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The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China

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Abstract

This Perspective explores the reality behind the headlines as well as more recent efforts to improve the situation. By examining legal developments and analyzing the obstacles to enforcement, this Perspective will highlight how the issues are largely symptomatic of a developing legal system–a system struggling to translate theory into practice as it attempts to bridge the gap between traditional Chinese and Western expectations of adjudication. Part I outlines the history and background of arbitration in China, while Part II considers the current state of the law, with a particular focus on recent legislative developments. Part III examines the institutional features of the legal and political system that present the greatest obstacles to the enforcement of arbitration awards. Part IV identifies those areas most in need of change that are both substantive and institutional in nature. Finally, Part V examines the key expectations of, and on, the system, and whether China may be defying what many perceive as the usual correlation between foreign direct investment and the rule of law, before drawing final conclusions.

LLM PERSPECTIVE

THE RECOGNITION AND ENFORCEMENT OF COMMERCIAL ARBITRAL AWARDS IN THE PEOPLE'S REPUBLIC OF CHINA

*Fiona D'Souza**

INTRODUCTION

Recently characterized by the *New York Times* as the "Chinese legal netherworld"[1] and by the former CEO of a major oil company as "a black hole,"[2] China's reputation for its enforcement of arbitration awards leaves much to be desired.[3] Yet, in spite of headlines such as these, China remains the world's most attractive destination for foreign direct investment ("FDI").[4]

This Perspective explores the reality behind the headlines as well as more recent efforts to improve the situation.[5] By examining legal developments and analyzing the obstacles to enforce-

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1. Joseph Kahn, *Dispute Leaves U.S. Executive in the Chinese Legal Netherworld*, N.Y. TIMES, Nov. 1, 2005, at A1 (reporting U.S. business executive deprived of liberty in P.R.C. and coerced into signing documents transferring property).

2. Gary Gentile, *China Will Someday Buy U.S Energy Company, Ex-UNOCAL Boss Says. Contract Enforceability and Competition Questions Remain Major Hurdles*, WILKES-BARRE TIMES LEADER (PA), Oct. 14, 2005, at C3 (citing former UNOCAL Corp. CEO Charles R. Williamson's position on conditions U.S. party insisted on in transaction with Chinese party to avoid arbitrating in China).

3. *See generally No Dispute About It*, ECON. INTELLIGENCE UNIT (Bus. China), Apr. 24, 2006 (noting that many Western business memoirs are packed with horror stories about colluding judges and unenforceable court decisions).

4. *See* U.N. CONFERENCE ON TRADE AND DEVELOPMENT ("UNCTAD"), PROSPECTS FOR FOREIGN DIRECT INVESTMENT AND THE STRATEGIES OF TRANSNATIONAL CORPORATIONS: 2005-2008 (Dec. 2005) http://www.unctad.org/en/docs/iteiit20057_en.pdf (last visited May 13, 2007); *see also* Press release, UNCTAD, New UNCTAD Surveys: Foreign Direct Investment Prospects Promising For 2005-2008, UNCTAD/PRESS/PR/2005/031 (Sept. 05, 2005) [hereinafter UNCTAD Press Release], http://www.unctad.org/templates/webflyer.asp?docid=6301&intItemID=1528&lang=1 (last visited Apr. 16, 2007). UNCTAD reports that eighty-seven percent of multinationals and eighty-five percent of experts it surveyed in 2005 ranked China the world's most attractive place to do business—at least thirty percent more than for the next best performer. *See* UNCTAD Press Release, *supra*.

5. The scope of this Perspectiveis limited to commercial arbitration awards. The difficulties of receiving recognition of an arbitration clause, while a preliminary and sizeable obstacle to enforcement, are not considered. Furthermore, this Perspective

ment, this Perspective will highlight how the issues are largely symptomatic of a developing legal system—a system struggling to translate theory into practice as it attempts to bridge the gap between traditional Chinese and Western expectations of adjudication.[6] Part I outlines the history and background of arbitration in China, while Part II considers the current state of the law, with a particular focus on recent legislative developments. Part III examines the institutional features of the legal and political system that present the greatest obstacles to the enforcement of arbitration awards. Part IV identifies those areas most in need of change that are both substantive and institutional in nature. Finally, Part V examines the key expectations of, and on, the system, and whether China may be defying what many perceive as the usual correlation between foreign direct investment and the rule of law, before drawing final conclusions.[7]

I. *ARBITRATION IN CHINA*

With its roots in Confucian philosophy, based on "*li*," principles of natural order and harmony,[8] mediation has been used for thousands of years to resolve disputes in China.[9] "*Fa*," or man-made law in the Western sense, was not used in ancient China as a means of preserving rights, freedom, and justice, as these were alien concepts.[10] This preference for non-adversarial dispute resolution underlies the extensive use of mediation in

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does not consider enforcement actions against State entities or actions involving the more politically sensitive matters of democracy and human rights.

6. *See infra* pt. III.

7. *See generally* Benedict Sheehy, *Fundamentally Conflicting Views of the Rule of Law in China and the West & Implications for Commercial Disputes*,26 NW. J. INT'L L. & BUS. 225 (2006).

8. *Id.* at 242.

9. Arbitration Law of the P.R.C., art. 50 (adopted by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995) [hereinafter Arbitration Law], *translated in* ARBITRATION LAWS OF CHINA (Legislative Affairs Commission of the Standing Comm. of the Nat. People's Cong. of P.R.C. eds., 1997). Mediation and arbitration are given equal recognition and awards from the two processes given the same effect in P.R.C. law. *Id.*

10. *See* Liang Zhiping, *Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55, 57(1989); *see also* 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 COLUM. J. ASIAN L. 149, 153 (2004) (analyzing how arbitration is much more adversarial in its proceedings than mediation); *accord* Sheehy, *supra* note 7, at 241.

both ancient and contemporary China.[11] Before the reform of the Civil Procedure Law ("CPL") in 1991, under the principle of "mediation first, trial second," courts were obliged to attempt resolution through mediation before resorting to the courts.[12] Chinese courts still mediate disputes before delivering judgments,[13] and also sometimes mediate during the arbitration process.[14] Furthermore, the courts regard arbitration and mediation awards equally for the purposes of recognition and enforcement.[15]

The Chinese formally adopted "arbitration" in the early twentieth century as Western-style legislation was introduced into the country following the downfall of the Qing Dynasty in 1910.[16] Arbitration does not fit easily with the traditional channels of resolution; it is very much a foreign import that the indigenous jurisprudence is taking time to adjust to.[17] Notwithstanding a continued suspicion that the international arbitration tribunals are dominated by the will and demands of the big capitalist powers, arbitration is an increasingly popular mechanism

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11. *See* JOHN SHIJIAN MO, ARBITRATION LAW IN CHINA 1 (2001). The art of "*lijie*," maintaining composure and remaining polite and courteous, is a strong cultural factor that results in the preference for mediation. Before the twentieth century, there was only a word for mediation in Chinese and no distinction was made between mediation and what is now termed "arbitration." *Id.*

12. *See* Civil Procedure Law of the P.R.C., art. 195(a) (for Trial Implementation) (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 8, 1982, repealed Apr. 9, 1991) [hereinafter CPL 1982], *translated in* ISINOLAW (P.R.C.), *repealed by* Civil Procedure Law of the P.R.C. (adopted by the 7th Nat'l People's Cong., effective Apr. 9, 1991), art. 9 [hereinafter CPL 1991], *translated in* WEI LUO, THE CIVIL PROCEDURE LAW AND PROCEDURE OF THE PEOPLE'S REPUBLIC OF CHINA 38 (2006); *see also* MO, *supra* note 11, at 13-14 (describing how, before 1982, courts focused their efforts on mediation of disputes under Article 6 of CPL 1982).

13. *See* CPL 1991, art. 9. Court-annexed mediation is regulated by CPL 1991, arts. 9, 85-91, and 155. *See* MO, *supra* note 11, at 4.

14. *See* Arbitration Law, arts. 5, 51 (provision for a voluntary conciliation process); *see also* MO, *supra* note 11, at 4.

15. *See* Arbitration Law, art. 89; *see also* Opinions of the Sup. People's Ct. on Several Issues Regarding the Application of Civil Procedure Law (P.R.C.), (adopted by Adj. Comm. of the Supreme People's Ct., promulgated July 14, 1992), art. 310 [hereinafter 1992 SPC Civil Procedure Opinion], *translated in* LUO, *supra* note 12, 137. Mediation is non-binding, but a settlement agreement can be converted into a binding arbitral award through the issuance of a consent award. *Id.*

16. MO, *supra* note 11, at 1.

17. *No Dispute About It*, *supra* note 3 ("Arbitration is a foreign institution and comes with its own culture, its own ideals and ways of thinking," quoting Wang Hongson, Head Secretary of the Beijing Arbitration Commission (" BAC")).

for resolving commercial disputes.[18] Both domestic and foreign investors perceive arbitration as preferable to litigating in what are perceived as corrupt courts and further, as a means of potentially having greater input on the outcome.[19]

The first formal arbitration system for resolving commercial disputes with foreign parties was set up shortly after Communist China was established.[20] Prime Minister Zhou En Lai requested the establishment of an arbitration system, primarily as an acknowledgement of the inadequacy of the court system for settling commercial disputes.[21] That system has ultimately evolved into the China International Economic and Trade Arbitration Commission ("CIETAC").[22] Together with the China Maritime Arbitration Commission ("CMAC"), CIETAC is one of the world's busiest arbitration forums.[23] Subsequent to the Arbitration Law in 1994, more than 140 other arbitration centers have been established in large and medium-sized cities throughout the country.[24] Most foreign parties forced to arbitrate within China still choose CIETAC, which has tried hard to bring its rules in line with international standards,[25] although the Beijing

18. *See* Sheehy, *supra* note 7, at 225; *see also* An Chen, *Is Enforcement of Arbitral Awards an Issue for Consideration and Improvement?—The Case of China*, Presentation at the Organisation for Economic Cooperation and Development ("OECD") Symposium: Making the Most of International Investment Agreements: A Common Agenda (Dec. 12, 2005), http://www.oecd.org/dataoecd/5/40/36054525.pdf (last visited Apr. 16, 2007) (observing possible fear of reoccurrence of "consular jurisdiction" system imposed in 1840 by Western imperialist powers after China's defeat in "Opium Wars," through which China was deprived of power to exercise judicial jurisdiction over her own territory).

19. Sheehy, *supra* note 7, at 225.

20. *See* JINGZHAO TAO, ARBITRATION LAW AND PRACTICE IN CHINA 7 (2004). The first provision for foreign-related arbitration was in the Protocol for General Conditions of Delivery of Goods Signed by China and Russian in April 1950. *See* Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM. L. & POL'Y 403, 446 (2006).

21. *See* TAO, *supra* note 20, at 7.

22. *See generally id.* at 17-32.

23. *SeeNo Dispute About It*, *supra* note 3 (China International Economic and Trade Arbitration Commission ("CIETAC") processed over 800 cases involving foreign partners in 2005, the largest international caseload in the world.).

24. Arbitration Law, arts. 10-15 (allowing creation of arbitration commissions in Central Government Municipalities and cities that are the seats of the people's governments of provinces or autonomous regions).

25. *See* Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in The People's Republic of China*, 1 ASIAN-PAC. L. & POL'Y J. 1, 6 (2000) (outlining development of CIETAC). For example, in 2005, CIETAC introduced revised rules and procedures focusing on promoting the autonomous nature of interna-

Arbitration Commission is also attracting attention for its ethical practices.[26]

Commercial arbitration is big business and increasingly competitive.[27] The profitability and prestige of the foreign-related arbitration commissions plays a large part in inducing domestic institutions to reform.[28] In the meantime, foreign arbitration commissions, such as the International Court of Arbitration of the International Chamber of Commerce in Paris("ICC"), are still prohibited from adjudicating in China.[29]

A. *The Court System*

China has approximately 3,500 courts of general jurisdiction and various specialized courts, with a career-judiciary system of roughly 106,000 judges and 52,000 assistant judges.[30] There are four levels of courts: one Supreme People's Court ("SPC") in Beijing; thirty Higher Level People's Courts ("HPC"), one for each province or autonomous region and centrally-administered city; 389 Intermediate People's Courts ("IPC"); and the Basic Level People's Courts ("BPC").[31] Nearly half of all civilian disputes, however, are still settled in local "People's Conciliation Committees."[32] Not only is there a cultural preference for medi-

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tional arbitration. *See* Peter Thorp, *New Arbitration Rules Welcomed*, FIN. TIMES (Asia), Aug. 31, 2005.

