supra* note 17, at 1. Compare 1990 Hong Kong Arbitration Ordinance, *supra* note 17, with 1982 Hong Kong Arbitration Ordinance, *supra* note 9.

²⁰ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, §§ 2L, 2M; Kaplan & Bunch, *supra* note 17, at 1.

²¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

²² Subject to the reciprocity reservation, the United Kingdom acceded to the New York Convention on behalf of itself in 1975 and on behalf of Hong Kong in 1977. See *New York Convention: Contracting States and Reservations* [4 New York Convention] Int'l Com. Arb. (Oceana Publications) pt. VI.4, VI.8 (July 1996); see also Kaplan & Bunch, *supra* note 17, at 43.

²³ See New York Convention, *supra* note 21.

²⁴ See Kaplan & Bunch, *supra* note 17, at 3.

²⁵ See *id.*

portion of its initial financing came from the Hong Kong government, HKIAC relies upon fees for the services that it provides in order to fund continuing operations. Therefore, HKIAC is financially independent from the Hong Kong government.²⁶ HKIAC acts as “an appointing and administrative authority . . . maintain[ing] a panel of highly qualified arbitrators” with no restriction on their nationality or residence.²⁷ The applicable arbitration rules for international arbitrations at HKIAC are the UNCITRAL Arbitration Rules.²⁸ For domestic arbitrations, HKIAC applies a set of arbitration rules adopted in 1993.²⁹ In the past few years, there has been a sharp increase in the number of cases submitted to HKIAC for arbitration.³⁰ This increase has been part of a trend that has made Hong Kong one of the major international arbitration centers in the world.³¹

2.2. *China*

On May 6, 1954, the central government of the People’s Republic of China authorized the establishment of an international commercial arbitration institution.³² As a result, the Foreign Trade Arbitration Commission of China (“FTAC”) was established within the China Council for the Promotion of International Trade (“CCPIT”).³³ FTAC was directed “to settle such disputes as may arise from contracts and transactions in foreign

²⁶ See *id.*

²⁷ *Id.*

²⁸ See *id.* For the complete text of the UNCITRAL Arbitration Rules, see UNCITRAL Arbitration Rules, Apr. 28, 1996, reprinted in 4 Int’l Handbook on Com. Arb. (Kluwer L. Int’l) UNCITRAL Arb. R. (Apr. 1993).

²⁹ See Kaplan & Bunch, *supra* note 17, at 3.

³⁰ See *id.* at 4.

³¹ See *id.* at 3-4.

³² See Decision of the Government Administration Council of the Central People’s Government Concerning the Establishment of a Foreign Trade Arbitration Commission Within the China Council for the Promotion of International Trade, May 6, 1954, § 1 [hereinafter CIETAC Establishment Decision], translated in Tang Houzhi, *The People’s Republic of China*, Annex I, in 1 Int’l Handbook on Com. Arb. (Kluwer L. Int’l) China, P.R. (Jan. 1994); Houzhi, *The People’s Republic of China*, *supra*, at 3; NEIL KAPLAN ET AL., HONG KONG AND CHINA ARBITRATION CASES AND MATERIALS 307 (1994).

³³ See CIETAC Establishment Decision, *supra* note 32, § 1; Houzhi, *The People’s Republic of China*, *supra* note 32, at 3; NEIL KAPLAN ET AL., *supra* note 32, at 307.

trade, particularly disputes between foreign firms, companies or other economic organizations on the one hand and Chinese firms, companies or other economic organizations on the other."³⁴ In accordance with this charge, FTAC promulgated its first set of arbitration rules, the Provisional Rules of the Foreign Trade Arbitration Commission of China ("FTAC Rules").³⁵ In addition, China's State Council issued a decree on November 21, 1958, authorizing CCPIT to establish the Maritime Arbitration Commission ("MAC") to handle international maritime arbitrations.³⁶

Despite the existence of FTAC and MAC, international arbitrations in China were sporadic throughout the 1960s and 1970s.³⁷ This resulted from China's international isolation, highly centralized economic system, and internal political and economic turmoil.³⁸ International arbitration practice did not become active in China until the 1980s.³⁹

The economic reform and open policy instituted by China in 1978 renewed the value of FTAC and MAC.⁴⁰ In 1980, as a part of the open policy, China amended the FTAC Rules to expand the jurisdiction of the arbitration institutions and changed the name of FTAC to the Foreign Economic and Trade Arbitration

³⁴ CIETAC Establishment Decision, *supra* note 32, § 1.

³⁵ See KAPLAN ET AL., *supra* note 32, at 307. The FTAC Rules went into effect on March 31, 1956. See Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade, Mar. 31, 1956, *reprinted and translated in* [2 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 10-500; KAPLAN ET AL., *supra* note 32, at 307.

³⁶ See KAPLAN ET AL., *supra* note 32, at 308. The Provisional Rules of the Maritime Arbitration Commission were promulgated on January 8, 1959. See Provisional Rules of Procedure of the Maritime Arbitration Commission of the China Council for the Promotion of International Trade, Jan. 8, 1959, *reprinted and translated in* [2 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 10-540; KAPLAN ET AL., *supra* note 32, at 308.

³⁷ See KAPLAN ET AL., *supra* note 32, at 309.

³⁸ See *id.*

³⁹ See Wang Sheng Chang, *A Comparative Survey of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and the Arbitration Rules of the China International Economic and Trade Arbitration Commission*, J. INT'L ARB., Dec. 1992, at 93, 96; Tang Houzhi, *Lecture, Arbitration — A Method Used by China to Settle Foreign Trade and Economic Disputes*, 4 PACE L. REV. 519, 520 (1984); KAPLAN ET AL., *supra* note 32, at 309.

⁴⁰ See Chang, *supra* note 39, at 96; Houzhi, *Arbitration*, *supra* note 39, at 520; KAPLAN ET AL., *supra* note 32, at 309.

Commission ("FETAC").⁴¹ On June 21, 1988, FETAC's name was further changed to the China International Economic and Trade Arbitration Commission ("CIETAC"), and MAC was reorganized as the China Maritime Arbitration Commission ("CMAC"), names which the two bodies retain today.⁴²

A new set of arbitration rules ("1989 CIETAC Rules") came into effect on January 1, 1989 to replace the FTAC Rules.⁴³ The drafters of the 1989 CIETAC Rules used the UNCITRAL Model Law as a guide.⁴⁴ The 1989 CIETAC Rules not only expanded CIETAC's jurisdiction, but they also permitted foreign nationals to be appointed to CIETAC's Panel of Arbitrators and allowed the parties to an arbitration to challenge arbitrators.⁴⁵ The number of cases submitted to CIETAC for arbitration increased dramatically in the late 1980s.⁴⁶ The increase resulted directly from China's explosive trade growth, although arbitration reform may have been a minor factor. Today China is one of the busiest international commercial arbitration centers in the world.⁴⁷

Despite the increasing number of arbitrations that began to take place in China, there was a continuing undercurrent of concern expressed with respect to the ability of China's legal system to deal with commercial arbitrations. The inconsistencies and conflicts of the 1989 CIETAC Rules with other legal provisions, particularly the arbitration provisions of the 1991 Law on Civil Procedure of the People's Republic of China ("Civil Procedure Law"), were cited frequently as evidence of the need for

⁴¹ See Chang, *supra* note 39, at 96; Houzhi, *The People's Republic of China*, *supra* note 32, at 3; KAPLAN ET AL., *supra* note 32, at 307.

⁴² See Chang, *supra* note 39, at 96; Houzhi, *The People's Republic of China*, *supra* note 32, at 3; KAPLAN ET AL., *supra* note 32, at 307-08.

⁴³ See Arbitration Provisions of the China International Economic and Trade Arbitration Commission, Sept. 12, 1988, art. 43 [hereinafter 1989 CIETAC Rules], reprinted and translated in [2 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 10-505; KAPLAN ET AL., *supra* note 32, at 307.

⁴⁴ See Houzhi, *The People's Republic of China*, *supra* note 32, at 2.

⁴⁵ See 1989 CIETAC Rules, *supra* note 43, arts. 4, 19.

⁴⁶ See KAPLAN ET AL., *supra* note 32, at 309.

