ARBITRATION AWARDS IN THE PEOPLE'S REPUBLIC OF CHINA: ESTABLISHMENT OF AN INDEPENDENT COURT TO ENFORCE AWARDS

BY
DONNA C. CHIN
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The People's Republic of China has become the "world's most favored destination for direct foreign investment."[1] As direct foreign investment has increased, so too has the need for resolution of business disputes.[2] Of the various ways to settle disputes in the People's Republic of China ("China") between Chinese and foreign parties, arbitration is the most popular.[3]

This is so in part because China has promoted arbitration as the preferred method for dealing with international commercial disputes.[4] More important, foreign investors and commentators have opined that arbitration is superior to litigation as a method of dispute resolution in China[5]; Chinese courts are reputedly "slow to act" and their judgments are considered difficult to enforce.[6] Foreign investors and practitioners have expressed concern about Chinese courts' local favoritism, corruption, lack of autonomy, incompetence,[7] and unpredictability[8]. In addition, arbitration in China is generally considered cheaper than litigation,[9] although there is evidence that this view may be unfounded.[10] Further, arbitration is a more private forum.[11] Finally, for cultural reasons, Chinese are more willing to arbitrate than to litigate.[12] Thus, in China, most business disputes are resolved through arbitration.

Nevertheless, foreign investors have formed the impression that enforcement of arbitral awards is "all but impossible in China."[13] Experts, despite a lack of meaningful empirical data, have criticized the difficulty of enforcing awards in China.[14] In the face of these perceived and actual difficulties, China should act to ensure fair and efficient

enforcement of awards. One solution would be to establish an independent court with nationwide jurisdiction to enforce arbitral awards.

Arbitration in China

China is said to be one of the oldest living civilizations on earth,[15] and within this history, arbitration is not a new concept; indeed, dispute resolution has ancient roots in China. During most of the two thousand years before the 1911 revolution, "the Chinese legal system reflected societal mores established by the Confucian philosophy which permeated all facets of life."[16] Confucianism teaches preservation of natural harmony.[17]

Thus, people in China throughout history have sought, and still seek, harmony and conciliation, as opposed to litigation. The normative concept of "li," reflecting principles of proper conduct, has traditionally ranked above "fa," or law in a positivistic sense.[18] One ancient Chinese proverb exemplifies these cultural attitudes: "It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit."[19] Further, this view is substantiated by mores and values deeply imbedded in Chinese culture, e.g. saving face, mutual benefit, social harmony, and *guanxi*, or fostering relationships to allow for favors.[20]

China has a long history of informal domestic dispute resolution. As to formal dispute resolution, in the 1950's, China established its first international arbitration institutions: the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC).[21] Later, China's Law on Chinese-Foreign Contractual Joint Ventures, Contract Law, and Equity Joint Venture Law, among other legislation, specified arbitration as a method of dispute resolution.[22]

In 1987, China acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), on the basis of reciprocity and as to commercial matters.[23] Article 238 of China's Civil Procedure Law directs courts to apply the terms of international treaties and conventions to which China is a signatory, including the New York Convention, even when those terms conflict with Chinese law.[24] Thus, in accordance with Articles I and II of the New York Convention, China recognizes and enforces valid written arbitration agreements as well as foreign arbitral awards made in a Contracting State, e.g. signatory to the Convention.

Over a decade ago, in 1994, China enacted an Arbitration Law for "impartial and prompt arbitration of economic disputes" and so that "contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organizations that are equal subjects may be arbitrated."[25] The Arbitration Law provides for arbitration of certain matters, including business disputes, but only if the parties executed a valid arbitration agreement, Art. 4, in which the parties stipulated to an arbitration institution.[26]

In *Korean Shinho Co. v. Sichuan Euro-Asia Econ. and Trade Gen. Co.,* for example, the Supreme People's Court found that the parties' arbitration agreement, as drafted, was invalid, and the Court therefore affirmed the Sichuan Court's rejection of an arbitration defense.[27] The parties' arbitration clause stated, "Any dispute arising from both parties shall be arbitrated in accordance with the commercial arbitration clause by the commercial arbitration committee of a third country which shall make a final award." The Supreme Court held that this clause was unclear and unable to be executed, since neither the method nor the institution was stipulated, and therefore the court below properly retained jurisdiction.

