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The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China

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Arbitration occupies "a space between business and politics."[1] Technically, arbitration is an arrangement for submitting disputes to an impartial decision-maker chosen by the parties. What this definition fails to convey is that the term "arbitration" encompasses a vast array of processes that have long-existed throughout the world as alternatives to judicial resolution of local disputes. Despite arbitration's popularity in resolving disputes *within* countries, until recently investors involved in disputes abroad relied primarily on formal diplomatic intervention from their home countries to protect their investments.[2] In the wake of the modern explosion of international trade and transnational investment, however, arbitration has become "the accepted method for resolving international business disputes."[3]

The nature of investment in the People's Republic of China ("China" or "PRC") and the role of law in China make international arbitration a particularly attractive alternative for both foreign investors in China and Chinese businesspersons. In spite of its popularity, however, arbitration in China's emerging marketplace is still subject to many of the limitations that plague China's court system—the same limitations that investors seek to avoid by choosing arbitration.[4] This paradox is the subject of this Essay.

The key to the paradox is that, while arbitration in China is imperfect, it remains the best alternative for international investors. The purpose of this Essay is to provide investors and practitioners with a realistic overview of the strengths and limitations of international arbitration in China. Part I of this Essay provides some general comments about the economic, social, and cultural reasons why arbitration is a popular choice among both international investors and Chinese nationals. We discuss how investors' enthusiasm about the advantages of arbitration has blinded them to the significant role national courts and laws play in arbitration in China. Part I concludes that arbitration can only provide a partial solution to the ills of China's legal system. Part II examines how the observations in Part I manifest themselves in recent developments affecting arbitration in China. We examine the impact on arbitration of positive and negative developments in Chinese law, Chinese international arbitral institutions, and the Chinese national court system. Part III examines the range

1. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 274 (1996). As a result of arbitration's existence outside of established national legal systems and its confidential nature, much scholarship about arbitration relies on anecdotal reports and assessments of actual arbitrations. Indeed, Messrs. Dezalay and Garth's research strategy was based on interviews of almost three hundred arbitrators and arbitrations specialists. *Id.* at 9.

2. John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L. J. 535, 539 (1993).

3. DEZALAY & GARTH, *supra* note 1, at 6.

4. Although this Essay examines disputes in China from the perspective of foreign investors, it would be a mistake to imagine that only Chinese parties breach contracts with foreign trading partners. *See, e.g., CIETAC Decision Supports China Tire's position in Dalian Rubber Arbitration*, PR NEWSWIRE, Nov. 8, 1994, *available in* LEXIS, NEWS Library, BUSDTL File (describing CIETAC award in favor of Chinese company and the Chinese company's surprise to find that Goodyear Tire & Rubber Co. had improperly participated in the transfer of assets from a Sino-foreign joint venture).

of efforts by foreign investors and the U.S. Government to diminish and eventually remove limitations on arbitration in China. Outsiders have used both carrots and sticks in their efforts to strengthen Chinese arbitration.

I.
ARBITRATION'S POPULARITY IN RESOLVING INTERNATIONAL COMMERCIAL DISPUTES IN CHINA

Investors going abroad view arbitration as a means of resolving disputes outside a foreign country's court system. Certainly, some celebrated historical arbitrations—the so-called "petroleum arbitrations"[5]— support this notion. Indeed, these dramatic international arbitrations seem to stand as beaming examples of how arbitration could provide a reliable alternative to potentially hostile national courts.[6] Few in the profession will ever forget how Libya was forced to arbitrate claims brought by multinational oil companies as a result of its nationalization of their interests in the 1970s.[7] Libya claimed that its nationalization decree invalidated the contracts with the oil companies, including the governing arbitration provisions.[8] Consequently, Libya argued, the oil companies could only seek redress in Libya's national courts. Justifiably fearful of their chances for success in Libya's national courts, the oil companies commenced arbitration abroad and obtained awards against Libya.[9] Initially, Libya refused to pay. Faced with the prospect of seizure of its overseas assets, however, Libya eventually settled for tens of millions of dollars.[10]

As described below, several features of the petroleum arbitrations make them somewhat anomalous. Thus, it would be a mistake to presume that arbitration in China will much resemble the high drama of these early arbitrations. Arbitration in China remains intimately dependent on China's domestic courts and national legal system.

A. Arbitration as a Private "Rule of Law"

Investors' consistent selection of arbitration as the dispute resolution mechanism of choice in China reflects both an appreciation of the shortcomings of China's legal system and myopia about how those shortcomings affect arbitration in China. Headlines report daily that markets in Asia are the fastest growing in the world.[11] As a result, foreign investors—perhaps "smitten by the same kind of opportunism that attracted Chinese immigrants one hundred years ago to

5. DEZALAY & GARTH, *supra* note 1, at 74–75 (noting that "the great petroleum arbitrations occupy a quasi-mythical position" and are of "tremendous importance in the history and folklore of arbitration.").

6. *Id.* at 75 ("They made arbitration known and recognized.").

7. *See* Barton & Carter, *supra* note 2, at 543.

8. *See id.*; *see also* DEZALAY & GARTH, *supra* note 1, at 224-25.

9. Barton & Carter, *supra* note 2, at 543.

10. *Id.*

11. At press time, instead of rapidly expanding, Asian markets had been experiencing a great deal of financial turmoil and, in some cases, collapse. These events highlight the magnitude of the risks described in this Essay and the importance of protections for foreign investors.

the United States' 'gold mountain,'"[12]—continue to pour investment dollars into China. Surprisingly, the boom of foreign investment in China has occurred despite what is generally regarded as inadequate legal protection for investors.[13] Even more surprising, however, is investors' initially naive confidence that arbitration will protect their Chinese investments.[14] Many investors appear astonished to learn that international arbitration clauses in their multimillion dollar contracts do not necessarily provide a viable means for resolving disputes or protecting their investments.[15]

In making business plans and decisions, cautious investors evaluate both the potential for profits and the attendant risks. In the highly entrepreneurial, rapidly expanding Chinese marketplace,[16] the potential gains are staggering. For this reason, some investors have discounted the high risks.[17] Whatever discount exists, however, does not obviate questions about whether and to what extent investments are legally protected.[18] The ability to answer these questions with some degree of certainty often depends on how developed the "rule of law" is in the place of investment.[19]

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12. *See* Pat K. Chew, *Political Risk and U.S. Investments in China: Chimera of Protection and Predictability?*, 34 VA. J. INT'L L. 615, 616 (1994) (noting that "despite the potential for political instability and the lack of protection, foreign investment in China continues to escalate dramatically.").

13. *Id.*

14. *See* Stanley B. Lubman, *Doing Business in China Could Give You a Big Mac Attack*, L.A. TIMES, Jan. 8, 1995, at M2. In commenting about how McDonald's was prematurely evicted from its 20-year lease at a desirable Beijing location, Mr. Lubman noted that Investor skepticism about the wisdom of doing business in China "is long overdue—but it should not be exaggerated."

15. *See, e.g.*, Dexter Roberts et al., *Cheated in China?: More American Companies Turn to Washington for Relief from Abuses*, BUS. WEEK, Oct. 6, 1997, at 142 ("U.S. companies that rushed into China's far-flung provinces in the heady days of 1993 are *discovering* that local protectionism and cronyism are making business a lot tougher than expected.") (emphasis added); *Prepared Statement of Robert R. Aronson, Chairman, Ross manufacturing Corporation and RevPower Limited, Fort Lauderdale, Florida, Before the House Comm. on Ways and Means, Subcomm. on Trade*, Federal News Service, Nov. 4, 1997, *available in* LEXIS, NEWS Library, FEDNEW File (describing a multimillion dollar investor's "*shock*" as he "*began learning* that China has a policy of non-enforcement of arbitral awards in favor of foreigners") (emphasis added).