26. *No Dispute About it*, *supra* note 3 ("The Beijing Arbitration Commission is the only local arbitration commission which meets or surpasses global standards.").

27. *See* Peerenboom, *supra* note 25, at 12-13.

28. *See id.*

29. *See generally* Michael Moser, *Investing in China: No Good Tidings For ICC. The International Chamber of Commerce Wants Access to Mainland For Its Court*, FIN. TIMES (ASIA), Dec. 21, 2005; Kim Rooney, *Legal View: Hong Kong May Harbor Solution*, FIN. TIMES (Online), Dec. 5, 2006 (discussing how current Chinese law effectively bars foreign parties from conducting arbitration with mainland Chinese parties within the country under rule of international arbitration institutions).

30. Donald Clarke, *Power and Politics in the Chinese Court Systems: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1, 6 (1996).

31. *Id.* There are also specialized Military, Maritime and Railway Courts. There appears to be no exact number of BPC available as they can be more geographically spread and informal in nature.

32. LUO, *supra* note 12, 13-14. Many individual disputes are still settled in local "People's Conciliation Committees," established in 1954. In 1989, there were 1,006,040 Peoples' Conciliation Committees and 5,937,110 people's mediators in China. In 2002, 4,636,139 civilian disputes were settled by such Committees versus 4,393,306 civil and commercial dispute combined adjudicated by the courts. *See id.* at 115 (citing *The Statistical Table of 2002 Civilian Dispute Mediation*, *in* LAW YEARBOOK OF CHINA (2003)).

ation, but the Chinese people do not readily resort to their courts to resolve disputes.

Each court is internally organized into several departments, all under the general authority of the Adjudication Committee and the court president.[33] These might include an adjudicatory chamber (*ting*), criminal chamber, civil chamber, and an administrative chamber.[34] The enforcement of judgments is generally the responsibility of an execution chamber (*zhixing ting*).[35] Even if a court does not have a specific chamber, the law requires that at a minimum it include officials responsible for enforcing judgments.[36] These officials are assisted by court police (*fajing*), who do not have the same authority as regular police but who are instrumental in enforcing awards.[37]

Notably, each Court is responsible to the People's Congress at the equivalent level, which supervises its work and handles the appointment and removal of judges.[38] Furthermore, the local government pays their wages and provides housing.[39] Such dependence impairs both the financial and ideological independence of judges.[40]

II. *LEGAL DEVELOPMENTS*

Although it is not easy to discern, Chinese law does have a discernable legislative hierarchy.[41] As a "People's Republic," the ultimate authority is the Peoples' Congress, which is the source of authority for the Constitution of P.R.C., and promulgations by the National Peoples' Congress ("NPC") and its Standing Committee, which are superior to regulations and laws made by the State Council and government authority.[42] Provincial laws and

33. Clarke, *supra* note 30, at 12 (describing the court structure).

34. *Id.*

35. *Id.* (Enforcement Chamber).

36. CPL 1991, art. 209 (enforcement officers); *see also* Clarke, *supra* note 30, at 13.

37. CPL 1991, art. 209 (outlining role of the enforcement police).

38. *See* Peerenboom, *supra* note 25, at 8.

39. *Id.*

40. *Id.* (outlining the institutional reasons for local protectionism in the judiciary).

41. Mo, *supra* note 11, at 31-32 (outlining legislative hierarchy).

42. *Id.* The most recent promulgation was December 4, 1982. The constitution's First Amendment was approved on April 12, 1988. The Second Amendment was approved on March 29, 1993. The Third Amendment was approved on March 15, 1999. The Fourth Amendment was approved on March 14, 2004. *See generally* Xian Fa [Constitution], (1982) (P.R.C.) (adopted on Dec. 2, 1982, First Amendment by the 7th Nat'l People's Conf., Apr. 12, 1988; and Second Amendment by the 8th Nat'l People's Conf.,

local regulations are technically subject to these three national authorities.[43] Absent the doctrine of *stare decisis*, the SPC has the power to issue judicial interpretations of the law, replies, notices or directives.[44] Only the SPC has the power to formally interpret laws and, with that power, the Court has played a critical role in the development of China's arbitration laws.[45]

The laws on recognizing and enforcing arbitral awards have been developed relatively expeditiously.[46] Twenty-five years ago, no law existed for either recognition or enforcement of foreign or foreign-related awards.[47] The Civil Procedure Law in 1982 was the first such law.[48] Among its numerous shortcomings was the lack of clarification on the status of ad hoc awards: there was no provision on refusal to enforce an award nor indeed any provision for the judgment review at all.[49] Not surprisingly, perhaps, five years later there had been no recorded case of a successful enforcement of a foreign arbitral award.[50] Fortunately, the 1982 Civil Procedure law was subsequently repealed and replaced by the 1991 revision, which does contain a number of provisions addressing the enforcement of awards.[51] This law was further supplemented by a comprehensive SPC interpretation in

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Mar. 29, 1993) *available at* http://english.people.com.cn/constitution/constitution.html.

43. *See* Mo, *supra* note 11, at 32-33.

44. *Id.* at 37 (explaining the role and status of judicial interpretations).

45. *Id.* More than forty judicial interpretations have been issued since 1949, about half of them after 1994. The National Procuratorate also has power to interpret national laws but had not interpreted any law related to arbitration as of 2001. *Id.*

46. *See* Clarke, *supra* note 30, at 17 n.67 (listing judicial interpretations illustrating activity).

47. Peerenboom, *supra* note 25, at 13 ("Such awards were considered self-executing and depended on voluntary compliance by the losing party. Similarly, parties seeking to enforce foreign awards were forced to rely primarily on voluntary compliance, although they could seek administrative assistance from government bodies such as CCPIT."); *see* Andrew Kui-Nung Cheung, *Enforcement of Foreign Arbitral Awards in the People's Republic of China*, 34 AM. J. COMP. L. 295, 297 (1986). *But cf.* Clarke, *supra* note 30, at 17-18 (noting that a 1956 speech by the then president of the Jiangsu Higher Level People's Court showed that many of the techniques in the 1982 and 1991 Civil Procedure Laws may have been in use from the 1950s).

48. *See* Cheung, *supra* note 47, at 296-97.

49. *See* Peerenboom, *supra* note 25, at14 (highlighting weaknesses and omissions in the 1982 CPL).

50. *See id.* at 15; *see also* Clarke, *supra* note 30, at 15 (noting that problems with execution were partly behind the CPL 1991 Revisions).

51. *See* CPL 1982; *see also* CPL 1991, at 132-35.

1992.[52]

In the meantime, China acceded to the New York Convention in January 1987 instigating major changes in arbitration law.[53] Its ratification was heralded as a deliberate step to encourage foreign investment into the country.[54] As an international convention, it was directly applicable and superior to any conflicting domestic laws or regulations.[55] The Convention was, however, received suspiciously, perceived as a product of the Western, industrialized system with a presumed inherent bias against the interests of the developing and socialist countries.[56] Much of that suspicion still remains.[57]

Since 1987, there has been a flurry of laws and SPC regulations in this area, including the 1991 revisions to the CPL.[58] This legislative and judicial activism is indicative of the government's commitment to reform in the enforcement of civil judgements, including arbitration awards.[59] The 1994 Arbitration Law[60] passed by the NPC now ranks highest in the legal frame-

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52. *See* 1992 SPC Civil Procedure Opinion, at 222-26.

53. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997 [hereinafter New York Convention]. China signed with two reservations: a reservation on reciprocity and a second reservation restricting its applicability to "commercial" arbitration awards. While the English language version of the reciprocity reservation is identical to the Convention, the Chinese language version is said to be much tighter and more restrictive in limiting recognition to arbitral awards made "within the territory of another contracting country." Chinese courts and scholars have interpreted this to mean that the Convention does not extend to domestic awards. *See* Zhou, *supra* note 20, at 442-43.

54. *See China to Ratify Convention on Foreign Arbitration*, XINHUA GENERAL OVERSEAS NEWS SERVICE, Nov. 27, 1986. Then Premier Zhao Ziyang told the Standing Committee of the National People's Congress that: "The ratification of the Convention . . . is aimed at meeting the demands of implementing the policy of opening China to economic cooperation with foreign countries and facilitating the country's foreign trade." Bruce R. Schulberg, *China's Accession to the New York Convention: An Analysis of the New Regime of Recognition and Enforcement of Foreign Arbitral Awards*, 3 J. CHINESE L. 117, 117 (1989).

55. CPL 1991, at 124.

56. *See* Schulberg, *supra*note 54, at 125-26 (rationalizing China's reluctance to join the Convention); *see also* Chen, *supra* note 18.

57. *See No Dispute About it*, *supra* note 3 ("Arbitration is a foreign institution and comes with its own culture, its own ideals and ways of thinking," quoting Wang Hongson, Head Secretary of the Beijing Arbitration Commission).

58. *See supra* note 51 and accompanying text.

59. *See* Clarke, *supra* note 30, at 17 n.67 (listing the Supreme People's Court and the Ministry of Justice notices and decrees dealing with specific problems of execution).

60. *See generally* Arbitration Law, *supra* note 9.

work for commercial arbitration in China.[61] This law consolidated all commercial arbitration and allowed for establishment of arbitration centers independent of the government, in keeping with the transition from a centrally planned economy to a more market-oriented one.[62] The monopoly of CIETAC and CMAC over foreign-related commercial disputes was thereby abolished, allowing for the large number of forums and commissions that now exist.[63]

Currently the law governing the enforcement of commercial arbitration stems from three main sources: international conventions,[64] international bilateral agreements, and domestic law.[65] In addition to the Arbitration Law 1994, the principal domestic laws are found in the 1991 Civil Procedure Law and a number of subsequent SPC interpretations, the principal features of which are discussed *infra*.[66] Which of these multifarious laws are applied in a particular case hinges on the type of award being petitioned for recognition and enforcement.

A. *Types of Award*

A key feature of the law applicable to the enforcement of arbitration awards in China is the trifurcated classification of awards, depending on their origin.[67] This is a departure from the binary domestic and non-domestic terminology of the New

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61. Mo, *supra* note 41, at 34. The legislative authority of codes is not always easy to determine; the Arbitration Law 1994 ranks lower than the Constitution of 1982, but by virtue of its NPC promulgation, higher that any regulations made by the State Council and local legislature. This is particularly relevant as there aremany local laws that conflict with provisions of the Arbitration Law 1994. *Id.* at 33-34.

62. *See* Arbitration Law, at 4.

63. *Id.*

64. In addition to the New York Convention, China is party to Washington Convention on Recognition and Enforcement of Arbitral Awards rendered by tribunals established within the International Center for the Settlement of Investment Dispute ("ICSID"). *See* Clarke, *supra* note 30, at 15.

65. *See* TAO, *supra* note 20, at 131-79 (outlining the laws on enforcement of arbitral awards in China); *see also* Chen, *supra* note 18.

66. *See* Arbitration Law; *see also* CPL 1991. The CPL 1991 contained a number of new provisions,including Article 217 (substantive review of domestic awards) and Article 260 (foreign-related awards). *See generally* Peerenboom, *supra* note 25, at 16-17.

67. Peerenboom, *supra* note 25, at 11; *see also* TAO, *supra* note 20, 131 (outlining the importance of the distinction). This trifurcation pertains only to the laws of enforcement. Arbitration Law and procedure within China has two categories, domestic and foreign-related arbitration. *See* TAO, *supra* note 20, at 89, 131.

York Convention.[68] Chinese law distinguishes between "foreign" awards, made outside of mainland China, "foreign-related" awards, and domestic awards.[69] The distinction is a crucial one with important consequences.[70] It is particularly relevant to foreign investment vehicles, which are surprisingly found subject to compulsory Chinese jurisdiction.[71]

Foreign awards are effectively classified as Convention or non-Convention awards, again depending on the origin of the award.[72] Foreign-related awards, however, are those issued by Chinese arbitration institutions, such as CIETAC, CMAC, or local arbitration commissions involving an extranational element or party.[73] As is discussed *infra*, the grounds for refusing to enforce Convention and foreign-related awards are primarily limited to procedural grounds, whereas domestic awards can be subject to substantive review.[74] Regardless of its orgin and classificiation, the first step to enforcement of the award is its recognition by the courts.

1. Recognition of Foreign Arbitral Awards

Shortly after China signed the New York Convention, the

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68. *See generally* Zhou, *supra* note 20, at 443-52.

69. Peerenboom, *supra* note 27, at 11 (foreign-related awards are those involving a foreign element).

70. *See* TAO, *supra* note 20, at 131.

71. *See infra* note 98 and accompanying text (compulsory jurisdiction for wholly-owned foreign enterprises and joint ventures).