Under the Arbitration Law, an arbitration award is final, and neither a hearing on the merits nor an appeal is permissible. Accordingly, the people's court must enforce an arbitration award unless a party seeks to set aside the award, and the people's court finds applicable at least one of several grounds under Article 58 of the Arbitration Law.[28] For example, a people's court may set aside an award under Article 58 if there is no arbitration agreement; the award exceeded the scope of the agreement or authority of the commission; the award resulted from certain procedural defects; the award was based on forged evidence; a party withheld evidence; or an arbitrator committed malfeasance or malpractice.[29] Of note, a people's court may set aside an award under Article 58 if the award violates the public interest.

On the other hand, a people's court may decline to enforce an award pursuant to Arbitration Law Article 63 and Article 217 of the Civil Procedure Law.[30] Under Article 217, a people's court may refuse to enforce an award, for example, if: there is no written arbitration agreement; the award exceeded the scope of agreement of the arbitration agency's authority; evidence is insufficient; certain procedural defects existed; a tribunal's erroneous application of law; or an arbitrator committed malpractice. Notably, under Article 217, a people's court may refuse to enforce an award if it would contradict the social or public interest.[31]

Further, Article 260 of the Civil Procedure Law, referenced in Articles 70 and 71 of the Arbitration Law, specifies more narrowly-tailored circumstances under which a court may refuse to enforce a foreign-related arbitral award.[32] In addition, as with domestic arbitral awards, a court need not enforce a foreign-related award if doing so would compromise the societal and public interest of China. Finally, Article V of the Convention specifies circumstances under which a foreign arbitration award may not be recognized

and enforced. For example, these circumstances include a party's proof of: invalidity of the agreement, such as when a party was "under some incapacity;" improper notice to the party against whom the award was made, or that party's inability to present; portions of the award fall outside the scope of the arbitration; procedural defects; and award status as not yet binding, or set aside or suspended by a competent authority. [33] A court also may not recognize a foreign award under the Convention if the subject matter was not arbitrable in that country, or recognition or enforcement of the award would be contrary to that country's public policy.[34]

The Supreme People's Court has *de jure* power to make law, and therefore its official interpretations of the Arbitration Law are binding. For example, on April 23, 1998, the Court enunciated that a people's court must notify the governing people's high court of the region before setting aside a foreign-related arbitral award rendered in China, and that this high court must notify the Supreme People's Court if the high court agreed to set aside the award.[35] Likewise, the Supreme People's Court has issued a Notice that it has the final decision to set aside a foreign arbitral award.[36]

The Arbitration Law and the Supreme People's Court's interpretations of the Law, in conjunction with the New York Convention[37] and various laws and regulations enacted by the National People's Congress, including the 1991 Civil Procedure Law and the 1999 Contract Law[38], thus form the basic legal framework for China's enforcement of domestic, "foreign-related,"[39] and foreign arbitration agreements.

<u>Chinese courts' reluctance to enforce awards</u>

Experts on Chinese law and arbitration have long criticized the difficulty of enforcing an arbitration award in China, despite what Professor Randall Peerenboom terms the "lack of a firm empirical foundation"[40] for this conclusion. Indeed, there is a

dearth of data regarding the actual resolution of both arbitral awards and enforcement actions, although these court records theoretically are public.[41] According to Professor Peerenboom, many have formed an opinion about the difficulty of enforcement based on a widely reported case involving a Florida company, Revpower, that sought enforcement of an award for six years before a Shanghai court.[42]

In 1988, Revpower entered into a Compensation Trade Agreement with Shanghai-Far-East Aero-Technology Import & Export Corporation ("SFAIC"), a state-owned corporation under the Ministry of Aviation.[43] The agreement provided for arbitration in Stockholm. In 1991, after having given notice of breach and having engaged in "friendly negotiations" for years, Revpower filed an arbitration claim in Stockholm.[44] During the arbitration proceedings, SFAIC filed a lawsuit in Shanghai, and Revpower moved to dismiss. Revpower's motion remained pending before the Shanghai court for years, contrary to applicable law.[45]

SFAIC subsequently withdrew from the Stockholm arbitration proceedings, and a unanimous panel awarded Revpower over US$4.4 million, plus interest and fees. In 1993, Revpower attempted to file an enforcement action before the Shanghai Intermediate People's Court, but the Court, without explanation or apparent justification, refused to accept the filing fee.[46] The Shanghai Court continued to ignore Revpower's motion, contrary to the New York Convention, until it succumbed to pressure from the Supreme People's Court and granted the application to enforce; by that time, six years after Revpower's motion to enforce, the Chinese respondent had transferred assets to other companies and Revpower could not recover.[47] This widely-publicized case fueled foreign opinion on China's courts refusal to enforce arbitration awards.