16. *See, e.g.*, Robert P. O'Quinn, *Beyond the MFN Debate: A Comprehensive Trade Strategy Toward China*, HERITAGE FOUND. REP., May 16, 1997, at 1 ("Today, the PRC ranks as the world's third-largest economy and tenth-largest trading power."). Perhaps one reason for investors' headlong investment into China is that when the rest of the world was in recession from 1990-92, China attained and sustained an extraordinary growth rate; *see also* Lubman, *supra* note 14, at M2.

17. *See* Chew, *supra* note 12, at 621 (noting that "many U.S. businesses seem inclined to minimize or overlook daunting financial and business problems that have plagued foreign investors since China 'opened its doors' in the late 1970s and 1980s.").

18. *See, e.g.*, Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 122 (1996) ("The way China handles [international business] disputes inevitably attracts the world's attention because it is an important factor in determining whether economic ties between China and the rest of the world will continue to expand.").

19. *See* Chew, *supra* note 12, at 638; Note, *Protection of Foreign Direct Investment in a New World Order: Vietnam—A Case Study*, 107 HARV. L. REV. 1995, 1995 (1994) ("Among measures that attract [foreign direct investment], an essential step is the establishment of a sound legal framework that can assure a stable investment environment and enhance investors' confidence.").

The term "rule of law" has many different meanings for different people[20] and there is even a great deal of debate about whether this concept should be exported outside of the Western legal traditions from whence it came.[21] For most investors, however, and for the purposes of this Essay,[22] the term "rule of law" is used to describe a legal system that guarantees minimum levels of certainty, predictability, and objectivity. Of these three, predictability is probably the most important element because it allows investors to make informed decisions about potential profits in relation to the attendant risks.

This observation leads back to one of the reasons for arbitration's popularity in China. In China, the "rule of law" is still developing and is often held hostage to local interests and biases.[23] The biases or perceived biases of local courts against foreign entities, especially entities whose claims or defenses could have serious economic consequences for the locale of the dispute, are a worldwide phenomenon.[24] In China, systematic protections against these biases in local courts have been slow to emerge. Arbitration, at least in theory, provides an alternative.[25] Without being fully aware of its limitations, investors in China have unquestioningly adopted arbitration as their dispute resolution choice. In fact, one study revealed that, in making investment decisions, investors tend to

20. *See generally* Richard H. Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) ("The Rule of Law is a much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before."); Carol A.G. Jones, *Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China*, 3 SOC. AND LEGAL STUD. 195 (1994). In her article, Professor Jones identifies three main theories of the "rule of law" and development of capitalism in modern society. First, there is what she terms the "modernization theory," which is based on the notion that Western-style law and legal institutions are essential to the development of capitalism. *Id.* at 198-99. The second major theory is Max Weber's thesis that capitalism is associated with formal legal rationality. *Id.* at 199-201. The third major theory, which Professor Jones calls "Globalization," posits that the increasing interconnectedness of the global marketplace will weaken local practices and customs, resulting in the spread of capitalism and the "rule of law." *Id.* at 201-204.

21. *See* Jones, *supra* note 20. After describing how the term "rule of law" is a Western-centric concept, Professor Jones argues that there is a unique style of Chinese capitalism, which defies theories about the interconnectedness of the development of a capitalist economy and the development of the "rule of law."

22. This Essay addresses the aspects of China's legal system relating to commerce and investment, not to other political and social issues, such as civil liberties in China.

23. *See* Chew, *supra* note 12, at 638.

24. In evaluating protectionism in China, it is important to note that the phenomenon is well recognized in the United States as well. Provisions for diversity jurisdiction in the federal courts are premised on the need to protect "foreign" parties against local biases operative in state courts. While China is not unique in the fact of its protectionism, it is unique in the degree of its protectionism.

A striking example of the extremes of domestic Chinese courts' protectionism involves three well-known American icons: Snap, Crackle, and Pop. When the Kellogg's company discovered that Snap, Crackle, and Pop, along with Kellogg's logo, had been misappropriated to sell products produced by a company in Meizhou in the Guangdong province, Kellogg's brought a lawsuit. The Meizhou court ruled against Kellogg's and even concluded that Kellogg's should pay US$250,000 to the Chinese company that had misappropriated its trademark. *See* Tim Wilson, *New Power of Mainland Mediators Puts Foreign Firms at Risk*, ASIAN BUS., Mar. 1997, at 16. The Provincial High Court later reversed the ruling. *Id.*

25. *See* ALBERT VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM INTERPRETATION 44 (1981) ("The gist of the notion of arbitration as regulated by most of the laws on arbitration is that it is conceived as a substitute for court litigation."); *Protection of Foreign Direct Investment in a New World Order, supra* note 19, at 2007.

add a substantial legal risk premium "'to reflect the contingent risk of subjection to a foreign court rather than a neutral international forum.'"[26]

The perception that arbitration provides refuge against the uncertainties of national courts is supported to some degree by the nature of arbitration and the degree of control parties have in shaping arbitration proceedings. Arbitration permits parties from two different countries to exercise a great deal of control over how a dispute will be resolved.[27] Parties can choose the place of arbitration, the nationality or qualifications of the arbitrators, and the language of arbitration. Together, these three factors can go a long way toward neutralizing the local biases that can influence a proceeding that is in a hostile jurisdiction, in a foreign language, and before an adjudicator who may be more sympathetic to the local party (or even hostile to the foreign party).[28] In addition, the parties can choose the applicable substantive law, thus sidestepping a country's fledgling commercial law that may not provide the predictability investors seek. Finally, almost all types of arbitration proceedings remain confidential.[29] Through these controls over the dispute resolution process, parties appear able to insulate themselves, at least partially, from real and perceived local biases of national courts. In this way, parties see arbitration as a form of "private rule of law."[30]

B. Limitations on Arbitration's Reliability

The parties' control of their legal destiny through arbitration is far from absolute. Because it is inherently a private system of dispute resolution, international arbitration does not (indeed cannot) supplant or function completely inde-

26. *See* Note, *supra* note 19, at 2007 & n.96 (*citing* Jan Paulsson, *Third World Participation in International Investment Arbitration,* ICSID REV.—FOREIGN INVESTMENT L.J. 1, 63 (1987)).

27. Apart from neutrality, flexibility is the primary advantage of arbitration. "[A]rbitration is . . . a broad enough term to encompass very different experiences." DEZALAY & GARTH, *supra* note 1, at 273.

28. *See* Ge, *supra* note 18, at n.48 and related text.

29. *Id.*

30. The advantages of arbitration for foreign investors in China provide an interesting contrast to the advantages of domestic arbitration in the United States. In the United States, domestic arbitration is chosen by parties because it is viewed as a more expeditious, economical, and informal alternative to U.S. courts. *See* Henry P. DeVries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 61 (1982). In international arbitration, the perceived advantages of U.S. arbitration are virtually nonexistent. Compared to its domestic counterpart, international arbitration is prone to frequent delays because of distance and difficulties in communication and language. The administrative costs associated with international arbitral tribunals and corresponding arbitrator fees can be daunting, especially compared to the fact that an action can be commenced in a national court for a nominal filing fee. For example, in arbitration under the International Chamber of Commerce ("ICC") Rules of Conciliation and Arbitration, when the sum in dispute is, for example, $2,000,000, parties must pay $19,500 in administrative fees and a minimum of $10,450 in fees per arbitrator, with a potential maximum of $45,000 per arbitrator. In China, CIETAC recently raised its administrative fees, making them comparable to the ICC. *See* Stanley Lubman, *Moving from "No" to Yes: Arbitration in Joint-Venture Disputes*, CHINA BUS. REV., May-June 1995, at 45.

pendently of national court systems.[31] At bottom, any "rule of law" is inextricably linked to the ruling power. The petroleum arbitrations involving Libya provide a counter-example that is instructive as a starting point from which to analyze where and when national courts and domestic legal systems influence arbitration.

