Front. Law China (2006) 3: 393–422
DOI 10.1007/s 11463-006-0017-2

RESEARCH ARTICLE

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Reforming Chinese arbitration law and practices in the global economy

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Abstract In the last 50 years Chinese arbitration law and practices has made significant contributions to the international commercial arbitration and strides to manage the rapidly increasing caseload associated with a period of amazing growth in economic interactions between Chinese and non-Chinese parties. In the global economy there are rooms for further improvement. The paper proposed some ideas on reforming the Chinese arbitration law and practices on the arbitration system regarding the ad hoc arbitration, panel system and tribunal jurisdiction, interim measures of protection, as well as standards for the judicial review on the arbitral awards.

Keywords reform, Chinese Arbitration Law, practices

China has taken significant steps towards integrating Chinese economy into the global economy since its accession to the World Trade Organization in 1991. Like its economy, China's arbitration system has faced immense growth and accompanying challenges. Arbitration law is a relatively new body of law that is developing rapidly as commercial ventures between Chinese and non-Chinese parties proliferate. China has a long history of mediation and conciliation, based in part on Confucian principles of comity and

Received June 11, 2006

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accord with others in commercial transactions and personal relationships.[1] Given the continued influence of Confucian culture on politics, business, and cultural transactions in modern China, and the advantages of arbitration perceived by many parties involved in international business around the globe, arbitration has become a frequently selected and more viable dispute resolution option in China in recent decades.

The role of law and the legal profession has also expanded significantly since the end of the Cultural Revolution in the late 1970s. The number of lawyers and judges has increased dramatically in the post-Mao era; litigation and administrative actions have similarly expanded.[2] Lawyers have become more professionalized and specialized, with greater independence.[3] Many legal norms have been codified and publicized, as the government encouraged a more robust legal system to spur the development of China's socialist market economy, international investment in China and foreign trade.[4] Domestic contract arbitration was sparsely used and highly controlled by such governmental bodies like the Administration for Industry and Commerce from the 1950s through the 1970s.[5] International commercial ventures between Chinese and non-Chinese parties increased from 1979 to 1991 under the open door policy and its newly decentralized economy, which allowed more Chinese entities to engage in international commerce.[6] With the advent of the government's current approach—a socialist market economy—in 1992, more widespread commercial activity was fostered.[7]

The establishment of arbitration law and development of a more robust legal system supporting domestic and international commercial arbitration in China since the early 1980s is an important aspect of these changes in the legal and economic systems. As shown below, there has been a rapid and dramatic growth in arbitration, with greater codification of procedural law, increased professionalization of arbitrators and arbitral institutions, and a proliferation of options to meet the growing need for dispute resolution services. In the 1990s, arbitration institutions in China received more independence and began to compete with each other to handle cases. China has become a large and important arbitral forum and its potential for expansion is great. The arbitration law promulgated in the mid-1990s incorporates

[1] Randall Peerenboom, *China's Long March Toward Rule of Law* 27–54 (Cambridge U. Press 2002). Professor Peerenboom provides an excellent overview of the historical development of the legal system in China, canvassing tensions between Confucian and Legalist principles, and illuminating the role of law in society and the development of a Chinese rule of law.
[2] *Ibid*. at 6-8.
[3] *Ibid*. at 343-83.
[4] *Ibid*. at 19, 55.
[5] Zhao Xiuwen, *Arbitrating Disputes with Chinese Entities*, Renmin University China Law Summer Teaching Materials 114, 114-15 (2004) (copy on file with the authors).
[6] *Ibid*.
[7] *Ibid*.

major changes from prior practice and is an important step towards conforming Chinese arbitration law and principles to international norms.[8]

These developments are consistent with the growth of international commercial arbitration in recent decades. As global interactions increase, parties have also increasingly invoked arbitration in their attempts to provide cost-effective, speedy, final and neutral fora for resolving their disputes.[9] While Chinese law has incorporated many of the standards governing modern international commercial arbitration law as its system has evolved, room for improvement remains.

This article recommends several changes to continue the modernization of Chinese arbitral law and practices, aligning it with international arbitration norms. These reforms should make arbitration within China a more attractive option for both Chinese and foreign parties. First, Chinese arbitration legislation should be amended to allow for ad hoc or non-administered arbitration when the parties desire an arbitration process that is not administered by a specific institution. Second, party autonomy should be enhanced with some changes to the arbitral process, including relaxing the conditions required for a valid arbitration agreement; expanding the circumstances in which arbitrators can rule on threshold jurisdictional issues and order interim relief; and establishing a unified list of qualified arbitrators. Finally, this article discusses some conflicts within Chinese law governing standards of judicial review and highlights some recent developments clarifying that arbitral awards rendered in China involving a foreign party deserve the most deferential review the law affords.

I Background: China's emergence as the world's largest arbitral forum

Before the establishment of the People's Republic of China in 1949, no independent international commercial arbitration institution existed in the country to handle disputes that might arise out of a commercial transaction between Chinese and non-Chinese parties.[10] If a dispute arose between a Chinese party and a foreign party, the parties typically referred it to an arbitration institution outside China prior to the mid-1950s. This was a barrier for Chinese companies seeking to engage in foreign trade. For example, in 1953, a Chinese corporation entered into a contract with a British

[8] *See infra* § II(A).
[9] Jay Folberg, Dwight Golann, Lisa Kloppenberg & Thomas Stipanowich, *Resolving Disputes* 509-16 (Aspen 2005).
[10] In practice, residents of or businesses incorporated in Hong Kong, Macau, and Taiwan are considered foreign parties since laws of these regions differ from those of the mainland, the People's Republic of China.

corporation for purchasing twenty-nine tons of wool.[11] After the deal was negotiated via telegraph, the British party sent a printed confirmation to the Chinese party for its signature.[12] The confirmation stated that the London Arbitration Court should arbitrate any dispute arising from the contract.[13] Although the Chinese party was concerned about arbitrating a case in London in the event of a dispute, the party had no local recourse in China until 1954.[14]

To meet the needs of the constant development of China's economic and trade relations with foreign countries, the former Government Administration Council of the Central People's Government adopted the first literation of the Foreign Trade Arbitration Commission ("FTAC"), the former name of China's International Economic & Trade Arbitration Commission ("CIETAC"), within the China Council for the Promotion of International Trade on May 6, 1954.[15] CIETAC served as a dispute resolution provider for disputes arising from contracts and transactions in foreign trade, particularly disputes between a foreign firm, company, or other economic organization and a Chinese organization. In 1958, the predecessor to the China Maritime Arbitration Commission ("CMAC") was established to settle all maritime arbitration cases.[16]

The creation of CIETAC and CMAC represented China's first step in providing international commercial arbitration services. During the next decade, international arbitration within China developed slowly for various reasons, including the United States trade embargo.[17] Additionally, internal Chinese economic policies of centralized state planning afforded only 100 entities across China the right to engage in foreign trade.[18] By the time China began to implement the open door policy in the late–1970s, CIETAC had existed for twenty years, but had only accepted about 100 arbitral cases.[19] About

[11] Wang Shengchang & Tao Chunming, *China International Economic and Trade Arbitration—Procedural Theories and Practices* 1-2 (Chinese ed., Renmin China Press 1992).
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*.
[15] Cheng Dejun, *Foreign Arbitration & Law* vol. 1, 246-48 (China Renmin University Press 1992).
[16] On November 21, 1958, the State Council at its 82nd Session adopted the Decision on the Establishment of a Maritime Arbitration Commission within the CCPIT. According to this decision, CMAC shall decide the following disputes:

(1) Disputes regarding the remuneration for salvage services rendered by sea-going vessels to each other or by sea-going vessel to a river craft and vice versa;
(2) Disputes arising from collisions between sea-going vessels or between sea-going vessels and river craft or from damages caused by sea-going vessels to harbor structures or installations;
(3) Disputes arising from chartering sea-going vessels, agency services rendered to sea-going vessels, carriage by sea in virtue of contracts of affreightment, bills of lading or other shipping documents, as well as disputes arising from marine insurance.

Ibid. at 361.
[17] Shengchang, *supra* n. 11, at. 3-5.
[18] *Ibid.*
[19] *Ibid.*

sixty of those cases were settled through conciliation, where a neutral third party meets with the parties to help settle the dispute, resembling mediation more than arbitration.[20]

The development of international commercial arbitration in China grew dramatically with the new policy and the improved relations between China and other countries in the late–1970s. After the promulgation and implementation of the first foreign investment law in 1979, the Sino-Foreign China Equity Joint Venture Law, foreign investors began to seek investment opportunities in China.[21] The State Council expanded the scope of CIETAC beyond disputes arising just from foreign trade to those arising from other economic activities, such as investment, financing, and agency (changing its name from the Foreign Trade Arbitration Commission ("FTAC") to Foreign Economic Trade Arbitration Commission ("FETAC")) on 26 February 1980, in order to encourage the development of foreign trade between China and other countries.