⁴⁷ For recent statistical information, see Chi Shaojie, *Arbitration Mechanism to Be Updated in China*, 23 INT'L BUS. LAW., 16, 16 (1995) and Michael J. Moser, *China's New International Arbitration Rules*, J. INT'L. ARB., Sept. 1994, at 5, 5-6.

further reform of the arbitration system.⁴⁸

In response to the need for reform, CIETAC formed a drafting group in early 1992 to further revise its rules.⁴⁹ The drafting group studied rules used by arbitration institutions around the world, including the International Chamber of Commerce Arbitration Rules, the UNCITRAL Model Rules on International Commercial Arbitration, and the Stockholm Chamber of Commerce Arbitration Institute Rules.⁵⁰ In addition, CIETAC circulated early drafts of its revised rules among various authorities.⁵¹ On March 17, 1994 CCPIT formally adopted the revised CIETAC Arbitration Rules,⁵² which were further amended in 1995 ("CIETAC Arbitration Rules") in accordance with the Arbitration Law.⁵³

The revised CIETAC Arbitration Rules were not the only step taken by China in reforming its arbitration system. With the rapid development of domestic economic reform and international commerce, China recognized an urgent need for a comprehensive and uniform arbitration law governing both domestic and international arbitrations. To meet this need, the National People's Congress promulgated its first Arbitration Law ("Arbitration Law") on August 31, 1994.⁵⁴ The Arbitration Law became effective on September 1, 1995.⁵⁵ This legislation governs both international arbitrations conducted by CIETAC and domestic

⁴⁸ See Code of Civil Procedure of the People's Republic of China, Apr. 9, 1991 [hereinafter P.R.C. Civil Procedure Law], *reprinted and translated in* [3 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 19-201; Cheng Dejun, *Report on the Draft Amendment to the Arbitration Rules of the China International Economic and Trade Arbitration Commission*, translated in KAPLAN ET AL., *supra* note 32, at 803, 803; Moser, *China's New Arbitration Rules*, *supra* note 47, at 6.

⁴⁹ See Moser, *China's New Arbitration Rules*, *supra* note 47, at 6.

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See Arbitration Rules of the China International Economic and Trade Arbitration Commission, Mar. 17, 1994, *reprinted and translated in* [2 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 10-480.

⁵³ See China International Economic and Trade Arbitration Commission Arbitration Rules, Sept. 4, 1995 [hereinafter CIETAC Arbitration Rules], *reprinted and translated in* CHINA L. & PRAC., Dec. 1995 — Jan. 1996, at 21.

⁵⁴ See Arbitration Law of the People's Republic of China, August 31, 1994 [hereinafter P.R.C. Arbitration Law], *reprinted and translated in* [2 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 10-470.

⁵⁵ See P.R.C. Arbitration Law, *supra* note 54, art. 80.

arbitrations conducted by various arbitration commissions organized throughout the country. The newly promulgated Arbitration Law, chapter 28 of the 1991 Civil Procedure Law, and the 1995 CIETAC Arbitration Rules constitute a comprehensive and modern legal framework for international commercial arbitrations in China.⁵⁶

Along with recent legislative actions, one of the most important developments in commercial arbitration in China has been the internationalization of the CIETAC process. Prior to the promulgation of 1989 CIETAC Rules, only Chinese nationals were appointed to CIETAC's panel of arbitrators.⁵⁷ In 1989, thirteen foreign nationals were named as members of the panel.⁵⁸ Following the introduction of the 1994 Arbitration Rules, CIETAC further reorganized the panel.⁵⁹ The panel of arbitrators currently maintained by CIETAC has 296 members, including eighty foreign nationals.⁶⁰ The reorganization has been well received by international legal and business communities.⁶¹

In addition to reaffirming CIETAC's role as an independent

⁵⁶ In addition, several statutes dealing with commercial transactions and international trade and investment contain provisions concerning international commercial arbitrations. See, e.g., Law of the People's Republic of China on Sino-Foreign Co-operative Enterprises, Apr. 13, 1988, *reprinted and translated in* [1 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 6-100; The Law of the People's Republic of China Concerning Enterprises with Sole Foreign Investment, Apr. 12, 1986, *reprinted and translated in* [2 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 13-506; Foreign Economic Contract Law of the People's Republic of China, Mar. 21, 1985, *reprinted and translated in* [1 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 5-550; Law of the People's Republic of China on Sino-Foreign Joint Equity Enterprises, July 1, 1979, *reprinted and translated in* [1 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 6-500.

⁵⁷ In March, 1987, nearly two years before any foreign nationals were appointed to the CIETAC panel of arbitrators, 13 members of the CIETAC panel of arbitrators were named to the HKIAC panel. See Seth Falson, *Hong Kong Arbitrators Face Battle to Prove Their Worth*, S. CHINA MORNING POST, Sept. 22, 1987, at 2..

⁵⁸ See Moser, *China's New Arbitration Rules*, *supra* note 47, at 9. Of the 13 foreign nationals appointed to CIETAC's panel of arbitrators, eight were Hong Kong Chinese. See *id.*

⁵⁹ See *id.*

⁶⁰ See Robert C.H. Lee, *Arbitration in the P.R.C.: Now a Viable Option?*, E. ASIAN EXECUTIVE REP., Sept. 15, 1994, at 6.

⁶¹ See *China's Arbitration Law Draws a Mixed Response*, S. CHINA MORNING POST, Nov. 28, 1994, at 20.

and autonomous arbitration institution,⁶² the Arbitration Law authorized the establishment of arbitration commissions to administer domestic arbitrations in centrally-governed municipalities, capital cities of the provinces, and other major commercial and industrial cities.⁶³ Like CIETAC, these arbitration commissions operate as independent and autonomous organizations.⁶⁴ To affirm the institutional legal status of these arbitration commissions, the Arbitration Law explicitly declares that “[a]rbitration shall not be the subject of administrative jurisdiction at any level or in any region” and that “an arbitration commission shall be independent of administrative bodies and shall have no subordinate relationships with [administrative authorities].”⁶⁵

To supervise the work of the arbitration commissions, the Arbitration Law provides for the creation of the China Arbitration Association (“CAA”).⁶⁶ The CAA is a separate legal entity with all of the arbitration commissions as its members.⁶⁷ The CAA acts as a self-regulatory organization overseeing the member commissions.⁶⁸ While it is unlikely that the commissions can in the near future generate sufficient funds to attain financial independence or will have enough qualified individuals available to serve on their panels of arbitrators, they are a good beginning in the development of a formal domestic arbitration system.

In addition, China has acceded to the 1958 New York Convention, subject to the “reciprocity” and “commercial” reservations.⁶⁹ Therefore, the New York Convention forms part of Chinese law and a foreign party may seek enforcement in China of an arbitral award made in another party state under the Convention.

⁶² See P.R.C. Arbitration Law, *supra* note 54, ch. VII.

⁶³ See *id.* ch. II.

⁶⁴ See *id.*

⁶⁵ *Id.* arts. 6, 14.

⁶⁶ See *id.* art. 15.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *New York Convention: Contracting States and Reservations* [4 New York Convention] Int'l Com. Arb. (Oceana Publications) pt. VI.3, VI.5 (July 1996). China acceded to the New York Convention on April 22, 1987. See *id.*

3. COMPARATIVE ANALYSIS OF MAJOR FEATURES

As discussed in Section 2 of this Article, the arbitration systems in both Hong Kong and China have undergone extensive changes in recent years. While older laws and rules may still apply to arbitration agreements concluded before the promulgation of newer laws and rules, future arbitrations and business transactions will be governed by the recently promulgated laws and regulations. Therefore, the analysis of this Article will focus on the arbitration systems established by recent legislation and rulemaking in Hong Kong and China, with a particular emphasis on those aspects of the systems that will affect international arbitrations.

3.1. *Jurisdiction and Arbitrability*

Under both Hong Kong law and Chinese law, jurisdiction of a particular tribunal is determined by the nature of the dispute submitted for arbitration and the statutory authorization of the tribunal to hear the case. Two issues become relevant in determining jurisdiction: (1) whether the arbitration is international or domestic; and (2) whether the dispute is arbitrable under the law.

3.1.1. *International or Domestic*

Both Hong Kong's arbitration system and China's arbitration system distinguish between international and domestic arbitrations. This distinction is important because it not only determines whether a particular tribunal has jurisdiction over a dispute, but it also determines which arbitration laws and rules apply.

In Hong Kong, once an arbitration is classified as "international," the UNCITRAL Model Law and Arbitration Rules will apply, unless the parties choose otherwise.⁷⁰ If an arbitration is classified as a domestic arbitration, the 1982 Arbitration Ordinance, which is largely modeled on the English Arbitration Acts of 1950-1979, and the 1985 Domestic Rules (as revised in 1993) will apply. The parties to a domestic Hong Kong arbitration will

⁷⁰ Under Hong Kong law, parties to an arbitration agreement may agree in writing to conduct an arbitration as either an international or domestic arbitration. See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, §§ 2L, 2M.

have a right to appeal to the court after any award, unless they have expressly waived such a right by means of an exclusion agreement.