First, it is important to note that the petroleum arbitrations occurred outside of Libya. Accordingly, Libyan laws governing the substance and procedures of the conduct of arbitration and the powers of arbitrators (to the extent such laws may have existed) did not affect the arbitral proceedings. By contrast, many state-owned Chinese entities that enter into contracts with foreign investors insist that the place of arbitration be China and that the contract designate a Chinese arbitral institution to administer potential disputes.[32] When arbitration occurs in China, through an arbitration institution created by Chinese law, it is inevitable that Chinese law and courts will affect the progress of that arbitration. In this regard, China is situated similarly to other nations that host arbitration.

"In arbitration proceedings, national courts serve two functions: assistance and control."[33] National courts may be called upon to enforce the arbitration agreement against a party who commences a lawsuit in contravention of the agreement. In some instances, national courts can assist in the appointment, revocation, or replacement of arbitrators.[34] Moreover, the arbitration law of the place of arbitration plays a significant role in governing the arbitration proceedings.[35] For example, local law will inevitably govern challenges to the validity of the arbitration agreement or the arbitrability of the dispute. Local law may also step in to fill gaps left open by unclear choice-of-law provisions.

In addition to the formal functions of national courts and legal frameworks, there are informal ways in which arbitration is affected by its locale. Frequently, arbitrators and legal advisors are drawn from the local legal community. The professional approaches of arbitrators and the parties' advocates are inevitably shaped by the legal system in which they were educated and trained.[36] In turn, these arbitrators and advocates' experiences affect the way they conduct or participate in arbitration proceedings.[37] For these reasons, an arbitration conducted in the United States under the Rules of Conciliation and Arbitration of the International Chamber of Commerce or UNCITRAL will likely be different in its pace and procedures than arbitration under the same rules in, for example, Thailand.[38]

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31. *See* DeVries, *supra* note 30, at 72 ("Though the most important principle of international arbitration is the freedom of the parties to facilitate the process in accordance with their own expectations, the process cannot be fully detached from any international law.").

32. *See* Lubman, *supra* note 30, at 45.

33. *See* DeVries, *supra* note 30, at 47 n.21.

34. *Id.*

35. *Id.* at 50.

36. *See generally* DEZALAY & GARTH, *supra* note 1, at 33-62.

37. *Id.*

38. When U.S. lawyers are involved in either domestic or international arbitration, the arbitration tends to take on a style similar to U.S. litigation. *Id.* at 54-55. They may seek discovery, including depositions, document productions and interrogatories. The conduct of proceedings may

Another factor that distinguishes the petroleum arbitrations from modern arbitration in China is that the petroleum arbitrations were against a nation-state (Libya), which had significant assets abroad. Most foreign investors in China enter into contracts with municipal state-owned enterprises. State-owned enterprises are not very likely to have assets abroad. Consequently, an investor who is able to obtain a favorable arbitration award against a Chinese party more often than not will be forced to seek enforcement from Chinese courts. Thus, while a foreign investor may be able to avoid Chinese courts in obtaining a favorable award, the investor may ultimately be forced to resort to Chinese courts to realize the benefits of the award.

Given the interrelatedness between arbitration and local laws, court systems, and legal communities, the ability of international arbitration to serve the needs of international investors depends on developments (or setbacks) in the "rule of law" in host countries.[39] Accordingly, arbitration cannot properly be viewed as an escape from the uncertainties of developing legal systems. Rather, it must be viewed as a buffer.

C. Arbitration and the Adversarial Process

Another reason for arbitration's popularity in China is the gap between Chinese and Western legal traditions. While international trade always involves trading partners from diverse cultural backgrounds, the distinction between Eastern and Western legal traditions is much more pronounced than the distinctions among different Western legal traditions. For example, Western contract law defines contracts as agreements that bind parties. By contrast, the Chinese conceive of contracts as relationships.[40] Arbitration helps bridge the gap between East and West.

Moreover, the Western emphasis on the "rule of law" stands in stark contrast to what is often termed the "rule of relationships" operative in Asian societies.[41] The Chinese "rule of relationships" model, often termed *guanxi,* is a sort of gift economy that involves the "cultivation of personal networks of mutual dependence and trust."[42] The dichotomy between the "rule of law" and the "rule of relationships" models poses many interesting questions. Regardless of how interesting these questions are, however, investors are more concerned with

include dispositive motions and will probably include vigorous cross-examinations of witnesses. By contrast, parties or arbitrators from Europe or Asia may refuse to permit such procedures and may require that all affirmative evidence be submitted in the form of declarations.

39. The importance of some of the functions of national courts and laws has been somewhat reduced through the promulgation and ratification of international treaties, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 ("The New York Convention of 1958"), 21 U.S.T. 2517, and international commercial law, such as the ICC Uniform Customs and Practice for Documentary Credit. The New York Convention of 1958 is an international treaty that obliges member countries to enforce foreign arbitral awards except in certain limited circumstances in which the validity of the award may be called into question.

40. Roderick W. Macneil, *Contract in China: Law, Practice, and Dispute Resolution*, 38 STAN. L. REV. 303, 327 (1986).

41. *See* Jones, *supra* note 20, at 197.

42. *Id.*

avoiding these questions than resolving them—at least when disputes arise regarding individual agreements. Arbitration provides parties with means to avoid those questions, at least in part.

In contrast to the exalted status of the "rule of law" in Western societies, law does not occupy the same position of importance in many Asian countries. In fact, Chinese culture is distinctly averse to the use of law or lawsuits to resolve disputes.[43] "Confucianism argues that legal principles and the legal system are ethically and socially inferior ways to resolve problems. The law is the last and most embarrassing resort, to be used only after rational dialog and moral reasoning have failed."[44] Or, as one commentator put it, "[t]he Chinese, perhaps demonstrating a higher level of civilization than exists here, abhor litigation. Their traditional approach to resolving disputes has been through good faith negotiation."[45]

Arbitration is flexible enough that the form of the arbitration proceedings agreed to by the parties can usually accommodate both parties' perceptions about law and its role in resolving disputes.[46] Arbitration is formal enough to appeal to Western sensibilities, but has a time-honored place in Chinese history and tradition. In this way, arbitration provides a forum and a process through which both parties can agree to participate, even if they are unable to agree about anything else.

II.
THE STATE OF ARBITRATION IN CHINA

The observations of Part I about the benefits and limitations of international arbitration are clearly visible in a passing glance at recent developments affecting arbitration in China. The premier international arbitration institution in China is the China International Economic and Trade Arbitration Commission, commonly known by its acronym, CIETAC.[47] With no other arbitral institution is the interplay between national legal and political systems, on the one hand, and arbitral institutions, on the other hand, more apparent.

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43. *See* DEZALAY & GARTH, *supra* note 1, at 253-55.

44. Chew, *supra* note 12, at n.115. *See also* Barton & Carter, *supra* note 2, at 552 ("There is possibly even a Confucian hesitance to rely on formal law and institutions for structuring society."); Ge, *supra* note 18, at 128 (arguing that the importance of arbitration in resolving disputes in China is rooted in Confucian teachings).

45. James D. Zirin, *Confucian Confusion,* FORBES, Feb. 24, 1997, at 136.

46. For example, Chinese arbitration (and litigation) procedures often include mediation initiated and managed by the arbitrators (or judge). Macneil, *supra* note 40, at 330. This historical hybridization of dispute resolution mechanisms in China is fundamentally opposed by American legal professionals and basic American legal assumptions. The American legal tradition exerts painstaking efforts to maintain the separateness of settlement and adjudication procedures and to insulate adjudicators from the parties' settlement discussions.

47. There are two international arbitration bodies in China, CIETAC and the China Maritime Arbitration Commission (known as "CMAC"), which together resolve virtually all international business disputes. Ge, *supra* note 18, at 131. Although most to the issues raised in this Essay relate equally to CIETAC and CMAC, for the sake of simplicity, we refer only to CIETAC because it is the arbitral institution most commonly used.