During the 1980s and early–1990s, CIETAC, based in Beijing, opened branches in Shenzhen and Shanghai. Additionally, CIETAC established offices in cities such as Chongqing, Chengdu, Changsha and Fuzhou. CIETAC had handled approximately 500 disputes during the 1980s, five times as many as during its first twenty years of operation.[22] By the middle of the next decade, CIETAC filings were averaging more than 700 cases per year, with about ten percent being resolved through conciliation.[23] The following chart shows the caseload that was accepted and concluded[24] by CIETAC during the period from 1990 to 2005 (Table 1).

CIETAC has thus become the world's busiest international arbitration tribunal,[25] and its awards have been enforced by competent courts of more than 140 countries and regions.[26] A number of factors have fueled this dramatic growth, including： Chinese economic policies, which encouraged more foreign trade and less centralized control over that trade; the lifting of restrictions on Chinese nationals interacting with parties outside China; and shifts in foreign policies towards China. Commercial transactions between

[20] *Ibid.*

[21] This law was adopted by the Second Session of the Fifth National People's Congress on July 1, 1979, and promulgated on and effective as of July 8, 1979. *China's Foreign Economic Legislation* vol. 1 1-7 (China For. Lang. Press 1985) (English translation on file with Professor Zhao).

[22] Zhao Xiuwen & Guo Shoukang, *International Economic and Trade Arbitration Law* 253 (Chinese ed., China Leg. Sys. Press 1995).

[23] Tatsuo Ikeda, *New and Future of ADR System in Asian and Pacific Countries*, 51 Osaka L. Rev. 21, 31 (2004).

[24] Concluded means the cases had been arbitrated and awards were made by the tribunal administered by CIETAC.

[25] Kelley Brooke Snyder, *Denial of Enforcement of Chinese Arbitral Awards on Public Policy Grounds: The View from Hong Kong*, 42 Va. J. Intl. L. 339, 340 (2001).

[26] *CIETAC Arbitration Guide* 11 (pamphlet on file with Prof. Zhao).

Chinese and non-Chinese parties increased rapidly, with a significant increase in the economic value of international commercial transactions connected with China. Chinese law responded, providing for arbitration of resulting disputes within China and establishing institutions to handle the dramatic growth in international commercial arbitration.

Table 1 CIETAC Caseload (Since 1990) [27]

	CIETAC Beijing		CIETAC South China Sub-Commission CIETAC Shenzhen		CIETAC Shanghai Subcommission		Total	
	Accepted	Concluded	Accepted	Concluded	Accepted	Concluded	Accepted	Concluded
1990							238	203
1991							274	205
1992							267	236
1993	389	217	57	56	40	21	486	294
1994	600	430	141	57	88	87	829	574
1995	660	628	146	158	88	89	902	875
1996	543	569	147	151	88	77	778	797
1997	490	560	123	121	110	85	723	766
1998	451	508	116	118	111	110	678	736
1999	428	459	111	127	130	120	669	738
2000	410	493	100	118	123	127	633	738
	359 Intl.		93 Intl.		91 Intl.		543 Intl.	
2001	420		138		117 Intl.		731	712
	335 Intl.		110 Intl.				562 Intl.	
2002	401	408	109	111	174	175	684	694
	300 Intl.		81 Intl.		87 Intl.		468 Intl.	
2003	373	390	131	108	205	206	709	704
	254 Intl.		82 Intl.		82 Intl.		422 Intl.	
2004	453	379	159	141	238	180	850	700
	288 Intl.		86 Intl.		88 Intl.		462 Intl.	
2005	462	448	213	209	304	301	979	958

Statistics (by case)

II Introduction to arbitration law in China

This section introduces the international arbitration law in China, describing general legal norms regulating arbitral relations, which flow from two distinct sources: (a) legislation promulgated by the Chinese legislature, the

[27] *CIETAC Website*, http://www.cietac.org, Chinese edition, translation on file with Prof. Zhao (accessed March 29, 2006).

People's Congress, and (b) obligations grounded on the bilateral or multilateral treaties to which China is a party. This section also briefly contrasts Chinese legislation governing domestic commercial arbitration (i.e., between Chinese parties) and international commercial arbitration (i.e., between Chinese and non-Chinese parties).

(I) Chinese legislation governing arbitration between Chinese and foreign parties

The primary law regulating arbitration today is the Arbitration Law of the People's Republic of China ("CAL").[28] In addition, the Civil Procedural Law,[29] the uniform Contract Law,[30] Sino-Foreign Equity Joint Venture Law,[31] Sino-Foreign Co-operative Joint Venture Law,[32] and other laws contain some provisions concerning arbitration or enforcement of arbitral agreements and awards.

The CAL was adopted and promulgated in 1994, as China began to implement a market economy. The law drew upon international arbitration legislation and practices, especially provisions in the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")[33] and the Model Law on International Commercial Arbitration ("UNCITRAL Model Law"), promulgated by the United Nations Commission on International Trade Law ("UNCITRAL") in 1985.[34]

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[28] This law was adopted on August 31, 1994 at the Ninth Session of the Standing Committee of the Eight National People Legislation's Congress and implemented on September 1, 1995. English translation available at http://www.cietac.org.cn/english/laws/laws_5.htm (accessed Apr. 18, 2006) [hereinafter *CAL*].

[29] This law was adopted at the Fourth Session of the Seventh National People's Congress (NPC) on April 9, 1991, promulgated by the President of the People's Republic of China (PRC) on and effective from April 9, 1991. English translation available at http://www.cietac.org.cn/english/laws/laws.htm (accessed Apr. 18, 2006) [hereinafter *CPL*].

[30] This law was adopted and promulgated by the Second Session of the Ninth NPC on March 15, 1999 and effective from October 1, 1999. English translation available at http://www.lehmanlaw.com/lib/library/Laws_regulations/ contract/contractlaw.htm (accessed Apr. 18, 2006).

[31] This law was adopted by the Second Session of the Fifth NPC on July 1, 1979 and revised in accordance with "Resolution on Revision of the Law of the PRC on Chinese-Foreign Equity Joint Venture" of the Third Session of the Seventh NPC on April 4, 1990, revised for the second time in accordance with "Resolution on Revision of the Law of the PRC on Chinese-Foreign Equity Joint Venture" of the Fourth Session of the Ninth NPC on March 15, 2001. English translation available at http://www.lehmanlaw.com/lib/library/Laws_regulations/investment/sion_ venture.htm (accessed Apr. 18, 2006).

[32] This law was adopted at the 1st Session of the 7th National People's Congress on April 13, 1988, and amended by the 18th Session of the Standing Committee of the 9th National People's Congress on October 31, 2000. English translation available at http://www.lehmanlaw.com/lib/library/Laws_regulations/investment/law_joint.htm (accessed Apr. 18, 2006).

[33] CIETAC, *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958)*, http://www.cietac.org.cn/english/laws/laws_13.htm (accessed Apr. 18, 2006) [hereinafter *New York Convention*].

[34] U.N. Comm. On Intl. Trade L., *Model Law on Commercial Arbitration*, English version available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/ml-arb-e.pdf (accessed Mar. 26, 2006) [hereinafter *UNCITRAL*].

The CAL reflects the characteristics deemed essential to modern international commercial arbitration law as below:

First, promoting party autonomy is one of its primary goals, although in alignment with building a socialist market system.[35] Article 1 of the CAL states: *"The law is formulated with the view to ensure fair and timely arbitration of economic disputes, reliable protection to legitimate rights and interests of parties concerned and a healthy development of the socialist market economy."*[36] Parties must agree to arbitrate "of their own accord" before an arbitration institution can exert jurisdiction; if there is a valid agreement to arbitrate, Chinese courts cannot assert jurisdiction over the dispute and an arbitration provider cannot accept a dispute if there is no valid agreement to arbitrate.[37] Parties can choose a particular arbitration institution (e.g., the Beijing Arbitration Commission, CIETAC or a provider institution outside of China) and can select the arbitrator(s).[38] During the arbitration procedure, the parties remain free to agree to settle their dispute through negotiation or conciliation.[39]

Second, the CAL expresses the principle that arbitration institutions are independent from the government. Article 14 of the law makes all "arbitration committees independent from the administrative organs, and they are not subject to any administrative organs and neither are they affiliated to each other."[40] Hierarchical relationships between arbitration commissions and administrative authorities were also prohibited, and Article 8 provides that arbitration shall be conducted independently according to the law and shall not be subject to interference from governmental entities, social organizations, or individuals.[41]