72. Peerenboom, *supra* note 25, at 11. This Perspective only deals with foreign awards made in countries that have ratified the Convention, referred to throughout as "Convention awards." Although it is technically possible to enforce an award from a non-Convention country under Civil Procedure Law, Article 269, it would only be under strict principles of reciprocity. In practice it would not only be difficult to obtain enforcement, but, as there are 142 parties to the New York Convention,including China's main trading partners, it is not likely to arise. *See id.* at 27; *see also* U.N. Commission on International Trade Law ("UNCITRAL"), Status: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Feb. 19, 2007).

73. Peerenboom, *supra* note 25, at 11. Foreign-related and domestic awards are separately identified in the Arbitration Law 1994, but it does not provide definitions. Instead, there is a 1991 SPC interpretation that states a case is a foreign-related one if: (1) one or both parties are foreign nationals, stateless persons, or foreign companies or organizations; (2) the legal actions leading to formation, change or termination of the legal relationship occurred in a foreign country; or (3) the subject matter of the dispute is located in a foreign country. *See* 1992 SPC Civil Procedure Opinion, at 222.

74. *See* Zhou, *supra* note 20, at 447; *see also* CPL 1991, art. 217.

SPC issued an interpretation aimed at smoothing its implementation, calling on judicial personnel to study the Convention and comply with it practically.[75] It also clarified issues on the commercial reservation, venue, and time limits.[76]

The grounds for refusal of recognition and enforcement of foreign awards derive directly from Article 5 of the Convention and are primarily confined to procedural criteria.[77] As in many jurisdictions, the most controversial ground for refusal is that the award is ruled to be against "public policy."[78] This can be vulnerable to abuse by protectionist concerns.[79] Although difficult, if not impossible, to define, "public policy" under the Convention is generally limited to violation of a State's "international public policy."[80] U.S. courts have held this defense applies only when "enforcement would violate the forum state's most basic notions of morality and justice."[81] The Chinese courts appear, however, to have interpreted it more broadly.[82]

2. Recognition of Foreign-Related Awards

The provisions of the Civil Procedure Law 1991 and Arbitration Law 1994 applicable to foreign-related awards closely resem-

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75. Notice of the Supreme People's Court on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to Which This Country Has Become Party, pmbl. (promulgated by the SPC on Apr. 10, 1987), *translated in* ISINOLAW (last visited Feb. 18, 2007) (P.R.C.).

76. *See id.*; *see also* Peerenboom, *supra* note 25, at 15-16 (outlining goals of the 1992 notice). The Convention does not apply to mediation awards.

77. Zhou, *supra* note 20, at 445-46. Article V stipulates limited grounds for grounds to invoke court refusal to enforce. Five grounds can be summarized as follows: (1) incapacity of the parties or invalidity of the agreement; (2) insufficient notice or unfair deprivation of procedural rights; (3) disputed issue beyond the agreed scope of submission; (4) improper arbitral procedures or tribunal; and (5) non-binding awards. Also if subject matter "is not capable of being settled by arbitration" or the enforcement would be against public policy. *Id.*

78. *See id.* at 448.

79. *See generally* Yongping Xiao & Zhengxin Huo, *Ordre Public In China's Private International Law*, 53 AM. J. COMP. L. 653, 668-69 (2005).

80. *Id.* (French Nouveau Code de Procédure Civile [N.C.P.C.], arts. 1498 and 1501 regulated the international public policy and have been influential around the world); *see* Zhou, *supra* note 20, at 449 (elucidating why "public interest" is broader than "public policy").

81. *See* Parsons & Whittemore Overseas Co. v. Societe General de L'industrie du Papier, 508 F.2d 969, 974 (2d Cir. 1974).

82. *See* Zhou, *supra* note 20, at 449.

ble the New York Convention.[83] There are four independent grounds a defendant may invoke against a petitioner for recognition[84] and enforcement of a foreign-related arbitral award, repeated and reinforced by the Arbitration Law 1994.[85]

Far more controversially, in contrast to grounds of "public policy" in the Convention, Chinese courts may deny recognition and enforcement to foreign-related awards on grounds of "public interest."[86] This concept of "public interest" has been applied much more broadly than "public policy."[87] According to one commentator, the term "public interest" is unique to Chinese Law and "may include any financial, cultural, environmental, or other interest as long as it is public, and not isolated to a small group."[88] Adding to the confusion, the concept is only found in the CPL 1991 and not in the hierarchically superior Arbitration Law 1994.[89]

In *Dongfeng Garments Factory of Kai Feng City & Tai Chun Int'l Trade (HK) Co. Lt. v. Henan Garments Imp. & Exp. (Group) Co.*,[90] the Zhengzhou IPC refused to enforce a CIETAC award simply because it was not in China's economic interests.[91] The SPC overturned this ruling in adjudication but regrettably failed to

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83. *See* Arbitration Law, arts. 65-73; CPL 1991, arts. 237-42; *see also* New York Convention, *supra* note 53.

84. *See* CPL 1991, art. 260. These four criteria are: (1) no written arbitration agreement exists; (2) notice was insufficient or procedural rights were unfairly deprived; (3) the arbitral procedure or tribunal was improper; and (4) the disputed issues were beyond the agreed upon scope of arbitration or the subject matter was not capable of settlement by arbitration.

85. Arbitration Law, art. 71.

86. *See* Arbitration Law, art. 71; *see also*, CPL 1991, art. 260 (stating that: "If a people's court determines that the enforcement of an award will violate the *social and public interest*") (emphasis added).

87. *See* ZHOU, *supra* note 20, at 448-49.

88. *Id.* at 449 (theorizing on possible violations of social public interest resulting in the refusal of enforcing arbitral awards, including: "[T]he violation of sovereignty, damage to natural resources, serious contamination to the environment, threat to public health or safety, or corruption of morality," citing HU LI, ENFORCEMENT OF THE INTERNATIONAL COMMERCIAL ARBITRATION AWARD: WITH SPECIAL REFERENCE TO THE ENFORCEMENT OF THE ARBITRAL AWARD IN THE P.R. CHINA 148 (2000)).

89. *See* Zhou, *supra* note 20, at 446. It is not known why the Arbitration Law 1994 does not contain the "public interest" ground, but, regardless, the CPL still provides legal basis for refusal to enforce. *See* CPL 1991, *supra* note 12, art. 260.

90. *See* Peerenboom, *supra* note 25, at 38 n.165 (discussing *Dongfeng Garments Factory of Kai Feng City andTai ChunInt'l Trade (HK) Co. Ltd.v. Henan Garments Imp. & Exp. (Group) Co.* (Zhengzhou Interm. People's Ct., Sept. 28, 1992)).

91. *See* Xiao & Huo, *supra* note 79, at 668-69.

further define "public interest" nor relate it to the international "public policy" standard of the Convention.[92] While the courts treat Foreign-related awards with less deference than Convention awards, it is domestic awards that are most open to the Court's discretion through *de novo* review.

3. Domestic Awards

Article 217 of the CPL outlines the grounds for refusing to enforce a domestic award.[93] The first three grounds are the same as §260(1) CPL for foreign-related awards.[94] These are further supplemented by grounds that: the "main evidence for finding the facts is insufficient;" "there is an error in the application of the law;" or the arbitrators were involved in any conduct of "embezzlement, bribery, practicing favoritism for himself or relatives, twisting the law in rendering arbitration award."[95] The subjective element of these grounds is compounded by what amounts to a broad standard of *de novo* review.[96] Without the protection of the SPC adjudicative process, or the mandatory jurisdiction of the IPC or higher court, an outside party is vulnerable to local protectionism in all its glory.[97]

The domestic application of these standards belies their enormous significance. Most international direct investment takes the form of wholly foreign-owned enterprises ("WFOE") or foreign joint ventures ("FJV"), which are subject to compulsory Chinese jurisdiction and domestic arbitration rules.[98] Thus, all related disputes must be arbitrated according to Chinese laws, and the New York Convention will not apply.[99] A dispute's classification as domestic or foreign-related determines the laws that apply to enforcement; it is a critical distinction.[100]

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92. *See* Zhou, *supra* note 20, at 449.

93. *See* CPL 1991, art. 217.

94. *See id.* arts. 217 (1)-(3), 260.

95. *See id.* art. 217 (4)-(6).

96. *See* Peerenboom, *supra* note 25, at 65 (outlining how the court can determine that enforcement of the award would contradict "social and public interest").

97. *Id.* (debating whether drawback of abuses of *de novo* review outweighs benefit of providing for protection of parties from arbitral incompetence).

98. *See* General Principles of the Civil Law of the People's Republic of China arts. 37, 41(2) (promulgated by Order No. 37 of the President of the People's Republic of China, Apr. 12, 1986, effective Jan. 1, 1987), *available at* http://en.chinacourt.org/public/detail.php?id=2696; *see also* Zhou, *supra* note 20, at 450-51.

99. *See* Zhou, *supra* note 20, at 450-51.

100. *See supra* note 67 and accompanying text.

The notion of the "foreign" element in a Sino-Foreign venture was first tested in the 1992 case, *China Int'l Eng'g Consultancy Co. v. Lido Hotel Beijing.*[101] The Beijing IPC applied a very restrictive definition of "foreign element" and classified the dispute as domestic.[102] CIETAC subsequently changed its rules of admission to include disputes between foreign investment enterprises and wholly owned domestic companies. The court has nevertheless persisted with a restrictive interpretation of the pre-requisite "foreign element."[103] In 2001, the Beijing Intermediate Court again ruled against the foreign element of a WFOE in *Amcor Flexible Packing (Beijing) Co. v. China No. 22nd Metallurgy Constr. Co.*,[104] regarding the rules applied by the Beijing Arbitration Commission.[105] Until there is definitive clarity in this area, the rules of the applicable arbitration institution are of great import.[106]

A. *Recent Improvements on Enforcing Convention and Foreign-Related Awards*

Over the past ten years, the SPC has issued three Interpretations and Directives notable for their contribution towards improving the recognition process.[107] Most significantly, in 1995 the SPC established a reporting mechanism structured around the courts' hierarchy to monitor judicial refusals to enforce Convention and foreign-related awards.[108] According to the 1995 Notice, if an IPC intends to refuse to enforce a foreign or for-

101. *See* Peerenboom, *supra* note 25, at 11-12 (discussing *China Int'l Eng'g Consultancy Co. v. Lido Hotel Beijing* (Beijing Interm. People's Ct., 1992), where Beijing Intermediate People's Courts ("IPC") ruled that FJV established under Chinese law was Chinese legal entity and fact that JV was party in arbitration proceeding did not qualify case as "foreign-related").

102. *See id.*

103. *See* Zhou, *supra* note 20, at 451-52.

104. *See id.* at 451-52 (discussing *Amcor Flexible Packing (Beijing) Co. v. China No. 22nd Metallurgy Constr. Co.* (Beijing No. 2 Interm. People's Ct.).

105. *See id.*

106. *Compare* Peerenboom, *supra* note 25, at 11-12 (*Lido Hotel* was under CIETAC rules that have since been expanded), *with* Zhou, *supra* note 20, at 451-52 (*Amcor* was under Beijing Arbitration Commission rules).

107. *See* Peerenboom, *supra* note 25, at 16-17.

108. Notice of the Supreme People's Court on Several Issues Regarding the Handling by the People's Court on Certain Issues Pertaining to Foreign-Related Arbitration and Foreign Arbitration (issued by the Sup. People's Ct., Aug. 28, 1995, effective Aug. 28 1995) [hereinafter 1995 Reporting Notice], *translated in* TAO, *supra* note 20, at 308.

eign-related award, it must first submit a report to the HPC.[109] If the HPC agrees, it must report the case to the SPC. Only on the SPC's approval can the IPC rule to refuse recognition or enforce the award.[110] According to Professor Randall Peerenboom, the notice was "warmly welcomed" by investors.[111] Peerenboom refers to accounts of one SPC judge who claimed that SPC had denied eighty percent of requests to refuse enforcement in the first five years of the system's operation.[112]

This reporting mechanism draws high-level attention to cases in which the lower courts wish to deny recognition and enforcement to awards, effectively inhibiting the exercise of local protectionist concerns.[113] The mechanism has also drawn criticism, however: firstly, for not specifying whether it applies to ad hoc awards; and, secondly, for failing to provide parties either a right to participate in the hearing by the HPC, a right to be notified about the hearing, or even the right to submit written documents into the process.[114] Thirdly, the Reporting Notice did not specify any time requirements, making it impossible to determine how many cases are reported in a timely manner and how many are left pending for years.[115] The potential significance of such delays is well illustrated by the U.S.-based ContiGroup Companies' efforts to enforce a $14 million arbitral award against Shandong Zhucheng Foreign Trade Company.[116] The petition for enforcement was referred from the IPC in Qingdao, to the HPC in Shandong, and finally to the SPC.[117] Once the petition was referred into the Reporting Mechanism, rather than ruling within sixty days as required by Arbitration

109. *Id.*

110. *See* TAO, *supra* note 20, at 308; *see also* Peerenboom, *supra* note 25, at 28-29.

