

Dancing with the Dragon: What U.S. Parties Should Know About Chinese Law When Drafting a Contractual Dispute Resolution Clause

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I. INTRODUCTION

As Thomas Friedman famously noted, the world is flat.¹ Globalization has redefined the parameters of business success to encompass a global view. The search for supply chains, partnerships, joint ventures, and other business ventures and investments requires U.S. companies to go ever farther afield. At the same time, the rise of the People's Republic of China (P.R.C. or China) has profoundly affected the global market and made doing business in China a benchmark of retaining a competitive edge in the marketplace. Yet as the number of transactions and contracts between U.S. and Chinese concerns increases, so too does the number of potential disputes.

This paper is intended as a guide for U.S. parties doing business with Chinese parties who wish to inoculate themselves to the greatest extent possible against foreseeable difficulties arising from disputes. One such protective measure is the inclusion of a dispute resolution clause in the contract between the parties. Dispute resolution clauses, for the purposes of this paper, refer to clauses in the contract between the parties that specify the location and means of dispute resolution. That location may be a forum in China or outside of China, and the means may be either litigation or arbitration.

U.S. parties must draft their Dispute Resolution Clauses with an eye towards two main factors: legal validity of the clause under Chinese law, and the practicality of enforcing the clause and/or any judgments or awards

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¹ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2006).

that may ensue. This paper will discuss the options available to U.S. parties with regard to both concerns, as well as looking to forecast likely future trends.

II. VALIDITY OF THE CLAUSE UNDER CHINESE LAW

A. General Overview of Chinese Legal System

China operates under a civil law system, with legislative power flowing downwards from the highest organ of state power, the National People's Congress.² According to the Chinese Constitution, the National People's Congress and its Standing Committee exercise the ultimate legislative power of the state.³ As such, the National People's Congress is empowered to amend the Constitution and supervise its enforcement, as well as to enact, adopt, and amend all fundamental laws in China.⁴

Such laws include the Civil Procedure, Arbitration, and Contract laws which govern dispute resolution.⁵ Unlike the common law system, China's civil system relies on statutory laws and interpretations which are "enacted and promulgated by the State" rather than on unwritten laws such as case

² XIAN FA [CONSTITUTION] art. 57 (1982, amended Mar. 14, 2004) (P.R.C.) [hereinafter XIAN FA].

³ *Id.* at art. 59.

⁴ *Id.* at art. 62.

⁵ Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999) 1999 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.), *translated at* State Administration for Industry & Commerce (SAIC) People's Republic of China, http://www.saic.gov.cn/english/Laws%20and%20Regulations/t20060227_14634.htm [hereinafter Contract Law]; Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sep. 1, 1995) 1995 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.), *translated at* Ministry of Commerce of the People's Republic of China, <http://english.mofcom.gov.cn/aarticle/policyrelease/internationalpolicy/200705/20070504715852.html> [hereinafter Arbitration Law]; Civil Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991) 1991 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.), *translated at* China Lawyer—Civil Procedure Law of the People's Republic of China <http://www.chnlawyer.net/ShowArticle.shtml?ID=2007112421473783632.htm> [hereinafter Civil Procedure Law].

law.⁶ Unwritten law must be confirmed by the State to carry the force of law; indeed, the Constitution makes interpretation of the law the exclusive domain of the Standing Committee of the National People's Congress.⁷ However, in 1981, the Standing Committee adopted a resolution delegating that power to the State Council, the Supreme People's Procuratorate, and the Supreme People's Court.⁸ Since then, the Supreme People's Court alone has issued "thousands of pieces of judicial interpretation to guide the lower courts, since they must handle the cases and apply the law."⁹ These interpretations are mandatory and binding upon the lower courts and carry the full weight of the law.¹⁰

B. Chinese Laws Specifically Governing Dispute Resolution

1. When Parties to a Foreign-Related Dispute May Select Litigation in Contractual Dispute Resolution Clauses

Under Chinese law, dispute resolution and the drafting of contractual dispute resolution clauses are variously governed by the Civil Procedure Law, the Contract Law, and the Arbitration Law.¹¹ Article 244 of the Civil Procedure Law permits parties to a foreign-related contract to draft a contractual dispute resolution clause selecting litigation as the means of resolution and a Chinese court as the forum.¹²

It would be unwise for parties to select a non-Chinese court as their contractually agreed-upon forum. Neither the Civil Procedure Law nor any

⁶ ZHU YIKUN, *CONCISE CHINESE LAW* 9 (2003). Zhu writes:

According to the creation methods and format of expression, the law falls into written and unwritten law. The written law is also known as statutory law, enacted and promulgated by the State. While unwritten law is not reduced into writing, it is only confirmed by the State. Normally it refers to customary laws. In common law countries, it refers to precedents, i.e. the judge-made law. Chinese law is primarily written law.

Id.

⁷ XIAN FA, *supra* note 2, at art. 67.

⁸ Resolution of the Standing Comm. Nat'l People's Cong. on Strengthening the Work of Legal Interpretation, (adopted June 10, 1981) *STANDING COMM. NAT'L PEOPLE'S CONG. GAZ* (P.R.C.) [hereinafter 1981 Resolution].

⁹ ZHU, *supra* note 6, at 26.

¹⁰ 1981 Resolution, *supra* note 8.

¹¹ Contract Law, *supra* note 5; Arbitration Law, *supra* note 5; Civil Procedure Law, *supra* note 5.

¹² Civil Procedure Law, *supra* note 5, at art. 244 ("Parties to a dispute over a contract involving foreign interests or over property rights and interests involving foreign interests may, through written agreement, choose the people's court in the place which has actual connections with the dispute as the jurisdictional court.").

subsequent Opinions or Interpretations by the Supreme People's Court have addressed the legitimacy of clauses in which parties to a foreign-related contract select litigation as the means of resolution but select a non-Chinese court as the forum. In the absence of such a provision, such clauses are unlikely to be held valid by the Chinese courts.¹³

Moreover, U.S. court judgments are not enforceable due to lack of reciprocity or international treaty. Article 306 of the Opinions on the Implementation of Civil Procedure Law issued by the Supreme People's Court in 1992 clarifies the stance of the Chinese government by noting that foreign court judgments shall not be recognized in the absence of an international treaty.¹⁴ Additionally, a Chinese court will not enforce a foreign court judgment where a Chinese court has jurisdiction and has accepted the case.¹⁵

2. When Parties to a Foreign-Related Dispute May Select Arbitration in Contractual Dispute Resolution Clauses

Article 128 of the Contract Law permits parties to a foreign-related contract to draft a contractual dispute resolution clause selecting arbitration as the means of resolution and a seat of arbitration either in China or abroad.¹⁶ Such clauses are considered arbitration agreements under the Arbitration Law.¹⁷ These arbitration agreements must comply with the requirements of the Arbitration Law in order to be considered valid; the invalidity of the arbitration agreement will automatically relegate the dispute to the jurisdiction of the Chinese court system.¹⁸

¹³ See *supra* text accompanying note 7.