Many positive things can be said about the competence and relative independence of China's foreign-related arbitration bodies. However, those institutions exist within the larger framework of the Chinese legal system. Consequently, CIETAC's long-term effectiveness will ultimately depend on the manner and degree to which it is supported by the Chinese Government and the extent to which China's national legal system evolves. This Part provides a description of several legal developments, both positive and negative, affecting arbitration in China over the past few years.

A. The New Arbitration Law

On September 1, 1995, the new Arbitration Law took effect. As the first unified and relatively complete law on arbitration in the PRC, the Arbitration Law brings welcome advances for the systems and procedures of arbitration in China.[48] The reforms brought by the Arbitration Law are the culmination of three years of drafting[49] and the consolidation of thirty years of experience in arbitrating foreign-related business disputes in the PRC.[50] Most changes introduced by the Arbitration Law are procedural in nature and do not directly affect the nature or proceedings of international arbitration organizations, such as CIETAC. We summarize below the most significant provisions in the Arbitration Law.[51]

1. Establishment of Independent Arbitration Commissions

The Arbitration Law establishes the institutional framework for the creation of Arbitration Commissions that are administratively independent from the Chinese Government.[52] The Arbitration Law also calls for the creation of the China Arbitration Association, a non-governmental, self-regulating organization of the Arbitration Commissions.[53] Additional provisions describe the requirements for the establishment of Arbitration Commissions,[54] the composition of the Arbitration Commissions,[55] and the qualifications for appointment of arbitrators.[56] Together, these provisions legitimize arbitration as a process of adjudication that is recognized by, but independent of, the Chinese Government. These advances for domestic arbitration do not have any direct effect on international arbitration.

48. *See, e.g.*, Ge Lui & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539 (1995).

49. CHENG DEJUN ET AL., INTERNATIONAL ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, CASES AND MATERIALS 297 (1994).

50. Xiao Zhiming, *The Commencement of the Arbitration Law*, HONG KONG LAW., July 1995, at 39 (on file with authors).

51. For a thorough and detailed discussion of the Arbitration Law, *see generally* CHENG ET AL., *supra* note 49, *and* BEN BEAUMONT ET AL., COMMENTARY ON THE CHINESE ARBITRATION ACT (1995).

52. *See* Arbitration Law of the People's Republic of China (Adopted at the Ninth Standing Comm. Session of the Eighth National People's Congress on Aug. 31, 1994), art. 10-12, 14 [Hereinafter "Arbitration Law"].

53. Arbitration Law art. 15.

54. Arbitration Law art. 11.

55. Arbitration Law art. 12.

56. Arbitration Law art. 13.

Nevertheless, advances for domestic arbitration may hold some important consequences for foreign investors who unwittingly end up before domestic tribunals.[57]

2. *Special International Issues*

Another significant aspect of the Arbitration Law is the inclusion of "special provisions" that relate to the "arbitration of disputes involving a foreign element and trade, transport and maritime interests."[58] The significance of these provisions is two-fold. First, reference to a "foreign element" legitimizes CIETAC's expanded jurisdiction specified in Article 2 of the CIETAC Arbitration Rules.[59] Second, by designating special provisions governing foreign-related arbitrations, the Arbitration Law affirms that, although China is harmonizing domestic and foreign-related arbitration, the two types of arbitration are distinct enough to require some separate provisions.[60] Because China's international arbitral tribunals are better established and more sophisticated, it is important that they remain distinct from domestic arbitral tribunals, which do not share CIETAC's reputation.

B. CIETAC's Prospering Institutional Reputation and Status

In addition to enhancement of the Arbitration Law, other trends bode well for the continued and expanding prosperity of CIETAC as an arbitral institution. CIETAC arbitral awards are generally enforced outside of China. CIETAC's caseload has continued to increase rapidly, reaching an estimated 600 cases in 1996.[61] At present, CIETAC has more arbitration cases than any other arbitration body in the world.[62] The CIETAC list of potential arbitrators has expanded to include younger arbitrators who have some exposure to foreign legal systems and are more inclined than the senior bureaucrats they replace to find "legal" rather than "practical" resolutions to disputes.[63] Other major breakthroughs are CIETAC rule changes that permit foreign arbitrators to be included in the Panel

57. For a discussion of how foreign investors may end up before domestic Arbitration Commissions, *see infra* Part II.D.

58. Arbitration Law art. 65.

59. For additional discussion of and questions about CIETAC's expanded jurisdiction, *see infra* Part II.D.

60. For a discussion of how a recent notice by the State Council undermines the significance of the distinction drawn by the special provisions relating to foreign arbitration, *see infra* Part II.E.2.

61. This estimate is based on unofficial information obtained from the Beijing CIETAC Secretariat. Even allowing for a possible margin of error, this number demonstrates a dramatic increase in CIETAC's caseload from 1990, which was 238 cases. BEAUMONT ET AL., *supra* note 51, at 6 n.13. This number is somewhat lower than the number of arbitration matters reported by official Chinese news agencies, which put the number of cases accepted by CIETAC in 1995 at more than 900. *Non-Governmental Foreign Economic, Trade Ties Advance*, XINHUA NEWS AGENCY, Jan. 30, 1996, *available in* LEXIS, ASIAPC Library, XINHUA File, Item No. 0130218.

62. *China Tops Dispute League*, THE FIN. TIMES, Mar. 21, 1996, at 6.

63. *See* DEZALAY & GARTH, *supra* note 1, at 279. "Legal solutions" are generally preferred by foreign investors who rely on existing legal standards to draft and seek enforcement of their contracts.

of Arbitrators[64] and foreign parties to use their own non-Chinese attorneys.[65] These changes have helped to bring the CIETAC Arbitration Rules more in line with recognized international standards.[66] These developments, along with an emerging track record, have led many to remark that CIETAC arbitration has become much more sophisticated than in earlier days.[67]

In addition to CIETAC's institutional composition, on September 4, 1995, the China Chamber of International Commerce ("China CIC") adopted significant amendments to the CIETAC Arbitration Rules.[68] While many of the changes adopted by the amendments are too subtle to warrant comment in this Essay,[69] other changes are likely to have important consequences for international arbitration in China.

One of the more interesting changes is the expansion of CIETAC's jurisdiction.[70] This amendment was introduced in response to designation of CIETAC by the Chinese Securities Supervision as the official arbitration institution for handling securities disputes arising between or among China's securities firms and the securities exchange agency.[71] One observer expects a "sharp increase" in the number of securities related matters brought before CIETAC,[72] probably as a result of the expanded securities jurisdiction.

Another significant change conforms the CIETAC Arbitration Rules to the Arbitration Law. The amendments stipulate that any objection to the validity of an arbitration agreement or to the jurisdiction of the Arbitration Tribunal shall be raised before the initial hearing of the Arbitration Tribunal or in the initial substantive defense.[73] When the parties dispute the validity of the arbitration agreement and raise the issue both before the Arbitration Tribunal and a People's Court, the decision of the People's Court will prevail if the Arbitration Tribunal's conclusion is different. This amendment conforms the CIETAC Arbitration Rules to the Arbitration Law, which contains virtually identical provisions.[74]

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64. Ge, *supra* note 18, at 132 & n.54 (*citing* CIETAC Arbitration Rules, art. 10).

65. *Id.* at 132 & n.57 (*citing* CIETAC Arbitration Rules, art. 22).

66. *Id.* at 131-32 & n.52.

67. *See id.*; DEZALAY & GARTH, *supra* note 1, at 278-79.

68. The China CIC is authorized under Article 73 of the Arbitration Law to promulgate rules governing foreign-related arbitrations. *See* Jingzhou Tao, *CIETAC Modifies its Arbitration Rules*, ASIA PAC. F. NEWSL., Winter 1995, at 11. For further discussion on possible limitations of China CIC's power under Article 73, *see infra* Part II.E.2.