111. *See* Peerenboom, *supra* note 25, at 29.

112. *See id.* at 28-30 (reporting that the SPC "denied eighty percent of the requests to refuse enforcement" and criticizing the system's exclusion of foreign ad hoc arbitration, the lack of a procedure to supervise non-reported but not enforced cases, and limited application to foreign invested companies).

113. *See id.*

114. *Id.*

115. *See id.* (discussing lack of time restriction). Time limits were subsequently prescribed in the Setting Aside Notice. *See infra* note 151 and accompanying text.

116. U.S. Comm. on Ways & Means, Statement of J.P. Gorgue, ContiGroup Companies Inc., New York (2005), http://waysandmeans.house.gov/hearings.asp?formmode=view&id=2904 (last visited Apr. 16, 2007).

117. *Id.*

Law,[118] the courts had delayed for several years; and Contigroup's enforcement efforts resorted to a pleading to the U.S. Congress for political assistance in enforcing the award.[119]

Furthermore, due to the finality of the appeals process, the Reporting Mechanism can be a double-edged sword. Article 140 of the CPL provides that there is no appeal of a court's refusal to enforce, but it is subject to adjudicative supervision by a higher court.[120] Having already gone through the reporting mechanism, however, the higher court would have reviewed any case to refuse enforcement and would have approved the decision. It is highly unlikely to decide differently second time around.[121] In reality, the petitioner's only recourse would be to look for assets in other jurisdictions or try to re-arbitrate, both of which are unlikely to be successful.[122]

The second notable SPC contribution came in 1998 when it promulgated the Fee Regulation, aimed at reducing the maximum time for a court to complete enforcement of a Convention award to eight months.[123] This regulation requires courts to issue a decision within two months of receiving the application and complete enforcement within a further six months.[124] This timeline, however, is contradicted by an even shorter six-month timeline for enforcement in the Enforcement Regulation passed four months earlier,[125] which applies to both foreign awards and

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118. Arbitration Law, art. 60.

119. *See* U.S. Comm. On Ways & Means, *supra* note 116.

120. CPL 1991, art. 140. The judges and officials in the adjudicative process, however, are strangers to the proceedings. It can nonetheless be effective, as in the *Dongfeng Garment Factory* case. *See generally* Peerenboom, *supra* note 25, at 38 n.165.

121. *See* Peerenboom, *supra* note 25,at 28-29. *See generally* Zhiping, *supra* note 10 (cultural factors mitigating against an overruling or reverse judgment).

122. *See* Peerenboom, *supra* note 25, at 39 (noting the difficulty of re-arbitrating if the issue was anything other that procedural in nature). Further, in light of the problems enforcing awards in China, the foreign applicant would have first sought enforcement abroad. For a domestic award, an applicant may get a different result in a different domestic court by virtue of *de novo* review. *See* CPL 1991, art. 217.

123. Regulations of the Supreme People's Court Regarding the Issue of Fees and Investigation Periods for the Recognition and Enforcement of Foreign Arbitral Awards (promulgated by the Sup. People's Ct., Nov. 14, 1998, effective Nov. 21, 1998) [hereinafter Fee Regulation], *translated in* TAO, *supra* note 20, at 312. It is not clear whether the drafters intended to exclude non-Convention awards and foreign-related awards. If so, it would be inconsistent with the 1995 Reporting Notice. *See supra* note 108 and accompanying text; *see also* Peerenboom, *supra* note 25, at 65.

124. *See* Peerenboom, *supra* note 25, at 65.

125. *See* The Rules of the NSC Concerning Several Enforcement Issues (Provi-

awards made by Chinese arbitration institutions.[126] This Regulation also provides for a time extension if "really needed in special circumstances," which are regrettably not defined.[127] Given that neither six nor eight months is a realistic timeframe for enforcement, this inconsistency is merely a technical observation, but one that should be clarified by the SPC.[128]

Finally, in 2002 the SPC issued a Directive taking decisive action to help insulate Convention and foreign-related awards from local protectionist interference.[129] These rules limit the jurisdiction of all civil and commercial cases involving foreign elements to specific IPCs in capital cities of provinces and special economic zones.[130] This jurisdictional protection works in conjunction with the SPC 1995 Reporting Mechanism to minimize the frustrations to due process.[131] Theoretically, because parties must file for enforcement to a higher court, they deal with judges and officials more removed from local politics and economic considerations.[132] In summary, although they have their own inconsistencies, loopholes, ambiguities, and omissions, these recent developments are real attempts to provide safeguards for acknowledged weaknesses in the system.[133]

B. *Procedural Requirements*

Despite these more recent improvements to the system, the process of achieving recognition for an arbitral award, no matter

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sional) art. 107 (issued by the NSC on July 8, 1998) [hereinafter Enforcement Regulation], *translated in* MO, *supra* note 41, at 672.

126. *Id.* arts. 2(3), 2(5).

127. *Id.* art. 107.

128. *See* Peerenboom, *supra* note 25, at 65 (noting how courts continue to ignore the time limits for accepting a case and leave enforcement cases pending).

129. The Supreme People's Court Rules on the Several Issues Regarding the Jurisdictions of Civil and Commercial Litigation Cases Involving Foreign Elements (promulgated by the Sup. People's Ct., Dec. 25, 2001, effective Mar. 1, 2002) [hereinafter Jurisdictions], *translated in* LUO, *supra* note 12, at 269.

130. *Id.* arts. 1, 3(3), 3(4) (rules are applicable to cases applying for the revocation, recognition, or enforcement of international arbitration awards and cases reviewing the validity of foreign civil and commercial arbitration clauses, *inter alia*). *See generally* Ellen Reinstein, *Finding A Happy Ending For Foreign Investors: The Enforcement Of Arbitration Awards In The People's Republic Of China*, 16 IND. INT'L & COMP. L. REV. 37, 66 (2005).

131. *See* Reinstein, *supra* note 130, at 66.

132. *Id.* (stating that the law is in order to correctively adjudicate civil and commercial cases involving foreign elements).

133. *See generally* Peerenboom, *supra* note 25, at 16-17.

what its origin, is a lengthy, unpredictable process that involves considerable procedural hurdles.[134] Regardless of the nature of the award, it must be entered into a P.R.C. court to achieve recognition and comply with onerous evidentiary requirements.[135]

The domicile of defendants, the place of infringement, or the location of the assets determines the relevant Chinese jurisdiction.[136] Any objection to jurisdiction must be raised very early in the proceedings to be considered.[137] Such motions are frequently used by parties as a delay tactic.[138]

Three judges hear cases: the chief judge and two assistant judges.[139] Ultimately, it is their role to ascertain the facts, and they have far-reaching interrogative powers with which to do so.[140] Remarkably for lawyers accustomed to civil procedure in Western jurisdictions, in China there are no rules against *ex parte* communications; indeed, such contact is perceived as part of the process.[141] There is provision for one limited appeal, but arbitration awards are subject to different adjudication processes depending on their origin, as discussed *supra*.[142]

The outcomes of the process are as multifarious and uncertain as the extra-judicial inputs.[143] Firstly, the court can refuse recognition (subject to the reporting process outlined above).[144] In this scenario, the petitioner of a Convention award can still take the award to another Convention jurisdiction where assets

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134. *See* Dennis Unkovic, *Enforcing Arbitration Awards in China*, 59 DISP. RESOL. J. 68 (Dec. 2004-Jan. 2005). *See generally* Peerenboom, *supra* note 25.

135. *See* CPL 1991, ch. 6; *see also* Several Rules of the Supreme People's Court on Evidence in Civil Procedures 2001 (promulgated Dec. 21, 2001, effective Apr. 1, 2002), *translated in* WEI, *supra* note 12, at 243.

136. CPL 1991, art. 259 (the CPL 1991 revisions excluded enforcement jurisdiction at the place of arbitration).

137. *Id.* art. 38 (providing that if a party rejects jurisdiction after the case is accepted, it may only contest jurisdiction during the period for submitting briefs).

138. *See* Andrew Aglionby, Partner, Baker & McKenzie (Hong Kong), China-Related Litigation and Arbitration: Are You Ready?, Remarks at Baker & McKenzie Presentation (Oct. 16, 2006).

139. *See generally* CPL 1991, art. 40.

140. *Id.* arts. 2, 116.

141. *See* Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PAC. L. & POL'Y J. 255, 297 (2003) (arguing against practice of unilateral contact with judges).

142. CPL 1991, art. 10 (if there are two trials, the second one is final); *see also supra* notes 69-74 and accompanying text.

143. *See generally* Lin, *supra* note 141 (*ex parte* hearings and unilateral contact).

144. *See* 1995 Reporting Notice, *supra* note 108.

are located against which the award can be enforced.[145] A fortunate side effect of China's growth is increased outbound FDI which could, in turn, have the effect of providing a greater number of potential forums for enforcement.[146] Secondly, in the case of awards issued in China, the respondents can apply to have the award set aside.[147] The grounds for setting aside Convention and foreign-related awards in Chinsee law are the same as those for refusal to enforce, but much narrower than the grounds that apply to domestic awards.[148]

The consequences of setting aside an award are more severe than refusal to enforce, as it effectively invalidates the award, so it might not be enforced in another New York Convention jurisdiction.[149] In recognition of the severity of this outcome, in 1998 the SPC set up a similar reporting mechanism for setting aside foreign-related awards as the 1995 mechanism for refusal to enforce.[150] Unlike the reporting system for the refusal to enforce mechanism, the setting aside regulation created tight deadlines: the threatening IPC has thirty days to report to the HPC; if the HPC agrees, the HPC should report to the SPC within fifteen days.[151]

If, however, the collegiate bench of three judges rules that an award should be enforced, they appoint the enforcement officer.[152] The enforcement officer sends notice to the party subject to enforcement, ordering the party to fulfill its obligations within a specified time limit.[153] If the party fails to comply, the

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145. *See* New York Convention, *supra* note 53.

146. Increased Chinese foreign investment overseas should result in a greater selection of available jurisdictions in which to enforce arbitral awards against P.R.C. parties under the New York Convention. *See* New York Convention, *supra* note 53.

147. *See* Arbitration Law, art. 58. This only applies to domestic awards issued by a Chinese arbitration commission. There is a six-month limitation period for such an application under Arbitration Law 1994, Article 59.

148. *See* Arbitration Law, art. 70 (referring to list of grounds in conformity with the New York Convention in CPL 1991, art. 260).

149. *See* New York Convention, *supra* note 53, art. V(1)(e)(The 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.).

150. *See* Notice of the Sup. People's Ct. on Certain Issues Relating to the Revocation by the People's Ct. of Foreign-Related Arbitration Awards (promulgated by the Sup. People's Ct. on Apr. 23, 1998) [hereinafter Setting Aside Notice], *translated in* TAO, *supra* note 20, at 309; Peerenboom, *supra* note 25, at 43.

151. *See* 1995 Reporting Notice, *supra* note 108.

152. *See* Clarke, *supra* note 30, at 12.

153. *See* CPL 1991, art. 219. The statute of limitations is particularly short, only six

court may take coercive action.[154] The courts have their own police force dedicated to enforcement, but, compared to the regular police force, they have lesser authority and are held in far lower esteem.[155] This inferior status is an intrinsic weakness in the enforcement of judgments, including arbitral awards.

III. *OBSTACLES TO ENFORCEMENT*

"At present, the most prominent problem in economic adjudication is the difficulty of executing judgments."[156] Since this comment by the President of the Supreme Peoples' Court in 1988, the difficulty of executing court judgments has continued to receive much attention both inside and outside China, not least in the dramatic headlines of the Western media.[157]

Clearly, the lack of enforcement can be a crucial issue for firms with capital invested in China; it is hard to quantify, however.[158] The "significant economic interests" of both the Chinese government and the Chinese arbitration institutions discourage the provision of accurate information from official sources.[159] That said, in the late nineties Peerenboom conducted an empirical study of the enforcement of arbitral awards that has provided some meaningful insights into what factors are affecting enforcement, some of which are discussed *infra*, in addition to the author's own observations.[160]

A. *Institutional Obstacles*

The contrast between the Chinese legal system and legal systems in the Western hemisphere, especially the Common Law jurisdictions, is stark.[161] China has "essentially had to create a modern legal system from scratch since 1978."[162] For example,

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months for companies and one year for natural persons. The onerous translation requirements mean this is often too short. *See* Peerenboom, *supra* note 25, at 21.