¹⁴ Opinions of the Sup. People's Ct. on the Implementation of Civil Procedure Law, art. 306 (1992) (P.R.C.) [hereinafter Opinions on Implementation]. The Opinion states:

Where the people's court of the People's Republic of China and the foreign court both have jurisdiction in the case, if one party litigates its case in the foreign court, but the opposing party submits the case to a court of the P.R.C. for consideration, the people's court of the P.R.C. may accept the case. After that decision is rendered, the application to the foreign court or the litigant's request to the people's court to acknowledge and execute the foreign court decision or rules shall not be approved. However, an exception shall be made where both sides have signed or participated in an international treaty.

Id.

¹⁵ *Id.*

¹⁶ Contract Law, *supra* note 5, at art. 128 ("Parties to a foreign-related contract may apply to a Chinese arbitration institution or another arbitration institution for arbitration.")

¹⁷ Arbitration Law, *supra* note 5, at art. 16 ("An arbitration agreement shall include arbitration clauses provided in the contract and any other written form of agreement concluded before or after the disputes providing for submission to arbitration.")

¹⁸ Contract Law, *supra* note 5, at art. 128.

Under Article 16 of the Arbitration Law, an arbitration agreement must specify: (1) an expression of the intent to apply for arbitration; (2) the matters for arbitration; and (3) a designated arbitration commission.¹⁹ Should the original arbitration agreement fail to supply any of these particulars to the satisfaction of the Law, Article 18 of the Arbitration Law permits the parties to draft a supplementary agreement to compensate for any defects and thus maintain the validity of the original agreement.²⁰

The Arbitration Law specifically indicates that only parties to a foreign-related contract are capable of entering into an arbitration agreement; this necessarily implies that parties to a domestic contract may not enter into an arbitration agreement. Indeed, the Supreme People's Court clarified and reinforced this understanding by issuing a Draft Provision in which it stated that an arbitration agreement between parties to a domestic contract which provided for arbitration abroad would be unenforceable.²¹

3. General Jurisdictional Principles

Articles 22 to 35 under Section 2 of the Civil Procedure Law cover territorial jurisdiction and outline the circumstances under which a Chinese court may assert jurisdiction over a dispute.²² Articles 243 and 246 of the Civil Procedure Law further delineate the ability of the court to assert jurisdiction even in matters involving foreign parties.²³ Article 246

Where the parties did not conclude an arbitration agreement, or the arbitration agreement is invalid, either party may bring a suit to the People's Court. The parties shall perform any judgment, arbitral award or mediation agreement which has taken legal effect; if a party refuses to perform, the other party may apply to the People's Court for enforcement.

Id.

¹⁹ Arbitration Law, *supra* note 5, at art. 16.

²⁰ *Id.* at art. 18.

²¹ Draft Provision of the Sup. People's Ct. Regarding the Handling by the People's Ct. of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations (Dec. 31, 2004).

²² Civil Procedure Law, *supra* note 5, at art. 22–35 (dealing with “Territorial Jurisdiction”).

²³ *Id.* at art. 243. The Civil Procedure Law states:

A lawsuit brought against a defendant who has no domicile in the People's Republic of China concerning a contract dispute or other disputes over property rights and interests, if the contract is signed or performed within the territory of the People's Republic of China, or the object of the action is within the territory of the People's Republic of China, or the defendant has distrainable property within the territory of the People's Republic of China, or the defendant has its representative agency, branch or business agent within the territory of the People's Republic of

explicitly gives Chinese courts jurisdiction over “disputes arising from the performance of contracts for Chinese-foreign equity joint ventures, or Chinese-foreign contractual joint ventures, or Chinese-foreign cooperative exploration and development of natural resources in the People’s Republic of China.”²⁴

This distinction has been referred to as a “trap for the unwary,” as foreign nationals conducting business in China through such foreign investment enterprises may be surprised to learn that they are legally considered Chinese parties subject to all the regulations that classification entails.²⁵ Under Chinese law, joint ventures and even wholly foreign-owned enterprises on Chinese soil are considered “Chinese entities established under the Chinese law.”²⁶ Parties to a domestic dispute will find that any contractual dispute resolution clauses they have drafted will automatically be invalidated by the courts, and their dispute referred to the Chinese courts where jurisdiction is appropriate under Articles 22 and 246 of the Civil Procedure Law.²⁷

Parties to a contract falling under the purview of Article 246 will therefore be presumptively considered domestic cases subject to domestic jurisdiction, and will not be able to use a contractual dispute resolution clause unless they establish sufficient foreign-related elements.²⁸ If such elements are established, then a dispute between entities that would be considered domestic by default will now qualify as “foreign-related” under the law of the Chinese Supreme People’s Court.²⁹

China, may be under the jurisdiction of the people’s court in the place where the contract is signed or performed, or where the object of the action is located, or where the defendant’s distrainable property is located, or where the infringing act takes place, or where the representative agency, branch or business agent is located.

Id. See *id.* at art. 246, (asserting mandatory jurisdiction over disputes involving certain Chinese-foreign joint ventures).

²⁴ Civil Procedure Law, *supra* note 5, at art. 246.

²⁵ Joseph T. McLaughlin, Kathleen M. Scanlon & Catherine X. Pan, *Planning for Commercial Dispute Resolution in Mainland China*, 16 AM. REV. INT’L ARB. 133, 143 (2005).

²⁶ Clarisse von Wunschheim & Fan Kun, *Arbitrating in China: The Rules of the Game: Practical Recommendations for In-House Counsel Concerning Arbitration in China* 10 (Sept. 25, 2007) (unpublished manuscript, on file with author).

²⁷ Civil Procedure Law, *supra* note 5, at art. 22, 246.

²⁸ Opinions of the Sup. People’s Ct. on the Application of Civil Procedural Law (Jan. 26, 1988) (P.R.C.) [hereinafter *Opinions on Application*].

²⁹ Int’l Inst. for Conflict Prevention and Resolution, *How Business Conflict Resolution Is Being Practiced in China and Europe*, 23 ALTERNATIVES TO HIGH COST LITIG. 148, 151 (2005) [hereinafter *Conflict Prevention*].