69. For example, several of the changes will not affect the English translation. *See* Tao, *supra* note 68, at 11-12.

70. *See* CIETAC ARBITRATION RULES (1995) ("CIETAC ARB. RULES") art. 2. The following language was added to Article 2: "If the laws or administrative legislation of the People's Republic of China include special provisions or special authorisation concerning the scope of a case accepted for hearing by the arbitration Commission, the Arbitration Commission may hear the case in pursuant to these special provisions or special authorisation."

71. *See* Tao, *supra* note 68, at 12.

72. *See* Lui & Lourie, *supra* note 48, at 542.

73. *See* CIETAC ARB. RULES, arts. 4 & 6.

74. *See* Arbitration Law art. 20.

C. *Enforcement of Awards*

Notwithstanding the positive developments discussed in Parts II.A. & B., the effectiveness of arbitration in China remains severely hampered. For foreign parties seeking to vindicate their rights through arbitration, obtaining a favorable arbitral award is only the first step in a long and precarious process. The enforcement problems are legendary for victorious parties seeking to enforce awards in China.[75] Despite the limited grounds upon which a Chinese court can legitimately deny enforcement of an arbitral award,[76] prevailing parties are routinely unable to enforce arbitral awards.

For example, in response to an article regarding investment in China, Mr. Andre G. Gigon, Director of the French company, Tetras S.A., felt compelled to warn potential investors in a letter to the editor about "risks relate[d] to problem-solving."[77] Mr. Gigon's company, Tetras, won an arbitration award against a Chinese company. A Chinese court even agreed, in principle, that the award was binding, "[y]et the court refused to notify the parties of its ruling, thus blocking the enforcement mechanism and the execution of the award."[78] Based on this experience, Mr. Gigon warned that investors should "be aware of the behavior of the Chinese judicial system . . . . The possibility of arbitration to secure binding solutions to international commercial disputes cannot be comforting."[79]

Mr. Gigon's story is not unique. Mr. Robert R. Aronson, Chairman of RevPower Limited, described how he was "shocked" by the delay tactics he encountered when trying to enforce a $9 million arbitral award issued by the Stockholm Chamber of Commerce against a Chinese party.[80] "When we filed the award with the Shanghai Court, the court refused to give us a receipt for the award, or a case number, and for the next two years refused to even acknowl-

75. *See, e.g.*, Chew, *supra* note 12, at 639 (noting that "the value of [CIETAC arbitration awards] is questionable because Chinese courts routinely refuse to enforce awards entered against Chinese defendants.").

76. *See* Civil Procedure Law art. 20 (PRC). Specifically, Article 260 provides:

> If the party against whom the enforcement is sought presents evidence which proves that the arbitration award made by the foreign-related arbitration institution of the People's Republic of China involves one of the following circumstances, the People's Court shall, after examination and verification by a collegial bench formed by the People's Court, rule to refuse the enforcement of the award:
>
> the parties have neither included an arbitration clause in their contract nor subsequently concluded a written arbitration agreement;
>
> the party against whom the enforcement is sought was not notified to appoint an arbitrator or to take part in the arbitration proceedings or the party against whom the enforcement is sought was unable to state his opinions due to reasons for which he is not responsible;
>
> the formation of the arbitral [institution] or the arbitration procedure was not in conformity with the rules of arbitration; or
>
> the matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitration institution.

77. Andre G. Gigon, *China: Enter at Your Own Risk*, BUS. WEEK, Oct. 20, 1997, at 5.

78. *Id.*

79. *Id.*

80. *Prepared Statement of Robert R. Aronson, supra* note 15.

edge that the award existed."[81] In the meantime, again to Mr. Aronson's shock and dismay, soon after RevPower received the award, the Chinese party started "transferring its business and assets to its parent . . . and grandparent [companies]."[82]

Enforcement remains one of the most difficult and uncertain aspects of arbitration in China.[83] In some instances, arbitral awards are denied enforcement because local courts come under significant pressure from local government authorities.[84] Other times, even if enforcement is not expressly denied, the practical effect is the same because the People's Court fails to actively enforce the award. Even when People's Courts issue orders requiring enforcement of arbitral awards, such orders are only pieces of paper that are dependent for execution on the often-elusive cooperation of local officials.[85] Enforcement at this point in the process is impaired because Chinese courts, especially their enforcement divisions, are critically underfunded.[86]

To the extent that the problems of enforcement result from a lack of guidance from the Chinese Government, the Supreme People's Court has recently offered some relief. In a decision handed down in August 1995, the Supreme Court instructed that lower courts may no longer overturn independent arbitral awards without the approval of a higher-level court.[87] However, the Supreme Court's decision falls short of directing or requiring lower People's Courts to enforce arbitral awards. Moreover, it is doubtful that one pronouncement by the Supreme Court can go far in curbing local practices that are firmly entrenched and politically motivated.[88] Finally, as noted above, outright denial of an application to enforce an award is only one of the mechanisms used to prevent a prevailing party from executing an arbitral award.

Notwithstanding these points, the Supreme Court's decision may provide prevailing parties some chance at success by partially insulating enforcement

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81. *Id.*

82. *Id.*

83. Parties seeking to enforce in China foreign awards rendered outside of China have the benefit of the New York Convention of 1958. Although the New York Convention of 1958 contains provisions substantially similar to those under Article 20 of the Arbitration Law, as a practical matter the effect is often the same.

84. *See* Stanley Lubman, *Setback for China-Wide Rule of Law*, FAR E. ECON. REV., Nov. 7, 1996, at 38.

85. *See generally* BEAUMONT ET AL., *supra* note 51, at 3-4 (describing political and economic factors that reduce the likelihood of enforcement of arbitral awards in China).

86. Matthew D. Bersani, *Enforcement of Arbitration Awards in China: Foreigners Find the System Sorely Lacking*, CHINA BUS. REV., May 1992, at 7. In order to enforce an award, court personnel must usually travel to the non-performing party's local court to coordinate enforcement efforts. *Id.* To facilitate this travel, court personnel often request that the foreign company holding the arbitral award cover travel costs. *Id.* U.S. parties can be punished under U.S. laws relating to corrupt overseas business practices if they comply with the court personnel's request, but suffer delay or outright refusal to enforce their award if they don't. *Id.*

87. *Dispute Resolution*, CHINA ECON. REV., Mar. 1996, at 23.

88. In fact, it is generally believed that the provincial areas of the PRC are not always under the control of the central Chinese Government. *Cf.* BEAUMONT ET AL., *supra* note 51, at 3-4 (proposing the creation of an Arbitration Court to oversee all procedural matters relating to arbitration, including the creation of enforcement mechanisms such as bailiffs).

decisions against the most extreme local pressures operative in lower People's Courts. More importantly, the decision indicates recognition by the Chinese Government that national oversight is necessary in the enforcement of arbitral awards. Despite the uncertainty regarding enforcement of arbitral awards, some remain hopeful about recent progress in the area of enforcement.[89] The Supreme Court's recognition of the need for central oversight of enforcement will hopefully prompt legislation that creates better enforcement procedures.