154. *See* CPL 1991, art. 220.

155. *See* Peerenboom, *supra* note 25, at 10.

156. *See* Clarke, *supra* note 30, at 2 n.2 (citing Sup. People's Ct.Work Report, Apr. 1, 1988, *reprinted in* SUP. PEOPLE'S CT. GAZETTE [SPCG], No. 2, June 20, 1988).

157. *See* Clarke, *supra* note 30, at 27.

158. *See generally No Dispute About it*, *supra* note 3.

159. *See* Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement Arbitral Awards in the P.R.C.*, 49 AM. J. COMP. L. 249,259 (2001).

160. *See id.*

161. *See generally* Zhiping, *supra* note 10, at 57 (discussing Chinese legal culture).

162. *See id.*

it was only ten years ago that lawyers were permitted to act in the interests of their clients rather than the interests of the State.[163]

As analyzed above, recognition and enforcement of arbitral awards in China have their shortcomings, but are subject to ongoing, gradual improvements by the SPC.[164] The larger, more fundamental obstacles, however, are institutional in nature.[165] As Peerenboom argues, focusing on drafting precise laws in the current institutional framework would be like "playing *erhu* while Beijing burns."[166]

1. The Judiciary

"Simply put, the courts are weak."[167] Companies do not respect judges, nor do lower courts seem to respect higher courts, and local protectionism and corruption are rife.[168] Within China, the legal system is still held in very low esteem, and judges and the judiciary have a status on a par with regular State bureaucrats.[169]

China has over 200,000 judges in an appointed judiciary that still lacks any formal judicial career structure.[170] The vast majority of judges, many of whom come from the military, are poorly educated and have no legal training.[171] As a result, many judges are not familiar with the rules and procedures on the recognition and enforcement of arbitral awards.[172] In a judicial system that is focused on criminal cases and de-motivated by lax performance quotas, there is little incentive to actively pursue cases beyond those.[173] The 1995 Judges Law strove to raise stan-

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163. *See* Sheehy, *supra* note 7, at 251 (discussing changes in Judges Law 1996 allowing lawyers to act in interests of clients rather than the State).

164. *See supra* notes 107-134 and accompanying text.

165. *See* Peerenboom, *supra* note 25, at 2-3.

166. *See* Peerenboom, *supra* note 159, at 319. The *Erhu* is a Chinese string instrument.

167. *See* Peerenboom, *supra* note 25, at 63.

168. *See id.* at 53.

169. *See id.* at 9.

170. *See* Clarke, *supra* note 30, at 6, 10.

171. Mo Zhang, *International Civil Litigation In China: A Practical an Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59, 94-95 (2002).

172. *See id.* at 94-95; *see also* Judges Law of the P.R.C., art. 9 (promulgated by the Standing Comm. People's Nat. Cong., Feb. 28, 1995, revised Jun. 30, 2001, effective Jan. 1, 2002), *translated in* ISINOLAW (last visited Feb. 18, 2007).

173. *See* Peerenboom, *supra* note 25, at 63; *see also* Clarke, *supra* note 30, at 37-38 (reasoning that enforcement of civil judgments has not been an area of concern for courts who are more focused on criminal adjudication and sentencing); *see also* Sheehy,

dards for new judges and required current judges to meet the standards within a reasonable time.[174] Confirmed judges were allowed to stay on, subject to the training requirement.[175] This is an area that will take time to improve, as a new generation of Chinese-qualified lawyers navigates the ranks of this changing profession.[176] Skilled, specialized judges capable of handling the increasing magnitude and complexity of disputes subject to arbitration will be in high demand.[177]

In addition, judges and court officers are entirely dependent on the corresponding level of government for their tenure, financing, and housing,[178] described by one Chinese commentator as the "institutional flaw" of the Chinese judiciary.[179] Although the People's Congress is formally empowered to appoint judges, in practice and as previously noted, judges are frequently selected from the ranks of the Communist Party of China ("CCP").[180] Personal connections are also a major factor, particularly in the smaller towns and provinces where local protectionism is rife.[181] The lack of qualification and independence is a great cause for concern.[182]

That said, the courts are the only institution in China to have putative authority to issue orders cutting across bureaucratic and territorial boundaries, provided that jurisdictional requirements are satisfied.[183] There is automatic "full faith and credit," but this strongly relies on comity between courts in dif-

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supra note 7, at 257-58 (describing how private law is now priority due to its neglect prior to and since 1949).

174. *See* Peerenboom, *supra* note 25, at 28 n.46.

175. Judges Law of the P.R.C. The law requires at least one to three years of prior legal work experience, depending on legal education.

176. *See generally* Xin Chunying, *What Kind of Judicial Power Does China Need?*, 1 INT'L J. CONST. L. 58 (2003); *see also* Judges Law of the P.R.C., art. 9; Lin, *supra* note 141, at 257-59.

177. *See generally* Lin, *supra* note 141.

178. *See, e.g.*, Lin, *supra* note 141, at 294-95 (citing *Cangan County v. Long Gang Rubber Molding, Inc*, in which a county-level court disregarded facts and law to decide in favor of controller of country treasury office suspected of fraud because he funded the court).

179. *Id.* at 295 (quoting Professor He Weifang of Peking University Law School).

180. *See* Lin, *supra* note 141, at 295-96; *see also* James V. Feinerman, *Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?*, 141 CHINA Q. 161, 195 (1995) (discussing courts subject to political pressures from Communist Party).

181. *See* Clarke, *supra* note 30, at 41.

182. *See generally* Lin, *supra* note 178.

183. *See* Clarke, *supra* note 30,at 5.

ferent provinces and states.[184]

2. The Enforcement Chamber

The status of the Enforcement Chamber is even less than that of the main court.[185] According to a number of sources, young and capable officers go to the adjudicatory chambers, while the execution chamber is the refuge of the tired, the mediocre, and the uneducated.[186] Practitioners perceive understaffed and under-funded courts that are incapable of the footwork required to collect money and assets.[187] Even if a court upholds an award, there are still daunting challenges at the enforcement stage.[188]

Indicative of the low esteem in which judges and enforcement officers are held are numerous reports of officials being threatened or beaten by the respondent's workers, shareholders, or creditors.[189] Peerenboom cites an occasion on which an applicant went with his lawyer, twenty judges, and court police to seek possession of assets subject to an award, only for the entourage to be locked in the warehouse where the assets were located.[190]

B. *Other Obstacles to Enforcement*

1. Civil Procedure

Local protectionism thrives on the weaknesses of the judiciary and the enforcement chambers; it is further exacerbated, however, by the rules of civil procedure.[191] The role of *ex parte* hearings before, during, and after court hearings is a key factor.[192] Not only are such hearings permissible, but there are no rules on what types of contact are acceptable.[193] Stories abound of instances where this has affected the outcome of a case di-

184. *Id.* at 5-6 (makes courts powerful, in theory).
185. *Id.* at 12-15.
186. *Id.*
187. *See No Dispute About It, supra* note 3 (citing Michael Moser, vice-chairman of the Hong Kong Arbitration Commission).
188. *Id.*
189. *See* Peerenboom, *supra* note 159, at 300-01.
190. *See id.*
191. *See* Lin, *supra* note 141, at 262, 287 n.104.
192. *Id.* at 286-87.
193. *See id.* at 286; *see also* Aglionby, *supra* note 138.

rectly or indirectly and to mitigate the effects, forum shopping is widely used.[194] On a regional scale, the SPC's reporting mechanism for refusal to enforce and setting aside awards also helps mitigate its impact, albeit at the back end of the process.[195]

Furthermore, there are onerous evidentiary requirements that can be easily abused deliberately or inadvertently to substantially delay the process:[196] an application to enforce must contain comprehensive information about the proceedings, an original or notarized copy of the award, the arbitration agreement, power of attorney and documentation of the applicant's legal representative, and a notarized and consularized certificate of incorporation or analogous documentation.[197] All documents must be in Chinese and accompanied by the enforcement fees.[198] Not surprisingly, judges often do not understand these rules and demand additional evidence, including evidence submitted to arbitration proceedings that must be translated and notarized.[199] It is often unclear whether this is a consequence of judicial incompetence or merely local protectionism at play.[200]

2. Political Interference

Despite the strong links between the CCP and the judiciary, it is reported that government officials interfere with the courts more frequently than does the CCP.[201] In this new era of China's economic development priorities, the CCP party leaders have motives aligned to those of investors and, conscious of China's reputation, may actually help enforce judgments.[202] In the case of one CIETAC award, the foreign lawyer enlisted the help of the local Political-Legal Committee Secretary, whose influence trumped that of the local party's senior court and was thus able to secure enforcement of the award for the foreign

194. *See* Aglionby, *supra* note 138.

195. *See* 1995 Reporting Notice, *supra* note 108.

196. *See* Aglionby, *supra* note 138.

197. *See* Several Rules of the People's Court on Evidence in Civil Procedures, arts. 10-12 (Promulgated by the SPC, Dec. 21, 2001) [hereinafter SPC Evidence Procedures], *translated in* LUO, *supra* note 12, at 246.

198. *See id.* art. 12; *see also* Peerenboom, *supra* note 25, at 19-20.

199. *See* Peerenboom, *supra* note 25, at 19-20.

200. *Seeid.* at 20.

201. Peerenboom, *supra* note 159, at 286.

202. *Id.*

party.[203]

According to Peerenboom, local protectionism is the most cited obstacle to enforcement; and its most significant manifestation is delay or difficulty discovering assets of respondents.[204] For example, a senior judge was asked by a government official who was friends with the Chinese respondent in a case to instruct the presiding judge to "drag his feet," which he was able to do for more than two years.[205] A similar fate befell TriNorth Capital Inc., a Canadian firm that secured a $4.2 million arbitration award against a Chinese party, but found that the local court refused to enforce it.[206] The municipality that owned the respondent company appointed the local judges.[207] TriNorth appealed to the SPC, but it was three years before they got their money.[208]

3. Insolvency

Statistically, insolvency is the most cited reason for non-enforcement.[209] Triangular debt arrangements play a big role.[210] Although there are laws allowing for subrogation, it is limited to the scope of the claim of the creditor and relies on substantial court interference, which is often lacking.[211] In this transitioning, vulnerable economy, local governments are very reluctant to declare companies bankrupt because of the resulting effect on unemployment and tax revenues.[212] Hence, local government officials will try to discourage enforcement of awards that would

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203. *Id.* at 287.

204. *Id.* at 276 (statistically, it did not seem to be so significant in the results of his survey).

205. *Id.* at 277.

206. *See* Tamara Loomis, *The China Syndrome*, CORP. COUNSEL, May 26, 2005.

207. *Id.*

208. *Id.*

209. *See generally* Peerenboom, *supra* note 159, at 273 (citing insolvency of the respondent as reason for non-enforcement in forty three percent of thirty-seven cases, with another four settling for partial enforcement; in only one cases was respondent formally bankrupt).

210. *Id.* at 274. Triangular debt refers to the situation in which one State-owned company owes money to another company, which in turn owes money to a third company, and so on.

211. *See* Peerenboom, *supra* note 25, at 56.

212. *See* Peerenboom, *supra* note 159, at 278 (State-owned enterprise reforms have also contributed to increased unemployment, adding social welfare and retraining costs to the already strained budgets of local governments. Increased unemployment not only causes budgetary problems but may lead to social unrest).

mean bankruptcy for a local respondent.[213]

Protectionist interests can induce officials to tip off local companies about applications for enforcement, enabling them to transfer assets before the order for enforcement is made.[214] The *RevPower* case is an infamous example, which has had a profoundly and disproportionately negative impact on China's reputation for enforcement.[215] The court not only allowed for parallel proceedings and misapplied Chinese law, but also exercised dilatory tactics with respect to the enforcement proceedings.[216] After seven years of international arbitration and P.R.C. court proceedings, a Shanghai court finally recognized an award for $4.5 million plus interest and fees. Unfortunately, the Chinese respondent had already transferred all its assets to other companies, and the petitioner was left with nothing.[217]

In recognition of this tendency, China now has laws aimed at mitigating the risks of insolvency being a bar to recovery.[218] Asset protection comprises attachment, sequestration, freezing, sealing up, and provision of security.[219] It is the respondent's duty to tell the court where assets are located,[220] and the court can use compulsory measures to discover concealed assets.[221] This process, however, relies on the court's enforcement division; consequently, the reality is that parties must conduct their own investigations.[222] This can be very difficult to do, even with the help of private investigators and high-level *guanxi*.[223]

By law, companies are to maintain only one bank account for tax reasons, and to file their accounts with the local govern-

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213. *Id.*

214. *Id.* at277.