C. Domestic vs. Foreign-Related

1. Defining “Foreign-Related”

The right of parties under Chinese law to include a contractual dispute resolution clause hinges on whether the Chinese courts consider the underlying contract to be “domestic” or “foreign-related.” Only parties to a foreign-related contract are permitted to include a contractual dispute resolution clause, whether for litigation or arbitration.³⁰

How does one determine whether a contract or dispute is foreign-related? In order to be considered foreign-related, the contract or dispute must contain a sufficient foreign element, including situations where:

[E]ither one or both of the parties is a person with a foreign nationality or a stateless person, or a company or organization domiciled in a foreign country, the legal facts that establish, change, or terminate the civil legal relationship between the parties take place in a foreign country, or the subject matter of the dispute is situated in a foreign country.³¹

Indeed in practice, parties have found that courts will consider a dispute to be foreign-related where one party is a foreign national, the cause of the dispute occurred abroad, or there exist other strong ties abroad which would preclude the court from applying a “domestic” label.³²

2. Distinction in Treatment of Foreign-Related vs. Domestic Cases

Whether the contract or dispute is characterized as domestic or foreign-related has a tremendous impact on the actual implementation of dispute resolution. Domestic and foreign-related arbitrations are subject to different controls and regulations under Chinese law. For example, parties to a foreign-related contract may, in the absence of a contrary Chinese law on point, freely select the law they wish to govern resolution of their dispute.³³ Domestic arbitrations, by contrast, are always governed by Chinese law.³⁴

The distinction between domestic and foreign-related disputes can result in dramatically different scenarios for the parties to an arbitration

³⁰ Contract Law, *supra* note 5, at art. 128 (stating that only “[p]arties to a foreign-related contract” may include an arbitration agreement); Civil Procedure Law, *supra* note 5, at art. 244 (only parties to a dispute over a contract or property rights and interests “involving foreign interests” may contractually agree to litigation).

³¹ Opinions on Application, *supra* note 28.

³² McLaughlin et al., *supra* note 25, at 143.

³³ Contract Law, *supra* note 5, at art 128.

³⁴ von Wunschheim & Fan, *supra* note 26, at 10.

agreement. Under China's arbitration version of "one country, two systems," arbitration commissions deal with domestic arbitrations under one set of rules and procedures and with foreign-related arbitrations under another.³⁵ Courts in China apply a stricter standard of judicial review to domestic disputes and may refuse to enforce an award based on several factors, including insufficient evidence, "errors in the application of the law," a violation of the "public interest," and others.³⁶

D. Means of Resolution

1. The Arbitration Option

Parties to a foreign-related contract often prefer arbitration over litigation as the contractually specified means of dispute resolution.³⁷ Arbitration offers parties significant advantages, including confidentiality, flexibility, and a neutral hearing, among others.³⁸ Arbitration offers a significant advantage as well with regards to enforcement of awards. Both China and the United States are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), pursuant to which arbitral awards may be enforced according to the mechanisms of the Convention.³⁹ The terms of the New York Convention obligate Chinese courts to enforce arbitral awards resulting from an arbitration proceeding in the United States or any other signatory country to the Convention.⁴⁰ The Supreme People's Court has decreed that lower courts may not refuse to enforce foreign arbitration awards without first consulting the Supreme People's Court, further emphasizing the P.R.C.'s intention to comply with the "pro-enforcement bias of the New York Convention."⁴¹ Meanwhile, the laws of the P.R.C.—specifically, Articles 62 through 64 of the Arbitration Law—govern enforcement of foreign-related and domestic awards issued by tribunals seated in China.⁴²

In contrast, foreign court judgments are legally unenforceable in China in the absence of reciprocity or an international treaty, thus rendering futile

³⁵ Arbitration Law, *supra* note 5, at Ch. VII: Special Provisions on Foreign-Related Arbitration.

³⁶ Civil Procedure Law, *supra* note 5, at art. 217.

³⁷ See Roger Best, *The Resolution of China Disputes*, Int. A.L.R. 2000, 3(1), *1.

³⁸ *Id.* at *1.

³⁹ McLaughlin et al., *supra* note 25, at 143.

⁴⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, June 10, 1958, 1959 U.N.T.S. 3 [hereinafter New York Convention].

⁴¹ Best, *supra* note 37, at *3.

⁴² Arbitration Law, *supra* note 5, at Ch. VI: Enforcement.

any efforts at litigation in the United States.⁴³ Additionally, there remain other “significant obstacles to the enforcement of Chinese court judgments outside China and enforcement of foreign court judgments within China,” for reasons that will be discussed below.⁴⁴

There are many compelling reasons to select arbitration as the means of choice. These reasons are linked as much to the strengths of arbitration as they are to the weaknesses of litigation in China. While conditions have begun to improve with the advent of stricter controls and higher judicial standards,⁴⁵ the Chinese court system remains notorious for its susceptibility to extra-legal influences such as local protectionism, its lack of adequate legal qualifications, and its lack of transparency.⁴⁶

While China has made great strides towards improving the competence and qualifications of judges,⁴⁷ the arbitration system offers a significant advantage by allowing parties to select an arbitrator with specific training and expertise regarding the issues in the dispute at hand.⁴⁸

Allegations of judicial corruption undermine confidence in the Chinese court system; often the local judiciary may depend entirely upon local government officials for its appointments, salary, and revenue, while local government officials may have interests linked to local businesses or other concerns.⁴⁹ This lack of independence has often led to corruption, which, coupled with incompetence and inefficiency, has caused parties to rely more heavily upon arbitration as an alternative means of dispute

⁴³ Opinions on Implementation, *supra* note 14, at art. 306.

⁴⁴ McLaughlin et al., *supra* note 25, at 140.

⁴⁵ Judges Law, art. 12 (promulgated by the Nat’l People’s Cong., Feb. 28, 1995, amended June 30, 2001) (P.R.C.) (requiring all judges both to possess a bachelor’s degree in law or other field, if requisite understanding of the law is shown, and to pass a unified judicial examination. Prior to the passage of the Judges Law in 1995, no formal requirements existed for qualification as a judge).

⁴⁶ von Wunschheim & Fan, *supra* note 26, at 5 (citing Judge Jianlin Song, *China’s Judiciary: Current Issues*, 59 ME. L. REV. 141 (2007)).

⁴⁷ Notice of the Sup. People’s Ct. on Article 19 of the Civil Procedure Law (Mar. 1, 2002) (P.R.C.) (restricting jurisdiction over foreign-related commercial cases to certain Intermediate People’s Courts with more senior judges presiding).