D. Curtailing the Scope of CIETAC's Jurisdiction

Another factor restricting the availability of international arbitration is ambiguity surrounding CIETAC's jurisdiction. Significant controversy has long existed regarding CIETAC's jurisdiction. The 1989 version of the CIETAC Arbitration Rules defined CIETAC's subject matter in general terms, providing that CIETAC's jurisdiction extended to "disputes arising from international economic and trade transactions."[90] Under this ambiguous statement of jurisdiction, a debate developed about whether CIETAC, as an international arbitral body, could exercise jurisdiction over disputes between two Chinese entities, and if so, under what circumstances. This debate holds potentially significant consequences for many foreign investors because Chinese-foreign joint ventures are deemed to constitute Chinese legal persons under Chinese joint venture law.[91]

The 1995 revisions to the CIETAC Arbitration Rules attempted to resolve the debate by extending CIETAC's subject matter jurisdiction to "disputes which arise in areas of . . . international or foreign economic relations and trade."[92] This provision was generally interpreted to permit CIETAC to assume jurisdiction over "external" or "foreign-related" (*shewai*) disputes, even if such

89. *See, e.g.*, David Samuels, *All Change in China*, INT'L COM. LITIG., Apr. 1996, at 13 (reporting about law firm Clifford Chance's success in enforcing an arbitration award). In addition, after its concerted campaign to publicize the difficulties encountered in attempting to enforce its arbitration award, discussed above, *supra* Part II.C., RevPower received private messages from the Chinese embassy in November 1995, suggesting that RevPower again try to enforce the award. *How to Cope When Things Go Wrong In China—The RevPower Dossier,* INT'L COM. LITIG., Apr. 1996, at 14-15. This time, the Shanghai Intermediate People's Court acknowledged receipt of the award and acknowledged that it was still enforceable despite the time lapse. *Id.* Chinese television even broadcast the Shanghai People's Court decision, presumably to showcase the decision to investors abroad. *Id.*

90. CIETAC ARB. RULES (1989) (on file with authors).

91. Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures, art. 2, (1988).

92. *See* CHENG ET AL., *supra* note 49, at 28, 308. CIETAC ARB. RULES art 2. The full text of Article 2 provides:

> [CIETAC] will use arbitration as a means of independently and impartially resolving disputes which arise in areas of contractual or non-contractual international or foreign economic relations and trade between foreign legal entities and/or natural persons and Chinese legal entities and/or natural persons, between foreign legal entities and/or natural persons, between Chinese legal entities and/or natural persons. Such arbitration will be undertaken in order to safeguard the legal rights and interests of the parties concerned and to promote the development of domestic and international economics and trade.

disputes involve only two domestic Chinese legal persons, as long as the disputes also involve a significant "foreign element" (*shewai yinsu*).[93] This revision was heralded as an important change that expanded the scope of CIETAC's jurisdiction.

In 1996, the Shanghai Municipal Intermediate People's Court rendered a judgment that raises serious doubts about the accuracy of this interpretation.[94] The underlying dispute arose between Shanghai Light Industrial Corporation ("Shanghai Corporation") and a Hong Kong-based company called Today's World Co. Ltd. The dispute involved a claim for payment for certain services provided by Shanghai Corporation to a Chinese-foreign joint venture between the two companies, called Shanghai Today's World Gourmet Co. Ltd. ("Today's World").[95] The services were provided pursuant to a contract that was ancillary to the joint venture contract and that contained no arbitration clause.[96]

Notwithstanding an arbitration clause in the joint venture contract, Shanghai Corporation filed a claim for damages against Today's World in the Shanghai Municipal First Intermediate People's Court. Despite vigorous jurisdictional objections by Today's World, the Intermediate Court held, and the Higher People's Court later affirmed,[97] that a People's Court could exercise jurisdiction over the dispute.

The jurisdictional holding appears to have been made in the alternative. In its first alternative holding, the Court concluded that the dispute arose under the ancillary contract, which contained no arbitration agreement. This holding is not controversial as it is consistent with the recognized grounds for refusing to enforce an arbitral award.[98]

The second alternative holding, however, is more troubling. In this alternative holding, the Court concluded that exercise of jurisdiction by the People's Court was appropriate because CIETAC could not exercise jurisdiction over a dispute that arose between two Chinese legal persons over a domestic contract.[99] This holding is disturbing because it suggests that disputes arising under most ancillary contracts between Chinese-foreign joint ventures and their Chinese partners cannot be brought before CIETAC. Troubling as it is, however,

93. *See* Ge, *supra* note 18, at 132; CHENG ET AL., *supra* note 49, at 28, 308; Lui & Lourie, *supra* note 48, at 559. This expanded jurisdiction is echoed in the Arbitration Law's provisions governing foreign-related arbitration. Specifically, Article 65 of the Arbitration Law describes the special provisions governing foreign arbitration to apply to the arbitration of disputes involving "foreign economics and trade, transport and maritime interests." ARBITRATION LAW art. 65.

94. *See* Clement Au-Yeung et al., *Joint Venture Dispute Triggers Jurisdictional Concerns*, CHINA LAW & PRAC., Feb. 1996, at 24.

95. *Id.* at 24-25.

96. *Id.* at 25-26.

97. *Id.* at 26.

98. *See* Civil Procedure Law art. 260(1) (PRC).

99. It should be noted that the parties eventually agreed to refer the dispute to the Shanghai Commission of CIETAC, where counterclaims, including one for termination of the joint venture contract, were raised. *See Case Update: Shanghai Joint Venture Dispute Lingers On*, CHINA LAW & PRAC., June 1996, at 47.

this conclusion has been echoed by CIETAC itself,[100] and by People's Courts that have been asked to enforce arbitration agreements.[101]

This crabbed interpretation of CIETAC's jurisdiction will likely have serious consequences for investors. Chinese-foreign joint ventures and their Chinese partners often enter into ancillary contracts for services to be provided to the joint venture or for land use. If these service and land contracts are regarded as domestic contracts, then disputes between the joint venture and the Chinese party will not be subject to CIETAC's jurisdiction. Because it is an issue of CIETAC's jurisdiction, parties will not have the option of avoiding this consequence by agreement. Moreover, this new interpretation of CIETAC's jurisdiction will have the affect of nullifying parties' choice of arbitration already provided for in contracts that predate this decision. Parties who thought they selected CIETAC arbitration to govern disputes arising out of these ancillary contracts will no doubt be disappointed to find themselves in domestic arbitration[102] or in People's Courts.

E. State Council Notice

Compounding the problems of CIETAC's curtailed jurisdiction, a June 8, 1996 notice from the State Council ("State Council Notice")[103] will likely have a profound effect on the reliability and continued vitality of arbitration in China. The State Council Notice contains three significant provisions, the net effect of which is to end CIETAC's long-standing exclusive jurisdiction over foreign-related disputes and to make it more difficult for parties to designate CIETAC in arbitration clauses in standard-form government contracts.

1. Validity of Arbitration Agreements

Article 1 of the State Council Notice states that if the arbitration body selected by the parties in an arbitration clause has been terminated, the clause is

100. One of the authors of this Essay was personally involved in a similar case in which CIETAC issued a ruling that declined to exercise jurisdiction over a similar dispute involving an ancillary contract for land and services. In declining to exercise jurisdiction over the dispute between a joint venture and the joint venture's Chinese partner, CIETAC rejected arguments that the dispute involved a "foreign element" even though the joint venture was primarily funded by foreign investment, the joint venture was primarily managed by foreign personnel and the joint venture was created to manufacture automobiles for domestic and export markets. This decision by CIETAC, and the inevitability of similar decisions in the future, suggests that parties will no longer have the option of agreeing to submit disputes arising out of ancillary contracts to CIETAC, as Shanghai Corporation and Today's World did.

101. For example, the Beijing court refused to enforce an arbitrated agreement made between the Beijing Lido Holiday Inn Hotel and the China International Engineering Co. The court's decision was based on its finding that, as a Chinese company, the hotel could not avail itself of CIETAC's jurisdiction and was instead required to apply for domestic arbitration. Wilson, *supra* note 24, at 16.

102. In the words of one investor who found out the hard way, "[m]ake sure you have an international arbitration agreement in your contract. If you get sucked into local arbitration, you're a dead duck." Charles Olivier, *China*, CORP. LOCATION, May/June 1997, at 54, 55.