1 Judicial supervision and enforcement of arbitral awards

Like courts in the United States and some other countries, the Chinese courts support agreements to arbitrate, providing both assistance and supervision for arbitral processes. Chinese courts are not authorized to accept a dispute arising from an international commercial transaction if the parties have a valid agreement to arbitrate it, absent waiver by parties.[42] Related Chinese

[35] *CAL*, *supra* n. 28, at art. 1.
[36] *Ibid.*
[37] *Ibid.* at art. 4-5.
[38] *Ibid.* at art. 6.
[39] *Ibid.* at art. 49-50.
[40] *Ibid.* at art. 14.
[41] Jingzhou Tao, *Arbitration Law and Practice in China* 5 (Kluwer L. Intl. 2004).
[42] CAL, *supra* n. 28, at art. 26; *see also* Tao, *supra* n. 41, at 70-71.

law provides that parties engaged in foreign economic trade, transportation, and maritime matters shall not bring their disputes to the People's Courts, if they have reached an agreement to arbitrate such disputes in either a Chinese or foreign international arbitral institution.[43]

Under Chinese Civil Procedural Law ("CPL"), Chinese courts are authorized to provide assistance when a party applies for interim measures of protection for disputed property during the arbitration process.[44] The courts also assist in enforcing arbitral awards. Significantly, the grounds for judicial review of awards differ for arbitrations involving only domestic parties and those involving arbitration agreements between Chinese and non-Chinese parties.[45] Judicial review of domestic arbitration awards are based on CPL Article 217, while international awards are based on CPL Article 260.[46] Essentially, Chinese courts are required to be much more deferential in reviewing arbitral awards involving foreign parties, in conformity with international arbitration standards and treaties. These differences will be explored in some detail in Section III below.

2 Laws governing domestic commercial arbitration

When commercial disputes within China involve no foreign party (i.e., both are Chinese nationals) and the subject matter in dispute is purely domestic, the CAL applies.[47] Previously, government entities dealt with domestic commercial disputes between Chinese entities. For example, economic contract disputes were subject to the Economic Arbitration Commission attached to the national or local Administration for Industry and Commerce,[48] while technology contracts were subject to the State Commission on Science and Technology.[49] After promulgation of the CAL in 1994, the domestic arbitration commissions were reorganized as independent bodies.[50] By May of 2005, a total of 185 arbitration commissions existed throughout China, including CIETAC and CMAC.[51] As noted earlier, Article 14 of the new law emphasized that arbitration committees are independent from, and not

[43] *CPL*, *supra* n. 29, at art. 257.
[44] *Ibid.* at art. 258.
[45] *Ibid.* at art. 217, 260.
[46] *Ibid.*
[47] Zhao, *supra* n. 5, at 118-19.
[48] Such practices were based on the Economic Contract Law of 1980 and did not end until the enforcement of CAL on September 1, 1995.
[49] Tao, *supra* n. 41, at 2.
[50] *Ibid*. at 3-5.
[51] Lu Yunhua, *Characteristics and Development of the China's Arbitration*, China Legal Daily Chinese ed. (May 11, 2005) (English translation on file with Prof. Zhao).

affiliated with other governmental organs.[52]

3 Domestic arbitration commissions, international arbitration commissions, and forum selection issues

The growth of these independent domestic arbitration commissions has been extremely rapid over the last decade, fueled by foreign investment and the construction boom in Beijing, Shanghai, and other regions in China. The Beijing Arbitration Commission ("BAC") and the Shanghai Arbitration Commission are heavily used domestic commissions.[53] In practice, domestic arbitration commissions accept mostly domestic cases, while international arbitration commissions such as CIETAC and CMAC accept mostly international cases. With the implementation of the socialist market economy and competition policy, however, the arbitration commissions gained the ability to take cognizance of cases based only on the arbitration agreement reached between the parties in the late 1990s.[54] Thus, BAC may accept international cases if the parties voluntarily submit their cases to it, and the only two international arbitration commissions in China, CIETAC and CMAC, may arbitrate domestic cases if the parties so provide in their arbitration agreement.[55]

Some commentators complain that the Chinese officials approving joint venture contracts typically require that the parties agree to arbitrate in China under Chinese rules.[56] This is untrue because the law permits the parties to choose foreign arbitration institutions to settle the dispute by arbitration as provided below by Article 15 of the Sino-Foreign Equity Joint Venture Law.[57] While some officials may seek these terms, parties retain contractual autonomy when considering whether to agree to arbitration, the institutions to administer the arbitration, as well as the place of arbitration. If there is no valid arbitration agreement, arbitration institutions have no jurisdiction over the dispute and courts cannot enforce any award rendered

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[52] *CAL*, *supra* n. 28, at art. 14.
[53] *Ibid*.
[54] Zhao, *supra* n. 5, at 118-19.
[55] Beijing Arb. Comm., *Arbitration Rules* art. 1 (Mar. 1, 2004) English translation available at http://www.bjac.org.cn/en/program/rule.htm (accessed Apr. 18, 2006); China's Intl. Econ. and Trade Arb. Comm., *Arbitration Rules* art. 3 (May 1, 2005) English translation available at http://www.cietac.org.cn/epop_1.htm (accessed Apr. 18, 2006) [hereinafter CIETAC Arbitration Rules]; China Maritime Arb. Comm., *Arbitration Rules* art. 2 (Oct. 1, 2004) English translation available at http://www.cmac-sh.org/en/rules.asp (accessed Apr. 18, 2006).
[56] Andrew Shields, *China's Two Pronged Approach to International Arbitration—New Rules and New Lane*, 15 J. Intl. Arb. 68 (June 1998).
[57] Sino-Foreign Joint Ventures in China, *Law of China on Chinese-Foreign Joint Ventures*, http://www.plventure.com/jvlaw.htm (accessed Apr. 18, 2006).

by arbitrators. Article 15 of the Sino-Foreign Equity Joint Venture Law expressly provides that the parties can choose a non-Chinese arbitration institution:

Disputes arising between the parties to a joint venture that the board of directors cannot settle through consultation may be settled through mediation or arbitration by a Chinese arbitration agency or through arbitration by another arbitration agency agreed upon by the parties to the venture. In cases where the parties of a joint venture have not made any stipulations on arbitration in their contract or have not reached an agreement on arbitration in writing afterward may take proceedings to the [P]eople's [C]ourt.[58]

An important limitation on contractual terms nevertheless exits. Although the parties to joint venture contracts may choose an arbitration institution either in China or abroad to settle their disputes, they have no right to choose the applicable law to govern their joint venture. Chinese Contract Law has specific provisions requiring the Chinese law to be applied to joint venture contracts.[59]

(II) International law as sources of Chinese arbitration law

It is important to recognize that Chinese arbitration law also includes bilateral and multilateral treaties or conventions to which China is a party. Many of these treatises encourage and support the use of arbitration to resolve disputes arising out of international commercial ventures and investments.

1 Bilateral treaties

a. Trade treaties

China has signed trade treaties with more than 100 countries and regions, including the European Union and the United States. Such treaties include provisions concerning the method for the settlement of disputes between the signatory states. First, the treaties encourage the parties to settle their

[58] *Ibid.*

[59] Art. 126 of the Chinese Contract Law provides:

The parties to a contract involving foreign interests may choose the laws applicable to the settlement of contract disputes, unless laws provide otherwise. If the parties to a contract involving foreign interests did not make a choice, laws of the State most closely related to the contract shall apply.

The law of the People's Republic of China shall be applicable to contacts on Chinese-foreign equity joint ventures, on Chinese-foreign contractual operation enterprises and on Chinese-foreign co-operation in exploring and developing natural resources, which are to be performed in the territory of the People's Republic of China.

Uniform Contract Law, *supra* n. 30, at art. 126.

disputes through negotiation and conciliation.[60] If these methods do not resolve a dispute, the parties may refer their disputes to arbitration in accordance with their arbitration agreement.

b. Investment Protection Treaties

Between the time China began to implement the open door policy at the end of the 1970s and July 2005, China had signed 115 such investment protection treaties with 112 countries.[61] Such treaties usually provide for arbitration as one of the most important methods for the settlement of disputes, including the interpretation and application of treaties and disputes between investors from different states.[62] For instance, Article 8 of the Agreement on Reciprocal Encouragement and Protection of Investments Between the People's Republic of China and the Kingdom of Spain, signed in Madrid on February 6, 1992, provided for the settlement of disputes between the contracting parties concerning the interpretation or application of the agreement by consultation and arbitration.[63] Article 9 also provided for the settlement of disputes between an investor of one contracting party and the other contracting party

[60] For example, the Bilateral Investment Treaty signed by China and France provides that parties must first attempt an amicable resolution of certain types of disputes before pursuing administrative, judicial or arbitral relief. Tao, *supra* n. 41, at 13-14.

[61] Shang Ming, Director of Department of Treaty & Law, Ministry of Commerce of the PRC, *Understanding of the Investment Protection Treaties While Investment Abroad*, China Legal Daily, Beijing (July 26, 2005) (English translation on file with Prof. Zhao).