⁴⁸ Arbitration Law, *supra* note 5, at art. 31. The Law states:

If the parties agree to form an arbitration tribunal comprising three arbitrators, each party shall select or authorize the chairmen of the arbitration commission to appoint one arbitrator. The third arbitrator shall be selected jointly by the parties or be nominated by the chairman of the arbitration commission in accordance with a joint mandate given by the parties.

Id.

⁴⁹ Rebecca Fett, *Forum Selection for Resolution of Foreign Investment Disputes in China*, 62 DISP. RESOL. J. 73, 76 (2007).

resolution.⁵⁰ Indeed, the China International Economic and Trade Arbitration Commission (CIETAC), the primary arbitration center in China, has “long marketed itself by arguing that the courts are corrupt and incompetent.”⁵¹

Arbitration proceedings also offer the advantage of allowing parties to select their choice of language for both written submissions and oral proceedings.⁵² Under CIETAC rules, while Mandarin Chinese remains the default language, parties may select the language of their choice in their arbitration agreement.⁵³ This offers numerous advantages, or at least neutralizes a potentially costly handicap by allowing the U.S. party to advocate more effectively using its native language. In addition, the benefit of selecting English as the language of choice can be measured in the time and money saved by dispensing with the need to translate all documents into Chinese. This stands in stark contrast to litigation in Chinese courts, where all documents and proceedings must utilize Mandarin Chinese.⁵⁴

Arbitration proceedings also permit greater latitude in the choice of counsel compared to court proceedings in China. Under CIETAC rules, parties may select either Chinese or foreign nationals to serve as advocates and representatives.⁵⁵ In contrast, foreign lawyers are barred from appearing in a Chinese court in any legal capacity, and foreign parties are required to retain the services of a Chinese lawyer.⁵⁶

Confidentiality concerns also make arbitration proceedings preferable to litigation. Parties generally submit evidence to the tribunal in a closed

⁵⁰ RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 296 (2002).

⁵¹ *Id.*

⁵² McLaughlin et al., *supra* note 25, at 148.

⁵³ CIETAC Arbitration Rules, art. 67(1) (revised and adopted by the China Council for the Promotion of International Trade / China Chamber of International Commerce on Jan. 11, 2005, effective May 1, 2005) (“Where the parties have agreed on the arbitration language, their agreement shall prevail. Absent such agreement, the Chinese language shall be the official language to be used in the arbitration proceedings.”).

⁵⁴ Civil Procedure Law, *supra* note 5, at art. 240 (“[T]he people’s court shall use the spoken and written languages commonly used in the People’s Republic of China. Translation may be provided at the request of the parties concerned, and the expenses shall be borne by them.”).

⁵⁵ CIETAC Arbitration Rules, *supra* note 53, at art. 16(2) (“Either Chinese or foreign citizens may be authorized by a party to act as its representative(s).”).

⁵⁶ Civil Procedure Law, *supra* note 5, at art. 241 (“When foreign nationals, stateless persons[,] or foreign enter prises or organizations need to appoint lawyers as agents ad litem to institute or respond to prosecutions in the people’s court, they must appoint lawyers of the People’s Republic of China.”).

hearing. Arbitrators are then bound by a duty of confidentiality.⁵⁷ No corresponding duty of confidentiality exists in public court proceedings in China.⁵⁸

Of course, parties may opt for arbitration in a non-Chinese forum. However, if the resulting award is to be enforced in China, parties should note that awards rendered by a “foreign” arbitration panel are just as likely to be enforced as awards rendered by one in China.⁵⁹ Also, the cost of arbitration abroad is significantly higher.⁶⁰

None of this is intended simply to endorse arbitration as the panacea for the pains of a party drafting a contractual dispute resolution clause. For example, while arbitration is technically superior to litigation in that it allows parties to select arbitrators with relevant expertise, parties may find it difficult to obtain suitable arbitrators who possess the relevant competence, knowledge, and expertise regarding their particular case.⁶¹ Foreign arbitrators often lack Chinese language skills and practical experience handling Chinese-related issues.⁶² For their part, Chinese arbitrators may also lack practical experience with foreign investment, and “may bring baggage of their past” relating to their former occupations as government judges and officials.⁶³

⁵⁷ Arbitration Law, *supra* note 5, at art. 40 (“[A]rbitration shall not be conducted in public. If the parties agree to a public hearing, the arbitration may proceed in public, except those concerning [S]tate secrets.”); CIETAC Arbitration Rules, *supra* note 53, art. 33. The Arbitration Rules state:

1. Hearings shall be held in camera. Where both parties request an open hearing, the arbitral tribunal shall make a decision. 2. For cases heard in camera, the parties, their representatives, witnesses, interpreters, arbitrators, experts consulted by the arbitral tribunal and appraisers appointed by the arbitral tribunal and the relevant staff-members of the Secretariat of the CIETAC shall not disclose to any outsiders any substantive or procedural matters of the case.

Id.

⁵⁸ McLaughlin et al., *supra* note 25, at 140.

⁵⁹ *Id.* at 151–52.

One relatively recent survey . . . reported that the enforcement rate for foreign awards was 52%, slightly higher than the 47% success rate for CIETAC awards. Furthermore, investors can expect to recover 75–50% of the award amount in 34% of the cases and half of the award at least 40% of the time.

Id.

⁶⁰ Fett, *supra* note 49, at 79.

⁶¹ *Conflict Prevention*, *supra* note 29, at 150.

⁶² *Id.*

⁶³ *Id.*

2. Arbitration in China vs. Arbitration Abroad

Parties to a foreign-related contract who opt for arbitration as the preferred means of dispute resolution must decide whether they prefer to choose a seat of arbitration in China or abroad. This choice is authorized by Article 128 of the Contract Law, which permits parties to a foreign-related contract to select a seat of arbitration either in China or abroad.⁶⁴ CIETAC rules further clarify this option by explicitly stating that “where the parties have agreed on the place of arbitration in writing, the parties’ agreement shall prevail.”⁶⁵

When deciding between a seat of arbitration in China or abroad, parties should be aware of certain differences that exist between arbitration practice in China and arbitration abroad. From a legal standpoint, *ad hoc* arbitration⁶⁶ is implicitly prohibited as the Arbitration Law requires identification of a “designated arbitration commission,” thus precluding the recognition of an *ad hoc* proceeding.⁶⁷ It remains the case that where no institution is named or can be discerned from a supplemental agreement, a Chinese court will find the arbitration clause null and void.⁶⁸

Chinese law also places limits upon the power and autonomy of the arbitral tribunal. For example, the arbitral tribunal lacks the unilateral power to take direct measures to preserve property. Article 28 of the Arbitration Law empowers the tribunal to do no more than refer a party’s application for preservation of property to the appropriate basic People’s Court.⁶⁹ Similarly, the arbitral tribunal lacks the unilateral power to preserve evidence even when confronted with the possibility that such

⁶⁴ Contract Law, *supra* note 5, at art. 128, (“Parties to a foreign-related contract may apply to a Chinese arbitration institution or another arbitration institution for arbitration.”).