103. Circular of the General Office of the State Council Regarding Several Issues Which Need to be Clarified in Relation to the Implementation of the Arbitration Law of the People's Republic of China, dated June 8, 1996.

still valid and can provide the basis for acceptance of the case by a domestic Arbitration Commission. This provision has been criticized as inconsistent with the Arbitration Law.[104] The criticism arises because Articles 16 and 18 of the Arbitration Law provide that an arbitration agreement is void if the parties do not clearly designate a specific Arbitration Commission.[105] An arbitration agreement void under these provisions of the Arbitration Law would nevertheless be considered valid and enforceable under the State Council Notice.

2. *Jurisdiction of Domestic Arbitration Commissions Over Foreign-Related Arbitration Cases*

Other significant provisions that will affect foreign investors are found in Article 3 of the State Council Notice. Under these provisions, domestic Arbitration Commissions now have the power to accept foreign-related arbitrations when the parties have agreed to submit disputes to such Arbitration Commissions. Until this pronouncement, CIETAC was regarded as having *exclusive* jurisdiction over foreign-related arbitral disputes[106] and Chinese law treated foreign-related and domestic arbitration as separate and distinct.[107]

Cross pollenizing foreign-related arbitration matters with domestic Arbitration Commissions creates several ambiguities regarding application of the Arbitration Law and the Civil Procedure Code. Confusion will be the likely result.[108] For example, it is uncertain whether foreign-related disputes adjudicated by domestic Arbitration Commissions will be governed by the procedures for domestic arbitration or foreign-related arbitration. If domestic arbitration procedures were applied by domestic Arbitration Commissions to foreign-related arbitrations, arguably such application would be at odds with Article 73 of the Arbitration Law. Article 73 designates the China CIC as the body responsible for formulating, in accordance with the Civil Procedure Code, rules governing foreign-related arbitration.[109] Article 3 of the State Council Notice suggests that the China CIC's power to do so may be undermined or limited by domestic arbitration provisions.

With respect to enforcement of arbitral awards, it is uncertain whether an award rendered by a domestic Arbitration Commission in a foreign-related arbitration will be governed by the provisions of the Civil Procedure Law pertaining to enforcement of domestic arbitral awards[110] or whether the provisions pertain-

104. *See* CIETAC BULLETIN, dated July 23, 1996 (on file with authors).

105. *See* Arbitration Law art. 16(3) ("An arbitration agreement shall contain the following particulars . . . (3) the chosen arbitration commission."); Arbitration Law art. 18 ("Where an arbitration agreement has not specified clearly . . . the choice of an arbitration commission, the parties concerned may conclude a supplementary agreement. If a supplementary agreement cannot be reached, the arbitration agreement shall be void.").

106. *See* Lubman, *supra* note 84, at 38.

107. For example, Chapter 7 of the Arbitration Law contains special provisions for arbitration involving foreign elements. *See* Arbitration Law art. 65-73.

108. *See* Wilson, *supra* note 24, at 16.

109. *See* CIETAC BULLETIN, *supra* note 104.

110. *See* Arbitration Law art. 58-61.

ing to enforcement of foreign-related arbitral awards apply.[111] Questions also exist about whether, in the context of enforcement proceedings, courts of foreign countries will recognize the jurisdiction of domestic Arbitration Commissions over foreign-related arbitrations.[112] The most notable distinction between the domestic and foreign-related provisions regarding enforcement of arbitral awards is that with domestic arbitral awards, People's Courts can review the legal reasoning supporting the award.[113] If courts can review the legal reasoning of arbitral awards, they will lose the finality that has thus far attracted foreign investors. This ambiguity makes it more difficult for investors to know what to expect if their agreements should end up in arbitration in China.

3. Dispute Resolution Clauses In Standard-Form Government Contracts

Perhaps the most ominous provisions of the State Council Notice are those that require all standard-form government contracts, interpreted to mean most trade contracts,[114] to be revised to incorporate one of two model arbitration clauses. The first option requires that the parties specify an Arbitration Commission. The text of the State Council Notice does not expressly preclude selection of CIETAC and CMAC as the specified Arbitration Commission. However, by failing to mention these foreign arbitration bodies specifically, the State Council implicitly suggests that standard form contracts should designate only domestic Arbitration Commissions.[115] The second option is a model clause providing that any disputes arising out the contract be resolved in the People's Court.

It is anticipated that introduction of these model clauses will reduce the ability of foreign investors to designate CIETAC as the body governing potential disputes and will increase the likelihood that foreign parties will end up arbitrating before domestic Arbitration Commissions or litigating disputes in People's Courts.[116] Prior to this provision, foreign investors generally had little or no choice but to agree to CIETAC arbitration because standard contracts and Chinese negotiators invariably insisted on arbitration in China.[117] The lack of choice was not too problematic because CIETAC was generally considered the most reliable and independent arbitral body in China. In light of this State Council Notice, however, the same lack of choice may have dramatically different consequences. Now, Chinese negotiators armed with the State Council Notice will most likely prevent foreign investors from resorting to CIETAC and instead force them into domestic arbitration.

111. *See* Arbitration Law art. 70; Civil Procedure Code art. 260 (PRC).

112. *See* CIETAC BULLETIN, *supra* note 104.

113. *See* Arbitration Law art. 58 (PRC) (providing that an arbitral award can be set aside if an award is made that "perverted the course of justice.").

114. *See* Lubman, *supra* note 84, at 38.

115. *See* CIETAC BULLETIN, *supra* note 104. In his commentary on the subject, Mr. Lubman suggests that, while the model arbitration clauses do not preclude selection of CIETAC or CMAC, as a practical matter they will make it exceedingly difficult for foreign investors to insist on designation of CIETAC. *See* Lubman, *supra* note 84, at 38.

116. Lubman, *supra* note 84, at 38.

117. Lubman, *supra* note 30, at 45.

III.
EXTERNAL EFFORTS TO BOOST THE EFFECTIVENESS OF CHINESE ARBITRATION

When China opened its doors to foreign investment in 1978 after being ravaged by the Cultural Revolution, "the country lacked virtually any of the indicia of a formal legal system."[118] Today, China stands transformed. This metamorphosis is due primarily to the passage of "an extraordinary range" of both national and local legislation to encourage and regulate international business.[119] Unfortunately, China's court system remains the weak link in China's evolving legal environment for foreign investment.[120] Arbitration in China is directly tied to China's court system and will always be subject, at least in part, to its limitations.

Given the importance to the world economy of China's vast and expanding markets, investors and foreign nations have not been content to simply wait and see what will happen. Both individual investors and foreign nations have an ongoing dialogue with the Chinese Government about what is expected and hoped for in China's legal system. Outsiders have employed both the carrot and stick approaches.

A. Carrots

The international community has offered several forms of encouragement and vehicles for reform to China's legal system. Much of the assistance has come in the form of advisors and legal expertise. For example, as part of the U.S.-China summit in November 1997, the United States and China agreed to establish a joint liaison group pursuing cooperation on development of China's legal system.[121] The joint liaison group will focus on training judges and lawyers, exchanging legal experts, and developing arbitration procedures.[122]

Perhaps the biggest enticement for China is admission to the World Trade Organization ("WTO"). For years, this prize has been dangled just out of China's reach. Among the reasons cited for further delaying China's admittance to the WTO is China's spotty record in honoring international arbitration awards.[123] Other potential sources for reform in the Chinese legal system include Chinese participation in the ICC (which is predicted to increase respect by Chinese companies for international arbitral awards).[124]

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118. Jerome A. Cohen, *ABA Committee of Corporate General Counsel Hears Report on China: China's Progress in Business Law*, METROPOLITAN CORP. COUNS., Mar. 1996, at 39.

119. *Id.*

120. *Id.*

121. *The White House, Fact Sheet: Accomplishments of the U.S.-China Summit*, M2 PRESSWIRE, Nov. 4, 1997, *available in* LEXIS, MARKET Library, IACNWS File.