In China, if an arbitration is treated as an international arbitration, the CIETAC Rules and relevant provisions of the Arbitration Law become applicable. If an arbitration is determined to be a domestic arbitration, however, CIETAC will have no jurisdiction over the case. Instead, the local arbitration association will have control. Therefore, the specific location of the domestic arbitration will determine the applicable arbitration rules because no uniform rules have been adopted for use by local arbitration associations.

Under the Hong Kong law,⁷¹ by reference to the UNCITRAL Model Law, an arbitration is international if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.⁷²

If a party has more than one place of business, its place of business for the purpose of a particular arbitration will be that which has the closest relationship to the arbitration agreement.⁷³

⁷¹ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 2(1).

⁷² UNCITRAL Model Law, *supra* note 18, art. 1(3).

⁷³ See *id.* art. 1(4)(a).

In cases where a party does not have a place of business, reference is made to the party's habitual residence.⁷⁴

The definition of "international arbitration" under the UNCITRAL Model Law is substantially more liberal than under previous Hong Kong law. Under the 1982 Arbitration Ordinance, an arbitration would be treated as "international" only if it involved at least one party whose residence, place of incorporation, or place of central management and control was located outside Hong Kong.⁷⁵ Under the 1990 Arbitration Ordinance and the UNCITRAL Model Law, however, an arbitration will be regarded as international even if both parties are Hong Kong residents, citizens, or companies, as long as the place with which the subject matter of the dispute is most closely connected is situated outside of Hong Kong.⁷⁶

The Hong Kong High Court applied precisely this reasoning in *Fung Sang Trading Ltd. v. Kai Sun Sea Prods. & Food Co.*⁷⁷ In that case, the court found that while both parties had their places of business in Hong Kong, the fact that the goods had to be delivered in China was a substantial part of the contract obligation.⁷⁸ Because a substantial part of the underlying obligation was to be performed outside of Hong Kong, the arbitration was within the scope of the UNCITRAL Model Law.⁷⁹

In contrast, Chinese law is less liberal than Hong Kong law in determining whether an arbitration is international or domestic. The Arbitration Law does not expressly define what constitutes an international or foreign-related arbitration or commercial dispute, even though the law contains a full chapter dealing with international or foreign-related arbitrations.⁸⁰ The term "international or foreign-related" is, however, implicitly defined in the

⁷⁴ See *id.* art. 1(4)(b).

⁷⁵ 1982 Hong Kong Arbitration Ordinance, *supra* note 9, § 23B(8).

⁷⁶ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 2(1); UNCITRAL Model Law, *supra* note 18, art. 1(3).

⁷⁷ See *Fung Sang Trading Ltd. v. Kai Sun Sea Prods. & Food Co.*, 1992 (1) H.K.L. Rep. 40, 40-41. An excerpt of the opinion is reprinted in *Hong Kong*, 17 Y.B. COM. ARB. 289 (1992).

⁷⁸ See *Fung Sang Trading Ltd.*, 1992 (1) H.K.L. Rep. at 41; *Hong Kong*, *supra* note 77, at 295.

⁷⁹ See *Fung Sang Trading Ltd.*, 1992 (1) H.K.L. Rep. at 41; *Hong Kong*, *supra* note 77, at 296.

⁸⁰ See P.R.C. Arbitration Law, *supra* note 54, ch. VII.

1995 CIETAC Arbitration Rules. The CIETAC Arbitration Rules provide that CIETAC has jurisdiction to settle by means of arbitration:

economic, trade and other disputes, whether international or foreign-related contractual or non-contractual, between foreign legal persons and/or natural persons and Chinese legal persons and/or natural persons, between Chinese foreign legal persons and/or natural persons, and between Chinese legal and/or natural persons in order to protect the legitimate rights and interests of the parties concerned and promote the development of domestic and foreign economic relations and trade.⁸¹

As one commentator has observed, the language in this provision suggests that CIETAC's jurisdiction now extends not only to disputes between foreign persons and Chinese persons or between foreign persons, but also to disputes between Chinese persons as long as the dispute involves an international or foreign-related element.⁸²

The CIETAC Arbitration Rules represent an improvement upon the 1989 CIETAC Rules, which provided that CIETAC had jurisdiction to settle only "disputes which arise in areas of international economics and trade, in order to safeguard the legal rights and interests of the parties concerned and to accelerate the development of international economics and trade."⁸³ Although the CIETAC Arbitration Rules fail to define explicitly what constitutes an international or foreign-related element, they allow CIETAC the possibility of assuming jurisdiction over disputes even when both parties to the underlying arbitration agreement are Chinese persons.

The question of what constitutes an international or foreign-related element under the Arbitration Law remains. To answer that question, the Supreme People's Court interpretation of what constitute "foreign-related" civil cases seems helpful:

⁸¹ See CIETAC Arbitration Rules, *supra* note 53, art. 2.

⁸² See Moser, *China's New Arbitration Rules*, *supra* note 47, at 8.

⁸³ 1989 CIETAC Rules, *supra* note 43, § 1.

[c]ivil cases in which one party or both parties are foreigners, stateless persons, foreign enterprises or foreign organizations; or in which the legal fact of establishment, modification or termination of the civil legal relationship between the parties legally occurred in a foreign country; or in which the object of the action is located in a foreign country, shall be civil cases involving foreign parties.⁸⁴

Clearly, if the word “arbitrations” replaced the words “civil cases,” then the Supreme People’s Court interpretation would become applicable to arbitrations. Thus, if an arbitration involves a dispute in which underlying material facts, such as establishment, modification, or termination of a business relationship, occurred outside of China or in which the subject matter of the dispute was located outside of China, then the arbitration should be considered an international or foreign-related arbitration, even if both parties involved in the dispute were Chinese persons.⁸⁵

Commentators have noted that it remains unclear whether the concept of a “foreign-related” transaction will be extended to include any business transaction conducted by a Sino-foreign joint venture or a wholly foreign-owned venture with another Chinese venture.⁸⁶ Indeed, there has been no official clarification. However, if the analogy between arbitrations and civil cases is accepted by appropriate Chinese authorities, it should also favorably affect these ventures. The analogy would offer the ventures an opportunity to avoid the potential problems associated with domestic arbitrations by using CIETAC as a venue to arbitrate their disputes with other Chinese companies. Such an opportunity did not exist under any early CIETAC arbitration rules because these ventures were considered Chinese legal persons

⁸⁴ Supreme People’s Court, Application of the Civil Procedure Law Several Questions, Opinion, *reprinted and translated in CHINA L. & PRAC.*, Jan. 14, 1992, at 40, 40.

⁸⁵ Coincidentally, this interpretation is in accord with the Hong Kong High Court’s interpretation in *Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co.*, which dealt with a similar issue. See *Fung Sang Trading Ltd. v. Kai Sun Sea Prods. & Food Co.*, 1992 (1) H.K.L. Rep. 40, 40-41.

⁸⁶ See Katherine L. Lynch, *The New Arbitration Law*, 26 H.K.L.J. 104, 115 (1996); Moser, *China’s New Arbitration Rules*, *supra* note 47, at 8.

under Chinese law.

Even though China has consistently claimed Taiwan, Hong Kong, and Macao as part of its territory, the Chinese government has consistently treated commercial transactions between companies based on the mainland and companies based in Taiwan, Hong Kong, and Macao as foreign-related transactions.⁸⁷ Investments from those regions also have been regarded as foreign investments.⁸⁸ Accordingly, arbitrations between mainland companies and those based in Taiwan, Hong Kong, and Macao always have been treated as international arbitrations and therefore have been conducted by CIETAC. While there is presently no reason to make any change in the status and treatment of Taiwanese companies, a clarification for Hong Kong and Macao companies is due because those territories are scheduled to return to China. This need for a clarification is particularly urgent in the case of Hong Kong, as the time for the handover nears.

Since both the Joint Declaration and the Basic Law guarantee Hong Kong a high degree of autonomy and permit Hong Kong to keep its capitalist system, continue its common law system, and enjoy its executive, legislative and independent judicial powers,⁸⁹ sufficient legal basis exists to continue the treatment of commercial transactions between Hong Kong companies and companies based on the mainland as foreign-related transactions. In addition, Hong Kong is one of the largest foreign investors in China. Any change in its status as a foreign investor could eliminate the preferential treatments that have been accorded to foreign investors under Chinese law and therefore would have a disastrous effect on the investors from Hong Kong. Given the significant practical consequences, it seems unlikely that Hong Kong will lose its foreign status after 1997, either for arbitration or for invest-

⁸⁷ See Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law, Oct. 19, 1987, *reprinted and translated in* [1 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 5-555.