⁶⁵ CIETAC Arbitration Rules, *supra* note 53, art. 31(1).

⁶⁶ CATHERINE TAY SWEE KIAN, RESOLVING DISPUTES IN ARBITRATION: WHAT YOU NEED TO KNOW 135 (1998) (“*Ad hoc* arbitration is conducted without reference to any arbitration institution charged with setting up the arbitral tribunal and administering the proceedings and without referring to any particular set of institutional rules.”).

⁶⁷ Arbitration Law, *supra* note 5, at art. 16(3).

⁶⁸ *Id.* at art. 18.

⁶⁹ *Id.* at art. 28. The Law states:

A party may apply for property preservation if, as the result of an act of the other party or for some other reasons, it appears that an award may be impossible or difficult to enforce. If one of the parties applies for property preservation, the arbitration commission shall submit to a people's court the application of the party in accordance with the relevant provisions of the Civil Procedure Law.

Id.

evidence might be lost or destroyed.⁷⁰ In such cases, the tribunal can do no more than forward the application to the basic People's Court and await the Court's ruling on the matter.⁷¹

Nor does China recognize the principle of *Kompetenz-Kompetenz*,⁷² which is the ability of an arbitral tribunal itself to determine whether it has jurisdiction over a dispute.⁷³ Under the Arbitration Law, the decision of the People's Court regarding the validity of an arbitration agreement supersedes the decision of the arbitration institution.⁷⁴

Despite these limitations, arbitration in China may remain a desirable, or at least a viable option when drafting a dispute resolution clause. In 2001, the American Chamber of Commerce conducted a survey of U.S. companies in Beijing and concluded that those parties that had submitted to arbitration in China "rated arbitration administered by major Chinese arbitration centres favourably."⁷⁵ Perhaps the most well-known major Chinese arbitration center is the aforementioned CIETAC.⁷⁶ The primary arbitration institution in China, CIETAC handles both domestic and foreign-related cases, and has established a reputation for its fairness and efficiency in dispute resolution. Although CIETAC rules do not carry the force of law, they nevertheless play an important role in arbitration in

⁷⁰ *Id.* at art. 46. The Law states:

In the event that the evidence might be destroyed or if it would be difficult to obtain the evidence later on, the parties may apply for the evidence to be preserved. If the parties apply for such preservation, the arbitration commission shall submit the application to the basic-level people's court of the place where the evidence is located.

Id.

⁷¹ *Id.*

⁷² UNCITRAL Model Law on Int'l Commercial Arbitration, Annex I art. 16(1), U.N. Doc.A/40/17, (June 21, 1985). The Model Law states:

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Id.

⁷³ INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 29 (Gabrielle Kaufmann-Kohler & Blaise Stucki eds., 2004).

⁷⁴ Arbitration Law, *supra* note 5, at art. 20.

⁷⁵ McLaughlin et al., *supra* note 25, at 140.

⁷⁶ China International Economic and Trade Arbitration Commission (CIETAC), <http://www.cietac.org.cn>.

China. For reasons of fairness, efficiency, and high standards, when opting for arbitration in China, U.S. parties will generally choose to participate in an arbitration administered by CIETAC, or another commission located in a major Chinese city.⁷⁷

3. *The Litigation Option*

In lieu of arbitration, parties to a foreign-related contract may select litigation in a Chinese court as their contractually preferred means of dispute resolution.⁷⁸ One might question the necessity of such a seemingly redundant clause, given that litigation in a Chinese court is the default option for dispute resolution under the Civil Procedure Law.⁷⁹ While this is true, a properly drafted clause allows the parties to select the Chinese court they feel is most appropriate, or with which they feel most comfortable. By specifying the preferred court, the parties can seek to negate certain deficiencies inherent in the local court system, deficiencies that might plague the court to which the parties would otherwise be assigned by default. For example, parties should draft a clause that confers jurisdiction on a court in a larger urban setting, for not only are the judges more likely to have higher qualifications, but also the court officials are less likely to be affected by local protectionism.⁸⁰

4. *Pitfalls of Litigation in China*

Although the government has taken measures to address these issues, inefficiency, corruption and local protectionism continue to plague China's court system.⁸¹ Foreign parties should be aware that local Chinese courts may overcharge, impose "unauthorized fees," and delay completion of cases for years.⁸² Judges in some courts demand outrageous bribes in order to speed a case through the system.⁸³ The lack of judicial independence

⁷⁷ McLaughlin et al., *supra* note 25, at 143.

⁷⁸ Civil Procedure Law, *supra* note 5, at art. 244.

⁷⁹ Civil Procedure Law, *supra* note 5, at Ch. II: Jurisdiction.

⁸⁰ McLaughlin et al., *supra* note 25, at 153.

⁸¹ Sup. People's Ct. Regulations on the Training of Judges (adopted Oct. 20, 2000) (intensifying judicial training to raise the level of competence) (P.R.C.). *See also* PEERENBOOM, *supra* note 50, at 296. Peerenboom states:

In response to protests by the public and NPC over judicial corruption, incompetence, and inefficiency, the SPC began an 'educational rectification campaign' in the spring of 1998 . . . [which] resulted in . . . the disciplining of nearly 5,000 judges and prosecutors, and the correction of 8,110 mishandled cases.

Id.

⁸² PEERENBOOM, *supra* note 50, at 281.