Arbitrators and practitioners have written about similar experiences in China. For example, Matthew Bersani, an attorney representing parties in Chinese arbitration proceedings, cited his firm's cases for the proposition that courts were reluctant to enforce arbitral awards; in one case, his client could not enforce an arbitral award because of local protection accorded the respondent.[48] Although such concerns about corruption and local favoritism may be to some extent speculative, or at least more difficult to prove than in the Revpower case, conclusions with regard to Chinese courts' application of the wrong law are substantiable. Sally Harpole, for example, while a CIETAC arbitrator noted "in a handful of the foreign arbitral award enforcement cases. . .the Chinese court reportedly reviewed the substance of the award rather than strictly following the New York Convention regarding enforcement procedures."[49]

More recently, in 2004, Li Hu, a CIETAC arbitrator, attributed Chinese courts' reluctance to enforce arbitral awards to local protectionism and lack of judicial personnel's knowledge about arbitration law and practice.[50] According to Professor Peerenboom, who has practiced in Beijing and specialized in foreign investment work, several of eighty nine enforcement cases he studied involved judges who were not familiar with rules regarding enforcement and in particular the Convention.[51] For example, two courts applied the wrong law, using the laws of China, rather than foreign law, to determine the validity of an arbitration agreement.[52] In another case, the Xiamen Intermediate People's Court cited the wrong law, Article 217 rather than 260, and the wrong reason for refusing to enforce a foreign-related award.[53] Indeed, one practitioner recently noted that the Supreme People's Court has acted to address courts' lack of knowledge regarding arbitration and enforcement law by publishing a draft interpretation of the Arbitration Law clarifying that

the law of the place of arbitration should be applied to determine validity of a foreign-related arbitration clause or agreement.[54]

According to Prof. Peerenboom's survey, of the seventy two 1991-99 foreign and CIETAC arbitral award enforcement cases studied, about only half resulted in enforcement.[55] Of these cases, however, in only 1/3 did an applicant obtain 75% or more of the arbitral award, while in 2/3, the applicant was granted less than 75% of the total award.[56] *Compare* Arbitration Research Institute of the China Chamber of International Commerce survey results.[57] Further, of the half of the cases surveyed that resulted in courts' refusal to enforce awards, eighteen (18) were ostensibly for legal reasons under the New York Convention and Civil Procedure Law, *see infra,* while sixteen (16) were due to lack of assets for recovery.[58]

Experts have attributed the difficulty in enforcing arbitral awards to: local courts' refusal to enforce those awards that are contrary to local economic interests; insufficient funding of court departments in charge of enforcing awards; procedural difficulties under China's civil procedure and arbitration laws[59]; a history of corruption and abuses in the judicial system due to institutional significance of politics over law [60]; and finally, but most important, "under-development of the court system," including lack of authority and lack of understanding by courts and judicial personnel of the New York Convention, China's Arbitration Law, and standard arbitration rules and practice.[61] Professor Peerenboom's conclusions, based on his extensive study of enforcement cases, are consistent with these observations.[62] He pointed to media and official governmental accounts of judicial corruption, [63] but as to courts' refusal to enforce awards, particularly noted weakness of the courts and judicial incompetence, in part due to the system in which the people's congress appoints, removes, and supervises judges, who are not tenured.[64]

Establishing an Independent Court to Enforce Awards

Of course, Chinese courts' enforcement of arbitral awards is of high importance to foreign investors.[65] Even if the vast majority of arbitration awards were voluntarily paid,[66] nevertheless the Chinese courts' reluctance to enforce awards would concern foreign investors, and may influence whether or not they decide to invest in China.[67] This reluctance by courts to enforce awards therefore should be of concern to China, for China clearly values attraction of foreign capital.