⁸⁸ See Law of the People's Republic of China on the Protection of Investment by Taiwanese Compatriots, Mar. 5, 1994, *reprinted and translated in* [3 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 19-582; State Council Regulations for Encouraging Investment by Overseas Chinese and Hong Kong and Macao Compatriots, Aug. 19, 1990, *reprinted and translated in* [2 Business Regulation] China Laws for Foreign Bus. (CCH) ¶ 13-550.

⁸⁹ See Basic Law, *supra* note 3, arts. 2, 5, 8; Joint Declaration, *supra* note 1, para. 3.

ment.

3.1.2. *Arbitrability*

Questions of arbitrability are jurisdictional in nature. If a dispute were not arbitrable under law, then an arbitrator would have no jurisdiction over the case.

Although Hong Kong adopted the UNCITRAL Model Law, which explicitly states that it applies to "international commercial" arbitration,⁹⁰ the 1990 Arbitration Ordinance provides that the application of the UNCITRAL Model Law shall not be limited to international commercial arbitration.⁹¹ According to one authority, the effect of this modification is that it is not necessary for the dispute to be commercial for the purpose of international arbitration.⁹² This implies that an international arbitration in Hong Kong may resolve almost any dispute, such as those in contract or tort, as long as there is a valid arbitration agreement between the parties. This implication, however, does not extend to domestic arbitrations in Hong Kong.

Under certain circumstances, the High Court of Hong Kong has the discretion to order that an arbitration agreement is ineffective and the power to give leave to revoke the authority of an arbitrator or umpire.⁹³ Such circumstances are: (1) in a dispute involving the question of whether a party has been guilty of fraud; (2) in a dispute involving the validity or infringement of patents, registered designs, or trademarks; (3) in a dispute relating to marriage, divorce, and relations between parents and children; and (4) in a dispute in which the contract underlying the arbitration is void *ab initio*.⁹⁴

For China, prior to the adoption of the 1994 CIETAC

⁹⁰ UNCITRAL Model Law, *supra* note 18, art. 1(1). The UNCITRAL Model Law gives the term "commercial" a wide interpretation to cover matters arising from all relationships of a commercial nature, such as: "any trade transaction . . . ; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and . . . other business co-operation;" and transportation. *Id.*

⁹¹ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 34C(2).

⁹² See Kaplan & Bunch, *supra* note 17, at 6.

⁹³ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 26.

⁹⁴ See Kaplan & Bunch, *supra* note 17, at 11-12.

Arbitration Rules, it was not clear whether the phrase "disputes which arise in areas of international economics and trade," found in the 1989 CIETAC Rules,⁹⁵ would cover both contractual and non-contractual disputes, including tort claims arising from business transactions. In fact, that was the issue faced by the Shanghai Municipal People's Court in *China National Technical Import & Export Corp. v. Industrial Resources Corp.*⁹⁶ In that case, the court held that the "claim involving fraud was based in tort, not contract, and thus fell outside the scope of CIETAC's jurisdiction."⁹⁷ Perhaps to address the concern caused by the *China National Technical Import & Export Corp.* ruling, the CIETAC Arbitration Rules explicitly state that CIETAC "shall by means of arbitration settle . . . economic, trade and other disputes, whether international or foreign-related contractual or non-contractual."⁹⁸ A non-contractual dispute is now clearly arbitrable before the CIETAC tribunal.

Under the Chinese Arbitration Law, certain disputes are not arbitrable: (1) marital, adoption, guardianship, fosterage, and succession disputes;⁹⁹ (2) administrative disputes which must be handled by administrative authorities under law;¹⁰⁰ and (3) situations where the arbitration agreement is void because the subject matter of the arbitration is outside the legally regulated scope of arbitration,¹⁰¹ or where the arbitration agreement was concluded by persons with no civil capacity or only limited civil capacity,¹⁰² or where the arbitration agreement was obtained by coercion or intimidation.¹⁰³ Although the Arbitration Law does not define "administrative disputes," it seems clear that the term refers to disputes involving government departments.¹⁰⁴ In addition, according to a leading authority, disputes involving the

⁹⁵ 1989 CIETAC Rules, *supra* note 43, art. 1.

⁹⁶ See Moser, *China's New Arbitration Rules*, *supra* note 47, at 8.

⁹⁷ *Id.*

⁹⁸ CIETAC Arbitration Rules, *supra* note 53, art. 2.

⁹⁹ See P.R.C. Arbitration Law, *supra* note 54, art. 3(1).

¹⁰⁰ See *id.* art. 3(2).

¹⁰¹ See *id.* art. 17(1).

¹⁰² See *id.* art. 17(2).

¹⁰³ See *id.* art. 17(3).

¹⁰⁴ See Donald Lewis, *The People's Republic of China, Arbitration Law: Editor's Notes*, CHINA L. & PRAC., Nov. 7, 1994, at 35, 36; Lynch, *supra* note 86, at 109.

validity and infringement of patents, trademarks, and copyright are not arbitrable under the Chinese law.¹⁰⁵

Although China has taken several significant steps towards a more liberal international commercial arbitration system, Hong Kong currently appears to have fewer explicit restrictions than China on arbitral matters.

3.2. *Arbitration Agreements*

All arbitrations must be based on a valid arbitration agreement. Arbitration, as a means of dispute resolution, is consensual in nature. Without a valid arbitration agreement, an arbitration tribunal will have no jurisdiction over a dispute. Therefore, the existence of a valid arbitration agreement is central to the entire arbitration process.¹⁰⁶

Under Hong Kong law, an "arbitration agreement" is an "agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."¹⁰⁷ Regardless of whether an arbitration agreement takes the form of a clause within a contract or the form of a separate agreement, the agreement must be in writing.¹⁰⁸ The requirement of a writing, however, may be satisfied if the agreement is:

contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one

¹⁰⁵ See Houzhi, *The People's Republic of China*, *supra* note 32, at 6.

¹⁰⁶ Both Chinese law and Hong Kong law recognize the principle that arbitration is a consensual means of dispute resolution that requires an arbitration agreement. See P.R.C. Arbitration Law, *supra* note 54, art. 4; UNCITRAL Model Law, *supra* note 18, art. 8.

¹⁰⁷ UNCITRAL Model Law, *supra* note 18, art. 7(1). The 1990 Hong Kong Arbitration Ordinance adopted the definition of "arbitration agreement" provided in article 7(1) of the UNCITRAL Model Law for both domestic and international arbitration. See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 2(1). Therefore, both the domestic and international arbitration regimes apply the same definition.

¹⁰⁸ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 2(2); UNCITRAL Model Law, *supra* note 18, art. 7(2).

party and not denied by another.¹⁰⁹

Even a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.¹¹⁰

Both the UNCITRAL Model Law and the UNCITRAL Arbitration Rules¹¹¹ recognize the separability of an arbitration clause from the main contract.¹¹² Under the law, an arbitration clause in a contract is treated as an agreement "independent of the other terms of the contract."¹¹³ An arbitral tribunal has the power to rule on its own jurisdiction, "including any objections with respect to the existence or validity of the arbitration agreement."¹¹⁴ A decision by an arbitral tribunal that a contract is invalid does not necessarily preclude the validity of the related arbitration clause.¹¹⁵ In other words, a tribunal may nonetheless continue an arbitration after its ruling.

In domestic arbitration, current Hong Kong law recognizes that an "arbitration clause is separable from the contract containing it to the extent that if the contract is repudiated and the repudiation is accepted, the arbitration clause survives the repudiation."¹¹⁶ This provision allows an arbitrator to render an award on the alleged repudiation claim.¹¹⁷

Similarly, under Chinese law, an arbitration agreement also must be in writing, whether it is an arbitration clause contained in a contract or a separate agreement concluded before or after a

¹⁰⁹ UNCITRAL Model Law, *supra* note 18, art. 7(2). For a detailed discussion of this provision, see *Pacific Int'l Lines (Pte) Ltd. v. Tsinglien Metals & Minerals Co.*, a decision of the Hong Kong High Court, an excerpt of which is reprinted in *Hong Kong*, 18 Y.B. COM. ARB. 180, 181-86 (1993).

