Finding a Happy Ending for Foreign Investors: the Enforcement of Arbitration Awards in the People's Republic of China

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INTRODUCTION

Since China opened its doors to foreign trade in 1978, foreign businesspeople have increasingly become involved in Chinese economic development. Foreign investors have now formed partnerships with their Chinese counterparts involving licensing, trade, and direct investment. China, in turn, has embraced the development and its benefits to its citizens.

While the world welcomes this increase in business opportunities, foreign investors and privately owned Chinese companies seek a stable environment and guarantees for fair trade. These guarantees are often hard to obtain, due to China's cultural skepticism towards the law, its one-party political system, and its underdeveloped court system. Chinese and foreign investors often fear that Chinese courts will not provide adequate protection for their investments.

To avoid the unpredictable and sometimes corrupt Chinese court system, these investors might add to their contracts a clause which specifies that contractual disputes will be settled through arbitration. But when one party refuses to pay the arbitration award, and that party's assets are located in China, enforcement of that award must come through Chinese courts. Investors end up in the same court system they initially sought to avoid and may encounter tremendous difficulties in recovering the promised award. [1]

Chinese leaders now recognize the importance of its judiciary to further economic gains, and have promoted several very important recent changes in Chinese law and society. In

particular, the highest Chinese court, the Supreme People's Court, has passed numerous regulations in the last five years in an attempt to address the longstanding problems faced by foreign parties in the Chinese court system. Legislation now also provides for domestic arbitration tribunals to accept arbitrable disputes involving a foreign party, which has increased the competition among and perhaps the quality of arbitral bodies in China. In addition, China has recently cracked opened its doors to permit the operation of foreign legal programs within its borders, increasing foreign dialogue and training among judges.

With these many changes, it is important to determine whether there has been an objective increase in foreigners' ability to enforce arbitration awards in China, or whether these attempts at change are mere posturing and quick-fixes. Equally important, perhaps, is whether foreign and Chinese parties sense a subjective increase in fairness in their treatment within China. Indeed, many scholars still insist on a complete overhaul of the Chinese judicial system, claiming that these changes provide a mere "band-aid" on the massive problems continuing to face Chinese courts. Regardless of one's view, whether optimistic or nay-saying, the development of investment and business relations in China in future years may hinge on China's ability to reform its court system, cultural attitudes and image to successfully enforce these awards and increase the confidence of foreign investors.

In part A of this paper, I will briefly describe the history and development of arbitration in China, and the reasons behind its amazing rise in popularity in contracts involving Chinese businesses. In part B, I will discuss the different types of arbitration awards and the reasons why parties often encounter difficulties enforcing those awards in the Chinese courts. In part C, I outline the Chinese judicial system and the traditional method of enforcing arbitral awards. Part D will address the attempts made by Chinese judges and lawmakers to confront these challenges,

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1 Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122 (1996) at note 1.

as well as the attempts to measure the improvements, if any, caused by these changes. Finally, part E discusses changes that I believe are necessary to ensure the success of enforcing arbitral awards, and possible vehicles to implement those changes.

A. Development of Mediation and Arbitration in China

Mediation, or conciliation,[2] has been utilized in China to resolve civil disputes for over two thousand years. China's widespread preference for avoidance of the courts has led to its high utilization of arbitration. As a result, China has some of the biggest and most widely utilized arbitration bodies in the world. The Chinese preference to use extra-legal means is largely due to three factors: Confucian philosophy, an underdeveloped court system, and the influence of communism. [3] In addition, the relationship-based systems of mediation provides insight into extra-judicial means of enforcing arbitration awards which will be discussed later in the paper.

Mediation is believed to have developed in China due to the influences of Confucian philosophy and social morality. Confucianism is a philosophic model that has dominated Chinese history. Confucius viewed China as a patriarchy, with the leaders in control as the father and the citizens as the children.[4] Just like in a family, the father can accord his children any rights as he deems fit, but the children have no inalienable rights.[5] In addition, Confucius believed that any conflict or litigation between people brings disharmony, which

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[2] There is very little distinction between "mediation" and "conciliation." One scholar stated, "The differences between the methods [in mediation and conciliation] are slight and the benefits or drawbacks accruing to either method seem negligible." James T. Peter, *Med-Arb in International Arbitration*, 8 AM. REV. INT'L ARB. 83 (1997) at note 1.

[3] *See* Ge, *supra* note 1, at 126; *see also* Michael T. Colatrella, *Court-Performed Mediation in the People's Republic of China: A Proposed Model to Improve the United States Federal District Courts' Mediation Programs*, 15 OHIO ST. J. ON DISP. RESOL. 391 (2000).

[4] Telephone Interview with Robert J. Reinstein, Dean, Temple University School of Law, Dec. 2, 2001.

[5] *Id.*

is harmful to social relationships.[6] Ethical behavior, known as *li*, was embodied in moral and customary principles of polite conduct.[7] The alternative, *fa*, represented law and regulation. Confucius held a low view of the law.[8] While the law was useful in that it could be used to convict and execute people, Confucius did not believe that *fa* could teach people humanity, kindness, compassion and benevolence.[9] Chinese law became mainly penal in nature, with highly developed criminal codes and procedures.[10] In the meantime, civil law was rare, as people tended to avoid pursuing li-disrupting litigation.[11] Compromise, or yielding (termed *jang*), became the preferred method of resolving conflicts, and mediation was widely utilized.[12]

The court system in China has traditionally been inaccessible and inadequate for most Chinese citizens.[13] The magistrates sometimes had no legal training and were often corrupt.[14] Litigants generally distrusted the courts, making popular the expression "win your lawsuit and lose your money." [15] Citizens embraced alternative dispute resolution as a way to avoid the corrupt court system.

Furthermore, Chinese leadership has traditionally embraced mediation. Until 1949, the village and family elders of each town generally took responsibility for dispute resolution in China. The elders sought to restore harmony and grant concessions through mediation.[16] Mao Zedong, the leader of Communist China, agreed with these principles of mediation, believing the promotion of social harmony and the common good of the society should be

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6 Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People's Republic of China*, 10 TEMP. INT'L & COMP. L.J. 313, 314-15 (1996).
7 Id.
8 Id.
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10 Urs Martin Lauchli, *Cross-Cultural Negotiations, With a Special Focus on ADR With the Chinese*, 26 WM. MITCHELL L. REV. 1045, 1059 (2000).
11 *See* Colatrella, *supra* note 3, at 397.
12 *Id*.; *see also* Ge, *supra* note XX, at 123.
13 Colatrella, supra note XX, at 397.
14 *Id*.
15 *Id*.
16 Amanda Stallard, *Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 463, 477 (2002).

emphasized over individual interests. Disputes were resolved through mediation by People's Mediation Committees, which also had the responsibility to "educate" the people and help to implement party policy. [17]

Because of these influences, Chinese society does not focus heavily on promulgating individual rights through an adversarial system. Instead, mediation focuses on the good of the whole, seeking to understand the other party's position and reach an agreement that benefits both parties.[18]

Mediation is also based on social morality, appealing to the parties' reason and emotion rather than to laws or regulations. Examples abound of successful mediations where mediators found creative solutions to the problems based on social morality. Professor Stanley Lubman cites several examples:[19]

> Two brothers disputed over the division of family property for 14 years. The mediation committee director engaged in heart-to-heart talks with the brothers, assisted them with their needs and recalled their goodwill in the past. They reconciled and renounced their bitterness, and continued their business relationship.
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> An eighty-year-old woman intended to commit suicide because none of her four sons would support her. A mediator talked with them many times, but they would not listen to him. The mediator himself took care of the woman for months, and his deeds moved her sons to acknowledge their wrongdoing. They divided responsibility for their mother's care.

Urs Martin Lauchli, an international dispute resolution consultant, also gave several examples of traditional dispute resolution in China:[20]

> In one dispute involving the marital problems of a husband and wife, which included allegations of abuse by the wife, the mediator suggested that the couple go to Beijing for a holiday. "The matter was resolved when the husband expressed regret that he abused his wife." In another instance, after mediation, an

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17 *Id*. at 388.
18 *Id*.
19 STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO, Stanford University Press (1999) at 231-32.
20 *See* Lauchli, *supra* note 6, at 1066.

> unmarried woman who had become pregnant agreed to write a "self-criticism" and pay a fine. In a third instance, a grandson was angry with his grandmother over her living arrangements. The neighborhood mediation "committee met with the disputants and reminded the grandson that his grandmother, who was ninety-four years old, did not have long to live and that he should therefore try to make her happy." (Footnotes omitted.)

Traditional mediation did not adhere to the rule of law, but instead encouraged creative solutions to fit the individual parties' circumstances.

The use of mediation in China has recently been declining, while arbitration and judicial resolution have become more popular.[21] With an increase in globalization and an accompanying complexity in forms of disputes, mediation committees may not have the expertise to resolve the dispute nor have jurisdiction over the parties. [22] Contracts between foreign parties may not involve repeat players, and higher monetary values are at stake.[23] In addition, Chinese society has become more rights-conscious, and parties use courts to protect rights and seek compensation for infringement of rights.[24] One survey showed that villagers have become increasingly willing to sue other citizens and bypass the local mediation committees. [25]

The rejection of mediation has led to a recent increase in arbitration in China. For most Chinese, arbitration strikes an appropriate balance between mediation and litigation.[26] Arbitration tribunals are viewed as less confrontational than litigation, appealing to the Confucian philosophy and Communist principles.[27] And the flexible nature of arbitration also can allow parties to more easily resolve disputes.[28]

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[22] Stanley Lubman, *International Commercial Dispute Resolution in China: A Practical Assessment*, 4 AM. REV. INT'L ARB. 107, 236 (1993).

[23] *Id*.

[24] *Id*.

[25] *Id*.

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[27] Fredrick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in The People's Republic of China*, 15 BERKELEY J. INT'L L. 329 (1997).

[28] *Id*.