215. *Id.*at 251 (stating that the impact of *Revpower* on public opinion "has been nothing short of staggering").

216. *Id.*

217. *Id.* at 250 n.5.

218. *See* Arbitration Law, arts. 28, 46, 68. Preliminary relief can be applied for that can cover both assets and evidence.

219. *See* CPL 1991, art. 221.

220. *See id.* art. 29.

221. *See id.* art. 31

222. *See* Peerenboom, *supra* note 159, at 277.

223. *See id. Guanxi* is the Chinese concept of social connections and relationships. *See generally Guanxi: The China Letter*, http://www.guanxionline.com (last visited Apr. 16, 2007).

ment.[224] In theory, there should be various sources of publicly available asset information; but, in reality, it is very difficult to gain access without the high-level *guanxi* needed to open the metaphorical filing cabinets.[225] Likewise, it is very difficult to ascertain title on real estate due to opaque transfers and lax record keeping.[226] Procuring information from banks is particularly problematic, as they tend to protect their customers in an increasingly competitive environment.[227] Banks have therefore been known to postpone taking action on a court's order until they have had adequate time to notify the customer to transfer the money to another account.[228] Furthermore, banks perceive the courts as bureaucratic equals from whom they do not like to take orders.[229] This situation is particularly significant given the paucity of legal remedies for fraudulent transfers[230] and piercing the corporate veil.[231]

4. Corruption

Corruption and bribery are still perceived as endemic in the Chinese judiciary and arbitration institutions.[232] After all the

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224. *See* Peerenboom, *supra* note 25, at 48 (discussing Commercial Banking Law of the P.R.C. art. 48).

225. *See* Peerenboom, *supra* note 159, at 293.

226. *See id.* ("All too often, either intentionally or simply for lack of legal expertise, [real estate] transfers are inadequately documented or violate legal requirements. As a result, it is frequently hard to sort out who owns which assets."); *see also* Peerenboom, *supra* note 25, at 50 ("Although such records filed with the real estate bureau are supposed to be available to the public, personal connections are often necessary to access the records.").

227. *See* Clarke, *supra* note 30, at 73 (highlighting that banks operating under more competitive regime are anxious to avoid offending customers); *see also* Peerenboom, *supra* note 159, at 293 (showing banks are not willing to divulge account information for fear of damaging relations with customers).

228. *See* Clarke, *supra* note 30, at 73.

229. *Id.* at 74 (discussing banks' perception of courts as a parallel bureaucracy as noted in interview with lawyer).

230. *See generally*, Peerenboom, *supra* note 25, at 12 (laws and regulations prohibiting parties from concealing or transferring assets or undergoing reorganization to avoid liabilities).

231. *See* CPL 1991, arts. 44, 213; *see also* 1992 SPC Civil Procedure Opinion, arts. 271-77 (where an enterprise as legal person is divided or merged, its rights and obligations shall be enjoyed and assumed by new legal person that results from change); Enforcement Regulation, arts. 76-83 (failing to provide general criteria for piercing corporate veil but providing guidelines for specific circumstances relevant to enforcement of awards); *accord* Peerenboom, *supra* note 25, at 61-62.

232. *See* Lin, *supra* note 141, at 294-95 (discussing judicial corruption as an impetus for reform); *see also* Jamil Anderlini, *Lawyer Suspended as Fuji Corruption Probe's Net*

changes of the past two centuries, and most recently the demise of communism, some commentators argue that an ideological void is being filled by hard-edged capitalism.[233] The sudden surge of economic ambition fuels corruption and encourages disrespect for the law, legal obligations, and the courts' orders.[234]

Official statistics indicate that incidence of fraud and corruption is rising.[235] It is hard to discern, however, whether this is an absolute increase or whether the rise can be attributed to a greater number of apprehended offenders.[236] In addition to incidents involving the judiciary and law-enforcement officials, there have been a number of high-profile cases of arbitration officials being arrested and charged with corruption.[237] The fact

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Widens. Graft-ridden Arbitration System on Trial as Beijing Seeks to Boost Its Credibility, S. CHINA MORNING POST, Feb. 7, 2006 (reporting on views held by foreign lawyers in China and Hong Kong).

233. *See* Jessica C. Stabile, *Clashes Between Economies And Environments: Consumerism Versus Conservation in Taiwan and Hong Kong*, 7 ASIAN-PAC. L. & POL'Y J. 125 (2006) (asserting that urbanization, capitalism, increasing average household incomes, and rising middle class lead to emergence of individualism and growth of consumer ethic in mainland China); *see also* Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 Nw. J. INT'L L. & BUS. 383, 404-05 (2000) ("The corruption problem seems only to worsen. So tightly knit are corrupt practices into the fabric of modern Chinese society that they are almost invisible. Invoice fraud, diversion of government investment capital, bribery, and misappropriation of central and local government funds all seem to have become a way of life . . . . The universal assumption that all officials and corporate managers are corrupt is probably responsible for the speed with which disgruntled workers take to the streets; civil protest, mostly peaceful, is reported almost daily by the foreign (not Chinese) press in China."); TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2005: CORRUPTION IN CONSTRUCTION AND POST-CONFLICT RECONSTRUCTION, http://www.transparency.org/publications/gcr/download_gcr#download (last visited Feb. 19, 2007) (rating China 3.2 of 10 point scale, where score of 10 signifies least corruption and 0 signifies most corruption).

234. *See* Peerenboom, *supra* note 159, at 319 (describing the side-effects of a "get rich quick" mentality).

235. *See id.* at 303 n.195 (citing Xiao Yang, President of the Supreme People's Court, confirming that law-enforcement personnel are involved in such malpractice as eating free meals, taking without paying, imposing man-made barriers, soliciting favors, demanding and taking bribes, perverting justice for money, and bullying the common people); *see also* John Pomfret, *Chinese Officials Bare Flaws of Legal System*, WASH. POST,Mar. 11, 1999, at A24 (reporting that the number of judges convicted of abusing power jumped from 1051 in 1997 to 2512 in 1998).

236. *See* Pomfret, *supra* note 235.

237. *See* Jamil Anderlini, *Arbitration Boss Arrested in Swoop on Staff "Fees,"*S. CHINA MORNING POST, Mar. 23, 2006 (reporting that the Secretary-General of CIETAC was arrested on charges of financial irregularity); *see also* Anderlini, *supra* note 232 (reporting that lawyer was suspended from Chinese law firm for role in at least one secret meeting between lawyers representing respondent and overseeing arbitrators).

that these cases have started to attract so much attention is an indication that such behavior is becoming less acceptable.[238] How robust this ethical infusion will be to the temptations of rapid economic growth and opportunity remains to be seen.[239]

IV. *SUGGESTIONS FOR REFORM*

A. *Institutional Reforms*

Given its current structure, the judiciary is effectively powerless to mitigate the effects of local protectionism.[240] Protectionism, along with corruption, is endemic within the system.[241] There has been great discussion of, and attempts at, judicial reform in recent years, but with little and slow effect;[242] the judiciary remains the weakest link in the chain.[243]

In assessing what is required, it is inappropriate to simply compare the Chinese structure with a Common Law model, to thereby identify any shortcomings and prescribe accordingly.[244] The contrasting legal history and culture of adjudication must be remembered.[245] Commentators suggest that there is gradual acceptance of the more Western concepts of separation of powers and judicial independence, but that they have not been applied.[246] Sustainable institutional reform needs to be an indigenous, gradual process so as not to destabilize a vulnerable system still in transition.[247]

1. Judicial Independence

The lack of judicial independence is one of the more funda-

238. *See* Anderlini, *supra* note 237.

239. *See* Peerenboom, *supra* note 159, at 319.

240. *See generally* Peerenboom, *supra* note 159.

241. *See* Lin, *supra* note 141, at 294-95 (judicial corruption as internal impetus for reform).

242. *See generally* Chunying, *supra* note 176.

243. *See supra* notes 170-190 and accompanying text (discussing the judiciary).

244. *See supra* notes 9, 10, 56 and accompanying text (contrasting legal cultures).

245. *See* Clarke, *supra* note 30, at 83-84.

246. *See generally* Lin, *supra* note 141.

247. *See* Lin, *supra* note 141, at 297 (need for slow and cautious structural reform); *see also, e.g.*, Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment And National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347 (2006) (arguing the importance of integrating international norms with local judicial jurisdictions to allow for sustainable reform).

mental obstacles to reliable enforcement.[248] Although it is a recognized principle in the Chinese Constitution and laws, it is independence of a uniquely Chinese character.[249] One cannot assume a Western notion of judicial independence, whereby judicial power derives directly from the Constitution and is subject only to checks and balances.[250] In China, the People's Congress is the source of all power, including the Constitution, thus placing an inherent limitation on the courts' powers.[251]

It has thus become very difficult to find a balance between increased supervision of the judiciary and the weakness in the system that derives from too many layers of scrutiny.[252] Applying extra tiers of supervision can merely exacerbate the very problems of corruption and systemic cost that they are intended to remedy. Scrutiny by those not familiar with the cases can quickly become unwelcome intrusion that interferes with the administration of justice.[253] Reforms aimed at promoting judicial independence should thus be focused on minimizing the layers of bureaucratic supervision and enabling the courts to exercise their power more equitably and free from interference.[254]

To promote these aims, a clearer model code on judicial independence is required, beyond that promoted by the Judicial Code of Ethics in 2001.[255] An explicit standard, even if not adhered to, is better than no standard at all and sets the bar for improvement. The author believes that, even if promoted only as an international standard applicable to foreign-related cases,

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248. *See* Mo Zhang, *International Civil Litigation In China: A Practical an Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59, 93 (2002); *see also* Chunying, *supra* note 176, at 68-69.

249. Xian Fa [Constitution], art. 126, (1999) (P.R.C.), *available at* http://english.people.com.cn/constitution/constitution.html; Organic Law of the People's Courts, (1983) (P.R.C.); Law of Judges, arts. 1, 8, (2001) (P.R.C.). *See supra* notes 12, 175 and accompanying text; Zhang, *supra* note 248, at 94-95; *see also* CPL, art. 6.

250. *See* Chunying, *supra* note 242, at 68-69.

251. *Id.*

252. *See* Zhang, *supra* note 248, at 94-95.

253. *See* Chunying, *supra* note 176, at 72.

254. *Id.* at 70.

255. *See Code of Judicial Ethics for the People's Republic of China*, 2002, *available at* http://www.accci.com.au/code.htm. *See generally* Stuart Hoberman, *Judicial Independence: A Critical Issue For The Bar And Bench*, N.J. LAW., MAGAZINE (Apr. 2006) (importance of independent judiciary); Tobin A. Sparling, *Keeping Up Appearances: The Constitutionality Of The Model Code Of Judicial Conduct's Prohibition Of Extrajudicial Speech Creating The Appearance Of Bias*, 19 GEO. J. LEGAL ETHICS 441 (2006) (discussing the importance of independent judiciary).

it would allow a line to be drawn between acceptable and unacceptable behavior.

To mitigate the impact of local government on the judicial process, the interests of the judiciary need to be uncoupled from those of local government.[256] Centralizing the funding and control of the courts would free judges from dependency on local interests for their status and welfare.[257] Such an initiative could also promote a greater sense of cohesion and professionalism among the judiciary.[258] In addition to the improvements brought about with the Law of Judges 1995 and the 2001 Code of Ethics, the training and performance of judges should be monitored centrally to promote consistency throughout the country.[259] Furthermore, in the interests of justice, the "reasonable time" for long-tenured judges to meet the new standards on education and performance should be deemed to have passed, and those judges still falling short should be worked out of the system, as capacity allows.[260]

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256. *See* Lin, *supra* note 141, at 296 (advocating Professor He Weifangs' proposal of "delocalization" of courts for unified court system); *see also* Kahn, *supra* note 1 (discussing a particular instance of the protection of influential companies and suppression of dissent as well as the power of a company in a "company town").

257. *See* Peerenboom, *supra* note 25, at 8 (describing the fiscal vulnerability of the judiciary); *see also* Zhang, *supra* note 257, at 94 ("the operating expenses, including salaries of the judges, are provided from the local government budget").

258. *See* Zhang, *supra* note 248, at 94-96. However, this would also challenge the current unitary state in which separation of powers is not a dominant theme.

259. *See* Judges Law of the P.R.C., *supra* note 172, art. 9 (providing certain requirements for a people's court judge including: (1) Chinese citizenship; (2) twenty-three years of age; (3) upholding the Chinese Constitution; (4) having good political and professional quality and morale; (5) good health; and (6) qualifying educational requirements).