¹¹⁰ See UNCITRAL Model Law, *supra* note 18, art. 7(2).

¹¹¹ The UNCITRAL Arbitration Rules were adopted by the HKIAC as its rules for international arbitrations. See *supra* note 28 and accompanying text.

¹¹² See UNCITRAL Model Law, *supra* note 18, art. 16(1); UNCITRAL Arbitration Rules, *supra* note 28, art. 21.

¹¹³ UNCITRAL Model Law, *supra* note 18, art. 16(1).

¹¹⁴ *Id.*

¹¹⁵ See *id.*

¹¹⁶ Kaplan & Bunch, *supra* note 17, at 14.

¹¹⁷ See *id.*

dispute arises.¹¹⁸ In either case, the document must include: (1) an expression of the intention to arbitrate;¹¹⁹ (2) the items for arbitration;¹²⁰ and (3) the selected arbitration commission.¹²¹ In the event that the original agreement fails to specify the arbitrable matters or fails to select an arbitration commission, the parties may subsequently add such information.¹²² Failure to reach an agreement on these supplemental matters, however, will render the entire agreement void.¹²³

The principle of separability is also recognized by the Arbitration Law and the CIETAC Arbitration Rules.¹²⁴ Under the law, subsequent modification, rescission, termination, nullification, or invalidity of a contract does not necessarily invalidate an arbitration agreement.¹²⁵ Under the CIETAC Arbitration Rules, CIETAC has the power “to decide on the existence or validity of an arbitration agreement” as well as the question of its own jurisdiction.¹²⁶ If one party contests the validity of the agreement in court, however, the matter will be decided by the court.¹²⁷

In terms of statutory provisions, the difference between Hong Kong law and Chinese law in the formal requirements for an arbitration agreement appears to be very small. The only significant divergence seems to be that Hong Kong law expressly permits the parties to use written correspondence to record their arbitration agreement, while Chinese law has no such express provision. In other material respects, however, the two systems are strikingly similar.

3.3. Arbitrators

Perhaps the most liberal aspect of Hong Kong arbitration law is the freedom afforded the parties to select arbitrators of their

¹¹⁸ See P.R.C. Arbitration Law, *supra* note 54, art. 16.

¹¹⁹ See *id.* art. 16(1).

¹²⁰ See *id.* art. 16(2).

¹²¹ See *id.* art. 16(3).

¹²² See *id.* art. 18.

¹²³ See *id.*

¹²⁴ See *id.* art. 19; CIETAC Arbitration Rules, *supra* note 53, art. 5.

¹²⁵ See P.R.C. Arbitration Law, *supra* note 54, art. 19.

¹²⁶ CIETAC Arbitration Rules, *supra* note 53, art. 4.

¹²⁷ See *id.*

choice. Parties are free to select their arbitrators or agree on an appointment procedure to include the desired number and qualification of arbitrators.¹²⁸ The UNCITRAL Model Law expressly states that "no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties."¹²⁹ An arbitrator is required by law to disclose "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence" and may be challenged on the basis of the existence of such circumstances or lack of qualifications.¹³⁰ However, a party may challenge an arbitrator appointed by itself only for reasons discovered after the initial appointment.¹³¹ Any objection to the appointment of a particular arbitrator should first be made to the arbitral tribunal and then to the High Court upon rejection by the tribunal.¹³² A successful challenge leads to the removal of the challenged arbitrator and the appointment of a substitute.¹³³

In general, any persons capable of conducting a fair hearing may be appointed as arbitrators if they are willing to accept the appointment. The appointment may be made by agreement or with the court's assistance.¹³⁴ If the arbitration is to be conducted by a three arbitrator tribunal, the third arbitrator may be selected by the two arbitrators appointed by the parties.¹³⁵ An interesting feature of Hong Kong law is that judges, magistrates, and other public officers are permitted to accept appointments as arbitrators with approval by appropriate authorities.¹³⁶ The Supreme Court of Hong Kong may remove an arbitrator who refuses or fails to act,¹³⁷ who "fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award,"¹³⁸ or who has engaged in misconduct.¹³⁹ Misconduct has

¹²⁸ See UNCITRAL Model Law, *supra* note 18, arts. 10-11.

¹²⁹ *Id.* art. 11(1).

¹³⁰ *Id.* art. 12.

¹³¹ See *id.* art. 12(2).

¹³² See *id.* art. 13.

¹³³ See *id.* art. 15.

¹³⁴ See *id.* art. 11.

¹³⁵ See *id.* art. 11(3).

¹³⁶ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 13A.

¹³⁷ See *id.* § 12(1).

¹³⁸ *Id.* § 15(3).

been interpreted to include the appearance of misconduct or bias, factual misconduct or bias, and technical misconduct, such as ambiguities, excess of jurisdiction, incompleteness, and breach of the rules.¹⁴⁰

The liberal policies of Hong Kong arbitration law, in addition to the territory's access to a wide variety of expertise with different legal, cultural, and ethnic backgrounds, make Hong Kong a very attractive place for international arbitrations.

Under Chinese law, an arbitration proceeding may be conducted by a three arbitrator tribunal or by a single arbitrator, depending on the parties' agreement.¹⁴¹ The appointment of the arbitrator or arbitrators may be agreed upon by the parties,¹⁴² or may be made by the chairman of the arbitration commission at either the parties' request¹⁴³ or upon their failure to make such an appointment within the prescribed time limit.¹⁴⁴

Under the Arbitration Law, an arbitrator must voluntarily disclose relevant information concerning his personal interest in a case and must withdraw from the appointment if:

- (1) the arbitrator is a disputing party or an immediate relative of the parties to the case or their agents;
- (2) the arbitrator has a personal interest in the case;
- (3) the arbitrator has some other relationship with the parties to the case or their agents which may affect the case to be arbitrated fairly; [or]
- (4) the arbitrator has had private meetings with the parties concerned or their agents, or has accepted gifts or has attended banquets provided by the parties concerned or their agents.¹⁴⁵

¹³⁹ See *id.* § 25(1).

¹⁴⁰ See Kaplan & Bunch, *supra* note 17, at 18-19.

¹⁴¹ See P.R.C. Arbitration Law, *supra* note 54, arts. 30-31.

¹⁴² See *id.* art. 31.

¹⁴³ See *id.*

¹⁴⁴ See *id.* art. 32.

¹⁴⁵ *Id.* art. 34. Under the CIETAC Arbitration Rules, "[w]here the chosen or appointed arbitrator has personal interests in a case, he shall disclose such interests to the Arbitration Commission by himself and ask for withdrawal." CIETAC Arbitration Rules, *supra* note 53, art. 28.

Failure to withdraw under any of these circumstances may render the arbitrator liable for any consequences and may result in the removal of the arbitrator from the panel of arbitrators.¹⁴⁶ Additionally, parties may submit a written demand for the withdrawal of an arbitrator on the basis of specific facts and grounds.¹⁴⁷ In either case, the final decision rests with the chairman of the arbitration commission.¹⁴⁸ Requiring that arbitrators disclose any personal interests and giving parties the power to challenge an arbitrator's fitness represent progress in the Chinese approach because none of the previous rules or regulations contained such provisions.

In a CIETAC arbitration, the candidates for appointment as arbitrators must be drawn from the panel of arbitrators maintained by CIETAC.¹⁴⁹ CIETAC's panel of arbitrators currently consists of 296 members, including 80 foreign nationals.¹⁵⁰ Despite the progress that CIETAC has made to include foreign nationals in its panel of arbitrators, the autonomy of parties to appoint arbitrators of their choice in China is still limited when compared to the system in Hong Kong. CIETAC could and probably will include more foreign nationals in the panel of arbitrators in the future, thereby enhancing its status as an international arbitration center. However, until CIETAC gives parties complete autonomy in selecting their arbitrators and provides them with access to potential arbitrators, as Hong Kong does, China will not be able to compete with Hong Kong in attracting foreign parties to arbitrate their disputes.

3.4. Procedural Matters

Hong Kong law generally permits parties to agree on procedures to be followed by tribunals in conducting arbitration proceedings.¹⁵¹ Parties in a proceeding may choose a procedure

¹⁴⁶ See P.R.C. Arbitration Law, *supra* note 54, art. 38.

¹⁴⁷ See *id.* art. 35; see also CIETAC Arbitration Rules, *supra* note 53, art. 29.

¹⁴⁸ See P.R.C. Arbitration Law, *supra* note 54, art. 36; see also CIETAC Arbitration Rules, *supra* note 53, art. 30.