Many foreigners also prefer arbitration as a fair and efficient vehicle for resolving disputes. Foreign parties might view the Chinese judicial systemas lacking commercial expertise in resolving business contracts, adhering to slow and complex court procedures, and practicing local protectionism, as discussed below. Arbitration is usually cheaper and faster than the court system. [29] Equally important, foreign investors utilize arbitration clauses in an attempt to avoid the Chinese court system, which is widely perceived as corrupt and ineffective, tending to favor the Chinese party.[30]

B. Arbitration bodies and awards in China

China began to open its borders to international trade in the early 1980's. Several ad hoc arbitral bodies developed in China in the early 1980's. These arbitration bodies presented a variety of problems to the disputing parties.[31] The bodies did not have unifying concepts or principles. Arbitration was not certain or predictable, as the finality of arbitral decisions varied considerably, as did relations between each arbitral body and the court system.[32]

After over a decade of experimental arbitration, the National People's Congress (NPC) passed the Arbitration Law of the PRC (Arbitration Law), effective September 1, 1995.[33] The Arbitration Law established uniformity between arbitral bodies, provided a procedural code, set a high standard for arbitration personnel, and gave arbitral awards more finality.[34] The law also outlined the relationship between arbitral bodies and the courts, and defined arbitrable transactions. [35]

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[29] *See, e.g.,* DISPUTE RESOLUTION IN THE PRC: A PRACTICAL GUIDE TO LITIGATION AND ARBITRATION IN CHINA, Asia Law & Practice Ltd. (1992) at 25.

[30] Interview with Zhao Shiyan, attorney at law, Jingtian & Gongcheng, in Beijing, China (Nov. 2, 2004).

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[33] Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539, 551-52 (Spring 1995).

[34] *Id*.

[35] *See* Brown, *supra* note XX, at 342.

There are several different types of arbitral awards in China: foreign, foreign-related, or domestic. Foreign arbitral awards are awards made outside of China,[36] while foreign-related awards are awards made by international arbitration bodies in China and/or awards that involve a foreign element.[37] A foreign element may include a case where at least one party is a foreign person, organization, or enterprise; the creation, modification or termination of the contract between the parties occurred in a foreign country; or the action was brought in a foreign country.[38] Domestic awards involve Chinese parties and subject matter only relating to China. These disputes are beyond the scope of this paper, as they are regulated by different laws.

a. Current arbitration bodies

Two main international arbitration bodies in China handle foreign- and foreign-related disputes: the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC).[39] In addition, Chinese domestic arbitration tribunals have greatly expanded within the last decade, and now may accept foreign- and foreign-related disputes. The rapid and extensive development of these domestic tribunals further demonstrates the demand for this type of forum within China and its importance to the Chinese government.

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36 *See generally* Chang, *supra* note 29.

37 *See* Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People's Republic of China*, 1 ASIAN-PACIFIC L. & POL'Y J. 12, 52 (2003) ("Evolving Regulatory Framework"). A dispute between two Chinese parties may be foreign-related when the object of the dispute is outside China or where the legal relationship between the parties was established, modified, or terminated outside China. *See also* Neil Kaplan, *Roundtable on Arbitration and Conciliation Concerning China: HKIAC's perspective* (paper prepared for presentation at the 17th ICCA Conference, May 16-18, 2004). Mr. Kaplan is the chairman of the Hong Kong International Arbitration Centre.

38 *See* "Evolving Regulatory Framework," *supra* note XX, at 52.

39 CMAC, created to resolve maritime disputes, only handles approximately twenty cases per year. Charles K. Harer, *Arbitration Fails to Reduce Foreign Investors' Risk in China*, 8 PAC. RIM L. & POL'Y 393 (1999). This paper will focus mainly on CIETAC.

i. CIETAC

CIETAC has undergone several changes in name and function before establishing itself as an international arbitration commission. In 1956, the China Council for the Promotion of International Trade (CCPIT) founded the Foreign Trade Arbitration Commission (FTAC) to handle trade disputes.[40] In 1980, FTAC was renamed the Foreign Economic and Trade Arbitration Commission, as its jurisdiction was broadened to include non-trade economic matters.[41] Then in 1988, CCPIT further expanded the body's jurisdiction to encompass disputes arising out of international economics and trade, and issued new rules that brought the body's procedures more into line with international practices. Reflecting the increased jurisdiction, CCPIT assigned the arbitration body its current name.[42]

CIETAC is now one of the largest commercial arbitration centers in the world, having arbitrated nearly 8,000 disputes between 1993 and 2003.[43] This high case load and popularity is due to several factors. Until 1996, the Chinese government authorized CIETAC as the only international commercial arbitration center in China.[44] Chinese parties not familiar with international business practices are more likely to name CIETAC as the designated arbitration commission.[45] In addition, increasing trade with Chinese businesses may correspond with an increase in arbitrable disputes. Finally, Chinese regulations recommend that Chinese parties involved in certain types of disputes apply to CIETAC for arbitration.[46]

ii. Domestic Arbitration Tribunals and the Beijing Arbitration Commission

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42 *See* "Roundtable," *supra* note XX.
43 See Liu, supra note XX, at 542.
44 *Id.*
45 *Id.*
46 *Id.*

CIETAC and other foreign arbitration organizations are now encountering competition for foreign and foreign-related cases from domestic arbitration tribunals. China's current domestic arbitration system was created only ten years ago, through the passage of the 1995 PRC Arbitration Law ("Arbitration Law").[47] Among other things, the Arbitration Law mandated the establishment of local arbitration commissions.[48] In 1996, the State Council authorized domestic arbitration commissions to accept foreign-related cases.[49] The location and scope of these commissions have grown tremendously, from seven "trial cities" in 1995 to approximately 170 commissions now operating in cities throughout China.[50] The commissions vary widely in case experience, expertise among arbitrators, and independence from local government influences.[51] The commissions located in major cities are reported to be more financially independent.

The Beijing Arbitration Commission (BAC) is considered to be China's "flagship" domestic arbitration institution, and is the national focal point for communication and training among the various domestic commissions.[52] The BAC is reported to be 100% self-sufficient, meeting its operating expenses from arbitration fees.[53]The BAC accepted 1029 cases in 2003, and has accepted over 4000 cases in total since its inception in 1995.[54]

Although the vast majority of the BAC's cases involve domestic disputes, the cases involving foreign-related disputes and foreign parties are growing. It is nowactively pursuing foreign markets.[55] The BAC now has specialists in the International Federation of Consulting Engineers (FIDIC) among its arbitrators to address issues in international

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[47] Arbitration Law, Art. 14; Jerome A. Cohen and Adam Kearney, *Domestic Arbitration: The New Beijing Arbitration Commission*, § 3.02 IV-3.2-3.3, in DOING BUSINESS IN CHINA (Freshfields ed. 2000) ("New BAC").
[48] *Id.*
[49] *See* "Evolving Regulatory Framework," *supra* note XX, at 12.
[50] *See* "New BAC," *supra* note XX, at 3.2; "Introduction to the BAC," *supra* note XX.
[51] *Id.*
[52] *See* "New BAC," *supra* note XX, at 3.2.
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[54] "Introduction to the Beijing Arbitration Commission," 17th ICCA Conference (May 16-18, 2004) ("Introduction to the BAC"); DONALD CLARKE & ANGELA DAVIS, DISPUTE RESOLUTION IN CHINA: THE ARBITRATION OPTION, China 2000 (2000), *available at* http://www.asialaw.com/bookstore/china2000/.
[55] Wang Hongsong, "Beijing Arbitration Commission 2001 Work Summary and 2002 Work Plan," *available at http://www.bjac.org.cn/en/brow.asp?id=133* (last visited Dec. 13, 2004) ("2001 Work Summary"); *see also* "Introduction to the BAC" ("The BAC has also been attaching prime importance to the building of arbitrator systems with reference to international practices.").

construction projects, particularly in light of the development in preparation for the 2008 Olympic Games in Beijing.[56] In addition, the BAC has an extensive and accessible website translated in English, which highlights its latest developments, including mandatory training sessions for newly appointed and untrained arbitrators, its recently compiled Arbitrators' Manual, and its publication stating the ethical standards for BAC arbitrators.[57] BAC also appears willing to adjust its procedures to accommodate foreign parties. For example, after foreign parties objected to the BAC's limitation that only two attorneys representing a party are allowed in the courtroom at a time, the BAC agreed to relax that requirement.[58]

Arbitrating with the BAC is attractive for several reasons. The BAC claims that the average duration of cases from formation to conclusion is a mere 79 days.[59] In addition, parties might specify arbitration with a domestic tribunal which contains arbitrators they are familiar with or arbitrators with a particular specialization.[60].

iii. Competition between CIETAC and BAC

Given the recent addition of quality domestic tribunals such as the BAC, CIETAC faces stiff competition over foreign- and foreign-related disputes. In addition, CIETAC practices have recently come under attack by scholars, particularly law professor and practitioner Jerome Cohen of New York University. CIETAC, realizing the necessity of addressing these critiques, has adopted some of the changes suggested by Prof. Cohen and disputes the necessity of other changes.

Prof. Cohen has assaulted CIETAC practices during the past decade. Prof. Cohen claims that CIETAC permits the appointment of staff persons as presiding arbitrators, which could arguably allow for the exercise of administrative influence and control over the panel's

[56] *See* "Introduction to the BAC," *supra* note XX.
[57] *Id.; see also* "Ethical Standards for Arbitrators of the Beijing Arbitration Commission," effective March 1, 2004, *available at http://www.bjac.org.cn/en/brow.asp?id=699* (last visited Dec. 13, 2004).
[58] See "New BAC," supra note XX, at 3.15.
[59] *See* "Introduction to the BAC," *supra* note XX.
[60] Interview with Wang Chenguang, Dean, Tsinghua University School of Law, in Beijing, China (November 2, 2004); *see also* "Introduction to the BAC;" "2001 Work Summary."

decision.[61] It appears Prof. Cohen's critique has been heeded, for Cao Lijun claims that CIETAC now requires that "all staff members … decline appointment by parties unless it is a joint appointment as a sole or presiding arbitrator."[62] Mr. Lijun further asserts that CIETAC staff members can only be appointed by the CIETAC chairman when the parties have defaulted in making an appointment.[63]

Prof. Cohen also questions CIETAC's current practice of allowing its arbitrators to serve as advocates in other CIETAC cases breeds too much familiarity and diminishes institutional integrity, particularly given China's existing "guanxi" practices.[64] Instead, he suggests, CIETAC should amend its rules, as the BAC has, to require all those serving as arbitrators to cease serving as advocates in other CIETAC cases.[65] CIETAC has not directly addressed this concern. However, Dr. Wang Sheng Chang, Vice Chairman of CIETAC, states that the statistics on the outcome of decisions by CIETAC arbitrators contradicts Prof. Cohen's claim of any resulting bias from CIETAC tribunals against foreign parties.[66]