[62] Tao, *supra* n. 41, at 12-15.

[63] *Agreement on Reciprocal Encouragement and Protection of Investments Between People's Republic of China and the Kingdom of Spain*, art. 8 (Feb. 6, 1992), Dept. of L. of the Ministry of For. Trade and Econ. Coop. of the P.R.C., *A Collection of the Laws and Regulations of the People's Republic of China Concerning Foreign Economic Affairs* vol. 1993-1994, 408-415 (Zhong Xin Press, 1996). Detailed provisions of Article 8 provide:

1. Any dispute between the contracting parties concerning the interpretation or application of this Agreement shall, as far as possible, be settled by consultation through diplomatic channels.

2. If a dispute cannot thus be settled within six months, it shall, upon the request of either contracting party, be submitted to an ad hoc arbitral tribunal.

3. Such tribunal comprises of three arbitrators. Within two months from the date on which either contracting party receives the written notice requesting for arbitration from the other contracting party, each contracting party shall appoint one arbitrator. Those two arbitrators shall, within further two months, together select a third arbitrator who is a national of a third State which has diplomatic relations with both contracting parties. The third arbitrator shall be appointed by the two contracting parties as Chairman of the arbitral tribunal.

4. If the arbitral tribunal has not been constituted within four months from the date of the receipt of the written notice for arbitration, the other contracting party may, in the absence of any other agreement, invite the President of the International Court of Justice to appoint the arbitrator(s) who has or have not yet been appointed.

If the President is a national of either contracting party is otherwise prevented from discharging the said function, the next most senior member of the International Court of Justice who is not a national of either contracting party shall be invited to make the necessary appointment(s).

5. The arbitral tribunal shall determine its own procedure. The tribunal shall reach its award in accordance with the provisions of this Agreement and the general principles of international law.

6. The tribunal shall reach its award by a majority of votes. Such award shall be final and binding on both contracting parties. The ad hoc arbitral tribunal shall, upon the request of either contracting party, explain the reasons of its award.

7. Each contracting party shall bear the cost of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and the tribunal shall be borne in equal parts by the contracting parties.

Ibid.

concerning an amount of compensation for expropriation, nationalization, or similar measures by international arbitration.[64]

2 Multilateral Conventions

China is a party to several important multilateral conventions, including the New York Convention,[65] the Convention for the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention"),[66] and the Convention Establishing the Multilateral Investment Guarantee Agency.[67]

(1) The New York Convention

In 1987, China became a party to the New York Convention. While acceding to the convention, China made two important declarations and reservations.[68] First, China reserved the right to enforce arbitral awards only when made in the territories of the contracting states of the New York Convention,

[64] Detailed provisions of Article 9 provide the following:

1. A dispute between an investor of one contracting party and the other contracting party concerning an amount of compensation referred to in Article 4 (expropriation and related measures—author's note) which has not been amicably settled after a period of six months from written notification of that dispute shall be submitted to international arbitration.

2. Where the dispute is referred to international arbitration, the investor and the other contracting party concerned in the dispute may agree to refer the dispute either to;

(1) an international arbitrator appointed by the parties to the dispute; or

(2) an ad hoc arbitral tribunal to be appointed under a special agreement between the parties to the dispute; or

(3) an ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law; or

(4) the International Center for Settlement of Investment Disputes (ICSID) set up by the Convention on Settlement of Investment Disputes between States and Nationals of other States, in case both Contracting Parties become member States of this Convention.

3. If after a period of three months after the dispute is referred to arbitration under paragraph 2 above there is no such agreement, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.

Ibid. at art. 9.

[65] *See supra* n. 33 and accompanying text. By the end of 2005, the number of contracting states had reached 137. China became a signatory of the New York Convention on January 22, 1987. *See* http://www.uncitral. org (accessed May 22, 2006).

[66] Washington D.C. (1965). As of January 25, 2006, the number of signatory states stands at 155 and of these, 143 states have also ratified the Convention. *See* http://www.worldbank.org/icsid/constate/c-states-en.htm (accessed May 12, 2006). China became a signatory to this convention on February 6, 1993.

[67] Washington, D.C. (Oct. 11, 1985). The number of contracting states had reached 167 by October 27, 2005, of those, twenty-three are developed countries and 144 are developing countries. China became one of the original members to this convention on April 30, 1998. Signatory information available at http://www.miga.org (accessed Apr. 18, 2006).

[68] The detailed declarations and reservations China made are as following: (1) China will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting States; and (2) China declared that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of the PRC. *See* http://www.uncitral.org (accessed Apr. 18, 2006).

including awards rendered in the United States.[69] Second, China agreed to apply the convention only for disputes that would be considered *commercial* under Chinese law.[70] This encompasses a wide range of disputes, including contracts, torts, sales of goods, leasing of property, engineering, processing, technology transfer, joint ventures, cooperative exploration of natural resources, insurance and credit, labor services, consultant services, and transportation services by sea, air, rail, and road.[71]

(2) The ICSID Convention

The ICSID Convention was drafted under the auspices of the World Bank in 1965. It was established to settle disputes between states and nationals of other states.[72] ICSID plays an important role by creating favorable investment environments and promoting international economic cooperation. China acceded to the ICSID Convention in 1993.[73] Since then, investment disputes between the Chinese government and investors of the contracting states may refer to ICSID for settlement if the parties have reached written arbitration agreements for the settlement of their disputes in ICSID. While acceding to the convention, China notified ICSID in accordance with Article 24(4) of the convention that the Chinese government would submit to ICSID jurisdiction only the disputes over compensation arising from expropriation and nationalization of foreign investment.[74] The improved investment environment in China has limited the need to submit disputes to ICSID.

III Reform of Chinese international arbitration law and practices

The CAL is a modern law, generally in agreement with the U.N. Model Law. However, there are several important reforms suggested in this section which would bring the law into further accord with the U.N. Model Law, contributing to the development of arbitration law and practice in China, and encouraging commercial relationships between Chinese and foreign parties. Chinese arbitration legislation should be amended to allow for ad hoc or non-administered arbitration when parties to a commercial transaction agree to it. Second, party autonomy should be enhanced through a series of procedural

[69] Tao, *supra* n. 41, at 314.
[70] *Ibid*.
[71] *See* Notice of the Supreme Court concerning China's accession to the New York Convention, April 10, 1987, Tao, *supra* n. 41, at 414; Zhao, *supra* n. 5, at 116.
[72] Tao, *supra* n. 41, at 12.
[73] International Centre for Settlement of Investment Disputes, *ICSID Annual Report 2005*, available at: http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2005/12/16/000160016_20051216135243/Rendered/PDF/346470ENGLISH0ICSID1AR051ENG.pdf (accessed Apr. 18, 2006).
[74] Zhao, *supra* n. 5, at 117.

changes. Finally, standards of judicial review need clarification to ensure that arbitral awards involving foreign parties receive more deferential review afforded under the arbitration law.

(I) Allowing Ad hoc Arbitration and Institutional Arbitration

The CAL does not allow ad hoc arbitration in China. However, parties may pursue ad hoc arbitration abroad.[75] The CAL states that a valid arbitration agreement shall designate an arbitration commission.[76] The arbitration agreement is invalid if the parties fail to reach agreement as to the arbitration commission.[77] This requirement undermines the importance of arbitration as the preferred method for settling commercial disputes.

In international commercial arbitration law and practice, the concept of arbitration includes both ad hoc and institutional arbitration (sometimes referred to as administered and non-administered arbitration).[78] With ad hoc arbitration, the arbitrator or arbitration panel selected by the parties is charged with all administrative matters associated with the arbitration process (e.g., setting rules, collecting the fees, arranging hearings, etc.). With institutional or administered arbitration, an entity provides such administrative services.

Institutional arbitration certainly plays an important role in the settlement of disputes arising from international business transactions. However, ad hoc arbitration provides advantages for parties as well. Generally, institutional arbitration is best suited for disputes involving a large amount of money, where more complex administrative procedures are required. If both parties coordinate the institutional arbitration procedure, it usually takes at least two to three weeks to register the case and to form a tribunal. In contrast, when using ad hoc arbitration, parties can arrange for an award to be rendered within the same period of time. In some maritime arbitration, the awards can be made in a couple of days, with the possibility of preserving perishable goods and limiting damages. If both parties cooperate with the tribunal, ad hoc arbitration often saves the parties time and money.

Moreover, the incompatibility of the CAL with general international standards providing for ad hoc arbitration could undermine the finality of arbitral

[75] Under the New York Convention, foreign arbitral awards include not only awards made by the arbitral tribunal under the administration of a permanent arbitration institution, but also awards from ad hoc arbitration tribunals. As a result, the Chinese Courts are obligated to enforce ad hoc arbitral awards made outside of China in accordance with the New York Convention. Zhao, *supra* n. 5, at 121.