China has demonstrated its interest in attracting foreign investment, for example, by delineating special economic zones in the 1970's, and later opening other areas to foreign economic activity, with preferential treatment to foreign companies.[68] Further, China subsequently enacted and refined laws to promote foreign investment.[69] Concerned about foreign investment, China declared 1999 the Year of Enforcement.[70] Finally, following accession to the World Trade Organization in 2001, China became subject to the regulations and dispute mechanisms of the WTO, and has attempted, albeit with insufficient success, to strengthen the ability of its court system to enforce foreign arbitral awards.[71]

In recent years, China has taken steps to ensure fair enforcement of arbitral awards.[72] For example, under the Supreme People's Court's Reform Plan, before appointment, judges must pass Justice Examinations.[73] China also now provides continuing legal education to judges. Unquestionably, however, to further promote and maintain its leading global position in foreign direct investment, China must do more to ensure fair and efficient enforcement of arbitral awards. One way of achieving fair and efficient enforcement would be to establish a central court responsible for enforcing all arbitration awards across China.[74] Indeed, such a central court, with highly-trained judges

having long-term, tenure-track appointments, and with nationwide jurisdiction, would address the perceived problems of local protectionism, corruption, weakness and incompetence of present people's court judges.

Such an independent court, with judges specifically trained in the law and practice of domestic, foreign-related and foreign awards, would enhance foreign companies' confidence in investing in China. This court would be an independent court, with limited grounds for appeal to the Supreme People's Court. The enforcement judges would receive continuing legal education both in China and abroad.

In addition, China should amend and enact law so as to make more uniform its treatment of foreign-related and domestic arbitration awards. China's enactment of the Arbitration Law was the first step to such uniform treatment. China now could take further steps, such as amending existing enforcement law to provide for the same power of review as to all awards, e.g. a court may not review the merits of a domestic arbitral award. Not only would this uniformity help judges enforce arbitral awards in a fairer and more efficient manner, uniformity would assist parties, practitioners and arbitration institutions in understanding relevant law on domestic and foreign-related arbitrations. In addition, uniform treatment of domestic and foreign-related arbitration awards would bring China into compliance with the World Trade Organization (WTO), to which China acceded in 2001;[75] China, in acceding to the WTO, committed to "uniform, impartial and reasonable" administration of law.[76]

By establishing an independent people's court for enforcement of arbitral awards, China would enhance its ability to attract foreign direct investments, thus maintaining its leading global position.

[1] OWEN D. NEE, JR., SHAREHOLDER AGREEMENTS AND JOINT VENTURES IN THE PRC 3 (2005); *see* Eu Jin Chua and Kathryn Sanger, *Arbitration in the PRC: new revisions have been made to CIETAC's arbitration rules. How have the new revisions further facilitated the recourse to PRC arbitration? China International Economic and Trade Arbitration Commission*," CHINA LAW & PRACTICE , May 2005, *available at* http://www.chinalawandpractice.com/default.asp?Page=1&cIndex=22&SID=4524&M=5&Y=2005 (stating that, over the last decade, "China has been the destination of choice for many multinational companies").

[2] Will W. Shen & Iris H.Y. Chiu, *Arbitration in China: History and Structure," in* 1 ARBITRATION IN CHINA: A PRACTICAL GUIDE 4 (Jerome A. Cohen et al., ed., Sweet & Maxwell Asia 2004); s*ee* Dennis Unkovic, *Enforcing Arbitration Awards in China,* 59 DISPUTE RESOLUTION JOURNAL 68 (Nov. 2004-Jan. 2005) (concluding that since China was "the world's top destination for foreign direct investment, commercial disputes between foreign investors and Chinese parties are on the rise," with arbitration "the preferred dispute resolution process in China"); Li Hu, *Enforcement of Foreign Arbitral Awards and Court Intervention in the People's Republic of China*, 20 ARBITRATION INT'L 167 (2004) (noting the "corresponding growth in the number of disputes between Chinese and foreign entities"); Matthew D. Bersani, *Enforcement of Arbitration Awards in* China, 19 CHINA BUS. REV. 6 (1992), *available at* http://www.chinabusinessreview.com/public (noting the "explosive growth in the number of disputes between Chinese and foreign parties brought to arbitration"); Shehla Raza Hasan, *Unlocking China's commercial disputes*, ASIA TIMES, March 24, 2006, *available at* http://www.atimes.com/atimes/China/HC24Ad01.html.

[3] Shen & Chiu, *supra* note 2, at 4; Chua & Sanger, *supra* note 1;Hasan, *supra* note 2; Unkovic, *supra* note 2, at 70 (advising to specify arbitration as the method for dispute resolution, outside China from the foreign party's perspective).

[4] Shen & Chiu, *supra* note 2, at 4; Chua & Sanger, *supra* note 1.