In addition, on October 18, 2001, the Supreme People's Court adopted *The Basic Principles of Professional Ethics of Judges of the People's Republic of China* ("*Ethics Code*"). The *Ethics Code* consists of fifty articles aimed at standardizing and perfecting the professional ethical norms of judges, improving and enhancing the professional quality of judges, and maintaining the good image of judges in the general public. *See* Zhang, *supra* note 248, at 95 n.265 (citing Zhong Hua Ren Min Gong He Guo Fa Guan Zhi Ye Dao De Ji Ben Zhun Ze [The Basic Principles of Professional Ethics of Judges of the P.R.C.] (2001), http://www.law-lib.com/law/law_view.html).

260. *See* Judges Law of the P.R.C., *supra* note 172, art. 9 (allowing those judges in place before the law's date of effectiveness to retain their positions). There is still concern that the standards are not high enough, as a law degree is not a minimum requirement. *See* Zhang, *supra* note 248, at 95.

2. Enforcement

In addition, the enforcement chambers need to be strengthened.[261] A pragmatic and expeditious solution would be to put court police on the same standing as regular police, or, more significantly, to integrate the two systems.[262] While this presents great challenges, given the regular police focus on criminal enforcement, enforcing arbitral awards against reluctant parties often does involve criminal conduct, and the efficacy of using the police could have the aggregate effect of reducing the enforcement time.[263] Additionally, consolidated, authoritative rules on enforcement would send a signal to the Chinese business and banking community that this is an important area for cooperation.[264] It is evident that fundamental institutional reforms are required, without which the impact of any legal reforms will be greatly diminished; but both are needed to bring about further improvements in the system.

B. *Legal Reforms*

There are a number of more substantive legal reforms that could be beneficial.[265] Firstly, clear guidelines for *ex parte* communications to stress the importance of judicial independence would help minimize any propensity for corruption and level the playing field for foreign parties.[266] Laws should also be passed on fraudulent transfers, and the law on piercing the corporate veil improved, although they will only be effective alongside structural reforms that improve the system's efficacy.[267]

1. Ad Hoc Awards?

Ultimately, more clarity is needed from the SPC on many of their existing interpretations and laws, especially on the poten-

261. *See supra* note 259 and accompanying text.

262. *See generally* Clarke, *supra* note 30.

263. *See supra* note 173 and accompanying text.

264. *See id.*

265. *Cf.* Peerenboom, *supra* note 159 (discussing the importance of institutional reform for effective change).

266. *See* Lin, *supra* note 141, at 296 (discussing the role of *ex parte* hearings).

267. *See generally* Bradley C. Reed, *Clearing Away the Mist: Suggestions for Developing a Principled Veil Piercing Doctrine in China*, 29 VAND. J. TRANSNAT'L L. 1643 (2006) (criticizing the current veil piercing statute enacted January 2006 as too ambiguous to be useful in a civil law system demanding specificity).

tial applicability of the 1995 reporting notice to foreign-related and ad hoc arbitral awards.[268] Given the increased use of ad hoc tribunals both within and outside China, all current and future rules should apply to their awards equally.[269] For as long as these reporting mechanisms play a role in monitoring enforcement levels, they should be kept as broad in application as they effectively can be.[270]

2. Expansion of the Reporting Mechanisms[271]

The reporting mechanisms for refusal to enforce or setting aside awards would be significantly strengthened if those cases denied enforcement or set aside by the SPC were to be published, incorporating the benefits and discipline of the practice of case reporting.[272] A centrally published report would help to better promote rigorous legal reasoning and standards of legal interpretation.[273] Such a publication would contain basic information about the case and the legal reasoning behind the refusal of enforcement, setting aside, or annulment; sufficient only to provide for an understanding of the procedural elements of the case.[274] To promote uniformity, as long as WFOEs and FJVs are subject to compulsory Chinese jurisdiction, any such publication should cover domestic awards as well as Convention and foreign-related arbitral awards, perhaps just for awards over a certain specified financial value.[275]

This information would serve as a useful guide for judges

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268. *See* Peerenboom, *supra* note 25, at 26.

269. *Id.*

270. *See generally* Clarke, *supra* note 30.

271. *See* 1995 Reporting Notice, *supra* note 108; Jurisdictions, *supra* note 129.

272. *See* Lin, *supra* note 141, at 299-311. There has been much discussion in China over recent years on the merits of adopting *stare decisis*. That, according to the Author, now is likely. *See generally* Bernadette Meyler, *Towards A Common Law Originalism*, 59 STAN. L. REV. 551, 588 (2006) (outlining the benefits of case reporting attributed to Sir Edward Coke in the nineteen century: "The reporting of particular Cases or Examples is the most perspicuous course of teaching, the right rule and reason of the law; for so did Almighty God himself, when he delivered by Moses his Judicial Laws, *Exemplis docuit pro Legibus* . . . .").

273. *See* Lin, *supra* note 141, at 296-97 (outlining The People's University Professor Wang Liming's recommendations for structural reforms addressing judicial independence, including public rendering of explicit legal opinions).

274. *Id.* at 309-10, (some pioneering Courts have started to publish opinions, including dissents).

275. *See supra* notes 67-69 and accompanying text (noting trifurcated classification of awards).

across the country to encourage consistency and perhaps even predictability.[276] In a judiciary increasingly incentivized to perform well, it would serve to induce greater standards of professionalism throughout the system.[277] It would also provide empirical data on the rates of enforcement, allowing greater scrutiny and promoting system efficiency.[278]

3. Public Policy v. Public Interest

As a matter of priority, the discrepancy between the Convention's "public policy" and "public interest" for foreign-related and domestic awards should be clarified in favor of the Convention's international standard.[279] Doing so would create an international benchmark for Chinese courts to apply, minimizing protectionist influences, especially in the enforcement of domestic awards that are not subject to the SPC reporting mechanism for enforcement.[280]

4. Domestic v. Foreign-related Awards

Similarly, the disparity in the scope of review of domestic versus foreign-related and Convention awards should be eliminated, bringing it into line with the international standards under the New York Convention.[281] As China transitions to a market-based economy, it requires an appropriate set of corresponding legal institutions, the most important characteristic of which is general applicability.[282] As Clarke suggests, laws must apply uniformly to large numbers of economic actors or "the system will revert to the kind of specific directive and ad hoc bargaining whose inadequacies led to the drive for reform in the first place."[283] When the Arbitration Law was first drafted there was reportedly debate whether to standardize the laws or to cre-

276. *See supra* note 272 and accompanying text (discussing benefits of reporting).

277. *See* Lin, *supra* note 141, at 309-10 (hypothesizing on the positive effect that public scrutiny reporting might afford on the quality of judicial reasoning). *See also* Judges Law of the P.R.C., art. 1.

278. *See* Peerenboom, *supra* note 159, at 256-57; *see also* Clarke, *supra* note 30 (noting the depth of the problem cannot be measured with precision due to the unavailability of statistical data).

279. *See* Zhou, *supra* note 20, at 448-49.

280. *See* 1995 Reporting Notice, *supra* note 108.

281. *See supra* notes 77-81 and accompanying text.

282. *See* Clarke, *supra* note 30, at 4.

283. *Id.*

ate two separate systems.[284] It was decided to opt for two separate systems at that time. It is now time to revisit that debate.[285]

5. Foreign Investors as "Domestic" Party

At the very least, international investors treated as WFOEs and JVs should be able to benefit from the laws on foreign-related arbitration.[286] Subjecting them to the domestic laws and procedures exposes them to an unnecessary risk.[287] Further subjecting them to the mercy of *de novo* review by the courts frustrates the very point of arbitration, let alone an arbitral award.[288] As the number of affected international parties rises, the effect on China's reputation both for foreign investment and international arbitration will be exponential.[289]

V. *GREAT EXPECTATIONS*

Reliable, meaningful, comparable empirical data on the current rate of enforcement of arbitral awards in China is notoriously difficult to obtain.[290] According to an Arbitration Research Institute ("ARI") survey in 1997, seventy-seven percent of CIETAC awards and seventy-one percent of foreign awards were enforced.[291] A subsequent study criticizes the methodology behind these ARI figures, not least because they do not differentiate between instances in which the award was fully satisfied or only partially satisfied.[292] Yet, so severe is the lack of reliable statistics that Peerenboom heavily caveats his own methodology.[293]

Notwithstanding such caution, Professor Peerenboom estimates the success rate for foreign applicants at forty-nine percent, slightly higher than that achieved for P.R.C. applicants at

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284. *See* Luo, *supra* note 12, 87-88 (argument for two separate systems was supported by the different foundations of the two types of arbitration and certain peculiarities of disputes involving foreign elements).

285. *Id.*

286. *See* Zhou, *supra* note 20, at 454-55.

287. *Id.* (criticizing compulsory domestic jurisdiction).

288. *Id.*

289. *See id.*

290. *See supra* note 278 and accompanying text (discussing difficulty of obtaining reliable empirical data).

291. *See* Peerenboom, *supra* note 159, at 267.

292. *See id.*

293. *See id.*

an estimated forty-three percent.[294] The enforcement rate for foreign awards was fifty-two percent, slightly higher than the forty-seven percent success rate for CIETAC awards.[295] This is comparable to the estimated rate of enforcement for civil judgements generally, which vary from eighty to fifty percent.[296]

It is interesting to see how this compares with enforcement rates in the United States, where reliable data is also hard to come by.[297] The U.S. Courts do not suffer from the same negative press, and U.S. enforcement rates do "not generate anything approaching the cries of alarm heard in China."[298] Still, based on available surveys, levels of enforcement of civil economic judgments in the United States and in England and Wales are also far from ideal and, indeed, may be equivalent to or even lower than the rate of enforcement in China.[299] It is quite possible that the American and English business communities tolerate domestic enforcement rates that the Chinese legal community would consider shockingly low.[300]

So, if China's enforcement rates are comparatively reasonable, why is its reputation in this area so bad? Firstly, as discussed *supra*,[301] there is a lack of statistics with which to defend the system.[302] As a result, we do not hear about the successes. There remains a strong preference for mediation in a legal culture that focuses on consensus and dislikes finality that disfavors the effi-

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294. *See id.* at 279.

295. *See id.* at 254.

296. *See* Clarke, *supra* note 30, at 28. Discussing the range and sources of available statistics. These figures are impossible to confirm or deny. *See* Chunying, *supra* note 176, at 61 (in some provinces, nearly eighty percent of the court judgments in economic and civil cases are not enforced or incompletely enforced).

297. *See* Clarke, *supra* note 30, at 33-34.

298. *See id.*

299. *See id.* (citing Committee on Post-Judgment Collection Procedures in the Special Civil Park, *Report to the Supreme Court of New Jersey*, N.J.L.J., Nov. 1, 1993, at 2). In the eleven New Jersey counties surveyed in 1987, only twenty-five percent of cases were returned fully satisfied, seven percent practically satisfied and the remaining sixty-eight percent were returned unsatisfied. *See also* John Baldwin & Ralph Cunnington, *The Crisis in Enforcement of Civil Judgments in England and Wales*, 2004 PUBLIC LAW 305 (citing the results of empirical studies in England and Wales indicating the level of enforcement of civil judgments is similarly poor; fewer defendants against whom civil judgments are registered respect them than honor them).

300. *See* Baldwin & Cunnington, *supra* note 299, at 305

301. *See id.* at 292

302. *See* Peerenboom, *supra* note 159, at 256-57 (showing that the difficulties and caveats in Peerenboom's empirical study illustrate the difficulty to get reliable data).

cacy of its own court system.[303] Given this cultural propensity to avoid confrontation, a disproportionately large number of awards are most likely satisfied consensually, at least partially.[304] Such settlements would be occuring under the judicial radar and would not be reflected in any available statistics.[305]

Secondly, those cases that resort to enforcement actions in court are only those that are contested or resisted.[306] Given the cultural backdrop, the parties probably resort to judicial intervention more reluctantly than in the West, where adversarial enforcement actions do not have such negative connotations, and have not been subject to strong cultural influences to settle consensually.[307] Even the most reasonable and informed Western expectations are likely to be disappointed by the reality of litigation at this late stage in the dispute resolution process, especially before a weak judiciary held hostage to local protectionism and corruption.

The frustration and confusion of the resulting outcomes results in the negative headlines of Western media. Such headlines both simplify and amplify the extent of the problem. They necessarily focus on a few high-profile, egregious cases involving surprised and frustrated foreign parties. Even with good legal advice and thorough due diligence, Western parties can fall prey to unrealistic expectations of the culture they are investing into and its mechanisms for resolving disputes with domestic parties.[308] China's pledge to improve its legal system on joining the WTO has increased foreign expectations of the system: "We were hoping that now it had entered the W.T.O., China would be more interested in showing how private disputes can be re-

303. *See* de Vera, *supra* note 10, at 162-64 (mentioning the culture and judicial recognition of mediation).