⁸³ *Id.* at 295 (citing instances of lawyers being asked to settle bills, provide new laptops,

may also be disadvantageous; the ruling Communist Party may exert influence “in the areas of ideology, policy and personnel matters” and thus sway a court to render a verdict in line with Party policy.⁸⁴ The appeals process may often be rendered moot by the practice of *qingshi*, in which a lower court seeks instruction in handling a case from a higher court.⁸⁵ In such an instance, the verdict of the lower court is unlikely to be overturned by the higher court, as the higher court was the original source of the verdict all along.⁸⁶ Local protectionism and interference can also prove inconducive to an unbiased court proceeding. For example, local governments that worry how an adverse judgment might affect local unemployment or other economic conditions may pressure a court to decide a case a certain way.⁸⁷ Overall, despite efforts by the Chinese government to combat such corruption, many problems still remain.⁸⁸

*5. Not an Option: Contractual Dispute Resolution Clause Selecting
Litigation in Non-Chinese Forum*

It should be noted that the Civil Procedure Law contains no article that authorizes parties to a dispute, domestic or foreign-related, to select a non-Chinese forum for litigation. Nor has the Supreme Court issued any Opinions or Interpretations to elucidate the matter. The very silence of the law on this subject may tempt parties to include a contractual dispute resolution clause agreeing to litigation in a non-Chinese court of law. Unfortunately, as stated earlier, in the absence of an explicit provision legitimizing such a selection, a Chinese court will likely find the clause invalid and simply look to the relevant sections of the Civil Procedure Law to assess its potential jurisdiction.⁸⁹

At first glance, this issue hardly seems relevant. Should the parties choose to litigate in a U.S. court, it certainly seems reasonable to infer that the dispute would remain outside the purview of the Chinese court system. However, should one of the parties decide to renege on the terms of the clause and instead seek relief in the Chinese courts, those courts would likely invalidate the clause on grounds that no authorizing provision of the Civil Procedure Law exists. In the absence of a valid dispute resolution clause, the other party would then find itself forced to litigate in a Chinese court against its original expectations.

and fund shopping expeditions for judges).

⁸⁴ *Id.* at 302.

⁸⁵ Mei-Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97 (2005).

⁸⁶ *Id.* at 122.

⁸⁷ PEERENBOOM, *supra* note 50, at 311.

⁸⁸ *Id.*

⁸⁹ *See supra* text accompanying note 7.

Furthermore, contracting for litigation in a U.S. court by means of a dispute resolution clause is futile if either party intends to pursue assets that are held in China. Chinese courts will simply not uphold the judgments of a foreign court in the absence of either a treaty or a relationship with that country providing for reciprocal enforcement of judgments.⁹⁰ Articles 266 and 267 of the Civil Procedure Law call for the existence of either reciprocity or an applicable international treaty before courts can even entertain the notion of enforcing a foreign court judgment.⁹¹ Unfortunately, no such reciprocity exists between China and the United States, nor is China party to any international treaty concerning the recognition and enforcement of U.S. court judgments.⁹² In short, “there is to date no evidence suggesting that a Chinese court would enforce the judgment of a U.S. court, and considerable evidence suggesting it would not.”⁹³

Even in instances where reciprocity or an international treaty does exist, a Chinese court may dismiss a foreign court judgment if it finds that the judgment violates basic principles of Chinese law, state security, or the public interest.⁹⁴ Additionally, a Chinese court will not enforce a foreign court judgment where a Chinese court has jurisdiction and has accepted the case.⁹⁵

In the final analysis, unless enforcement is to take place entirely outside of China, drafting a dispute resolution clause explicitly calling for litigation in a non-Chinese forum will ultimately prove to be a fruitless and frustrating exercise.

III. OBSTACLES AND PRACTICAL CONSTRAINTS ON DISPUTE RESOLUTION CLAUSES

A. When Parallel Proceedings Might Arise

Should parties to a foreign-related contract include a contractual dispute resolution clause calling for litigation in the United States, and one

⁹⁰ Michael J. Moser, *People's Republic of China*, in DISPUTE RESOLUTION IN ASIA 85, 94 (Michael Pryles ed., 3d ed. 2006) (describing the doctrine of “reciprocity,” which involves mutual recognition of the court judgments of the other country; China has entered into such agreements with France, Italy, Spain, Turkey and Greece, among others).

⁹¹ Civil Procedure Law, *supra* note 5, at arts. 266, 267.

⁹² Best, *supra* note 37, at *2 (“[T]he PRC does not have any treaty obligations to enforce the judgments of the courts of its major trading partners—the United States, Germany and the United Kingdom.”).

⁹³ Donald Clarke, *The Enforcement of United States Court Judgments in China: A Research Note 5* (George Wash. Univ. Law Sch. Pub. Law and Legal Theory Working Paper, Legal Studies Research Paper No. 236, 2004).

⁹⁴ Civil Procedure Law, *supra* note 5, at art. 268.

⁹⁵ See Opinions on Implementation, *supra* note 14, at art. 306.

party reneges, as discussed above, the matter is not necessarily entirely at an end. It is true that the clause would be invalidated in China, and the Chinese courts would refuse to enforce a U.S. court judgment. However, the U.S. party may still choose to proceed with litigation in the United States on the basis of the clause in order to get a judgment which would be enforceable in the United States and in other countries. Should the validity of the clause be upheld in the United States, the parties might find themselves embroiled in parallel proceedings halfway around the world from each other.

Similarly, if the arbitration agreement specifies arbitration in a non-Chinese forum, and one party reneges, parallel proceedings may result. The Chinese party may attempt to relocate the arbitration to China or invalidate the arbitration agreement entirely. The Chinese party may do this by presenting its case to a Chinese court, which has the ultimate power to rule on the validity of the arbitration agreement under the Arbitration Law.⁹⁶

However, the U.S. party may resist and attempt to uphold the validity of the clause in a non-Chinese court. Thus the possibility exists that a non-Chinese court may contradict a Chinese court and find the arbitration agreement valid under the standards of international arbitration, thus entitling a foreign arbitration institution such as the International Chamber of Commerce (ICC)⁹⁷ to hear the case. This can occur if the grounds for invalidation by the Chinese court are peculiar only to China, and do not invalidate the clause under the terms of the New York Convention. If the arbitration clause is thus rendered valid abroad but invalid in China, parallel proceedings may result where parties litigate in China while arbitrating abroad pursuant to the clause. Where parallel proceedings occur as a result of a breach of the dispute resolution clause, parties have a limited number of options under the law.

Where a clause calls for litigation abroad in a foreign-related dispute, a Chinese court will reject the clause and institute its own proceedings, as discussed earlier. China does not recognize the doctrine of *lis pendens* with

⁹⁶ Arbitration Law, *supra* note 5, at art. 20. The Law States:

If the parties object to the validity of the arbitration agreement, they may apply to the arbitration commission for a decision or to a people's court for a ruling. If one of the parties submits to the arbitration commission for a decision, but the other party applies to a people's court for a ruling, the people's court shall give the ruling.

Id.