[5] *See, e.g.*, Chua & Sanger, *supra* note 1; Yujie Gu, Note, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 DRAKE LAW REV. 173, 193 (1999)(observing that, in China, arbitration is "one of the most important ways to resolve disputes in the international area"); Sally A. Harpole, *Following Through On Arbitration*, 25 CHINA BUSINESS REVIEW 33 (1998) *available at* http://www.chinabusinessreview.com/public/9809/harpole.html (stating that "arbitration is widely used in China to resolve business disputes"); Hasan, *supra* note 2 (noting that discomfort relating to resolution of business disputes between Chinese and foreign parties stems from the fact that judgments from courts of other countries are generally not recognized or enforceable in China, whereas an arbitration award is enforceable in China under the 1952 New York Convention on Recognition and Enforcement of Arbitration Awards); Pittman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation,* 29 Law & Soc. Inquiry 465, 484 (2004)(noting that the Chinese experience has contributed to increases in arbitration and mediation in North America as well, due to "questions about access to justice," and "delays, expenses and formalism of the judicial system"); William W. Park, *When the Borrower and the Banker are at Odds: the Interaction of Judge and Arbitrator in Trans-Border Finance*, 65 TULANE LAW REV. 1323, 1326 (1991)(noting that as to trans-border loan judgments, arbitral awards may be more enforceable than foreign court judgments); George O. White III, *Foreigners at the Gate: Sweeping Revolutionary Changes on the Central Kingdom's Landscape—Foreign Direct Investment Regulations & Dispute Resolution Mechanisms in the People's Republic of China,* 3 RICH. J. GLOBAL L. & BUS. 95, 137(2003).

[6] Nee, *supra* note 1, at 285; Randall Peerenboom, *Enforcement of Arbitral Awards in China*, 28 CHINA BUSINESS REV. 8 (2001).

[7] Carlos De Vera, *Arbitrating Harmony: 'Med-Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China,* 18 COLUMBIA JOURNAL OF ASIAN LAW 149, 172, 175 (2004).

[8] Andrew Aglionby, *Investment-Related Disputes," in* 1 ARBITRATION IN CHINA: A PRACTICAL GUIDE 614 (Jerome A. Cohen et al., ed., Sweet & Maxwell Asia 2004); Stanley Lubman, *The Study of Chinese Law in the United States: Reflections on the Past and Concerns about the Future,"* 2 WASH. U. GLOBAL STUD. L. REV. 1, 8-9 (2003).

[9] Nee, *supra* note 1, at 286; Aglionby, *supra* note 8, at 616 .

[10] De Vera, *supra* note 7, at 153.

[11] Aglionby, *supra* note 8, at 616 .

[12] *See generally* Robert F. Utter, *Dispute Resolution in China,* 62 WASH. L. REV. 383 (1987). As to the move away from mediation due to the lack of public confidence in its informalities, and the increase in arbitration as a compromise approach, *see* Potter, *supra* note 5, at 484-85.

[13] Peerenboom, *supra* note 6; Shen & Chiu, *supra* note 2, at 16; Hasan, *supra* note 2; Bersani, *supra* note 2 (observing "the virtual impossibility of enforcing arbitration awards in China" despite the fact that on "paper," Chinese courts are bound by law to recognize certain arbitration awards).

[14] Andrew Jeffries, *Arbitration in China: Enforcement Issues," in* 1 ARBITRATION IN CHINA: A PRACTICAL GUIDE 295, 297 (Jerome A. Cohen et al., ed., Sweet & Maxwell Asia 2004); De Vera, *supra* note 7, at 176-77; Peerenboom, *supra* note 6.

[15] White, *supra* note 5, at 99.

[16] Utter, *supra* note 12, at 384.

[17] *Id*.

[18] De Vera, *supra* note 7, at 163-65.

[19] Utter, *supra* note 12, at 162-64.

[20] White, *supra* note 5, at 127-29.

[21] CIETAC has had various names over the years, and as of the 1990's, was the most active international commercial arbitration body. Shen & Chiu, *supra* note 2, at 16; Hu, *supra* note 2, at 81(observing that CIETAC and CMAC remain the leading arbitration institutions in China).