Prof. Cohen has also critiqued CIETAC for permitting arbitrators to assign the drafting of the published opinion to the CIETAC staff.[67] Dean Wang suggests that this situation is being addressed by CIETAC, as the CIETAC administration is now asking arbitrators to spend more time on the hearings, meeting two or three times if necessary, and to write the award judgments themselves.[68] Indeed, Mr. Lijun claims that CIETAC now encourages the tribunal to play a larger role in administering the case and now requires members of the tribunal, in particular the presiding arbitrator, to draft the award.[69]

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[61] Jerome A. Cohen, "International Commercial Arbitration in China: Some Thoughts from Experience," Address at the International Economic Law and China In Its Economic Transition Joint Conference (Nov. 4 and 5, 2004) ("Int'l Address").
[62] *See* E-mail from Cao Lijun, Arbitrator and Staff Member, CIETAC, China (Jan. 31, 2005, TIME PST) ("Cao e-mail 1/31/05").
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[64] *See* "Int'l Address," *supra* note 61. Professor Cohen also notes that, while CIETAC will honor an arbitration clause specifying that the presiding arbitrator be from a third country, CIETAC does not advertise or encourage this option.
[65] *Id.*
[66] *See* "Roundtable," *supra* note 193.
[67] *See* "Int'l Address," *supra* note 61. In comparison, the BAC requires arbitrators to do their own work. *Id.*
[68] *See* Interview with Wang Chenguang, *supra* note XX.
[69] *See* Cao Lijun e-mail 1/31/05, *supra* note XX.

Aside from these procedural issues, CIETAC and the BAC offer their own advantages and disadvantages. CIETAC is well established in the business community and is generally well-respected.[70] It has relied on income earned from administrative fees instead of receiving funds from the government for almost 20 years, demonstrating its independence from the government.[71] Parties are able to designate a specific foreign arbitrator to sit on the panel, as CIETAC's panel of arbitrators includes 146 foreign nationals from nearly 30 different countries.[72] In comparison, the BAC claims to have "Chinese and foreign professional" experts, but it is uncertain whether the arbitrators are actually from foreign countries or are merely Chinese arbitrators authorized to hear foreign disputes.[73]

CIETAC claims new areas of expertise which could assist the resolution of certain types of contracts, having established the Domain Name Dispute Resolution Center in 2001, and the Future Transaction Dispute Resolution Center in 2003.[74] CIETAC officials claim that courts will give deference to CIETAC awards, given CIETAC's forty-year history and courts' greater familiarity with the institution.[75] And Dean Wang has mentioned that enforcement of CIETAC awards can be less problematic than domestic awards, as the application of SPC interpretations are more clearly applicable to CIETAC awards than to domestic awards.[76]

On the other hand, BAC offers several potentially persuasive advantages over CIETAC, particularly for smaller commercial disputes.[77] BAC's procedure is relatively

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[70] *Id*.
[71] *See* "Roundtable," *supra* note 193.
[72] *See* Roundtable, *supra* note 193.
[73] *See* "Introduction to the BAC," supra note XX; "New BAC," supra note XX ("Although there are currently six individuals from Hong Kong and two from Taiwan on the BAC roster, there are no foreign arbitrators on the list and no plans to appoint foreign arbitrators in the foreseeable future, primarily due to financial constraints.").
[74] *See* Roundtable, *supra* note 193.
[75] Cao Lijun asserts:

> It is true that CIETAC awards, whether domestic ones or foreign-related ones, receive more deference in the enforcement or annulment proceedings. Most of CIETAC arbitrators are distinguished legal scholars, practitioners or retired judges and their qualities are reflected in their decision-making. CIETAC is the most reputable institution in China. The awards are also subject to the scrutiny of CIETAC before they are officially rendered. I believe all these contribute to the deference.

Cao Lijun e-mail 1/31/05.
[76] *See* Interview with Wang Chenguang, *supra* note XX.
[77] *See* "New BAC," *supra* note XX, at 3.22.

speedy, with an average duration of 79 days from the beginning to the conclusion of a case.[78] In addition, the fees for BAC arbitration are relatively less expensive than for CIETAC.[79] This choice could benefit a smaller company which is already familiar with and specifies an arbitrator listed with the BAC.

There are currently no statistics indicating whether parties involved in foreign disputes are staying with CIETAC arbitration or switching to domestic tribunals such as the BAC. It appears CIETAC has accepted fewer overall cases as a result of the 1996 Notice, which could potentially be caused by competition from the local arbitration commissions.[80] But the statistics are not available to decipher whether those involved in foreign disputes have chosen not to arbitrate with CIETAC, or whether they are, for example, specifying other international arbitration bodies or other dispute resolution methods such as mediation.

iv. Ad-hoc bodies

Chinese courts appear to have taken a new approach to the final type of arbitration within China, ad hoc arbitration. Chinese law has traditionally held as void arbitral agreements issued by a body not administered by a recognized arbitral institution.[81] Furthermore, Article 18 of the Chinese Arbitration Law specifies that, if an arbitration clause does not select an arbitration commission or does not reach a supplementary agreement regarding the commission which is chosen, the arbitration agreement will be void.[82] Due to the New York Convention, Chinese courts usually recognize and enforce ad hoc awards made in a Convention State.[83] However, it is unclear whether Chinese courts will acknowledge and enforce ad hoc awards made within Mainland China.[84] Peerenboom

[78] *See* "Introduction to the BAC," *supra* note XX.
[79] *See* "New BAC," *supra* note XX, at 3.22.
[80] Mauricio J. Claver-Carone, *Post-Handover Recognition and Enforcement of Arbitral Awards between Mainland China and Hong Kong SAR: 1999 Agreement vs. New York Convention*, 33 LAW & POL'Y INT'L BUS. 369, 401 (2002).
[81] *See* Kaplan, *supra* note XX.
[82] *See* Claver-Carone, *supra* note XX, at 392.
[83] *See* "Evolving Regulatory Framework," *supra* note XX, at 13.
[84] *Id*.

predicts CIETAC will oppose acknowledgement of ad hoc awards in an attempt to ensure its dominance in foreign-related arbitration cases in China.[85]

It is less certain whether arbitration clauses calling for "arbitration under UNCITRAL rules in China" may be enforced.[86] One unpublished, internal document of the Supreme People's Court (SPC) stated that an arbitration clause of this nature is ad hoc arbitration and therefore unenforceable.[87] On the other hand, arbitration clauses that specify arbitration in China under the auspices of the International Chamber of Commerce and the Singapore International Arbitration Centre are supposedly valid and enforceable.[88]

It appears that the law in China is shifting towards a more open approach to ad hoc arbitrations. The December 31, 2003, draft of the Provisions of the Supreme People's Court Regarding People's Courts' Handling of Arbitration Cases Involving Foreign Elements and Cases Arbitrated Abroad states:

> An arbitration agreement is invalid in which the parties have agreed to submit their disputes to ad hoc arbitration, except when the parties concerned are citizens of member countries to the 1958 United Nations Convention on the Recognitions and Enforcement of Foreign Arbitral Awards and the laws of such countries do not prohibit ad hoc arbitration.

Article 27 (December 31, 2003 draft).[89] Since China does not officially allow ad hoc arbitration, it is assumed that this provision applies only when both parties are citizens of foreign countries. But some have argued that the SPC provision would only make sense if it were to apply to the Chinese party as well.[90] This could indicate China's increased willingness to permit ad hoc arbitrations and enforcement of resulting agreements within China.[91]

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[85] *Id*.

86 *See* Clarke, *supra* note 34, at 8.

[87] *See* Claver-Carone, *supra* note 35, at 391-92.

88 *Id*.

[89] *See* Kaplan, *supra* note XX.

[90] *Id*.

[91] Indeed, there are isolated cases where courts in China have upheld ad hoc awards. For example, in 1990 the Guangzhou Maritime Court enforced three ad hoc awards made in London in Ocean Shipping Company. *See* John Shijian Mo, ARBITRATION LAW IN CHINA 427 (Sweet & Maxwell ed. 2001) (discussing *Guangzhou v. Marships of Connecticut*).

C. General procedure for enforcement of arbitration awards in China

Arbitration awards are considered final and enforceable.[92] If a party fails to pay an arbitration award, the party receiving the award must seek enforcement in the court system where the assets are located. For many parties, this leads to the situation they fear the most: dealing with the Chinese court system.

1. Chinese court structure

A brief overview of the structure of the court system in China is necessary to understand the problems of enforcement as well as potential solutions. There are about three thousand county-level Local People's Courts.[93] Above this are 389 Intermediate Level People's Courts (IPC), which sit in provincially-administered cities and centrally-administered cities.[94] The Local and Intermediate Level Courts have separate enforcement chambers. At the next level, there are thirty High People's Courts (HPC), one for each province, autonomous region, and centrally-administered city.[95] Finally, the Supreme People's Court (SPC) is the highest court in China.

In addition, each court has a parallel Adjudication Committee, which is comprised of the president of the court, the vice-president, the head of specialized chambers, and regular judges. These Committees, usually members of the CCP, advise individual judges in cases deemed to be important. This further detracts from judicial independence.

2. Civil Procedure Law

Before 1982, China had no legal basis for enforcing foreign-related arbitral awards.[96] The awards depended on voluntary compliance by the losing party.[97] The CPL, passed in

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92 *See* Lubman, *supra* note 10, at 246.
93 *See* Berkman, *supra* note XX, at 22.
94 *Id.*
95 *Id.*
96 *See* "Evolving Regulatory Framework," *supra* note 26, at 13.
97 *Id.*

1982, provided a legal basis for compulsory enforcement of arbitration awards. Article 195 of the CPL specified:

> When one of the parties concerned fails to comply with a ruling made by a foreign affairs arbitration organization of the PRC, the other party may request that the ruling be enforced in accordance with the provisions of this article by the courts at the place where the arbitration organization is located or where the property is located.