[76] *CAL*, *supra* n. 28, at art. 16.

[77] *CAL*, *supra* n. 28, at art. 18.

[78] Zhao, *supra* n. 5, at 119.

awards. The potential for efficiency and finality are some of the greatest virtues of arbitration for disputants. The New York Convention applies to both ad hoc and institutional arbitral awards. Since the CAL does not permit ad hoc arbitration, an award made by an ad hoc arbitration tribunal in China cannot be enforced, while the Chinese courts are obligated to enforce such awards made in the territories of other states of the New York Convention.[79] Supposing one Chinese party reached an agreement with a foreign party to settle their dispute by employing an ad hoc arbitration tribunal in China. The resulting award should not be enforced by Chinese courts because the arbitration agreement did not provide for a particular arbitration committee and therefore would be considered invalid. If the losing party had executable property located abroad, courts in that country might be familiar with ad hoc arbitration and enforce the award. Alternatively, courts are obligated to honor such an award if it was made outside of China under the New York Convention.[80]

The refusal of Chinese law to recognize ad hoc arbitration causes inequalities not only between Chinese parties and non-Chinese parties, but also between the mainland and other Special Administration Areas inside China, such as Hong Kong or Macau. The law strives to promote reciprocal recognition and enforcement of arbitral awards between mainland China and Hong Kong.[81] The courts in the mainland are required to honor awards made in Hong Kong, including awards rendered by ad hoc tribunals.[82] But the courts in Hong Kong recognize and enforce only awards made by the listed arbitration institutions, thereby excluding those made by ad hoc tribunals.[83]

Confusion is compounded by the tension between Chinese legislation governing arbitration and international laws comprising Chinese arbitration law. While the CAL refuses to recognize ad hoc arbitration in China, Chinese law recognizes ad hoc arbitration abroad. First, the Chinese courts recognize and enforce foreign ad hoc arbitral awards under the New York Convention due to the principle of reciprocity.[84] Second, there are provisions in bilateral treaties between Chinese governments and the governments of foreign countries concerning the settlement of disputes arising either from the performance or interpretation of the bilateral treaties or from the expropriation measures between the foreign investors and the Chinese government

[79] Zhao, *supra* n. 5, at 121.
[80] *New York Convention*, *supra* n. 33, at art. V(1)(a).
[81] *See* Tao, *supra* n. 41, at 318-20 (Arrangement Between the Mainland and Hong Kong SAR (Special Administration Region) Concerning the Mutual Recognition and Enforcement of Arbitration Awards).
[82] *Ibid*.
[83] *Ibid.* at 321-23 (Arbitration (Amendment) Ordinance 2000 (excerpt)).
[84] Jinshu Zhang, *Arbitration China Style: Negotiating a Changing Legal Landscape*, 32 Intl. L. News 18, 19 (Spring 2003).

by ad hoc arbitration tribunal.[85]

This inconsistency, and the general confusion regarding ad hoc arbitration in Chinese law should be clarified. The CAL should be revised, allowing parties to choose either ad hoc or institutional arbitration in China and abroad. If the parties agree to settle their dispute using a particular arbitrator or arbitrators under ad hoc arbitration, the award rendered should be given the same validity as an award resulting from institutional arbitration. If there are concerns for the fairness and quality of ad hoc tribunals, further procedural regulations can be promulgated for ad hoc arbitration, in conformity with the arbitrators' qualifications and other requirements already contained in the CAL for institutional arbitration. In 1976, the UNCITRAL drafted arbitration rules for ad hoc arbitration, which have become the accepted international commercial arbitration standard used by many arbitration institutions.[86] If Chinese arbitration law is amended to allow ad hoc arbitration, it would bring Chinese law into full accord with modern international arbitration principles. Moreover, this development would allow the parties to realize the promise of arbitration's autonomy finality, efficiency and cost savings.

(II) Promoting party choice/autonomy with procedural reforms

1 Validity of the arbitration agreement

The CAL requires the parties to record their agreement on specific items in writing to establish a valid arbitration agreement.[87] If the parties fail to reach agreement on a designated arbitration commission, the arbitration agreement shall be void, even though the parties clearly intended to settle their dispute by arbitration.[88] For instance, if the arbitration clause in a contract provides that *any dispute arising from and in connection with this contract shall be settled by arbitration in Beijing*, the clause expresses the parties' intention to settle their dispute by arbitration in a designated place, but without designation

[85] *See e.g. Agreement on Reciprocal Encouragement and Protection of Investments Between the People's Republic of China and the Kingdom of Spain*, *supra* § II(B)(1)(b).

[86] For example, the Singapore International Arbitration Center and the Hong Kong International Arbitration Center have adopted UNCITRAL arbitration rules. Other institutions such as the American Arbitration Association and the Stockholm Arbitration Court also permit parties to choose to apply to their institution for arbitration while using UNCITRAL arbitration rules. Tao, *supra* n. 41, at 80.

[87] Article 16 of the CAL provides that the arbitration agreement "shall include…arbitration clauses stipulated in the contracts or other written agreements for arbitration reached before or after a dispute occurs. An arbitration agreement shall contain the following: 1. [t]he expression of application for arbitration[;] 2. [m]atters for arbitration[; and] 3. [t]he arbitration commission chosen." *CAL*, *supra* n. 28, at art. 16.

[88] *Ibid.* at art. 18.

of the name of the particular arbitration institution.[89] Since there are multiple arbitration commissions in Beijing,[90] and the law requires the parties to specify a particular arbitration commission for the arbitration agreement, the clause would be considered invalid.[91]

In 1996, the Chinese Supreme Court responded to a ruling of the Higher People's Court of Guangdong Province on the validity of an arbitration agreement.[92] The contractual parties had reached agreement to arbitrate their dispute in the China Council for the Promotion of International Trade ("CCPIT"). Since CCPIT is not an arbitration institution and the parties failed to reach a supplementary agreement to designate a particular arbitration commission, the Supreme Court deemed the arbitration agreement void.[93] In another case, the arbitration clause in a contract between a Chinese company and a Swiss company provided: *"Any dispute in connection to the contract shall be settled by arbitration in accordance with Conciliation and Arbitration Rules of the International Chamber of Commerce ('ICC'). The place of arbitration shall be in London."*[94] The Intermediate People's Court in Haikou, the capital of Hainan Province, decided that the arbitration clause was void because the parties failed to specify a particular arbitration institution, and the ICC rules are not applied exclusively by the ICC.[95]

Despite the faults in these arbitration clauses, the parties clearly expressed their intention to settle the dispute by arbitration instead of litigation, though these types of clauses might be enforced in Hong Kong and some other countries.[96] The CAL judges the validity of the arbitration agreement too harshly, failing to honor the parties' choice to arbitrate. Like an ordinary contract, an arbitration agreement should be considered valid if the parties expressed their intention to arbitrate disputes, even if the parties failed to specify an arbitration institution. In such circumstances, either party should be able to apply to a court for the designation of an arbitration institution. The court would then designate an arbitration institution or an arbitrator (if ad hoc arbitration is permitted in the future) for the settlement of the dispute. If the parties reached an agreement to settle their dispute by arbitration, it

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[89] Zhao, *supra* n. 5, at 118.

[90] The Beijing Arbitration Commission ("BAC") and CIETAC are located in Beijing. CIETAC is an international arbitration institution and concentrates on arbitrating international cases, while BAC deals primarily with domestic cases. In addition, there is the third arbitration commission in Beijing, China Maritime Arbitration Commission ("CMAC"), which takes cognizance of maritime matters. Zhao, *supra* n. 5, at 119.

[91] *CAL*, *supra* n. 28, at art. 16.

[92] Ltr. to the Supreme Court Fa Jing (96) No. 401 (English translation by and letter on file with Prof. Zhao).

[93] *Ibid.*

[94] Wang Shengchang, *Recognition and Enforcement of Foreign Arbitral Awards in China* vol. 2, 501 (Zhao Xiuwen trans., Int. Econ. L. Series, Chinese ed., Law Press 1999).

[95] *Ibid*.

[96] Neil Kaplan, Jill Spruce & Michael J. Moser, *Hong Kong and China Arbitration: Cases and Materials* 221-224 (Butterworths Asia 1994).

should be enforced, even if it is incomplete.