[22] Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures, Art. 26 (Adopted by the First Session of the Seventh National People's Congress, promulgated on April 13, 1988)("Law on Chinese-Foreign Contractual Joint Ventures"); Contract Law of the People's Republic of China, Art. 128 (Adopted at the Second Session of the Ninth National Congress, March 15, 1999, effective Oct. 1, 1999)("Contract Law"); Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, Art. 15 (Adopted by the Second Session of the Fifth National People's Congress on July 1,1979, promulgated on July 8, 1979, revised at the Third Session of the Seventh National People's Congress on April 4, 1990, and amended for the second time at the Fourth Session of the Ninth National People's Congress on March 15, 2001)("Equity Joint Venture Law"). The Equity Joint Venture Law requires a written arbitration agreement between the parties in order to arbitrate, and provides that disputes may be settled via "arbitration by a Chinese arbitration agency" or other agency agreed upon by the joint venture parties or, where the there is no written agreement to arbitrate, by "the people's court". Art. 15. *See generally* Nee, *supra* note 1, at 286. Investment vehicles include wholly foreign-owned enterprises, equity joint ventures, and cooperative joint ventures; however, analysis of the various investment vehicles is beyond the scope of this paper.

[23] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 ("Convention" or "New York Convention"). *See* Park, *supra* note 5, at 1363.The United States implemented and adopted the New York Convention in 1970 on the basis of reciprocity and as to commercial matters; federal legislation has implemented the Convention, 9 U.S.C. §§ 201-08. *See generally* Linda J. Silberman, *Enforcement and Recognition of Foreign Country Judgments in the United States*, 739 PLI/LIT 351, 356 (2006).

[24] *See* Civil Procedure Law of the People's Republic of China (promulgated at the Seventh Nat'l People's Congress, April 9, 1991, effective April 9, 1991)("Civil Procedure Law").

[25] Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sep. 1, 1995)("Arbitration Law"). China's Arbitration Law applies to all "[c]ontractual disputes and other disputes over rights and interests in property," Art. 2, but not to administrative disputes or to "marital, adoption, guardianship, support and succession disputes," Art. 3; thus, the Arbitration Law applies to both domestic arbitration between Chinese parties, and foreign-related arbitration, involving a foreign interest and/or a foreign party. *See generally* Shen & Chiu, *supra* note 2. Nevertheless, there still exists a practical distinction between domestic and foreign-related arbitrations. *Id.* at 15.

[26] Art. 18; Denis Brock & Kathryn Sanger, *Legal Framework of Arbitration," in* 1 ARBITRATION IN CHINA: A PRACTICAL GUIDE 25, 37 (Jerome A. Cohen et al., ed., Sweet & Maxwell Asia 2004), *citing* The Supreme People's Court Letter Concerning the Question Over the Effect of an Arbitration Clause that Only Selected the Place of Arbitration but not the Institution (holding that failure to specify the institution made the arbitration agreement ineffective under Civil Procedure Law Art. 18 (March 19, 1997), as well as a Reply by the Court dated Oct. 21, 1998 confirming that both a court and arbitration institution have jurisdiction to decide the validity; *compare* The Supreme People's Court Letter Concerning the Question over the Effect of an Arbitration Clause which Selected Two Institutions at the same time (Dec. 12, 1996)(holding that arbitration agreement was valid where it specified two institutions).

[27] ***Korean Shinho Co. v. Sichuan Euro-Asia Econ. and Trade Gen. Co., Chinalaw ID. CNLCAS 110*** **(Sup. People's Ct. 2001),.**

[28] **Grounds for setting aside an award under Article 58 of the Arbitration Law are: 1. There is no agreement for arbitration. 2. The matters ruled are outside the scope of the agreement for arbitration or the limits of authority of an arbitration commission. 3. The composition of the arbitration tribunal or the arbitration proceeding violated the legal proceedings. 4. The evidences on which the ruling is based are forged. 5. Things that have an impact on the impartiality of ruling have been discovered concealed by the opposite party. 6. Arbitrators have accepted bribes, resorted to deception for personal gains or perverted the law in the ruling.** ***See*** ***http://en.chinacourt.org/public***

[29] ***Id.***

[30] **Article 217 provides:**

If a party fails to comply with a legally effective award of an arbitration agency established according to law, the other party may apply for execution to the people's court which has jurisdiction over the case. The people's court so applied to shall execute the said award. Should the party against whom the application is made provide evidence which proves that the arbitration award involves any of the following circumstances, the people's court shall, after examination and verification by a collegial panel, order to cancel the arbitration award: 1) the parties have not stipulated clauses on arbitration in the contracts, or have not subsequently reached a written agreement on arbitration; (2) matters decided exceed the scope of the arbitration agreement or the limits of authority of the arbitration agency; (3) the composition of the arbitration division or the procedure for arbitration is not in conformity with the legal procedure. (4) the main evidence for ascertaining the facts is insufficient; (5) there is errors in the application of the law; or (6) the arbitrators committed acts of malpractice for personal benefits and perverted the law in the arbitration of the case; If the people's court determines that the execution of the arbitration award would contradict the social and public interest, it shall order to cancel the award. The above-mentioned order shall be served on both parties and the arbitration agency. In the event that an arbitration award is canceled by an order of the people's court, the parties may, in accordance with the written agreement on arbitration reached between the two parties, apply to the arbitration agency for arbitration anew and may also bring a lawsuit in the people's court. ***See*** ***http://en.chinacourt.org/public***.