The article did not consider ad hoc awards, and it did not contain a provision for the refusal of enforcement; all awards were final and enforceable.[98] The court would not perform the limited review allowed under the New York Convention, but was merely instructed to execute the award. In addition, parties could seek enforcement at the place of arbitration or where the assets were located.[99]

The procedure for enforcing foreign arbitral awards under the 1982 CPL proved fairly confusing. PRC courts could only enforce final judgments or rulings, so arbitral awards must be converted into a judgment or ruling to be enforceable.[100] Moreover, only a foreign court could request the enforcement of an award, not the victorious party, and some foreign courts did not have the jurisdiction to make this request.[101] The PRC court could also refuse to enforce the judgment if it would violate national or social interests.[102] Due largely to this confusion, no parties successfully enforced a foreign arbitral award under Article 195.[103]

In December 1986, the NPC determined that China would join the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[104] China made the following declaration:

> (a) The People's Republic of China will apply the Convention to the recognition and enforcement of arbitral awards rendered in the territory of another Contracting State only on the basis of reciprocity; and
> (b) The People's Republic of China will apply the Convention only to disputes which have, according to the laws of the People's Republic of

[98] *Id.* at 14.
[99] Id.
[100] Id.
[101] Id.
[102] Id.
[103] Id.
[104] Id. at 15.

> China, been determined as arising out of contractual relationships or non-contractual commercial legal relationships.

Once China became a party of the New York Convention, it was subject to reciprocity and commercial reservations.[105] Over 100 countries, including most of China's major trading partners, are now parties to the New York Convention.[106] Reciprocity now applies to nearly all arbitral awards involving Chinese parties.[107]

In 1991, the NPC amended the 1982 CPL, specifying the courts must handle enforcement pursuant to international treaties to which China is a party.[108] The revision also provided standards for refusal to enforce domestic and foreign-related awards, to be discussed later in the paper. In addition, the revisions no longer provided jurisdiction based on the place of arbitration.[109] The venue for foreign-related awards can only be the respondent's legal domicile or where the property is located.[110]

D. Obstacles to enforcement of foreign arbitration awards

"An arbitral award is only as good as the court that is asked to enforce it."[111]

Chinese courts have the statutory authority to enforce arbitral awards. Whether based on anecdotal information, one or two poorly decided enforcement decisions, or a prevalent refusal by Chinese courts to enforce foreign awards, many foreign investors and commentators report that enforcement of foreign awards in China is nearly impossible.[112]

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[105] Id.
[106] Id.
[107] *See* "Evolving Regulatory Framework," *supra* note XX, at 27.
[108] *See* Liu, *supra* note XX, at 549.
[109] *See* "Evolving Regulatory Framework," *supra* note XX, at 27.
[110] *Id.*
[111] *See* Michael J. Moser, *Roundtable on Arbitration and Conciliation Concerning China: Commentary* (paper prepared for presentation at the 17th ICCA Conference, May 16-18, 2004). Mr. Moser is a partner at Freshfields Bruckhaus Deringer.
[112] *See, e.g.*, Greg Rushford, *Chinese Arbitration: Can It Be Trusted?* ASIAN WALL ST. J., Nov. 29, 1999; Harer, *supra* note 23 ("If the Chinese party to an arbitration agreement does not voluntarily participate and comply with an award, the arbitration agreement can be a no-win situation for a foreign party transacting business with a Chinese entity."); Sally A. Harpole, *Following Through on Arbitration*, CHINA BUS. REV., September-October 1998, at 33-38, *available at http://www.chinabusinessreview.com/9809/harpole.html*; Jerome A. Cohen, "Experience in Arbitration and Recognition and Enforcement of Arbitral Awards in the P.R.C." Joint U.S.-China Arbitration Seminar, April 7, 1998, Beijing, China ("Experience in Arbitration") (citing the Revpower case and an attempt by a Swiss company to enforce a Stockholm arbitration award).

Combating this perception, PRC sources have cited to positive anecdotal information to downplay enforcement challenges.[113]

The difficulty in verifying the accuracy of these foreign reports is exacerbated by the lack of concrete measurable data. Several attempts have been made to ascertain the likelihood of success for enforcing an arbitration award. In 1997, the Arbitration Research Institute (ARI) of the China Chamber of Commerce surveyed 134 applications made to People's Courts between 1991 and 1996 for enforcement of CIETAC awards.[114] According to this survey, 97 awards were enforced and 37 were denied enforcement by the courts.[115] The survey cited main reasons for denial of the awards. In several cases, the validity of the arbitration agreement itself was in question. For other cases, parties were effectively denied the opportunity to participate in the arbitration proceedings. In yet other cases, the courts found that the arbitrators exceeded their authority by acting outside the jurisdictional limits of the arbitration body or the scope of the arbitration agreement.[116]

Professor Randall Peerenboom claims that the ARI's survey suffered from "methodological problems and poor responsiveness by the courts."[117] He conducted his own independent survey of 89 CIETAC and foreign arbitral award enforcement cases.[118] Calculating enforcement rates from 72 of these cases, Peerenboom painted a substantially bleaker picture than the official CIETAC statistics, finding that 52% of the foreign awards and 47% of the CIETAC awards were enforced.[119] Investors could expect to recover 50-75% of the award amount in 34% of the cases and half of the award amount in over 40% of the cases.[120]

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113 *See, e.g.*, Wang Guiguo, "One Country, Two Arbitration Systems: Recognition and Enforcement of Arbitral Awards in Hong Kong and China," 14 J. INT'L ARB. 5-42 (Mar. 1997) (claiming there are few reported cases where courts have refused to enforce a convention award).
114 *See* Cheng, *supra* note XX, at 130.
115 *Id*.
116 *Id*.
117 Randall Peerenboom, *Seeking Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 254 (2001) ("Seeking Truth").
118 *Id*. at 251.
119 *Id*. at 254.
120 *Id*.

What accounts for this relatively low recovery rate for arbitration awards? Many different factors may be involved, including a lack of an independent Chinese judicial system, corruption, and the insolvency of Chinese parties.

1. Lack of an independent judiciary: Influence from CCP and local government officials

The Constitution of the PRC, in effect since 1982, specifies that China is a unitary state based on a system of parliamentary supremacy.[121] In practice, however, the Communist Party (CCP) exercises governance over China parallel to official State governing bodies.[122] The CCP Committeealso exerts tremendous influence on all levels of the court system.[123] The Committee often selects judges, and the People's Congress at the corresponding level ratifies the choices.[124] These judges go on to serve on the adjudication committee of each court, wielding considerable power to determine the outcome of controversial cases.[125] Judges who are also CCP members sometimes discuss cases involving difficult legal issues with the Political-Legal Committee, and accept general policies set by the CCP.[126] As a result, parties affiliated with the CCP rarely lose in the court system.[127]

Judges in China do not enjoy independent judicial decision-making. Local governments appoint judges and pay them a low salary, and Chinese judges do not enjoy tenure.[128] The low salaries and financial dependence on the government could increase the instances of judges accepting bribes or favoring local parties.[129] In addition, relatives and administrative superiors of the judges may influence judicial decision-making.[130]

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[121] James V. Feinerman, *The Give and Take of Central-Local Relations*, CHINA BUSINESS REVIEW, January 1, 1998, *available at* 1998 WL 10921709.
[122] *Id*.
[123] *Id*.
[124] *See* "Evolving Regulatory Framework," *supra* note 26, at 44.
[125] Randall Peerenboom, CHINA'S LONG MARCH TOWARD RULE OF LAW 306 (Cambridge University Press 2002) ("Long March").
[126] *Id*.
[127] *See* Reinstein, *supra* note 4.
[128] *See* Lubman, *supra* note 10, at 279; "Long March," *supra* note XX, at 294.
[129] *See* Interview with Zhao Shiyan, *supra* note XX.
[130] *Id*.

Corruption has often been cited as a deeply rooted problem in the Chinese court system. One judge reported that she refused a large number of bribes and banquet invitations, and as a result, "she was ridiculed by her neighbors, treated coldly by her friends and was even the object of revenge and abuse by scoundrels, but in the end she won the trust and praise of the masses."[131]

Courts in China have less power than their western counterparts, partly due to the current constitutional structure. Judges are appointed by the NPC and are funded by the government at the same level.[132] The judges rely on salaries and housing provided by the municipal government.[133] This dependence can give local governments leverage over the courts, and government officials have been known to make threats such as cutting off needed funding to build housing for court staff. [134] Local courts might "choose" to protect the defendant business or government to safeguard the local financial needs of the courts or the local government.[135]

Courts are also more dependent on local government due to the gradually decentralization that has taken place since 1985.[136] Local governments must often support themselves through local taxes, fees and charges collected from local businesses, providing an incentive to propagate those steady sources of income.[137] The enforcement of an arbitration award against a local business could thus negatively impact the local economy, and in some cases the business will have to shut down, resulting in a number of citizens losing their jobs and housing.[138] Local People's Courts recognize these detrimental effects and may seek to evade enforcement of the award.[139]

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131 *See* Lubman, *supra* note XX, at 279.
132 *Id.* at 278.
133 *Id.*
134 *Id.*
135 CECILIA HÅKANSSON, COMMERCIAL ARBITRATION UNDER CHINESE LAW, Iustus Förlag, 1999.
136 *See* Pitman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 LAW & SOC. INQUIRY 465, 472-73 (2004). Potter notes this interplay of central and subnational governments resembles the federalist system of the United States. *Id.*
137 [Potter article? Find it!]
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139 *See* Potter, *supra* note XX, at 17-18. But Peerenboom's study challenges the theory of higher enforcement in more sophisticated areas, as he found more instances of local protectionism in major investment centers than in smaller cities. *See* "Seeking Truth," *supra* note XX, at 269.