¹⁴⁹ See CIETAC Arbitration Rules, *supra* note 53, arts. 24-25.

¹⁵⁰ See text accompanying note 60.

¹⁵¹ See UNCITRAL Model Law, *supra* note 18, art. 19; Kaplan & Bunch, *supra* note 17, at 23.

of their own, or they may adopt an established set of rules.¹⁵² They can agree on where they wish to conduct the hearing¹⁵³ and whether they would consent to a conciliation procedure.¹⁵⁴ The parties can also agree on whether the proceeding should be conducted solely on the basis of documents.¹⁵⁵ In both international and domestic arbitrations, the parties to a dispute can agree on the language or languages that will be used in the proceedings, which will apply to both written statements and oral arguments.¹⁵⁶

In the absence of agreement between the parties, arbitral tribunals in Hong Kong have the discretion to determine what procedures are necessary to accomplish the goals of the arbitration.¹⁵⁷ Furthermore, absent an agreement to the contrary, the tribunal in an international arbitration will determine which language or languages will be used in the proceeding.¹⁵⁸ In the case of a domestic arbitration, the default language will be English.¹⁵⁹ In both international and domestic arbitrations, tribunals may order any documentary evidence to be accompanied by translations into the language or languages determined by the tribunals or agreed upon by the parties.¹⁶⁰

In conducting an international arbitration, an arbitral tribunal in Hong Kong is empowered to determine the admissibility, relevance, materiality, and weight of all evidence¹⁶¹ and may

¹⁵² See UNCITRAL Model Law, *supra* note 18, art. 19; Kaplan & Bunch, *supra* note 17, at 23.

¹⁵³ See UNCITRAL Model Law, *supra* note 18, art. 20; Kaplan & Bunch, *supra* note 17, at 23.

¹⁵⁴ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, §§ 2A(1), 2B(1).

¹⁵⁵ See UNCITRAL Model Law, *supra* note 18, art. 24; Kaplan & Bunch, *supra* note 17, at 23.

¹⁵⁶ See UNCITRAL Model Law, *supra* note 18, art. 22; Kaplan & Bunch, *supra* note 17, at 23.

¹⁵⁷ See UNCITRAL Model Law, *supra* note 18, art. 19; Kaplan & Bunch, *supra* note 17, at 23.

¹⁵⁸ See UNCITRAL Model Law, *supra* note 18, art. 22; Kaplan & Bunch, *supra* note 17, at 23.

¹⁵⁹ See Kaplan & Bunch, *supra* note 17, at 24.

¹⁶⁰ See UNCITRAL Model Law, *supra* note 18, art. 22; Kaplan & Bunch, *supra* note 17, at 23-24.

¹⁶¹ See UNCITRAL Model Law, *supra* note 18, art. 19(2).

appoint experts to report on specific issues.¹⁶² In addition, an arbitral tribunal in an international arbitration, or a party with approval of the tribunal, can turn to the High Court for assistance in carrying out certain procedures, which may include issuing subpoenas, examining witnesses under oath, securing amounts in dispute, obtaining the detention, preservation, or inspection of any property, or obtaining preservation, interim custody, or sale of any goods.¹⁶³ In domestic arbitrations, subject to a challenge in the High Court, parties may issue subpoenas to compel witnesses to attend proceedings or to produce evidence, take other discovery measures under relaxed rules of evidence, and seek judicial assistance for interim measures of protection.¹⁶⁴ Under the law, all statements, evidentiary documents, expert reports, or other information presented to the tribunal in an international arbitration must be communicated to both parties.¹⁶⁵

Finally, an arbitral award in an international arbitration in Hong Kong must be in writing and signed by the arbitrator or arbitrators.¹⁶⁶ The award is deemed final and not subject to judicial review on the merits.¹⁶⁷ Certain corrections, interpretations, and additional awards are possible on the tribunal's own initiative or at the parties' request when based on justifiable grounds.¹⁶⁸ In domestic arbitrations, appeals to the High Court upon questions of law are allowed, but only under limited circumstances.¹⁶⁹ In all other situations, the award becomes enforceable in courts of competent jurisdiction.¹⁷⁰

There appears to be no express provision in Chinese law authorizing parties to select their own procedural rules. Presumably, tribunals generally will follow their own procedures, although there is no express provision prohibiting modification of

¹⁶² See *id.* art. 26(1).

¹⁶³ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, §§ 14(4)-(6), 34E; UNCITRAL Model Law, *supra* note 18, art. 27.

¹⁶⁴ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 14(3A)-(6).

¹⁶⁵ See UNCITRAL Model Law, *supra* note 18, art. 24(3).

¹⁶⁶ See *id.* art. 31(1).

¹⁶⁷ The Hong Kong Arbitration Ordinance explicitly excludes judicial review under section 23 of the Ordinance from applying to international arbitration. See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 2M.

¹⁶⁸ See UNCITRAL Model Law, *supra* note 18, arts. 31-33.

¹⁶⁹ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 23.

¹⁷⁰ See *id.* § 2H; UNCITRAL Model Law, *supra* note 18, art. 35.

such procedural rules. Parties do, however, have the autonomy to decide whether they would consent to a conciliation procedure¹⁷¹ and whether the proceeding should be conducted entirely or partially on the basis of written documents.¹⁷² Furthermore, parties may agree whether the underlying dispute should be resolved by a summary proceeding.¹⁷³

In general, unless the parties agree otherwise, arbitrations in China are conducted in camera.¹⁷⁴ Cases accepted by CIETAC and its subcommissions are usually heard in Beijing, Shanghai, or Shenzhen.¹⁷⁵ The secretary-general of CIETAC or one of its subcommissions may approve alternative arbitration locations.¹⁷⁶

With respect to the language to be used in an international arbitration proceeding, the CIETAC Arbitration Rules reiterate the established principle that Chinese is the official language of CIETAC.¹⁷⁷ Unlike prior rules, including the 1989 CIETAC Rules, the new CIETAC Arbitration Rules permit parties to designate other languages as the language for individual arbitrations.¹⁷⁸ As such, the new rules allow the possibility that a foreign language can be used in arbitrations, although it is unlikely to be a concession easily drawn from a Chinese party.

CIETAC, other arbitration commissions, and parties to arbitrations have powers and rights to conduct evidentiary discovery, to appoint experts, and to seek judicial assistance for protection of evidence similar to those granted to arbitrators and

¹⁷¹ See P.R.C. Arbitration Law, *supra* note 54, art. 51; CIETAC Arbitration Rules, *supra* note 53, art. 46.

¹⁷² See P.R.C. Arbitration Law, *supra* note 54, art. 39; CIETAC Arbitration Rules, *supra* note 53, art. 32.

¹⁷³ See CIETAC Arbitration Rules, *supra* note 53, art. 64. Under the CIETAC Arbitration Rules, a dispute with an amount of less than Rmb 500,000 in controversy should be resolved by a summary proceeding unless the parties agree otherwise. See CIETAC Arbitration Rules, *supra* note 53, art. 64.

¹⁷⁴ See P.R.C. Arbitration Law, *supra* note 54, art. 40; CIETAC Arbitration Rules, *supra* note 53, art. 36. If a case involves state secrets, the arbitration may not be openly conducted even if the parties agree to do so. See P.R.C. Arbitration Law, *supra* note 54, art. 40; CIETAC Arbitration Rules, *supra* note 53, art. 36.

¹⁷⁵ See CIETAC Arbitration Rules, *supra* note 53, art. 12.

¹⁷⁶ See *id.* art. 35.

¹⁷⁷ See *id.* art. 75.

¹⁷⁸ See *id.*

parties in Hong Kong.¹⁷⁹ An unusual feature of Chinese law, however, gives arbitral tribunals the power to conduct their own investigations and to collect evidence on their own initiative.¹⁸⁰ When exercising such discretion, the tribunal is required under certain circumstances to notify the parties and to give them an opportunity to comment on the result or to present their own evidence in response.¹⁸¹ This tribunal activism is consistent with China's civil law tradition.

Under Chinese law, an arbitration award must be in writing.¹⁸² It must specify the award, the relevant facts, and the grounds upon which the award is based.¹⁸³ In addition, the award must state the apportionment of costs, unless there is a contrary agreement between the parties.¹⁸⁴ Arbitral awards are not subject to judicial review, absent possible corrections by the tribunal at the reasonable request of a party.¹⁸⁵ Once the awards are final, they may be enforced in any competent court.¹⁸⁶

Hong Kong and Chinese law are procedurally very similar in many respects. While Hong Kong law is more flexible than Chinese law in permitting parties to agree on certain procedural matters, the two systems share many analogous provisions.