[31] ***Id.***

[32] **Article 70 of the Arbitration Law provides: Whereas the claimant has produced evidence to substantiate one of the cases as provided for in the first paragraph of Article 260 of the Civil Procedure Law, the People's court shall form a collegiate bench to verify the facts and order the cancellation of the award. Arbitration Law Article 71 provides: Whereas the respondent has produced evidence to substantiate one of the cases as provided for in the first paragraph of Article 260 of the Civil Procedure Law, the people's court shall form a collegiate bench to verify the facts and order the non-performance of the award.**

Article 260 of the Civil Procedure Law provides that a people's court may refuse to enforce an award made by the foreign affairs arbitration agency of China if: 1. The parties concerned have not stipulated clauses on arbitration in the contract or have not subsequently reached a written agreement for arbitration; 2. The person against whom the application is made is not duly notified to appoint the arbitrator or to proceed with the arbitration, or the said person fails to state its opinions due to reasons for which he is not held responsible; 3. The composition of the arbitration division or the procedure for arbitration is not in conformity with the rules of arbitration; or 4. Matters for arbitration are out of the scope of the agreement for arbitration or the limits of authority of the arbitration agency.

Further, a court need not enforce an award if doing so would compromise the societal and public interest of China. Commentators have noted that, following China's adoption of the New York Convention, a party may more easily enforce a foreign than domestic arbitral award in China. Nee, ***supra*** **note 1, at 286.**

[33] **Grounds for refusal under the New York Convention include: the agreement was invalid under the law to which the parties subjected it, or under the law of the country in which the award was made; the party against whom the award was made was improperly notified or otherwise unable to present a case; the award pertained to a difference not contemplated by or not falling within the terms of the case submitted to arbitration; the arbitral authority's composition or procedure did not comply with the agreement or, failing such an agreement, the law of the country in which the arbitration took place; or, the award was not yet binding, or was set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made. Convention, art. V. A court also may refuse to enforce an award when the dispute's subject matter could not be settled by arbitration, or when enforcement or recognition would contradict the public policy of that country.**