⁹⁷ International Chamber of Commerce: International Court of Arbitration, <http://www.iccwbo.org/court/arbitration/>.

regard to international civil and commercial cases.⁹⁸ Thus, the Supreme People's Court has made it clear that litigation in the United States will not forestall parallel litigation in China.⁹⁹

Where a clause calls for arbitration abroad in a foreign-related dispute, a U.S. party may seek protection from Chinese litigation under the New York Convention, to which both nations are signatories.¹⁰⁰ The terms of the New York Convention obligate Chinese courts to recognize arbitration agreements entered into by the parties,¹⁰¹ and to recognize and enforce arbitral awards rendered by any signatory nation.¹⁰² Especially relevant to the issue of parallel proceedings is the obligation of the Chinese court in this instance to stay court proceedings under a contract containing an arbitration agreement or clause.¹⁰³

The U.S. party need not fear that appearing before the Chinese court to defend its case will automatically waive its objection to the jurisdiction of that court. Neither U.S. nor Chinese law presumptively considers appearance before a Chinese court to constitute such a waiver. According to the Civil Procedure Law of China, the party's accession to the jurisdiction of the court will only be presumed if the party proceeds with its defense without raising an objection to jurisdiction.¹⁰⁴ Similarly, the U.S. Court of Appeals for the Third Circuit has ruled that a party has not waived its objection to the jurisdiction of a Chinese institution simply by appearing before that institution, as long as the party consistently maintains its objection throughout the proceedings.¹⁰⁵ With this guideline in mind, a U.S. party may appear before CIETAC to argue a point or to prevent an arbitral award against its interests without fear of having inadvertently

⁹⁸ Li Shuangyuan & Lü Guoming, 6 *ASIAN Y.B. INT'L L.* 135, 151–52 (1998). *Lis pendens*, Latin for “suit pending,” is a notice that “put[s] the whole world on notice that the status of the . . . matter being litigated is unsettled and therefore one should proceed with caution in entering into agreements concerning said . . . matter.” *GILBERT'S POCKET SIZE LAW DICTIONARY* 190 (1997).

⁹⁹ See Opinions on Implementation, *supra* note 14, at art. 306.

¹⁰⁰ World Intellectual Property Organization, Parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, <http://www.wipo.int/amc/en/arbitration/ny-convention/parties.html> (updated Jan. 1, 2007).

¹⁰¹ New York Convention, *supra* note 40, at art. II.

¹⁰² *Id.* at art. III.

¹⁰³ *Id.* at art. II, § 3; Best, *supra* note 37, at *3.

¹⁰⁴ Civil Procedure Law, *supra* note 5, at art. 245 (“If the defendant in a civil lawsuit involving foreign interests raises no objection to the jurisdiction of a people's court, responds to the prosecution and replies to his defen[s]e, he shall be deemed to have admitted that this people's court has jurisdiction over the case.”).

¹⁰⁵ *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 290 (3d Cir. 2003) (“The Supreme Court affirmed our judgment . . . [that] [a] jurisdictional objection, once stated, remains preserved for judicial review absent a clear and unequivocal waiver . . .”).

conceded a potentially crucial point.¹⁰⁶

B. Anti-Suit Injunctions in the United States and China

Should a Chinese party breach a clause calling for arbitration or litigation abroad and instead seek relief in a Chinese court, the U.S. party may wish to take measures to protect its non-Chinese assets from any judgment handed down by the Chinese court.

To this end, the U.S. party can seek an anti-suit injunction from a U.S. court. This defensive measure is unlikely to halt litigation in China, for as previously explained, China does not recognize U.S. court judgments as no reciprocal relationship or international treaty exists.¹⁰⁷ However, while the U.S. party may be unable to forestall litigation in China, it may seek to have those proceedings, and any subsequent judgments resulting from those proceedings, invalidated under U.S. law due to breach of the clause. The purpose of seeking such an injunction is therefore not to effect any practical change in the status of the Chinese litigation, but rather to protect U.S. assets against any verdict of the Chinese court.

The U.S. party need not apply to a Chinese court for an anti-suit injunction. No provision in the law grants Chinese courts the power to issue such injunctions; indeed, the concept is unknown to Chinese law. The Chinese courts will likely interpret this statutory silence as a marker of their lack of competence to issue anti-suit injunctions.¹⁰⁸

U.S. courts issue anti-suit injunctions to prevent a party from proceeding with litigation in a non-U.S. jurisdiction under circumstances that are deemed to be unjust.¹⁰⁹ U.S. courts have shown a strong preference for issuing such injunctions to uphold the effectiveness of a dispute resolution clause.¹¹⁰ For example, the U.S. Court of Appeals for the Ninth Circuit has explicitly affirmed the paramount importance of enforcing valid forum selection clauses “absent strong reasons to set them aside.”¹¹¹ The Ninth Circuit has reiterated the strongly held belief that anti-suit injunctions may often be the only means of enforcing such clauses.¹¹² The court has also stated that the violation of forum selection clauses “frustrates a policy

¹⁰⁶ *Id.*

¹⁰⁷ *See* Civil Procedure Law, *supra* note 5, at art. 267.

¹⁰⁸ *See supra* text accompanying note 7.

¹⁰⁹ *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006) (“Courts derive the ability to enter an anti-suit injunction from their equitable powers. Such injunctions allow the court to restrain a party subject to its jurisdiction from proceeding in a foreign court in circumstances that are unjust.”).

¹¹⁰ *Id.* at 993 (“Protecting contractual devices that provide such indispensable, essential functions within international trade justifies the imposition of an anti-suit injunction.”).

¹¹¹ *Id.* at 992.

¹¹² *Id.* at 993.

of the United States courts and may well be vexatious and oppressive, thus necessitating such injunctions.”¹¹³

Certain U.S. courts greatly emphasize the importance of comity, and are reluctant to issue anti-suit injunctions in the absence of a final judgment in the U.S. proceeding as such injunctions effectively restrain not merely the foreign party, but the foreign court itself.¹¹⁴ For example, the U.S. Court of Appeals for the Second Circuit has bluntly stated its “general hesitation to issue a foreign anti-suit injunction.”¹¹⁵ However, where a judgment has been entered on the merits in a U.S. proceeding, a U.S. court is more likely to issue an anti-suit injunction to enforce a judgment arising from an arbitration clause.¹¹⁶ Considerations of comity have a diminished influence on the court’s judgment in such an instance.¹¹⁷ Even courts that have traditionally shown reluctance to issue anti-suit injunctions acknowledge a “strong public policy in favor of arbitration, particularly in international disputes.”¹¹⁸ The Second Circuit has explicitly stated that “the standard for enjoining foreign litigation after the domestic court reaches judgment is lower.”¹¹⁹

U.S. parties are likely to find success when applying for an anti-suit injunction in the Fifth or Ninth Circuits, which place great weight upon “preventing vexatious and duplicative litigation and in protecting its jurisdiction and final judgment.”¹²⁰ The U.S. Court of Appeals for the Fifth Circuit has listed three factors it evaluates in determining whether parallel proceedings in another country are “vexatious or oppressive” and “threaten the Court’s jurisdiction.”¹²¹ The factors are: (1) inequitable hardship resulting from the foreign suit; (2) the foreign suit’s ability to frustrate and delay the speedy and efficient determination of the cause; and (3) the extent to which the foreign suit is duplicative of the litigation in the United States.¹²²

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *MasterCard Int’l Inc. v. Federation Internationale De Football Ass’n*, No. 60 Civ. 3036(LAP), 2007 WL 631312, at *4 (S.D.N.Y. Feb. 28, 2007) (quoting *China Trade & Dev. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987)).