Decentralization has also affected the various levels of sophistication found within the local court systems. Provinces develop and adopt new regulations promulgated by the central government at different speeds, influencing the chances of effectuating enforcement of an award. Wang Chenguang, Dean of Tsinghua University and a member of the Advisory Committee to the Supreme People's Court, notes that the court systems in the coastal areas are more highly developed, as lawyers trained in those areas tend to stay to work, raising the level of education for judges and lawyers involved in the system, and there is typically more interaction with foreign parties.[140] On the other hand, rural areas often suffer a high attrition rate, as many students move to the big cities to pursue a higher education, leading to a court system ill-prepared to handle conflicts with foreigners.[141] But the PRC constitution provides that China is a unitary state, and the Chinese government continues to subject local authorities to the central government.[142]

2. Local protectionism

Local protectionism has long been a dilemma in China. In an effort to fight protectionism, imperial China required its magistrates to rotate to new places every few years and prohibited them from serving in their home districts.[143] Even the Chinese government has acknowledged that protection from local officials and courts thwarts the collection of foreign awards and ultimately interferes with China's economic development.[144]

Local protectionism can appear at any stage in the judicial process, and it affects both foreign parties and parties from foreign provinces in China. Judges have required applicants for enforcement of an arbitral award to provide a number of documents not required by PRC law, including evidentiary documents that the arbitration tribunal relied on in making its

[140] *See* Interview with Wang Chenguang, *supra* note XX.
[141] *Id*. Indeed, Dean Wang indicates the Supreme People's Court is considering whether to effectuate simpler court procedures in outlying areas to make the systems more accessible to the public and easier to use.
[142] *Id*.
[143] See "US-China Commission Hearing," supra note XX.
[144] Potter, supra note XX, at n.72 (citing various Chinese governmental officials decrying local protectionism).

award.[145] Judges have also required parties to perform the costly and time-consuming effort of translating, notarizing, and consularizing the documents. [146]

In one form of protectionism, local governments may help companies to hide or transfer assets or dodge debts.[147] This appears to have taken place in the infamous RevPower case, where RevPower Limited received a $9 million arbitral award from the Stockholm Chamber of Commerce against a Chinese party. But when RevPower attempted to enforce the award in the Shanghai People's Court, the court refused to acknowledge the award for two years, during which time the Chinese party had transferred its business and assets to its parent and grandparent companies and appeared to be insolvent.[148]

Chinese authorities recognize that local protectionism adversely affects long-term business dealings with foreign companies. One Chinese report stated, "The hard-won respect of CIETAC is being squandered by a judicial system unable to make Chinese parties pay up."[149] In 1991, the President of the SPC, Ren Jianxian, acknowledged to the NPC the damage caused by local protectionism. He urged several prohibitions to counter local protectionism:

(i) Prohibiting local party cadres from interfering with the judicial process in an attempt to protect local interests;
(ii) Prohibiting government officials and other parties from making threats or launching campaigns against judicial officers carrying out the execution of court orders;
(iii) Prohibiting judicial organs from practicing favoritism towards local parties by making unfair rulings or avoiding their proper responsibilities;
(iv) Prohibiting officials of the public security and procuratorial organs from interfering with the adjudication of economic cases by treating contract and debts
(v) Prohibiting any organ or individual from obstructing the execution orders of the People's Courts in any other way.[150]

[145] See "Seeking Truth," supra note XX, at 299.

[146] *See* "Evolving Regulatory Framework," *supra* note XX, at 88; Potter at 19.

[147] *See id.* at 194.

[148] *See* Brown, *supra* note 23, at 341; "Seeking Truth," supra note XX, at n.5.

[149] *See* Lubman, *supra* note 13, at 157; *see also* DEJUN CHENG, ET AL., INTERNATIONAL ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA, Butterworths Asia, 2000.

[150] *See* Cheng, *supra* note 55, at 128.

Justice Ren urged that court personnel and government officials who repeatedly violate these prohibitions and engage in local protectionism be disciplined and possibly subject to criminal sanctions.

While the SPC has responded to the threat of local protectionism, as discussed later in this paper, it is uncertain whether these efforts have had an effect. The web site for the Beijing Arbitration Commission contains an interesting editorial note concerning the continuing threat of local protectionism, in relation to Chinese parties from outlying provinces. The editor writes:

> When I attended an international convention, hearing other countries talk about the severe regional protectionism of China Mainland justice, a so-called national self-respect made me hardly admitted I had heard about willing and promptly even though I [] believed it to be absolutely unreasonable and irresponsible. Upon reading the following cases however, I was dropped into such agony that [the] ghost of the regional protectionism were broadening its magic trance around Chinese great ground.[151]

The situation is certainly alive and well, and remains to be fully addressed.

3. Transfer of assets and resulting insolvency of Chinese party

a. Assistance of courts, officials

Peerenboom disagrees with critics who blame local protectionism for the lack of enforcement of awards, and instead claims local protectionism has served as a "scapegoat" for judges, central government officials and lawyers, where blame for failure to enforce the award is shifted to local government officials.[152] Peerenboom arguesthattrue challenge to enforcing an arbitration award is the insolvency of the respondent.[153] Of the 37 non-enforcement cases in his 1997 survey, 43% were unenforceable because the respondent did not have the necessary assets to pay the award.[154] In eleven of the sixteen no-asset non-

[151] *See* "Civil Ruling of Shanxi Jiexiu People's Court against Enforcement of NO.199801276 Arbitration Award of Beijing Arbitration Commission," *at* http://www.bjac.org.cn/en/brow.asp?id=145.
[152] *See* "Seeking Truth," *supra* note XX, at 254.
[153] *Id.*
[154] *See id.*

enforcement cases, local counsel for the petitioners believed that the respondents were truly insolvent and lacked unencumbered assets.[155] In three other cases, the lawyers believed the respondents had fraudulent transferred their assets to other companies to avoid payment. The lawyers in the remaining two cases were unsure whether the respondent had assets.[156]

While Peerenboom downplays the role of local protectionism in the enforcement of awards, many cases of apparent insolvency could be a result of protectionism. For example, a local government official could warn a company of an upcoming application for enforcement, leading to a fraudulent transfer. Or a bank might aid the local party by delaying or refusing to provide bank account information or freeze bank accounts.

If the property has been transferred or is no longer available, the plaintiff might need to bring a second suit to seize property to satisfy the award. For example, Dean Wang served as chief arbitrator in a case in Shenzhen.[157] Wang later spoke with the attorney of the winning party who said the enforcement was taking a long time because the other party had declared bankruptcy.[158] As a result, the attorney had to file another lawsuit to seize property in order to satisfy the award.[159]

An additional lawsuit was also necessary in the case Guangzhou Ocean Shipping Company, in which the defendant American company failed to pay the remainder of an arbitration award.[160] The plaintiff Chinese company learned that a third party, located in China, owed the defendant a freight fee and was preparing to pay the fee.[161] The plaintiff submitted an application for recognition of the arbitral award and for a transfer of the above payment to the plaintiff to satisfy that award. The Guangzhou Maritime Court ordered the fee to be paid directly to the plaintiff.[162]

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[155] Id.
[156] *See id.*
[157] *See* Interview with Wang Chenguang, *supra* note XX.
[158] *Id.*
[159] *Id.*
[160] *See* Zhao Shiyan, Enforcement of Foreign Arbitral Awards in the People's Republic of China 22 (2001) (unpublished LL.M. thesis, Vrije University, Amsterdam).
[161] *Id*.
[162] *Id*.

b. Applicants have the responsibility to locate respondents' assets for collection

In order to attach assets, courts must ascertain where the assets are located. Respondents are required by law to state where the location of their assets, yet in practice, parties seeking enforcement bear the burden of providing this information to the courts.[163] Judges may decline to track down the assets for several reasons. They frequently have difficulty obtaining cooperation from banks and administrative agencies, due mainly to the low stature of the courts within the political structure. Banks may resist court orders to assist in enforcement because "the court is essentially just another bureaucracy, with no more power to tell [them] what to do than the Post Office."[164]

In the face of frequent mergers, reorganizations and spin-off companies, China's rapidly changing economic landscape makes it difficult to determine asset ownership.[165] Inadequately documented transfers and mergers of various companies, plus a rapidly-changing regulatory framework for land acquisition in China, add difficulty to find clear title to many assets.[166]

With the burden on the applicant, information regarding the respondent's assets is even harder to obtain. Parties may have to work with professional investigation companies, whose members in turn rely on connections with former ministry colleagues to find information on assets.[167] Under PRC law, Chinese companies are limited to one bank account for normal business activities,[168] yet some companies ignore this law and open multiple accounts to evade taxes. It is often almost impossible to track down all of a company's accounts.[169]

Applicants seeking information on a respondent's assets may contact the Administration of Industry and Commerce (AIC). The AIC compiles a Registration Record

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163 *See* Enforcement Regulation art. 28; "Seeking Truth," *supra* note XX, at 294.

164 *Id*.

165 *See* "Evolving Regulatory Framework," *supra* note 26, at XX.

166 *Id*.

167 *See* "Seeking Truth," *supra* note 47, at 292.

168 *See* Commercial Banking Law of the PRC art. 48.

169 *See* "Evolving Regulatory Framework," *supra* note 26, at 49.

Book, in which all companies' financial statements should be available.[170] These records are officially available to the public, but in practice they are closely guarded, and lawyers usually need to present a court notice before being granted access to the record books.[171]

Banks, for the most part, are reluctant to give out account information out of fear of damaging relations with their customers.[172] Instead of immediately complying with a court order, banks might notify customers first to allow sufficient time for the customer to transfer money into another account before the bank attempts attachment.[173]

4. Ambiguity in the CPL regarding grounds for refusal of enforcement

Article 260 of the Civil Procedure Law of the People's Republic of China (for Trial Implementation) (CPL) provides specific procedural grounds for refusing to enforce foreign-related awards:

(a) The parties have neither included an arbitration clause in their contract or subsequently reached a written agreement;
(b) The respondent did not receive notification to appoint an arbitrator or to take part in the arbitration proceedings or the respondent could not state his opinions due to reasons for which he is not responsible;
(c) The formation of the arbitration tribunal or the arbitration proceedings do not conform to the rules of arbitration;
(d) The matter decided in the award exceeds the scope of the arbitration agreement or is beyond the authority of the arbitration institution.

Finally, a court may refuse to enforce an award if the enforcement is contrary to social public interests.