122. *Id.*

123. *Future of U.S. Foreign Policy in Asia and the Pacific: Hearing Before the House Subcomms. on Asia and the Pacific and on Int'l Econ. Pol. of the House Comm. on Int'l Rel.*, 104th Cong. 164 (1996) (statement of Charlene Barshefsky, Deputy U.S. Trade Representative).

124. Jean-Charles Rouher, former Secretary General of the ICC, *Chinese Move on Arbitration*, FIN. TIMES (LONDON), Jan. 6, 1995, Letters to the Editor, at 12.

B. Sticks

Not all problems encountered with arbitration in China are dealt with through gentle encouragement of Chinese legal institutions. Some foreign investors frustrated with their treatment in obtaining or seeking to enforce arbitral awards in China are driven to more hard-nosed measures. Investors are turning to the U.S. Government and Embassy in Beijing to put pressure on the Chinese Government. "The American Embassy [in Beijing] has seen a big jump in complaints over the past six months from disgruntled U.S. companies fed up with their lack of protection under China's legal system."[125]

Examples of entreaties to the U.S. Embassy abound. For instance, the Kimberly-Clark Corporation sought intervention from the U.S. Embassy after an appeal to local officials failed to prevent the manager of Kimberley-Clark's joint venture from operating a rival factory making similar products with materials wrongfully diverted from Kimberly-Clark's factory.[126] In another example, the U.S. government intervened in a case involving a U.S. investor whose store and small factory had been closed down so that Municipal Officials could use the location for redevelopment.[127] In yet another example, Chicago-based Borg-Warner Automotive Inc., an auto parts manufacturer, sought assistance from the U.S. Embassy in appealing a judgment of a Shiyan court awarding all of Borg-Warner's joint venture assets, 60% of which originally came from Borg-Warner, to the joint-venture's Chinese partner.[128] The outrageous aspect of the case is the fact that the entire suit was conducted by the general manager of the joint venture, who represented both the joint venture and the Chinese partner throughout the proceedings.[129]

Another strategy disgruntled foreign investors have employed is public condemnation. The most notable illustration of this tactic is provided by Mr. Aronson of RevPower. After being unable to enforce a multimillion dollar arbitral award rendered in favor of his company,[130] Mr. Aronson began a publicity campaign to "broadcast" the problems he had encountered. Mr. Aronson contacted four senators and ten congresspersons, all of whom wrote letters to the Chinese Embassy in Washington.[131] He also hired an expert attorney to conduct a structured publicity campaign.[132] Mr. Aronson himself has testified before Congress on several issues relating to U.S.-China trade relations.

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125. Roberts et al., *supra* note 15, at 142.

126. *Id.* at 143.

127. U.S. and Foreign Commercial Service, *China Investment Climate Statement for 1997*, INT'L MARKET INSIGHT REP., July 15, 1997, ¶63, *available in* LEXIS, WORLD Library, INTMKT File.

128. Roberts et al., *supra* note 15, at 143.

129. *Id.* It is interesting to note that foreign investors' reliance on assistance from the U.S. Embassy hearkens back to the days before the popularity of international arbitration, when diplomatic intervention by the investors' home country provided protection for investments. *See supra* note 2 and accompanying text.

130. *See supra* notes 80-82 and accompanying text.

131. *How to Cope*, *supra* note 89, at 14-15.

132. *Id.*

The most strident pressures on China relate to the most serious problem: enforcement of arbitral awards. A bill entitled "International Arbitration Enforcement Act of 1997" is currently pending before Congress.[133] The bill is essentially an amendment to the Foreign Sovereign Immunities Act.[134] The Foreign Sovereign Immunities Act permits U.S. persons to execute international arbitration awards against foreign states or state-owned enterprises through federal district courts.[135] The International Arbitration Enforcement Act would permit U.S. parties to collect the value of their arbitral award (plus interest) from a foreign state that refused or failed to enforce an arbitral award for which enforcement was sought pursuant to the New York Convention of 1958.

The value of this legislation is that, most often, the Chinese state-owned enterprises against which arbitral awards are rendered do not have assets in the United States against which U.S. award holders can execute their award. The International Arbitration Enforcement Act of 1997 creates civil liability for countries that are members of the New York Convention of 1958 on the theory that a court's refusal to enforce an award in violation of the Convention is a breach of the Convention by the nation in which the court resides.[136] By providing a means for enforcing arbitral awards outside of China, the International Arbitration Enforcement Act seeks to create the same leverage that was available to the oil companies in the petroleum arbitrations against Libya.

IV.
CONCLUSION

We are not in a position to predict which efforts by foreign investors and the United States will have the most significant effect on the stability and reliability of international arbitration in China. Instead, in closing we offer a few observations about the backdrop against which the external efforts described above in Parts III.A. and B. are being made.

As a starting point, it is significant that the Chinese Government actively acknowledges the fact that China must improve its protections for foreign investments in order to continue attracting those investments.[137] This acknowledgment suggests that, whatever form external efforts to affect China's legal system take, the Chinese Government will be watching and evaluating.

It is also important to factor in the unlikelihood that investors would ever completely abandon the markets of China, despite the continuing handicaps of

133. H.R. 2141, 105th Cong. (1997).

134. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.)

135. *See id.* at § 1610.

136. *See Prepared Statement of Robert R. Aronson, supra* note 15.

137. *See, e.g., Non-Governmental Foreign Economic, Trade Ties Advance, supra* note 61 (reporting that Guo Dongpo, President of the CCPIT, "pointed out that foreign arbitration, mediation and trademark agency services carried out by the CCPIT have helped to improve China's investment climate."); *How to Cope, supra* note 89, at 14-15.

China's dispute resolution mechanisms.[138] Even RevPower, the company most vocal in advocating the stick approach, has stated that it would again invest in China once its arbitral award has been enforced.[139]

Together, the Chinese Government's concern and investors' continued interest in Chinese markets suggests that the two will remain wary partners in the project of increasing the protections in China for foreign investments. Arbitration has a critical role in that project. As a semi-autonomous mechanism for dispute resolution, arbitration offers a forum for the continued dialogue between the Chinese government, Chinese business entities, and foreign investors about the nature and extent of protections for foreign investments in China. Investors facing significant roadblocks to vindicating their claims may yearn for the type of force-fed arbitration that proved so effective against Libya. Ultimately, however, extranational efforts, if indeed they are even completely possible,[140] will not by themselves produce the necessary reforms within China. Engagement, though it may not be voluntary, is necessary to the development of a stronger, more reliable system of arbitration in China.

Foreign investors in China are beginning to regard their investments as profit-making endeavors, not simply as feet in the door to access future markets. The examples in this Essay demonstrate investors expressing shock and dismay, as opposed to mere resignation, in response to the problems they have encountered in pursuing arbitration in China. As a result of these higher expectations, investors are less willing simply to "write off" invested capital when a dispute arises. Instead, they will be looking more carefully at the protections that exist for their investments. Because arbitration is the primary method of dispute resolution, developments in arbitration will inevitably be at the heart of their focus.

138. *See, e.g.*, Fiona Thompson, *Dabhol Debacle Dents Foreign Investors' Confidence*, PETROLEUM ECONOMIST, Nov. 1995, at 6 (discussing the competition between India and other countries in Asia for investment dollars).

139. Olivier, *supra* note 102, at 55. Other investors who can tell nightmare stories about ventures in China nevertheless continue their business activities there. For example, despite the trouble experienced by Kimberly-Clark, discussed *supra* note 126 and accompanying text, the company plans to expand its operations in China. Roberts et al., *supra* note 15, at 143. In an even more astonishing example, one company, whose Chinese partner cut and pasted a crude photocopy of the foreign manager's signature onto a radically different feasibility study, still remains in business with the same Chinese partner. Olivier, *supra* note 102, at 54.

140. As noted above, in negotiating contracts with Chinese entities, foreign investors usually have little leverage to demand clauses calling for arbitration outside of China. *See supra* note 117 and accompanying text.