304. *See* Peerenboom, *supra* note 159, at 256-57.

305. Even in Western jurisdictions, a high number of awards are satisfied by settlement. *See generally,* PRICEWATERHOUSECOOPERS LLP, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 2006, *available at* http://www.pwc.com/arbitration-study.

306. *See* Arbitration Law, *supra* note 9, art. 62.

307. *See generally* de Vera, *supra* note 10.

308. *See* Jay Hoenig, *Managing Business Risks: Wise Companies Prepare For—and Minimize Their Exposure To—Risks When Investing in China,* CHINA BUS. REV. (Nov. 1, 2006), *available at* http://www.chinabusinessreview.com/public/0611/hoenig.html (discussing, *inter alia,* measures companies can take to identify and minimize regulatory risk in China).

solved," said one baffled CEO to the *Los Angeles Times*.[309] His company invested in 2001, one year after China joined the W.T.O., and was embroiled in typically frustrating arbitration proceedings a few years later. PepsiCo, like other large multinationals, seems to have been surprised to find no easy exit one year after it first sought to extract itself from a troublesome joint venture and got involved in a subsequent legal dispute.[310]

Such bad publicity, however, does not yet seem to be deterring eager outside investors.[311] Even in some of the more severe cases, companies still cannot resist being in China: "China is too big for [foreign companies] to ignore."[312] In spite of the legal uncertainty and its climate of corruption and protectionism, China remains the most popular destination for foreign direct investment,[313] with levels expected to rise until at least the end of the decade.[314] Such statistics raise the question of whether this phenomenon with arbitration awards indicates that China may be an exception to the general correlation between the rule of law and FDI.[315]

Some commentators suggest that cultural factors reflecting an emphasis on relationships could be an adequate substitute for a rule of law. These factors include a distinct form of "Chinese

309. *See* Evelyn Iritani, *A Local Firm's Baffling Trip Through China's Arbitration System*, L.A. TIMES, Dec. 26, 2003.

310. *See* Andrew Batson, *Pepsico Finds No Easy Exit from Troubled China Venture*, DOW JONES NEWS, Aug. 14, 2003.

311. *See, e.g.*, *id.*; *see also* Iritani, *supra* note 309. None of the foreign companies mentioned in the examples in this study had any intention of withdrawing from the Chinese market.

312. *See* Iritani, *supra* note 309 (noting that attorneys for U.S. investment firms operating in China endure extensive arbitration proceedings in China).

313. *See* UNCTAD, *supra* note 4 (discussing China as the most popular destination for capital).

314. *See Faintly Declining Investment*, ECONOMIST, Oct. 27, 2006. China attracted over US$60 billion in foreign direct investment in both 2005 and 2004. In the first quarter of 2006, FDI rose 6.4 percent to US$14 billion, more than any other developing country. The ECONOMIST Intelligence Unit forecasts continuing growth in foreign direct investment to the end of the decade after slight declinesin 2005 and 2006, albeit at a diminishing rate. *Id.*

315. *See generally* Jan Hoogmarten, *Can China's Socialist Market Survive WTO Accession? Politics, Market Economy and Rule of Law*, 7 SPG L. & BUS. REV. AM. 37 (2001) ("Establishing the Rule of Law is another hurdle to be taken by a transition economy like China to support the underlying principles of the WTO."). On the rule of law in China more generally, see Clarke, *supra* note 30; Lin, *supra* note 141; Lubman, *supra* note 233; Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471 (2002).

capitalism," a *guanxi*-based rule of relationships,[316] clientism and corporatism.[317] Peerenboom's empirical study, however, found that outside of insolvency, non-enforcement was due to local protectionism, weak courts, corruption, and shortcomings in the regulatory framework.[318] These are obstacles to enforcement that the proposed relation-based alternative to the rule of law would merely exacerbate. The most effective remedy is a greater emphasis on the rule of law including, but not limited to, institutional changes to strengthen the legal system.[319]

Enforcement of arbitral awards is an issue that the legal system of any growing economy relying on private investment must confront, sooner or later, for sustained success.[320] It is, however, an issue that is only confronted by parties when commercial agreements go sour.[321] During the recent years of China's booming economy, this has not happened on a large scale. The real test of the system will come if, and when, foreign investments start to unwind.[322] Inevitably, at least some foreign parties will have been caught up in the rush to get a foothold in China: "[I]n China you have to be three times as careful."[323] Few companies are likely to have completed the due diligence necessary to help ensure obligations and expectations will be met.[324]

As a result, unless China can institute reforms that will help meet international standards, cases such as these will become far more commonplace. Unrealistic expectations, however, could undermine the policy of Western commercial and State actors towards China.[325] What is a reasonable level of enforcement to

316. *See* John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L L. 329, 374 (2006) ("Often viewed by outsiders, including American business investors, as a corrupted system of cronyism and bribery, *guanxi* suggests relationships that include mutual obligation, reciprocity, goodwill, and personal affection.").

317. *See* Peerenboom, *supra* note 159, at 313.

318. *Id.* at 314.

319. *Id.*

320. *Id.* at 284 (noting importance of effective arbitration award enforcement).

321. *See* Arbitration Law, *supra* note 9, art. 62. To end up in the courts, the parties will have failed at all mediation attempts, and the respondent will either refuse or be unable to satisfy the award.

322. *See generally* Peerenboom, *supra* note 159 (stating that insolvency is the most frequent obstacle to enforcement).

323. *Id.* (general counsel of U.S. fast-food franchise on due diligence requirements in China).

324. *See* Loomis, *supra* note 206.

325. Stanley Lubman, *There's No Rushing China's Slow March to a Rule of Law*, L.A. TIMES, Oct. 19, 1997.

expect, and how can it be determined? Resorting to quantitative measurements, although useful, is a somewhat academic exercise, especially considering the acute cultural preference for settlement earlier in the process.[326] It is crucial that China be seen as taking steps to improve its reputation for enforcing awards to bring its practice in line with international norms.

The Constitution of the P.R.C. itself acknowledges, "the future of China is closely linked with that of the whole world."[327] Its commercial interests are now closely aligned with those of the international business community.[328] In turn, arbitration's role in international commerce is firmly established, yet its legitimacy clearly relies on the enforceability of the awards it yields.[329] It is important for the stability and sustainability of China's economic and social expansion that it be able to provide a reliable forum, not only for resolving China-related disputes, but also to ensure that resulting awards are worth the paper they are printed on.[330] Increased international commercial activity may also encourage considerations of reciprocity within the Chinese legal system as China itself turns to overseas courts to resolve its disputes.[331]

In addition to the legal reforms outlined above, actions of high-ranking officials indicate that China seems to be on a charm offensive. The public image desired by the Chinese courts is one of competence in handling cases involving foreign elements fairly and justly.[332] Knowing the eyes of the world are watching, the SPC has repeatedly asked all courts to exercise jurisdiction over cases involving foreign elements in strict accor-

326. *See* Clarke, *supra* note 30, at 33. As Clarke discusses, "we do not know how much execution would constitute a good rate. The social marginal cost of one hundred percentenforcement is probably not worth it." *Id.*

327. Xian Fa [Contitution], pmbl. (1982) (P.R.C.) *available at* http://english.people.com.cn/constitution/constitution.html (last updated Mar. 22, 2004).

328. *See* UNCTAD, *supra* note 4. Given the unprecedented levels of foreign investment in China and the importance of WTO membership and foreign direct investment.

329. *See* Price Waterhouse Coopers, *supra* note 305, at 33. A recent global empirical study on corporate attitudes and arbitration practices found seventy-three percent of corporations preferred arbitration to litigation to resolve cross border disputes. Enforceability of awards was the second most important reason (behind procedural flexibility) for preferring international arbitration to transnational litigation.

330. *See supra* note 134 and accompanying text.

331. *See* Feinerman, *supra* note 180, at 195 (consideration of reciprocity increasingly affecting Chinese courts).

332. *See, e.g.*, An Chen, *supra* note 18; Anderlini, *supra* note 232.

dance with existing law, treaty, and private agreement.[333] In October 2006, the Chairman of China Council for the Promotion of International Trade ("CCPIT"), claimed, "China's arbitration results have gained high credit globally," pointing to more than 10,000 cases submitted to arbitration in China over the past five decades.[334]

Public relations, however, work both ways. The most effective tool for enforcement, despite the availability of court orders and enforcement police, was found to be the naming of the offending respondent in the local newspaper.[335] The resulting loss of "*mianzi*," or face, is a source of great sensitivity in Chinese psychology.[336] This concept can be easily extrapolated from the individual to the international dimension. It could be that the negative press generated by such high-profile multi-national disputes consciously or otherwise induces specific outcomes within the Chinese legal system.[337] Even more broadly, the loss of *mianzi* caused by these infamous cases of poor enforcement could be playing a key role, alongside the economic incentive, in inducing China to reform and implement the necessary institutional changes.[338]

There is a lot at stake. As a WTO member, China is under an obligation, inter alia, to provide for uniform enforcement of law and a transparent adjudication process.[339] Should China fail to live up to these promises, it could rapidly lose credibility with

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333. *See* Notice of the Sup. People's Ct. on Issuing the Basic Code of Professional Ethics for Judges of the P.R.C. (promulgated by the SPC on Oct. 18, 2001), *translated in* ISINOLAW (last visited Feb. 18, 2006) (P.R.C.); *see also* Zhang, *supra* note 171, at 62-63 (citing Li Guoguang, Vice-President of the Supreme People's Court, *Several Policy Issues Concerning the Current Trials in Civil Cases* (Speech at the National Conference of Civil Trials, Oct. 28, 2000)).

334. *China's Arbitrations on Trade Disputes*, XINHUA NEWS AGENCY, Oct. 19, 2006, *available at* http://www.chinadaily.com.cn/bizchina/2006-10/19/content_711818.htm.

335. *See* Peerenboom, *supra* note 159, at 295.

336. Echo Shan, *"Mianzi" of Chinese Weighs a Lot, Comes at a Price*, CHINA DAILY (ONLINE), Aug. 8, 2005, http://www.chinadaily.com.cn/english/doc/2005-08/08/content_467216.htm (last viewed Feb. 10, 2007). In a survey of 1150 Chinese youths, ninety-three percent said they pay a lot of attention to their *mianzi* (people's decency, personality, and dignity). Public gaffes were the most humiliating, followed by the perception of failing to fulfill one's promise.

337. *Id.* This could be a result of internal political pressure out of concern for international reputation, or the result of an individual's *mianzi*.

338. *Id.* Conversely, it could also have been behind its sustained reluctance to admit there is a problem.

339. *See* Hoogmarten, *supra* note 315.

its trading partners and be precluded from international mechanisms for settling disputes.[340]

CONCLUSION

While the negative hype surrounding the recognition and enforcement of arbitration awards in China is not unfounded, it is also not proportionate. That is not to say that the international investors should adjust their expectations downwards, nor acquiesce to the status quo. This study merely aims to put China's bad reputation for enforcing awards in the context of a cultural and legal clash between an infant legal system that is slowly reforming and Western-style expectations of justice.

The central government is clearly conscious of the problem at all levels, and the SPC has provided some increasingly useful, if not comprehensive, interpretations. Overall, China is perceived to have made significant and encouraging progress in recent years.[341] As the volume and magnitude of arbitration awards increases in line with economic activity, it is increasingly important that China be perceived as a reliable jurisdiction for enforcing arbitration awards, both by foreign and Chinese businesses. To achieve this, there is no clear alternative to promoting the rule of law and bringing about institutional change.

Arbitration, however, is a Western import that brings with it foreign principles of adversarial adjudication, impartiality, transparency and finality. The necessary cultural adjustment will not take place overnight, and the process will not be forced by external pressure, especially from the West. To expect China to have made the transition in the time it took to sign on the dotted line at the WTO, and to judge it accordingly, merely frustrates those international parties who seek to gain from its new trading status. If arbitration really is the "Chinese legal netherworld," at the very least, it is finding its map.

340. *See* Lin, *supra* note 141, at 298-99 (quoting Professor Mi Jian, Deputy Chief Justice of the Qinghai Provincial High Court).

341. *See generally P.R.C. Arbitration Law; Clarification from the P.R.C. Supreme People's Court*, FRESHFIELDS BRUCKHAUS DERINGER, Sept. 2006, *available at* http://www.freshfields.com/publications/pdfs/2006/16296.pdf; *see also* Anderlini, *supra* note 232.