This final basis of refusal, where enforcement is contrary to the "social and public interests of China, could be problematic.[174] In the famous case *Dongfeng Garments Factory v. Henan Garments Import & Export Co*., plaintiffs alleged that the defendant had breached

170 *Id*.
171 *Id*.
172 *Id.*
173 *See id*. *See also* Simon Morgan, "Options and Practicalities," Dispute Resolution in China and Hong Kong Seminar, May 30-31, 1996, London, England.
174 *See* Håkansson, *supra* note 51, at 203.

the parties' joint venture contract.[175] A CIETAC arbitral tribunal accepted the case in April 1991 and awarded considerable damages to the plaintiffs in April 1992. The defendants did not pay the damages, so the plaintiffs commenced proceedings in an Intermediate People's Court (IPC) for enforcement of the award. The court issued an order rejecting the plaintiffs' application.[176] The court held that "according to current State policies and regulations, enforcement . . . would seriously harm the economic influence of the State and public interest of the society, and adversely affect the foreign trade order of the State." To compel the defendant to pay damages for its breach would disadvantage "social and public interests."[177]

The SPC subsequently overturned the lower court's decision in November 1992, holding, "It is incorrect for the Zhengzhou Municipal Intermediate People's Court to refuse to enforce the arbitral award on the grounds that enforcement would seriously harm the economic interests of the state…"[178]

5. Lack of court funds

Court personnel must often travel to non-performing party's local court to coordinate enforcement efforts, and lacking funds to do so, they sometimes ask foreign parties to cover travel costs. But many foreign parties would be punished in their home country if they were to comply with this request. American parties, for example, might be punished under United States law relating to corrupt overseas business practices if they give money to court personnel.[179] But if the parties refuse to comply, the court might delay or refuse to enforce the award.[180]

6. Shortage of qualified, experienced judges

175 *See id.*
176 *See id.*
177 *Id.*
178 *See* Cheng, *supra* note 55, at 131.
179 *See* Brown, *supra* note 23, at 86.
180 *Id.*; *See also* Morgan, *supra* note XX.

While there are over 200,000 judges in China, most of these judges are not university graduates in law.[181] Many have instead come to the courts after serving in the military or for Party organizations.[182] As of 1993, only two-thirds of all judges had post-secondary training in any subject, including non-legal subjects.[183] Furthermore, many young judges have been appointed to handle the recent judicial reforms, but they often lack the expertise required to effectuate the reforms.[184] This lack of legal expertise has resulted in a mishandling of applications for enforcement of arbitration awards.[185]

In addition, enforcement is considered the least prestigious chamber for judges. As a result, the judges assigned to the enforcement chamber usually have less training than judges of other chambers.[186] Chinese judges may mistakenly apply PRC law to interpret the validity of an arbitration agreement, as happened in the Revpower case.[187]

Low salaries have exacerbated the shortage of skilled judges in China. Some of the highest-paid judges receive only RMB 2,000-3,000 Yuan/month (approx. USD 250-350/month), whereas lawyers in China may earn RMB 10,000-30,000 Yuan/month (USD 1200-3600/month),[188] so judges often abandon their post for the "greener pastures" of starting their own practice or joining large firms.[189] One SPC judge commented that in 1998-1999 alone, approximately 15% of all People's Court judges left their positions for positions in law firms.[190]

7. Failure to sanction noncompliant parties

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181 Susan Finder, Inside the People's Courts: China's Litigation System and The Resolution of Commercial Disputes, in DISPUTE RESOLUTION IN THE PRC: A PRACTICAL GUIDE TO LITIGATION AND ARBITRATION IN CHINA, Asia Law & Practice Ltd. (1992).

182 Interview with Robert Reinstein, supra note XX.

183

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185 *See* Håkansson, *supra* note 51, at 194.

186 Berkman at 26.

187 *See* "Seeking Truth," *supra* note 47, at 328.

188 Id.

189 *See* Interview with Zhao Shiyan, *supra* at XX.

190 *See id*.

Chinese courts have a range of contempt powers to sanction those who fail to comply with the terms of a court order or obstruct the enforcement process.[191] On August 23, 2002, the People's Congress adopted a law interpretation imposing criminal sanctions on parties which attempt to evade enforcement of court judgments and arbitral awards.[192] In addition, Article 102 of the CPL prohibits forging or destroying important evidence; concealing, transferring, selling or destroying property that has been sealed up or detained; and refusing to carry out legally effective judgments or orders of the people's court.[193] Under Article 102, courts may impose fines between RMB 1000 and 30,000 on non-compliant companies and impose punitive damages in the amount of twice the interest from the time of default.[194]

In addition to financial sanctions, courts may detain respondents for refusing to comply with subpoenas. Article 313 of the Criminal Law[195] gives courts the ability to impose a sentence of less than three years on parties which seek to conceal, transfer, or intentionally destroy property, as well as voluntarily convey property or transfer property at an unreasonably low price, making the judgment or award unenforceable.[196] Under Article 221 of the Civil Procedure Law, courts may freeze or transfer the bank deposits of the losing party, as well as make inquiries to banks or other financial institutions.[197] And courtsmay withhold or garnish wages or evict a respondent from his home, under Article 222 of the CPL.[198]

With this wide array of sanction possibilities, one might expect Chinese courts to effectively control non-compliance.[199] But the measures are not often utilized, and have

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191 *See* "Evolving Regulatory Framework," *supra* note 26, at 51.
192 Wang Sheng Chang, *Roundtable on Arbitration and Conciliation Concerning China: CIETAC's Perspective* (paper presented at 17th ICCA Conference, May 16-18, 2004) ("Roundtable: CIETAC's Perspective").
193 CPL art. 102.
194 *See* "Evolving Regulatory Framework," *supra* note 26, at 51.
195 Effective October 1, 1997. But according to Jeffrey Berkman, Chinese judges do not have the authority to issue criminal contempt orders. *See* Berkman at 25.
196 *See* "Roundtable," supra note XX.
197 *Id.*
198 *See id.;* "Evolving Regulatory Framework," supra note 26, at 51-52.
199 Wang Sheng Chang, the Vice Chairman & Secretary General of CIETAC, stated, "It is expected that the law interpretation will extend a considerable assistance to curb the bad faith behavior attempting to evade the enforcement." "Roundtable," *supra* note 193.

sometimes proven ineffective.[200] According to Judge Lu Xiaolong of the Supreme People's Court, the SPC has never sanctioned non-compliant parties for not paying a damages award and has never held a non-compliant party in contempt of court.[201]

[DISCUSS REASONS FOR NO SANCTIONS WITH JUDGE LU!] Local government officials may instruct managers of the respondent company to not comply with the court's orders. Because of the low stature of Chinese courts and lack of respect for the rule of law, judges fear their imposed fines or detention of non-complying officials will not be carried out.[202]

Courts might instead take creative extra-judicial measures to effect compliance. Some courts have had the name of a non-complying company published in the local newspaper.[203] This effectively put pressure on the defaulting company to pay up while providing notice to other companies of the defaulting company's potentially poor economic condition.[204]

8. Lack of transparency in judicial process

Parties often have difficulty determining what actually happened during the enforcement proceedings, as they do not have a right to participate in hearings where higher courts decide whether or not to enforce an arbitration award.[205] The higher court need not notify the parties about the hearing or give them an opportunity to submit written documents to support their positions.[206] Some parties have complained that the higher court's reliance on the lower court's presentation of the facts and legal issues had disadvantaged them.[207]

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200 *See* "Evolving Regulatory Framework," supra note XX, at 53.
201 E-mail from Judge Lu, *supra* note XX.
202 *See id.*
203 *See id.* at 54.
204 Chinese law practitioners appear well-versed in using all resources, not just legal ones. As one Chinese attorney put it, one needs to "think of a problem in a less legal way!" Interview with Zhao Shiyan, *supra* at XX.
205 *See* "Seeking Truth," *supra* note 47, at 288.
206
207 *See id*.

Furthermore, the Enforcement Regulation does not require that the court state its reason for its decision, nor state the grounds for deciding to extend the allotted time for enforcement.[208]

[Add paragraph on how greater accountability could be useful, reassuring to investors.]

E. What steps has China taken to ensure enforcement?

Considering the newness of the legal system and arbitration commissions in China, as well as the constitutional obstacles facing courts, Chinese officials and judges are attempting to change the current system to better enforce arbitration awards and allow foreign investors to feel safe in their business transactions. This section will analyze recent developments in award enforcement.

1. Party members and government officials are speaking up

The Chinese government recognizes the importance of attracting foreign investment.[209] They are aware of adverse effects of negative publicity resulting from cases such as Revpower. As a result, the government has passed several laws that provide foreign investors benefits and protection not given to domestic companies.[210] The CCP has supported government efforts to combat local protectionism through campaigns such as designating 1999 to be the Year of Enforcement. [211] The CCP is not supposed to interfere with courts to influence the outcome of cases. Nevertheless, judges (often CCP members) continue to discuss specific cases with the CCP Political-Legal Committee. Furthermore, the "flurry of rule-making" by the Supreme People's Court, described below, can be seen as "testimony to the resolve of the Chinese Government to come to grips with this important matter."[212]

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208 *See id*.

209 *See* "Seeking Truth," *supra* note 47, at 279.

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211 One source stated that the Year of Enforcement was actually proposed by the SPC, but embraced by government officials. *See* Claver-Carone, *supra* note 35, at fn 157; "Seeking Truth," *supra* note XX, at 285.

212 *See* Moser, *supra* note XX.

Indeed, Peerenboom found that Party interference did not affect enforcement of arbitral awards.[213] He had only found one case where a Party member blocked the enforcement of an arbitral award, and he reported that most lawyers surveyed felt that the CCP played a positive role in award enforcement.[214] Senior leaders attempting to attract foreign investment do not want the negative publicity that results from awards that are not enforced. Peerenboom cited three cases where a senior member of the CCP Committee or Political-Legal Committee helped to secure enforcement.[215]

The bigger tension in China may arise between political and legal reform.[216] Due to the authoritarian nature of a one-party regime, the Chinese government might feel that it cannot afford to lose cases. The government wants freedom of contract, yet it has not indicated its willingness to lose some cases and subject itself to the legal system.[217] But without surrendering control over court decisions, it will be very difficult "to create a market economy that will inspire the confidence of foreign financial investors."[218]

2. Statutory interpretations passed by the SPC

Neither the Arbitration Law nor the Civil Procedure Law contains procedural rules for enforcing arbitral awards or challenging the validity of arbitration agreements.[219] These issues are instead addressed in several dozen judicial notices.[220] The most important of these notices are discussed below.

a. 1995 SPC Reporting Mechanism Notice

213 *See id.* at 285-86.
214 Id.
215 *See id.*
216 *See* Reinstein, *supra* note 4.
217 *See id*.
218 *See* "US-China Commission Hearing," *supra* note XX.
219 *See* Moser, *supra* note XX.
220 *Id*. *See also* Lu Xiaolong, *The Recognition and Enforcement of Foreign Arbitral Award in China* (May 18, 2004), *in* 17th ICCA Conference, May 16-18, 2004.