2 Jurisdiction of the arbitration tribunal

Another issue closely related to the validity of the arbitration agreement concerns the arbitration tribunal's scope of jurisdiction. Once an arbitration tribunal is properly designated in the parties' agreement, the tribunal may determine the validity of the arbitration agreement and the scope of its own jurisdiction. It is referred to as the doctrine of *Kompetenz-Kompetenz* in Chinese arbitration law and is a universal part of modern arbitration law. For example, in U.S. arbitration law, the doctrine of *arbitrability* provides that threshold jurisdictional issues—including whether the parties agreed to arbitrate and the scope of the arbitration clause—are generally determined by the arbitrator(s).[97] Under the current CAL, it is the task of the arbitration commission, not the arbitration tribunal, to decide the validity of the arbitration agreement and its own jurisdiction.[98] In Chinese arbitration practice, both the court and the arbitration commission have authority to decide the validity of the arbitration agreement.[99] In other words, apart from the court, it is the arbitration commission but not the tribunal (or panel of arbitrators in a given case), to decide the jurisdiction of the tribunal. The arbitration tribunal is the panel of arbitrators responsible for arbitrating the case, while the arbitration commission is an administrative agency. If one party submitted a dispute to the court and the other to an arbitration commission, theoretically both the court and arbitration commission have jurisdiction and the conflicting rulings could arise. CIETAC Rules were recently revised to allow some flexibility on these jurisdictional issues. The 2005 Rules provide that CIETAC has the power to determine whether a valid arbitration agreement exists and whether CIETAC has jurisdiction over the dispute. CIETAC may, however, delegate this power to the tribunal.[100]

It makes sense for the administration commission to decide *prima facie* the validity of the arbitration agreement upon accepting the case. After the arbitration tribunal is established, however, if a party challenges the validity of the arbitration agreement, the tribunal should rule on the validity of the arbitration agreement and its own jurisdiction.[101] At present, the CAL does not provide this option. In the future, the CAL should be amended to ensure consistency with the flexibility recently provided by the CIETAC Rules.

[97] Folberg et al., *supra* n. 9, at ch. 17, sec. D.
[98] CAL, *supra* n. 28, at art. 20.
[99] *Ibid*.
[100] CIETAC Arbitration Rules, *supra* n. 55, at art. 6(1).
[101] *CAL*, *supra* n. 28, at art. 20.

This would comport with international arbitration principles and reduce the time and expense associated with technical jurisdictional issues. As a safeguard, the parties should be able to challenge the ruling of the tribunal in a court within a limited period of time (e.g., within thirty days of the ruling), although this will increase the time and cost of the arbitral process. The court's ruling on the jurisdictional issues would be final. Alternatively, the parties could allow the arbitration to proceed after the tribunal's jurisdictional ruling and after an unfavorable award, a party may ask a court to set aside the award, arguing that the arbitrators exceeded their jurisdiction or there was no valid agreement to arbitrate.

3 Selection of arbitrators

The arbitration tribunal is directly responsible for adjudicating the case whether the arbitration is ad hoc or institutional. As a result, the arbitrator is considered a *civil judge*, who is appointed to adjudicate the case not by the government but by the contracted parties. The qualification of the arbitrators is closely related to the quality of arbitral awards. The ICSID Convention provides that "[p]ersons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."[102]

National arbitration laws in some countries, including the United States, contain no particular provision as to the qualifications of arbitrators.[103] According to the practices in those countries, persons with capacity are qualified. To serve on a tribunal, the most important factor is to be chosen by the parties, thereby honoring party autonomy. The disputing parties or institutional providers of arbitration take a candidate's qualifications and credibility into consideration when selecting arbitrators.

In contrast, China has particular requirements as to the qualification of arbitrators. The CAL specifies that an arbitrator must meet one of the following conditions: the arbitrator (1) has been in arbitration work for eight years; (2) has worked as a lawyer for eight years; (3) has served as a judge for eight years; (4) has been engaged in legal research work or legal education work and has a senior title; or (5) has acquired legal knowledge, worked in the fields of economics and trade, and possesses a senior title or has

[102] World Bank Group, *ICSID Convention* art. 14(1), English version available at http://www.worldbank.org/icsid/ basicdoc/basicdoc.htm (accessed Apr. 10, 2006).
[103] *See e.*g. 9 U.S.C.A. § 5 (West 1999).

attained an equivalent professional level.[104]

This subsection focuses on the operation of the panel system rather than the strict qualifications set forth for arbitrators in the CAL. The present arbitration system requires all arbitration commissions to draw up a list of arbitrators according to different professions.[105] By May 2005, 185 arbitration commissions existed throughout China[106] and each individual arbitration commission maintains its own panel list.[107] Only those persons whose names are on a particular commission's panel are eligible to be appointed as arbitrator by that commission. An arbitrator on CIETAC's list, for instance, cannot arbitrate for the BAC unless the arbitrator's name is also on the BAC list. Additionally, even those who are qualified under the CAL cannot serve as an arbitrator unless their names are on the particular arbitration commission's list. Thus, even if the parties agree on using a particular arbitrator, they cannot do so if that person is not on the list of the arbitration institution designated by the parties.

In the last couple of years, the qualification of arbitrators and the panel system in China were reformed. On 13 July 2004, the Supreme Court of the PRC issued a notice that judges engaged in active duty cannot serve as an arbitrator for a arbitration.[108] The court deemed such service harmful to the protection of the parties' interests in litigation.[109] Those whose names are included on the panel list of a particular arbitration commission were given one month to resign from the list.[110] This reform should allow judges to concentrate on performing their duty in terms of providing judicial review for arbitration and further promote independence in the arbitration system.

In addition, the parties are now permitted to choose an arbitrator from outside the CIETAC panel list. As revised in 2005, the CIETAC Rules provide that: [111]

(1) *The parties shall appoint arbitrators from the Panel of Arbitrators provided by the CIETAC.*

(2) *Where the parties have agreed to appoint arbitrators from outside of the CIETAC's Panel of Arbitrators, the arbitrators so appointed by the*

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[104] *CAL*, *supra* n. 28, at art.13.

[105] *CAL*, *supra* n. 28, at art.13; Zhao, *supra* n. 5, at 128.

[106] Lu Yunhua, *The Characteristics and Development of the Chinese Arbitration*, China Legal Daily (May 11, 2005).

[107] *See CAL*, *supra* n. 24, at art. 11 (requiring that "[an] arbitration commission shall meet the following requirements: 1. [i]t shall have its own name, residence and statute[;] 2. [i]t shall have necessary property[;] 3. [i]t shall have its own members[;] 4. [i]t shall have appointed arbitrators").

[108] The People's Supreme Court Notice on the Withdraw of Judges in Active Duty from Their Duty as Arbitrators in Various Arbitration Commission, July 13, 2004. Zhao Xiuwen, *International Commercial Arbitration Law* 196 (Renmin U. Press 2004).

[109] *Ibid.*

[110] *Ibid.*

[111] Since establishment of CIETAC in 1956, there have been six amendments and seven Rules altogether: 1956 Provisional Rules; 1988, 1994, 1995, 1998, 2000 and 2005 Rules. Tao, *supra* n. 41, at xix.

parties or nominated according to the agreement of the parties may act as co-arbitrator, presiding arbitrator or sole arbitrator after the appointment has been confirmed by the Chairman of the CIETAC in accordance with the law.[112]

Therefore, CIETAC has strengthened the parties' autonomy by allowing greater choice of arbitrators, as long as CIETAC confirms the appointment.

We suggest that potential arbitrators, with some professional background, could be trained in special courses relating to the settlement of disputes through arbitration. Once they have passed an examination, those trained professionals could be deemed qualified and included on a unified China arbitrator list. This could be made accessible to all through the Internet. The various arbitration commissions could then appoint an arbitrator from the qualified people for institutional arbitration. If the law is reformed to allow ad hoc arbitration, the parties could also select qualified arbitrators through this approved and centralized list.

4 Interim measures of protection

The CAL gives no authority to the arbitration tribunal to order interim measures of protection for parties. Interim measures of protection aim at preventing a party from transferring property before an award is made, as well as guaranteeing the enforcement of an award. According to the UNCITRAL Model Law adopted by dozens of countries, both arbitration tribunals and courts may grant interim measures of protection while an arbitration is pending.[113] In international arbitration practice, an order of an arbitration tribunal on interim measures of protection shall be enforced by the local court.

Under current Chinese law, if a party applies for interim measures of protection of property, the arbitration commission shall submit the party's application to the People's Court.[114] The CAL should take international commercial arbitration law into consideration and grant authority to the arbitration tribunal, as well as courts, to order interim measures of protection. When ordering such measures before the arbitration procedure has started, the courts should order the applicant to apply for arbitration within a particular number of days after the protection order is issued. Otherwise, the order should be dismissed. Such provisions could promote coordination

[112] CIETAC Arbitration Rules, *supra* n. 55, at art. 21.
[113] *UNCITRAL*, *supra* n. 34, at art. 17.
[114] *CAL*, *supra* n. 28, at art. 28. The party that applies for the interim measures of protection of property shall provide security. *Id.* Preservation of property shall be limited to the scope of the claim or to the property relevant to the case. *Ibid.*

between the courts and the arbitration institution, as well as preventing a party to thwart engaging in intentional delay. Allowing courts and tribunals to grant interim relief supports the efficacy of arbitration and arbitral awards, and would bring the domestic law into closer conformity with international standards.