¹⁷⁹ See P.R.C. Arbitration Law, *supra* note 54, arts. 43, 68; CIETAC Arbitration Rules, *supra* note 53, art. 38.

¹⁸⁰ See P.R.C. Arbitration Law, *supra* note 54, arts. 43, 68; CIETAC Arbitration Rules, *supra* note 53, art. 38.

¹⁸¹ See CIETAC Arbitration Rules, *supra* note 53, arts. 38, 40. No similar provision existed under the prior CIETAC Rules. In one case, the Hong Kong High Court refused to grant enforcement of a CIETAC award on the grounds that due process had been violated when a party had not been allowed to cross-examine experts appointed by the tribunal and to present its own evidence in response to their finding. See *Paklito Inv. Ltd. v. Klockner E. Asia Ltd.*, 1993 (2) H.K.L. Rep. 39, 39-50. An excerpt of the opinion is reprinted in *Hong Kong*, 19 Y.B. COM. ARB. 664 (1994). The new CIETAC Arbitration Rules seem to be designed to prevent such an incident from reoccurring.

¹⁸² See P.R.C. Arbitration Law, *supra* note 54, art. 54; see also CIETAC Arbitration Rules, *supra* note 53, art. 55.

¹⁸³ See P.R.C. Arbitration Law, *supra* note 54, art. 54; see also CIETAC Arbitration Rules, *supra* note 53, art. 55.

¹⁸⁴ See P.R.C. Arbitration Law, *supra* note 54, art. 54; see also CIETAC Arbitration Rules, *supra* note 53, art. 55.

¹⁸⁵ See P.R.C. Arbitration Law, *supra* note 54, art. 9; see also CIETAC Arbitration Rules, *supra* note 53, art. 60.

¹⁸⁶ See P.R.C. Arbitration Law, *supra* note 54, art. 62; see also CIETAC Arbitration Rules, *supra* note 53, art. 63.

3.5. *Grounds for Setting Aside an Arbitral Award*

In Hong Kong, the High Court is the competent court for setting aside an arbitration award.¹⁸⁷ An arbitral award made in an international arbitration may be set aside if the applicant seeking such recourse can prove: (1) that the party was under some incapacity or that the arbitration agreement was otherwise invalid;¹⁸⁸ (2) that the party “was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;”¹⁸⁹ (3) that the award deals with a dispute outside the scope of the arbitration agreement;¹⁹⁰ or (4) the arbitral tribunal did not comply with the terms of the arbitration agreement.¹⁹¹ In addition, an award may be set aside if the court finds that: (1) “the subject-matter of the dispute is not capable of settlement by arbitration” under Hong Kong law;¹⁹² or (2) the award conflicts with Hong Kong public policy.¹⁹³ Grounds for setting aside an arbitral award resulting from a domestic arbitration include: (1) misconduct by an arbitrator; (2) disqualification of an arbitrator; (3) lack of jurisdiction by an arbitrator or tribunal; and (4) violation of public policy.¹⁹⁴ An application for setting aside an arbitral award must be filed with the court within a specific time limit.¹⁹⁵ Before setting aside an award, the court may, at request of a party, give the arbitral tribunal an opportunity to eliminate the grounds for setting aside the award.¹⁹⁶

¹⁸⁷ See Kaplan & Bunch, *supra* note 17, at 41.

¹⁸⁸ See UNCITRAL Model Law, *supra* note 18, art. 34(2)(a)(i); Kaplan & Bunch, *supra* note 17, at 41.

¹⁸⁹ UNCITRAL Model Law, *supra* note 18, art. 34(2)(a)(ii); see Kaplan & Bunch, *supra* note 17, at 41.

¹⁹⁰ See UNCITRAL Model Law, *supra* note 18, art. 34(2)(a)(iii); Kaplan & Bunch, *supra* note 17, at 41.

¹⁹¹ See UNCITRAL Model Law, *supra* note 18, art. 34(2)(a)(iv); Kaplan & Bunch, *supra* note 17, at 41.

¹⁹² UNCITRAL Model Law, *supra* note 18, art. 34(2)(b)(i); see Kaplan & Bunch, *supra* note 17, at 41.

¹⁹³ See UNCITRAL Model Law, *supra* note 18, art. 34(2)(b)(ii); Kaplan & Bunch, *supra* note 17, at 41.

¹⁹⁴ See Kaplan & Bunch, *supra* note 17, at 41-42.

¹⁹⁵ See *id.*

¹⁹⁶ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 24; UNCITRAL Model Law, *supra* note 18, art. 34(4).

Under the Chinese Arbitration Law, an arbitral award may be set aside when the applicant seeking such recourse proves: (1) that no arbitration agreement existed;¹⁹⁷ (2) that the subject matter of the arbitration was beyond the scope of the arbitration agreement;¹⁹⁸ (3) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the applicable arbitration rules;¹⁹⁹ (4) that the evidence on which the award was based had been forged;²⁰⁰ (5) that the other party withheld evidence that affected the fairness of the proceeding;²⁰¹ or (6) that the arbitrators demanded or accepted bribes or committed graft during the arbitration proceeding.²⁰² In addition, the court can set aside an arbitral award if it finds that the award is in violation of public policy.²⁰³

Under article 260 of the 1991 Civil Procedure Law, however, there is a different set of statutory grounds for setting aside a foreign-related arbitral award.²⁰⁴ These civil procedure provisions are incorporated by reference in the Arbitration Law.²⁰⁵ Under the 1991 Civil Procedure Law, a court can nullify a foreign-related arbitral award if the party seeking to void the award can demonstrate: (1) that no arbitration agreement was ever reached;²⁰⁶ (2) that the respondent was not given notice of the appointment of an arbitrator or of arbitration proceedings, or was otherwise unable to present its case for reasons beyond its control;²⁰⁷ (3) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the applicable arbitration rules;²⁰⁸ or (4) that the subject matter dealt with in the award was beyond the scope of the arbitration agreement or the jurisdiction of the arbitral tribunal.²⁰⁹

¹⁹⁷ See P.R.C. Arbitration Law, *supra* note 54, art. 58(1).

¹⁹⁸ See *id.* art. 58(2).

¹⁹⁹ See *id.* art. 58(3).

²⁰⁰ See *id.* art. 58(4).

²⁰¹ See *id.* art. 58(5).

²⁰² See *id.* art. 58(6).

²⁰³ See *id.* art. 58.

²⁰⁴ See P.R.C. Civil Procedure Law, *supra* note 48, art. 260.

²⁰⁵ See P.R.C. Arbitration Law, *supra* note 54, arts. 70, 71, app.

²⁰⁶ See P.R.C. Civil Procedure Law, *supra* note 48, art. 260(1).

²⁰⁷ See *id.* art. 260(2).

²⁰⁸ See *id.* art. 260(3).

²⁰⁹ See *id.* art. 260(4).

Based on the wording of the Arbitration Law, the set of rules contained in article 260 of the Civil Procedure Law and incorporated by reference in the Arbitration Law seem to apply only to foreign-related arbitral awards. The other set of rules, contained in article 58 of the Arbitration Law, appears to apply to domestic arbitral awards. This interpretation, if it is in accord with the intention of the drafters of the Arbitration Law, presents a problem that warrants official clarification. Article 217 of the 1991 Civil Procedure Law provides two additional grounds for setting aside a domestic arbitral award: (1) when the principal evidence is insufficient to ascertain the facts;²¹⁰ and (2) when the application of law is erroneous.²¹¹ Since the new Arbitration Law neither incorporates these provisions nor specifically repeals them, one commentator has suggested that the provisions still apply, thereby subjecting all domestic arbitral awards to potential judicial review on the merits.²¹²

If the statutory law is taken as a whole, however, a more appropriate interpretation appears to be that, because the provisions contained in article 217 of the 1991 Civil Procedure Law were not incorporated in the Arbitration Law by reference and are in conflict with the Arbitration Law, they were in effect repealed by the Arbitration Law. The Arbitration Law expressly states that “[i]n the event of the provisions of any arbitration regulations promulgated prior to the implementation of this Law which are in conflict with the provisions of this Law, this Law shall prevail.”²¹³

Overall, there are few differences between the Hong Kong and Chinese statutory provisions dealing with the grounds for setting aside arbitral awards. Nevertheless, certain conflicts between the rulings of Hong Kong courts and Chinese courts are inevitable with respect to these statutory provisions. This will be evidenced when the courts are invited to apply the term “public policy,” words likely to be interpreted more broadly in China than in Hong Kong.