In 1995, the SPC issued the Notice on Courts' Handling of Issues in Relation to Matters of Foreign-Related Arbitration and Foreign Arbitration (1995 Notice).[221] The Notice specifies that, if an IPC intends to refuse to recognize or enforce a foreign award, it must first submit a report to High People's Court (HPC). If the HPC agrees with the IPC, the HPC must then report the case to the SPC.[222] The SPC has a special tribunal to review these cases, which include review of the validity of arbitral clauses or agreements and resulting awards in both domestic foreign-related awards.[223]

The SPC generally reviews about 30 cases every year, although in 2004 it reviewed over 40 cases.[224] These cases result in both enforcement of the award or refusal to enforce.[225] Supreme People's Court Judge Zhang Jin Xian related to the author two recent examples of SPC review under the reporting mechanism.[226] In one case, the London Sugar Association sought to have an arbitral award enforced against the China Sugar & Wine Group Company before the Beijing No. 1 Intermediate People's Court.[227] In a decree issued on August 6, 2001, the court refused to recognize and enforce the award, stating the award ran counter to public policy in China. On appeal, the Beijing High People's Court affirmed this decision, and the case was then reviewed by the Supreme People's Court. In a decision on July 1, 2003, the SPC recognized and enforced the award, holding that, while the transaction leading to the award was invalid according to Chinese law, the action was not equal to violating the public policy of China.

In another recent case, the London Arbitration Tribunal granted an award on December 7, 2001 for contract violation against Wuhu Smeltery, Anhui, China, on behalf of Gerald Metals Inc. (GMI).[228] GMI sought to have the award before the Anhui Province Higher People's Court, but the court found that the award went beyond the scope of the

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221 *See* "Evolving Regulatory Framework," *supra* note XX, at 28.
222 *See* Cheng, *supra* note XX, at 128.
223 E-mail from Dr. Lu Xiaolong, Judge, Supreme People's Court, China (Jan. 19, 2005, 08:41 PST) (on file with author). Dr. Xiolong is the head of the SPC tribunal which reviews cases referred by the reporting mechanism. *Id*.
224 Id.
225 Id.
226 E-mail from Zhang Jin Xian, Judge, Supreme People's Court, China (Jan. 25, 2005, 04-36 PST) (on file with author).
227 Id.
228 Id.

arbitration clause included in the contract, and it refused to recognize the entire award. On review, the SPC affirmed that the award went beyond the scope of the arbitration clause, but found that the award could be separated into two parts: the section with the right to arbitrate and the section not under arbitration. The SPC concluded that part of the award arose from the arbitrable section of the contract, and it recognized that portion of the award.[229]

b. Interim preservation of assets and evidence

To prevent funds from being transferred and making the award unenforceable, a party may apply to the arbitration commission for preservation of the other party's assets. The arbitration commission must then file these papers with the People's Court, as per Article 28 of the Arbitration Law.[230] A party can also move for property preservation under Article 258 of the Civil Procedure Law.[231] The People's Court then rules on the request for interim intervention. [232]

While these articles certainly indicate a willingness by the court system to preserve property, these methods may fail for the same reasons discussed above, that the same local court ruling on the interim request could have already facilitated local protectionism. Again, the local court may fear that enforcement might interfere with the defendant's ability to operate a company, or it might cave in under pressure from local governments and deny the application.

c. 1998 regulation clarifying arbitration fees and establishing time limitations

In 1998, the SPC issued the Regulations of the SPC Regarding the Issues of Fees and Investigation Periods for the Recognition and Enforcement of Foreign Arbitral Awards (Regulations).[233] These Regulations clarified the collection of fees for actions to enforce

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[229] Id.

[230] E-mail from Cao Lijun, Arbitrator and Staff Member of CIETAC, Beijing, China (Dec. 10, 2004, 02:04 PST) (on file with author) ("Cao Lijun e-mail 12/10/04").

[231] Id.

[232] *See* Håkansson, *supra* note 51, at 144.

[233] *See* Cheng, *supra* note 55, at 137.

foreign arbitral awards, and also suggested time limitations within which courts should resolve such actions.[234] The Regulations apply nationwide, specifying that the People's Courts may collect an application fee for each action in the amount of 500 Yuan.[235] In addition, the court may require that the party applying for enforcement of an arbitral award must pay in advance an enforcement fee to be determined in accordance with the fee scale contained in the Measures Regarding Costs for People's Court Actions promulgated in 1989.[236] The Regulations thus prohibited the common practice of "double collection" where People's Courts charged parties separately for recognition and enforcement procedures.[237]

The Regulations also addressed the "judicial purgatory" in handling applications for the recognition and enforcement of foreign arbitral awards.[238] Under the Regulations, the People's Court must issue its ruling within two months from the date of accepting the application.[239] Then the court must complete the enforcement proceedings within six months after the ruling granting recognition to the award.[240] If the court refuses recognition or enforcement, it must report to the SPC within two months from the date it accepted the application.[241]

d. 1998 education rectification campaign

Xiao Yang, the President of the SPC, reportedly confirmed comments by President Jiang Zemin that law enforcement officials have participated in such wrong as "eating free meals, taking without paying, imposing man-made barriers and soliciting favors, demanding and taking bribes, perverting justice for money, and bullying the common people."[242] In response, Chinese officials in 1998 ordered an "educational rectification campaign" that

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234 *See id*.
235 Id.
236 *See id.*
237 *See* "Evolving Regulatory Framework," *supra* note XX, at 22.
238 *See* Cheng, *supra* note 55, at 137.
239 Id.
240 Id.
241 *See id*.
242 Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 264 n.369 (2001).

denounced these activities and focused on reducing judicial corruption, incompetence and inefficiency. As a result, among other things, 8,110 previously mishandled cases were corrected, and nearly 5000 judges and prosecutors were disciplined.[243]

e. 2002 and 2003 SPC regulations limiting jurisdiction over arbitration awards with foreign elements to specialized IPC courts

On March 1, 2002, the SPC issued a directive stating that all civil and commercial cases involving foreign elements are under the jurisdiction of certain IPCs in capital cities of provinces and special economic zones.[244] This provision was handed down with the intent to lessen the potential local protectionism of local courts, particularly protectionism aimed at foreign parties.[245] The SPC also intended to increase the quality of judgment by focusing foreign-element cases in courts with highly-educated and experienced judges.[246]

It is too soon to say whether this interpretation has reduced the local protectionism faced by foreign parties, both from other provinces and from other countries. SPC Judge Zhang believes that the interpretation has improved the Chinese legal environment. As an example, he cites to the Intermediate People's Courts in Guangdong province, which from 2002 to 2004 tried 10 cases between foreign parties and local governments. Judge Zhang claims that, due to the 2002 interpretation, the local government defendants were discouraged from interfering in the judicial process. As a result, the cases were decided fairly, as none of the parties decided to appeal the decisions.[247]

f. SPC regulation imposing liability for failure to enforce awards

243 *Id.*
244 *See* Xiaolong, *supra* note 220. The SPC solidified this rule in its Dec. 31, 2003 provisions.
245 *See* Zhang e-mail, supra note XX; Moser, *supra* note XX.
246 *See* Moser, supra note XX
247 *See* Zhang e-mail, supra note XX.

The SPC issued two regulations in 2000 to clarify jurisdictional issues and increase the sense of responsibility among enforcement personnel.[248] The regulations imposed liability for failure to enforce judgments and awards in accordance with the law.[249] The likelihood of judges to use these regulations remains to be seen, however, particularly given the current lack of sanctions employed by the courts.

3. 1995 Judges Law

China now requires a basic standard of education for its judges. The 1995 Judges Law specifies that judges must be graduates of tertiary educational institutions in law or have specialized legal knowledge.[250] Judges appointed before the implementation of the Judges Law who do not meet these standards must attend a "Judges College" to study law part-time.[251] The SPC has trained HPC judges at the National Judges Institute, and those judge are responsible for training other judges.[252] The SPC has provided specific training for judges on enforcement.[253].

4. Changes in CIETAC arbitration rules

CIETAC made a series of major changes to its arbitration rules in 1994, 1995 and 1998 in order to reflect fairness and objectivity to the international business community.[254] CIETAC now permits foreign arbitrators to be included in the Panel of Arbitrators.[255] Arbitration can be carried out in English or other foreign languages as agreed upon by the parties involved,[256] and foreign parties can use their own non-Chinese attorneys in the proceedings.[257] The new arbitration rules set forth a nine-month time limit for a tribunal to

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248 *See* "Evolving Regulatory Framework," *supra* note 26, at 17.
249 *See id*.
250 *See* Finder, *supra* note 78, at 68.
251 Id.
252 *See* "Long March," supra note XX, at 293.
253 For example, the SPC gathered all of the country's judges in 1996 for a conference on enforcement. *See* Finder, *supra* note XX.
254 *See* Ge, *supra* note 1, at 132. *See also* Lubman, *supra* note 13, at 165.
255 Arbitration Rules of CIETAC art. 10.
256 *See id*. art. 75.
257 *See id*. art. 22.

conduct a hearing and render its award, and a time extension may be granted.[258] Arbitral awards are final and binding upon both disputing parties, and neither party may bring suit before a court or request alteration of the award from any other organization.[259]

The revised CIETAC rules now provide for new "fast-track" arbitration tribunals. In the "fast track," a single arbitrator appointed by the CIETAC chairman handles claims worth less than RMB 500,000 Yuan (USD 60,000).[260] Under these proceedings, oral hearings need not take place.[261] The panel must render an award within ninety days from the appointment of the arbitrator or within thirty days from conclusion of an oral hearing.[262] This type of tribunal particularly benefits parties with smaller claims and with time constraints.