(III) Standards of judicial review

There are two remedies for arbitral awards made in China: setting aside and refusing enforcement of the awards.[115] The grounds for judicial review differ significantly, depending on whether the arbitration involved solely domestic interests or foreign interests. A complex set of laws governs this topic, with conflicts between the CAL and the CPL, in addition to the potential for conflicts between courts and arbitral tribunals inherent in any judicial review structures. In order to secure the efficiency and finality the parties seek when they choose arbitration for resolving commercial disputes, it is imperative that the law in this area be carefully monitored in future.

1 Conditions for setting aside and refusing enforcement of awards

Chinese Civil Procedural Law distinguishes between awards made in China by domestic arbitration commissions (domestic awards) from those of Chinese international arbitration commissions (CIETAC and CMAC).[116] With domestic commissions now able to accept international commercial disputes, based on the parties' preferences, and institutions like CIETAC now being able to render awards in disputes involving solely Chinese parties, if the parties so desire, this approach is confusing. It might be better to consider awards rendered in China as domestic and awards rendered outside of China as foreign. Additionally, domestic awards could be divided into domestic awards and international awards, with domestic awards involving no *foreign elements* and international awards involving a foreign element. Foreign elements include one the following characteristics: (1) one of the parties is a foreign national; (2) the disputed matters are located in a state other than the state where the court is located; or (3) the legal relationship occurred in a state other than the state where the court is located.[117]

[115] *CAL*, *supra* n. 28, at art. 70-71.
[116] *CPL*, *supra* n. 29, at art. 217, 260.
[117] *See* Xiaowen Qiu, *Enforcing Arbitral Awards Involving Foreign Parties: A comparison of the United States and China*, 11 Am. Rev. Intl. Arb. 607, 608 (2000); Song Huang, *Several Problems in Need of Resolution in China by Legislation on Foreign Affairs Arbitration*, 10(3) J. Intl. Arb. 95 (1993).

The primary distinction made by the present Civil Procedural Law is based on which arbitration commission made the awards: a domestic or international commission? If the arbitral award was made by the domestic arbitration commission, Article 217 applies. If the award was made by CIETAC or CMAC, Article 260 applies. Article 260 of the Civil Procedural Law limits the Chinese courts' standard of review regarding international awards to non-substantive matters.[118] Chinese courts may set aside or refuse to execute arbitral awards only when a valid arbitration agreement does not exist, when notice of the arbitration was not given to the opposing party, when the arbitration procedure failed to conform with law, or when matters decided by the arbitrator(s) exceeded the scope of the arbitration agreement or the authority of the arbitration commission.[119]

Conversely, the Chinese courts are empowered to engage in more substantial review of awards rendered by domestic arbitration commissions. Under Article 217 of the Civil Procedural Law, a court may set aside or refuse to enforce an award when it determines there was no agreement to arbitrate, when the arbitrators exceed their power or the confines of the agreement, or when the composition of the tribunal or its procedure is contrary to law.[120] Additionally, a Chinese court can set aside or refuse to enforce an award when the evidence is insufficient; when the arbitrator(s) made a definite error of law; when arbitrators are found to have embezzled, accepted bribes, engaged in malpractice for personal benefit or *perverted the law*.[121]

In sum, Chinese courts are allowed limited judicial review of international arbitration commission awards, quite similar to the narrow grounds provided

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[118] *CPL*, *supra* n. 29, at art. 260.

[119] CPL art. 260 provides the following conditions to set aside arbitral awards:

A) the parties have neither included an arbitration clause in their contract nor subsequently reached a written arbitration agreement;

B) the person against whom the application is made was not notified to appoint an arbitrator or to take part in the arbitration proceedings or the said person was unable to state his opinions due to reasons for which he is not responsible;

C) the compositions of the arbitral tribunal or the arbitration procedure was not in conformity with the rules of arbitration; or

D) matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration institution. *CPL*, *supra* n. 29, at art. 260.

[120] CPL art. 217 provides the following conditions for setting aside arbitral awards:

A) the parties have neither included an arbitration clause in their contract nor subsequently reached a written arbitration agreement;

B) matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration organ;

C) the composition of the arbitral tribunal or the arbitration procedure was not in conformity with statutory procedure;

D) the main evidence for ascertaining the facts was insufficient;

E) the law was truly applied incorrectly; or

F) one or several arbitrators committed embezzlement, accepted bribes, practiced favoritism or made an award that perverted the law. *CPL*, *supra* n. 29, at art. 217.

[121] *Ibid.*

in the United States for judicial review of commercial arbitration awards.[122] The more deferential standard of judicial review afforded to awards made by CIETAC and CMAC tribunals is based on Article V(1) of the New York Convention.[123] No substantial review can be applied to an award made by CIETAC and CMAC, yet courts may set aside or refuse to enforce awards made by domestic arbitration commissions based on more discretionary standards such as misapplication of law or lack of sufficient evidence.[124] Before the promulgation of the CAL in 1994, awards were distinguished according to the institutions that administered the arbitration and different judicial review standards applied. The CAL reorganized domestic arbitration commissions so they became non-governmental organizations rather than governmental bodies. The law provided that these commissions should be established in certain municipalities and provinces or where the need for the arbitral services exists.[125] The arbitration commissions are to be independent from administrative authorities, with no subordinate relationship between arbitration commissions and administrative authorities, or among the arbitration commissions.[126] As noted above, after CAL became effective, and with the encouragement of a socialist market economy, all arbitration commissions in China could accept cases based on the arbitration agreements of the parties; domestic arbitration commissions may now accept cases involving foreign elements while CIETAC may accept domestic cases. Competition has ensued among the various international and domestic commissions, particularly in larger cities. This entrepreneurial spirit has posed some

[122] *Federal Arbitration Act*, 9 U.S.C.A §§ 10-11 (West 1999 & Supp. 2005). For discussion of narrow grounds for judicial review, *see* Folberg, et al., *supra* n. 9, at Chapter 17.

[123] Article V(1) of the New York Convention provides:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) [t]he parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) [t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) [t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) [t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) [t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

International Commercial Arbitration, New York Convention, Art. V(1) (Jan. 1978) (Giorgio Gaja ed., pt. II, Oceana Publ., Inc. July 1996).

[124] Zhao, *supra* n. 5, at 124.

[125] *CAL*, *supra* n. 28, at art. 10.

[126] *Ibid.* at art. 14.

challenges for the arbitration system in China.

For example, what standard of judicial review applies when a domestic arbitration commission renders an award in a dispute between a Chinese party and a foreign party based on the parties' arbitration agreement? If one of the parties asks a court to set aside the arbitral award, should the court apply the usual Article 217 applicable to domestic commissions or the more deferential Article 260 standard? The same dilemma could occur with a CIETAC award involving only domestic parties.

Article 70 of the CAL establishes a special procedure if a party presents evidence to prove that a foreign-related award involves one of the circumstances set forth in the first paragraph of Article 260 of the Civil Procedural Law.[127] If the party meets this problem, the People's Court shall, after examination and verification by a collegial bench formed by the People's Court, rule to set aside the award.[128] How to define a foreign-related award, however, remains an issue. Does the legislation refer to a case involving a foreign element or any awards made by the international arbitration commissions, given that both domestic arbitration commissions and international arbitration commissions may accept cases involving foreign-related elements? The best interpretation is that a court should apply Article 260 to all awards involving foreign elements, regardless of whether the awards were made by a domestic or international arbitration commission within China. Article 260 says that *"[a]fter examination and verification, a collegiate bench formed by a people's court shall decide not to enforce a ruling rendered by a PRC agency in charge of arbitrating disputes involving foreigners in any of the following circumstances as proven by the object of the application…"*[129] Obviously, Article 260 refers to awards made by international arbitration commissions instead of awards involving foreign elements rendered by domestic arbitration commissions. The key point lays in the fact that Civil Procedural Law was promulgated in 1991, and the CAL was not promulgated until 1994. In 1991, domestic arbitration commissions were not entitled to adjudicate disputes involving non-Chinese parties; only international arbitration commissions such as CIETAC or CMAC adjudicated international cases.[130]

While this interpretation seems clear, Chinese arbitration law and practice still contains some uncertainty as to which standard of judicial review should apply to foreign-related awards made by the domestic arbitration commissions or awards made by CIETAC and CMAC without foreign-related

[127] *CPL*, supra n. 29, at art. 260.
[128] *CAL*, *supra* n. 28, at art. 70.
[129] *CPL*, *supra* n. 29, at art. 260.
[130] Tao, *supra* n. 41 at 2.

elements. In December 2003, the Chinese Supreme People's Court promulgated a draft judicial interpretation, clarifying that more deferential standard of review should apply to all awards being involved with foreign parties or elements, whether the awards were issued from a domestic or international arbitration institution.[131] This interpretation grants more deferential standard of review to awards made by CIETAC, CMAC and their branches, as well as the arbitration commissions set up under CAL, depending on the international arbitration agreement. That is to say, if an award touches upon a foreign element, it is considered a foreign-related award, whether it was rendered by international arbitration commissions such as CIETAC or CMAC, or made by a domestic arbitration commission such as the Beijing Arbitration Commission, or other commissions set up in accordance with CAL. Thus, as recently clarified by the Supreme People's Court, foreign-related awards made by the Chinese arbitration commissions in China are now subject to more deferential judicial review afforded in accordance with Article 260 of the Civil Procedural Law.