²¹⁰ See *id.* art. 217(4).

²¹¹ See *id.* art. 217(5).

²¹² See Lynch, *supra* note 86, at 117.

²¹³ P.R.C. Arbitration Law, *supra* note 54, art. 78.

3.6. Recognition and Enforcement of Foreign Arbitral Awards

On the basis of reciprocity, a foreign arbitral award may be enforceable in Hong Kong either as a matter of law or as an international treaty obligation. To be enforceable, the award must have:

- (a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- (b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;
- (c) been made in conformity with the law governing the arbitration procedure;
- (d) become final in the country in which it was made;
- [and]
- (e) been in respect of a matter which may lawfully be referred to arbitration under the law of Hong Kong.²¹⁴

Also, enforcement of the award must not violate Hong Kong law or public policy.²¹⁵ Under Hong Kong law, courts will generally refuse enforcement of an award if any of the following conditions are present:

- (a) the award has been annulled in the country in which it was made; or
- (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented; or
- (c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration.²¹⁶

In addition to the statutory provisions found in the Arbitra-

²¹⁴ 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 37(1).

²¹⁵ *See id.*

²¹⁶ *Id.* § 37(2).

tion Ordinance, Hong Kong is also bound by several international conventions. Chief among them is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²¹⁷

Under the Arbitration Ordinance, an order by the Governor of Hong Kong declaring that any state or territory is a party to the New York Convention is conclusive evidence of that fact.²¹⁸ Accordingly, Courts will enforce the arbitral awards made in that state or territory, unless one of the following conditions is proven: (1) that a party to the arbitration agreement was under some incapacity;²¹⁹ (2) that the arbitration agreement was invalid;²²⁰ (3) that a party "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;"²²¹ (4) that the award deals with a matter or contains decisions beyond the scope of the arbitration agreement;²²² (5) that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or . . . with the law of the country where the arbitration took place;"²²³ or (6) that the award has not become "binding on the parties, or has been set aside or suspended by a competent authority of the country in which . . . it was made."²²⁴ In addition, Hong Kong courts may refuse to enforce a foreign award if the award deals with a matter which is not capable of settlement by arbitration or if enforcement of the award would be contrary to Hong Kong public policy.²²⁵

Although the provisions found in the Arbitration Ordinance originated in the New York Convention, they were later incorporated with little modification in Hong Kong domestic law. In fact, since Hong Kong's accession to the New York Convention in 1977, many foreign arbitral awards, including numerous awards

²¹⁷ See New York Convention, *supra* note 21.

²¹⁸ See 1990 Hong Kong Arbitration Ordinance, *supra* note 17, § 46.

²¹⁹ See *id.* § 44(2)(a).

²²⁰ See *id.* § 44(2)(b).

²²¹ *Id.* § 44(2)(c).

²²² See *id.* § 44(2)(d).

²²³ *Id.* § 44(2)(e).

²²⁴ *Id.* § 44(2)(f).

²²⁵ See *id.* § 44(3).

from China, have been brought to Hong Kong for enforcement.²²⁶

Hong Kong became a member of the New York Convention by virtue of the United Kingdom's accession to the Convention.²²⁷ Therefore, it is presently unclear how China's resumption of sovereignty on July 1, 1997, will affect Hong Kong's status within the Convention. Because China is also a member of the New York Convention, the technical issue seems to concern the maintenance of Hong Kong's status within the Convention. A clarification is surely required from the governments involved.²²⁸

There are no practical reasons why either Hong Kong or China would want to terminate Hong Kong's membership in the Convention. Assuming that an appropriate membership arrangement can be instituted in a timely fashion, the transition of sovereignty should present no problems for enforcement of foreign arbitral awards in Hong Kong under the New York Convention.²²⁹

In China, under the 1991 Civil Procedure Law, a party involved in an arbitration in a foreign country may seek enforcement in China of the arbitral award.²³⁰ The party seeking enforcement must apply to the Intermediate People's Court in the place where the party against whom enforcement is sought resides or has property.²³¹ The court must handle the matter in accordance with international treaties to which China has acceded or according to the principle of reciprocity.²³²

The New York Convention is the most important international treaty concerning international commercial arbitration to which China is a party.²³³ Since China's accession to the Convention in 1987, Chinese arbitral awards have gained recognition and

²²⁶ See Kaplan & Bunch, *supra* note 17, at 43; Michael J. Moser, *China and the Enforcement of Arbitral Awards*, ARB., May 1995, at 132, 135.

²²⁷ See *supra* text accompanying notes 21-23.

²²⁸ The authors of this Article understand that the issue is currently being actively discussed.

²²⁹ At least one authority confidently asserts that there will be no changes with respect to Hong Kong's status in the New York Convention after July 1, 1997. See Kaplan & Bunch, *supra* note 17, at 43.

²³⁰ See P.R.C. Arbitration Law, *supra* note 54, art. 269.

²³¹ See *id.*

²³² See *id.*

²³³ See *supra* text accompanying note 69.

enforcement in a number of countries, including the United States.²³⁴ In the meantime, a number of foreign arbitral awards have been granted recognition and enforcement in China under the New York Convention.²³⁵ Nevertheless, when one looks at the published and unpublished record on P.R.C. enforcement of foreign arbitral awards, Chinese performance is mixed. Several problems of enforcement are said to have occurred in some cities that are not major international centers. A general lack of knowledge among Chinese judicial officials of the New York Convention and local protectionism are frequently cited as causes of such enforcement problems.²³⁶ As with many legal issues in China, consistent application of existing legal principles remains a problem. Enforcement of arbitral awards is no exception. On balance, however, China's reputation for enforcement is probably worse than it deserves.

With the exceptions noted above, there presently appears to be no problem with the enforcement of foreign arbitral awards in Hong Kong and China as a matter of law. The treatment in mainland China of arbitral awards made in Hong Kong, however, remains uncertain. The treatment in Hong Kong of arbitral awards made in mainland China is similarly unclear. In the past, arbitral awards rendered in Hong Kong have been enforced in China as foreign awards under the New York Convention. Similarly, awards made in China have been treated in Hong Kong as foreign awards.

After July 1, 1997, because the laws governing arbitrations and the judicial systems enforcing the awards will remain separate from one another, Hong Kong and China will clearly need to recognize and enforce the arbitral awards of each other on similar reciprocal terms. Given the transfer of sovereignty, however, treating awards as "foreign" may be awkward, especially for the Chinese. A reasonable approach would be to amend both Hong Kong's and China's arbitration laws to permit the two sides to enforce arbitral awards made in the territories on terms identical

²³⁴ See Richard Singleton et al., *U.S. Court Recognizes Chinese Arbitral Award*, CHINA L. & PRAC., Sept. 1996, at 48, 48-51; see also Moser, *China and the Enforcement of Arbitral Awards*, *supra* note 226, at 135.

²³⁵ See, e.g. Moser, *China and the Enforcement of Arbitral Awards*, *supra* note 226, at 134.

²³⁶ See *id.*; Xiaomin Sun & Ying Zen, *Settling Out of Court*, 23 CHINESE B. REV., No. 5, 50 (1996).

to those of the New York Convention, while regarding the awards as "domestic." Hopefully an appropriate arrangement will be in place by July 1, 1997.²³⁷

4. CONCLUSION

The arbitration systems of Hong Kong and China have very different origins. Nevertheless, both systems have undergone extensive revisions during the 1980s and 1990s. During the revisions, both systems were subject to many of the same influences, most notably the UNCITRAL Model Law. In theory, both systems are currently quite similar, although the flexibility and party autonomy allowed in Hong Kong's system reflects the existing social situation of that jurisdiction. Additionally, again reflecting differences in political and social theory, the implementation of Hong Kong's legal structure affecting arbitration is more likely to be predictable and less subject to extraneous influences than that of China.

Despite the differences between the Hong Kong and Chinese arbitration systems, it seems clear that the two systems should be able to coexist easily after 1997. Both systems seem to be moving in the same direction and should, under the Chinese sovereign, continue to complement each other. One possible impediment to smooth coexistence, however, is the ambiguity concerning the domestic/international status of Hong Kong awards in China and Chinese awards in Hong Kong. This conflict demands resolution. With this exception, the authors of this Article hope that the transition of Hong Kong to Chinese sovereignty can go as smoothly as the coexistence of both countries' arbitration systems is likely to be.

²³⁷ The authors of this Article understand that this issue is currently regarded as a high priority in both Beijing and Hong Kong.