F. Further suggestions to assist enforcement of Chinese arbitration awards

It is not yet clear whether the newly-promulgated SPC rules are having much impact on the enforcement of awards. Professor Jerome Cohen describes these measures as "bandaids for a patient that is severely ill," while the system needs "radical surgery and structural rehabilitation."[263] It is true that band-aids are easier to apply in China than larger, overarching structural transformations.[264] After all, China does not take quickly to changes, especially those changes that might threaten the primacy of the CCP. But a combination of several additional "quick fixes" and deeper structural changes should help modify the current system and reassure foreign investors that they can ultimately achieve a happy ending in China.

1. Publish comprehensive statistics on enforcement

Scholars and practitioners have urged the Chinese government to make Chinese arbitration more public and transparent. As a result, two volumes have been published

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258 *See id*. arts. 22 and 52.

259 *See id*. art. 60.

260 *See* Ge, *supra* note 1, at 133.

261 *Id*.

262 *Id*.

263 Jerome Cohen, Opening Statement Before the First Public Hearing of the U.S.-China Commission, June 14, 2001 hearing, Washington, D.C., *available at* http://www.uscc.gov/hearing/2001_02hearings/transcripts/01_06_14tran.pdf ("US-China Commission Hearing").

264 *See* Interview with Wang Chenguang, *supra* note XX.

containing written CIETAC awards.[265] These volumes help to add transparency to the CIETAC process. In addition, Cheng Dejun and Wang Sheng Chang, both Vice Chairmen of CIETAC, and Michael Moser, a CIETAC arbitrator, published various case summaries in their recent volume "International Arbitration in the People's Republic of China: Commentary, Cases and Materials" (2nd ed. 2000).

While these publications are useful in introducing practitioners to CIETAC practices,[266] their helpfulness in determining the reasoning behind CIETAC awards and whether the awards are enforced is questionable. The awards often fail to state the applicable legal rules, and focusing more on the fairness or equity of the awards than on the rules themselves.[267] The fact-specific awards thus offer little guidance to lawyers seeking to determine the reasoning behind CIETAC awards.[268]

But arbitration bodies such as CIETAC are in advantageous positions to determine whether their foreign-related awards are enforced by the court system. Through post-arbitration questionnaires and some research, for example, CIETAC could compile a database of the awards, their enforcement rates and the reasons for non-enforcement. At least one CIETAC official has recognized the importance of such statistics and has indicated CIETAC's willingness to conduct these types of surveys in the near future.[269]

2. Continue to improve the education of Chinese judges

As discussed earlier, many Chinese judges do not have a background in law, and most have never studied foreign legal systems. The fledgling court system, low political stature

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265 *See* Leung, *supra* note 27, PATRICIA LEUNG, EDITOR-IN-CHIEF, SELECTED WORKS OF CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION AWARDS (1989-1995) UPDATED TO 1997, Sweet & Maxwell, 1998.

266 *See, e.g.*, Cheng, *supra* note 55.

267 *See* Lubman, *supra* note 13. This may reflect the Chinese tendency to focus more on the solution of the dispute, the fairness of the solution and the factual situation than to the legal arguments presented by the parties. *Id.*

268 *See* Lubman, *supra* note 10, at 290.

269 *See* Lijun Cao e-mail 12/10/04, *supra* note XX.

and lack of historical precedents make it difficult for judges to know and follow the rule of law.

One recent development may serve to strengthen the rule of law in China. In 1999, Temple University School of Law collaborated with Tsinghua University in Beijing to begin the first foreign LL.M. degree program in China.[270] As of November 2004, 141 lawyers and judges have already graduated from this program. This 15-month, 30 credit program includes a summer semester at Temple's campus in Philadelphia, PA.[271] Combined with several other legal programs in China, Temple has educated 411 legal professionals within just four years.[272]

After four years of running the only Western LL.M. in China, Temple is now being joined by several other Western-style law programs. The University of Minnesota Law School is currently planning an LL.M. program beginning in Summer 2005, in collaboration with China University of Political Science and Law ("Fada") in Beijing. In the program, Chinese lawyers will earn 24 credits in the 18-month program, which will be taught in English by the U of M faculty.[273] In addition, in February 2004, Peking University Law School and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University in Sweden launched a three-semester Masters' program for Research Direction in Human Rights.[274] Twenty postgraduate students from Peking University are enrolled in this groundbreaking program.[275]

Several other programs in specialized legal areas have also begun in China. The University of Maryland and Tianjin University are offering a Mastersdegree in Judicial

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270 *See id.*

271 Interview with John Smagula, Director of Asia Law Programs, Temple University School of Law, in Beijing, China (Nov. 2, 2004).

272 Temple's other programs include a judicial education partnership with the Supreme People's Court, a prosecutorial education partnership with the Supreme People's Procuratorate, legislative drafting projects, scholarly roundtables promoting the development of law, and AIDS and public health law initiatives. *Id.*

273 Interview with Adelaide Ferguson, Assistant Dean for Post J.D. Programs, Temple University School of Law, in Beijing, China (Nov. 6, 2004); Mary Jane Smetanka, "U and China: A shared passion for education," startribune.com, at http://www.startribune.com/stories/1592/5119861.html (last visited Dec. 13, 2004); E-mail from Meredith M. McQuaid, Associate Dean and Director of International and Graduate Programs, University of Minnesota School of Law (Dec. 15, 2004, 14:33 PST) (on file with author)..

274 *See* Interview with Adelaide Ferguson, *supra* note 244; "A Brief Introduction to the Human Rights Master Program," at http://www.hrol.org/hrmp/english.php (last visited Dec. 13, 2004).

275 *Id.*

Justice, while the University of Australia is collaborating with Normal University in Shanghai to offer a Masters degree in International Business Transactions.[276] And Chinese judges and lawyers have increasingly been permitted to study abroad.[277]

3. Develop a special judicial division for enforcement of foreign-related awards

While the SPC has already taken steps to ensure a judge's expertise in the field, namely assigning foreign-related arbitration enforcement cases to specifically designated IPCs, the development of separate divisions specializing in enforcement of foreign-related awards would further help ensure judges' expertise and lessening of local protectionism. This approach is already being tested in the intellectual property realm, as special courts dedicated to intellectual property matters were established in July 1993 as divisions of the Beijing HPC and IPC.[278] Judicial personnel in these divisions receive specialized training to improve their ability to handle difficult cases.[279]

In a similar manner, China could develop specialized enforcement branches aimed solely at arbitration awards. This would ensure a high level of specialization within the divisions, and would reassure foreign investors concerned about fairness and expertise.[280] [Write this bit…] Use Neil Kaplan's article from ICCA conference, p. 16; also use Berkman article p. 10.

4. Hire a skilled local attorney to help develop "guanxi" relationships with local officials

[276] Interview with Mo Zhang, professor, Temple University School of Law, in Beijing, China (November 1, 2004).
[277] For example, Temple Law School reports 20 LL.M. Chinese graduates from their main campus in Philadelphia. Johan Gernandt, Vice Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce, reports that several Chinese lawyers have studied or practiced in Stockholm, Sweden during the last ten years. [GET THE CITE!!]

Furthermore, in 1997, the solicitor-general of Hong Kong, Daniel Fung, announced the establishment of a model court in mainland China funded by the Hong Kong government, where judges and attorneys from Hong Kong would stage mock trials for observation by Chinese lawyers, judges and officials. *See* Interview by Kirsten Sylvester with Daniel Fung, solicitor-general of Hong Kong, Washington, D.C. (1997), *available at* 1998 WL 10921709.
[278] *See* Berkman, *supra* note XX, at 48.
[279] *Id.*
[280] Neil Kaplan has also proposed the development of specialized courts for arbitration awards: "There must be something to be said in favour of creating one body to deal with all arbitration issues coming into Chinese courts – these specialist institutions have the ability to establish consistency in their decisions." *See* Kaplan, *supra* note XX.

Attorney Zhao Shiyan notes that most of the barriers in enforcement are practical, not legal.[281] Accordingly, he suggests that foreign investors make good connections with local governments and banks. If a conflict arises, Zhao suggests the foreign party should hire a competent local attorney, sit down with bank officials (or the potentially troubling party) and talk through the problem amicably.[282] Spoken like a true Confucianist, Zhao suggests arbitration proceedings should be avoided if at all possible, and the problems should be addressed through relationships.[283]

5. Persevere

One American academic has "diagnosed" many foreigners with "forensic xenophobia," unwilling to use the Chinese legal system.[284] But he argues that foreigners should push through these "fears" and continue to use the court system. By doing this, procedural obstacles and weaknesses in the legal code will be uncovered, continuing to alert the Chinese government of the need for further reforms. And the existence of only several notorious cases (such as *Revpower)* will likely discourage local officials from utilizing protectionist methods.

CONCLUSION

China's arbitration system is a fascinating case study in the recent development of a judicial system constrained by severe social and economic factors. Foreign investors desire a guaranteed return on their investment, yet social and political factors discussed in this paper both encourage and thwart that certainty. Additional political pressure from other world powers may further shape China's legal system. For example, China's recent membership in the WTO requires it to establish an internationally-recognized independent legal system.

[281] *See* Interview with Zhao Shiyan, *supra* note XX.
[282] *Id*.
[283] *Id*.
[284] *See* Berkman, *supra* note XX, at 41.

Chinese officials have slowly allowed increased independence of the Chinese judiciary in order to further economic development. The judiciary, recognizing the importance of protecting foreign investors in China, has produced quite a few directives towards the lower courts and has attempted to provide education for lower-level judges. But these steps can only go so far. The political status quo does not permit the rapid expansion of judicial power, protecting the ultimate superiority of the Communist regime. However, the education and independence necessary for increased freedom of contract may also result in increased freedom of speech and religion.

This recent focus on Chinese ADR has also led several American commentators to consider the adoption of Chinese ADR techniques in American federal courts. Professor Michael Colatrella recently noted that China's "court-performed" mediation model could effectively reduce court expenses while offering increased flexibility and risk avoidance.[285] Former U.S. Chief Justice Warren Burger suggested that an increased use of mediation in courts around the world might stem the current flood of litigation.[286]

Scholars and practitioners alike eagerly watch to see the effects of the recent foreign arbitration regulations, as well as which further reforms may be adopted in the Chinese arbitration system. At its current rate of development, nobody can predict what the next decade may bring.

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285 *See* Colatrella, *supra* note 3, at 416.

286 *See* Ge, *supra* note 1, at 122.