[34] New York Constitution , art. V.
[35] Brock & Sanger, *supra* note 26, at 481.
[36] THE SUPREME PEOPLE'S COURT NOTIFICATION CONCERNING THE SETTING ASIDE OF FOREIGN-RELATED ARBITRAL AWARDS BY PEOPLE'S COURTS (APRIL 23, 1998), 2 ARBITRATION IN CHINA: A PRACTICAL GUIDE app. 27 at 465(Jerome A. Cohen et al., ed., Sweet & Maxwell Asia 2004).
[37] China also has entered into bilateral investment treaties, including the Washington Convention in 1993, that refer to arbitration.
[38] Article 128 of the Contract Law provides that parties to a contract with a foreign element may agree to arbitration in China or internationally.
[39] In China, arbitrations are considered foreign-related when (a) at least one party is a foreign entity, foreign legal person, or stateless person; (b) the subject matter is foreign; or (c) the act giving rise to, modifying, or extinguishing a right or obligation under a contract occurred in a foreign country. *See* Article 178, Several Opinions by the Supreme People's Court on the Implementation of Principles of Civil Law (adopted Jan. 26, 1998)("Civil Code Judicial Interpretations"), *cited in* Brock & Sanger, *supra* note 26, at 30; Hu, *supra* note 2, at 168. In 1999, China and Hong Kong signed a Memorandum of Understanding Concerning the Mutual Enforcement of Arbitral Awards (effective Feb. 1, 2000); discussion of the MOU is outside the scope of this paper.
[40] Peerenboom, *supra* note 6, at 28.
[41] Randall Peerenboom, Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC, 29 AM. J. COMP. L. 249, 258-59 (2001).
[42] Peerenboom, *supra* note 6.
[43] Alberto Mora, *The Revpower Dispute: China's Breach of the New York Convention?" in* DISPUTE RESOLUTION IN THE PRC 151 (Chris Hunter, ed., Asia Law & Practice 1995).
[44] Mora, *supra* note 43, at 153.
[45] Mora, *supra* note 43, at 154.
[46] Mora, *supra* note 43, at 155-56.
[47] Peerenboom, *supra* note 6.
[48] Bersani, *supra* note 2.
[49] Harpole, *supra* note 5.
[50] Hu, *supra* note 2, at 178. *Compare* Jeffries, *supra* note 15, at 297-98 (calling unfounded the view that enforcement of arbitral awards is a problem in China, but noting existence of issues, including local protectionism, respect for law and independence of the judiciary, and delay).
[51] Peerenboom, *supra* note 41, at 298.
[52] *Id.* at 299.
[53] *Id.*
[54] Aglionby, *supra* note 8, at 10.
[55] Peerenboom, *supra* note 6.
[56] *Id.* at 9. Applicants before courts in major foreign investment centers, and applicants with smaller awards, were more successful in enforcement. *Id.* at 10.
[57] The Arbitration Research Institute of the China Chamber of International Commerce conducted two studies in 1994 and 1997. The latter study was larger, and found that 77% of CIETAC awards and 71% of foreign awards were enforced. In both cases, ARBI used information provided by some courts. Peerenboom, *supra* note 41, at 251.
[58] Peerenboom, *supra* note 6, at 9-10.
[59] Bersani, *supra* note 2.
[60] Utter, *supra* note 12, at 386.
[61] Shen & Chiu, *supra* note at 16; Hu, *supra* note 2, at 178.
[62] As to cases where courts stated legal grounds for refusing to enforce awards, Peerenboom noted: weakness of Chinese courts due their relatively low stature in the Chinese government system and their financial dependence upon the People's Congress and other governmental counterparts; local protectionism of the responding party by government officials; lack of professionalism and competence of judges, particular in enforcement chambers and as to arbitral enforcement law, standards, and procedure; and corruption. Peerenboom also observed that the lack of set time deadlines allowed courts to avoid enforcement. Peerenboom, *supra* note 6, at 10-12. Peerenboom noted several cases of illegal transfers, resulting in lack of assets and therefore lack of enforcement. *Id.* at 12. .
[63] Peerenboom, *supra* note 41, at 303.

[64] ***Id.*** **at 294.**
[65] **Harpole,** ***supra*** **note 5.**
[66] **Peerenboom,** ***supra*** **note 6, at 12.**
[67] **Peerenboom,** ***supra*** **note 41. Peerenboom opined that investors were concerned about how China's courts would interpret violations of "public policy" under the Convention or "social public interests" under Article 260 of the Civil Procedure Law so as to refuse to enforce an award.** ***Id.*** **at 298.**
[68] ***See generally*** **Owen D. Nee, Jr.,** ***China's Special Economic Zones and Fourteen Coastal Cities,*** **405 PLI/Comm. 445 (1986); John Zhengdong Huang,** ***An Introduction to Foreign Investment Laws in the People's Republic of China,*** **28 J. MARSHALL L. REV. 471, 471-72 (1995).**
[69] ***See, e.g.*** **Equity Joint Venture Law and Law of the People's Republic of China on Economic Contracts Involving Foreign Interest (1985).**
[70] **Peerenboom,** ***supra*** **note 41, at 285.**
[71] **Following China's accession to the World Trade Organization ("WTO") on December 11, 2001, it became subject to WTO requirements as well as dispute settlement mechanisms. The Accession of the People's Republic of China to the World Trade Organization, November 23, 2001, GATT B.I.S.D. (Supp.) at (2001) WT/L/432** ***et seq*****.** ***See*** **Nee,** ***supra*** **note 1, at 256. For example, to comport with WTO market opening commitments, China opened certain industries to foreign-owned enterprises, while requiring joint ventures for certain other industries.** ***See*** **Catalogue for Guidance of Foreign Investment Industries and its Attachment (State Development and Reform Commission and the Ministry of Commerce, issued Nov. 20, 2004, effective Jan. 1, 2005)("Catalogue"); Potter,** ***supra*** **note 5, at 485.**
[72] **Harpole,** ***supra*** **note 5.**
[73] **Brock & Sanger,** ***supra*** **note 26, at 41.**
[74] **Bersani,** ***supra*** **note 2, at 11.**
[75] **Brock & Sanger,** ***supra*** **note 26, at 39.**
[76] ***Id.***