2 Enforcement of Foreign Arbitral Awards

According to Article 269 of the Civil Procedural Law provides that,

where a verdict rendered by a foreign arbitration organization requires the courts in the PRC to acknowledge its validity and execute it, the applicant shall directly apply to the intermediate people's court in the place of the residence of the party concerned or of his property to do so, and the people's court shall act according to the international treaties which China has concluded or to which China is a party of or in accordance with the principle of mutual reciprocity.[132]

The enforcement claim can be heard by the Intermediate People's Court where the person is domiciled, resides, or has a principal place of business, or, if none of the above applies, where his property within China is located.[133]

In judicial practice, foreign awards may be divided into those made in the contracting states of the New York Convention (convention awards) or in other countries (non-convention awards). Judicial review of convention

[131] Supreme People's Court's Draft Regulations on the People's Courts' Dealing with Foreign-Related and Foreign Arbitration. This Draft has been discussed and has not been come into force by now. As to the detail of the Draft, *see* CIETAC, *Arbitration and Law* 136-140 (Chinese ed., No. 93, Law Press, Beijing, August 2004).

[132] *CPL*, *supra* n. 29, at art. 269.

[133] *Supreme People's Court Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* No. 5, *Fa (Jing),* April 10, 1987. The Supreme People's Court Gazette of the People's Republic of China (*Renmin Fayuan Gongbao*), No. 2, 16-18, 1987.

awards apply Article V of the New York Convention, while judicial review of non-convention awards are enforced in accordance with the principle of reciprocity under Article 269. As discussed above, Chinese courts cannot review the merits of convention awards in accordance with Article V of the New York Convention.[134] According to the China Arbitration Institute, attached to the CCPIT, no party applied to the People's Court for enforcement of foreign-related arbitral awards prior to 1990.[135] During the period from 1990 to August 1997, fourteen applications for enforcement of foreign arbitral awards were made in the People's Courts.[136] Among those applications, ten had already been enforced and three were not enforced (some were still pending when the statistics were issued).[137] The reasons supplied for not enforcing awards were that the respondent no longer existed or there was no property to execute against in China.[138] There were no reported rejections for enforcement from the Chinese courts due to grounds in the New York Convention, in contrast to the courts of some other countries.[139]

The Supreme People's Court took an important step in 1995 to secure enforcement of foreign arbitral awards by setting up a reporting system to monitor the lower courts' refusals to enforce foreign arbitral awards.[140] If a low court determines in a given instance that the enforcement of a foreign arbitral award is in conflict with provisions in the international conventions to which China is a party, or with the principle of reciprocity, the courts to refuse enforcement.[141] Before a court refuses enforcement under the new system, it submits its draft decisions to a high court for approval before the decision is finalized. The high court is required to report its draft decision for approval to the Supreme People's Court. Such a decision, refusing enforcement of a foreign arbitral award, can only be made after the Supreme People's Court has replied positively in support of that action.[142] These extra measures ensure careful review of foreign arbitral awards in Chinese courts and should help buttress the finality and enforceability of awards rendered abroad.

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[134] Zhang, *supra* n. 84 at 19.
[135] Shengchang, *supra* n. 11 at 498.
[136] *Ibid.*
[137] *Ibid.*
[138] *Ibid.*
[139] *Ibid.*
[140] Notice of the Supreme People's Court on Several Issues Regarding the Handling by the People's Court of Certain Issues Pertaining to Foreign-related Arbitration and Foreign Arbitration, *see* Tao, *supra* n. 41 at 308.
[141] *Ibid*.
[142] The courts' jurisdictions in China are usually divided into three levels: the jurisdiction of Basic (Local) People's Courts, Intermediate People's Courts, Higher People's Courts in each of the administration provinces, and the Supreme People's Court. The first instance adjudicating international cases should be the Intermediate People's Court.

IV Conclusion

The dramatic growth in commercial transactions between Chinese and non-Chinese parties in recent decades has been accompanied by a remarkable growth in China's law and processes governing international commercial arbitration. Not surprisingly, some conflicts surfaced during this era of growth and change, but all the issues highlighted above can be addressed to keep Chinese law and practices evolving in conformity with international norms. While Chinese arbitration law and practices are generally in agreement with UNCITRAL Model Law and international arbitration practices, we suggest that future reform of arbitration legislation and practices should focus on the following items.

First, the arbitration legislation should allow for ad hoc arbitration in China and abroad. Parties should be allowed to select a particular qualified person as an arbitrator. An award issued in ad hoc arbitration should have the same binding force as that made by the arbitration tribunal under an arbitration commission.

Second, the importance of a party choice and autonomy needs to be reinforced with some significant procedural changes. Conditions for the validity of the arbitration agreement should be relaxed and the court's role in supporting the validity of agreements to arbitrate, even when particular commissions are not specified by the parties, should be strengthened. After the arbitration tribunal is established, if a party challenges the validity of the arbitration agreement, the commission should allow the tribunal to rule on the validity of the arbitration agreement and its own jurisdiction, as contemplated by Article 6(1) of the CIETAC 2005 Rules, with some appeal to the courts available. The present panel system, unique to each individual arbitration commission, should be reformed and a unified panel registration for qualified arbitrators should be established. The names of qualified arbitrators could be published on the internet, making them available for both the parties' and commissioners' selection and appointment. Arbitrators should have greater authority to award interim relief to parties for appropriate and necessary reasons. Alternatively, as in Article 6(1) of the CIETAC 2005 Rules, the parties should be able to appoint an arbitrator by agreement, whereas whose name is not included in the panel list in some circumstances it is subject to the approval of the commission administering the arbitration.

Finally, Chinese Arbitration Law and the related Civil Procedural Law provide two different standards of review for awards involving only domestic parties and awards involving foreign parties or elements. The review accorded the latter by Chinese courts is much more deferential and mirrors international arbitration norms. Recent clarification of these laws by the

Chinese Supreme Court affords the more deferential standard of review to all arbitration awards involving foreign parties or elements, regardless of whether the arbitration tribunal issuing the award was an international or domestic arbitration commission.

Chinese arbitration law and practice has made significant strides to manage the rapidly increasing caseload associated with a period of amazing growth in economic interactions between Chinese and non-Chinese parties. The reforms suggested here would continue the development, making arbitration within China a more appealing alternative for both Chinese and foreign parties by ensuring efficiency, finality, and party autonomy.

Acknowledgements Dean Kloppenberg is grateful to Professor Hari Osofsky for comments on a draft, to her research assistants—Kelly Diggins, Erin Simon, and Jon Smallwood—for their diligence, and to the editors of the *Dayton Law Review* for their contributions.

Appendix

Evolution of Chinese Arbitration Law

1955 Former government Administrative Council of the Central People's Government adopted a Decision on the Establishment of a Foreign Trade Arbitration Commission (FTAC) within the China Council for the Promotion of International Trade.
1958 Adopted Decision on the Establishment of a Maritime Arbitration Commission (MAC) within the China Council for the Promotion of International Trade.
1979 China begins to implement the Open Door Policy.
Sino-Foreign Equity Joint Venture Law adopted (revised in 1990 and 2001).
1980 Changed FTAC to Foreign Economic and Trade Arbitration Commission (FETAC), extended scope from only foreign trade to activities arising from economic activities such as investment, financing, and agency.
1987 China acceded to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, which was originally established in 1958.
1988 Changed FETAC to the current China International Economic & Trade Arbitration Commission (CIETAC).
Changed MAC to the current China Maritime Arbitration Commission (CMAC).
Sino-Foreign Co-operative Joint Venture Law promulgated in 1988 (amended in 2000).
1991 Civil Procedural Law adopted.
1993 China acceded to the International Center for the Settlement of Investment Dispute (ICSID). In 1965, ICSID was drafted under the auspices of the World Bank.
1994 Arbitration Law of the People's Republic of China adopted (implemented in 1995).
1999 Uniform Contract Law adopted and implemented.