¹¹⁶ *Id.* at *6.

¹¹⁷ *SG Avipro Finance Ltd. v. Cameroon Airlines*, No. 05 Civ. 655 (LTS)(DFE) 2005 WL 1353955 at *2 (S.D.N.Y. June 8, 2005).

¹¹⁸ *Id.* at *3.

¹¹⁹ *MasterCard*, 2007 WL 631312 at *7, (quoting *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F.Supp.2d 118, 131 (S.D.N.Y. 1997)).

¹²⁰ *Commercializadora Portimex S.A. DECV v. Zen-Noh Grain Corp.*, 373 F. Supp. 2d 645, 652 (E.D.La. 2005).

¹²¹ *Id.* at 649.

¹²² *Id.* (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366 (5th Cir. 2003)).

Particularly relevant to U.S.-China contract disputes is the Fifth Circuit's stated belief that the failure of foreign courts to respect U.S. court judgments justifies and indeed necessitates the imposition of an anti-suit injunction.¹²³ As China does not recognize U.S. court judgments, it is likely that an American party will be successful in obtaining an anti-suit injunction from a court in the Fifth Circuit. Such an injunction will assist the American party in protecting its American assets from any ruling of the Chinese courts.

C. Enforcement of Arbitral Awards From a Non-Chinese Forum

Once the dust has settled in the aftermath of the hearings, and the tribunal or court has issued a final judgment, parties must grapple with the problem of enforcing the judgment. One significant practical concern relates to the ability of a foreign party to actually locate the assets of a Chinese defendant when attempting to collect the award. Chinese parties often have insubstantial foreign assets, with the majority of their assets located in China.¹²⁴ A recent study revealed that in up to forty percent of cases, failure to enforce a judgment resulted from the Chinese party being judgment-proof.¹²⁵ Therefore, although the New York Convention permits enforcement outside of China, enforcement will be rendered moot if U.S. parties find to their dismay that the Chinese party has no material assets outside of China.¹²⁶ However, as the number of Chinese firms conducting business overseas continues to increase, the likelihood that those parties will have assets (such as investments in European and U.S. companies) in other member states of the New York Convention also increases. Therefore, when drafting a contractual dispute resolution clause, U.S. parties should endeavor to ascertain the location and identity of the assets of their Chinese partners in order to increase the effectiveness of any future enforcement measures.¹²⁷

U.S. parties must be cognizant of extra-legal pressures that can undermine court-ordered enforcement of an arbitral award in China.¹²⁸ Banks have been known to disregard judicial orders to freeze the assets of their customers. In some cases, court orders may carry no more weight than the paper upon which they are issued.¹²⁹

¹²³ *Id.* at 653.

¹²⁴ See *Conflict Prevention*, *supra* note 29, at 151 (quoting Joseph McLaughlin: “[C]hances are, depending on the company in China . . . they won’t have assets—at least material assets—outside of China, unless you get really lucky and find bank accounts.”).

¹²⁵ *Id.* at 151.

¹²⁶ *Id.*

¹²⁷ von Wunschheim & Fan, *supra* note 26, at 16.

¹²⁸ See *supra* notes 81–88 and accompanying text.

¹²⁹ William Heye, *Forum Selection for International Dispute Resolution in China-*

D. Chinese Courts Apply Different Standards to the Review of Domestic
vs. Foreign Arbitral Awards

The Civil Procedure Law provides two differing standards by which courts will evaluate an arbitral award. Chinese courts will review awards that result from a foreign arbitration on procedural grounds,¹³⁰ while they will review awards that result from a domestic arbitration on both substantive and procedural grounds.¹³¹ This means that domestic awards may essentially be reviewed *de novo*,¹³² while foreign awards will be given the benefit of the doubt regarding the validity of the tribunal's application of law and evaluation of the evidence.¹³³ The ability of the Chinese courts to thus apply a "broader scope of judicial review" to domestic awards serves to "increase the vulnerability of such awards."¹³⁴ Because domestic awards are subject to "a much more rigorous, much more open series of review[s]," when a party is "a multinational based in China," or has "multinational operations in China, often you really want it to be a foreign award."¹³⁵

Irrespective of whether the award stems from a domestic or a foreign arbitration, under Chinese law, parties must request enforcement of their award within six months if the parties are companies or other legal entities. The law extends the time limit to one year if the parties are individuals. The time limit begins on the last day of the period specified in the award for its performance.¹³⁶

Enforcement of an arbitral award will require the U.S. party to dive

Chinese Courts vs. CIETAC, 27 HASTINGS INT'L & COMP. L. REV. 535, 549 (2004).

¹³⁰ Civil Procedure Law, *supra* note 5, at art. 260. The Law states:

(1) the parties have not stipulated clauses on arbitration in the contract or have not subsequently reached a written agreement on arbitration; (2) the person against whom the application is made is not duly notified to appoint the arbitrator or to proceed with the arbitration, or the said person fails to state its opinions due to reasons for which he is not held responsible; (3) the composition of the arbitration division or the procedure for arbitration is not in conformity with rules of arbitration; or (4) matters decided exceed the scope of the arbitration agreement or the limits of authority of the arbitration agency.

Id.

¹³¹ *Id.* at art. 217 (adding the following criteria for dismissal: "(4) the main evidence for ascertaining the facts is insufficient; (5) there are errors in the application of the law; or (6) the arbitrators committed acts of malpractice for personal benefits and perverted the law in the arbitration of the case.").

¹³² *Id.*

¹³³ *Id.* at art. 260.

¹³⁴ McLaughlin et al., *supra* note 25, at 152.

¹³⁵ *Conflict Prevention*, *supra* note 29, at 150.

¹³⁶ Civil Procedure Law, *supra* note 5, at art. 219.

right back into the Chinese court system and confront all the accompanying pitfalls that the arbitration clause was meant to avoid in the first place.¹³⁷ The U.S. party will have to deal with a potentially unqualified and biased judiciary, local protectionism, and other problems with no guarantee that the court will choose to enforce the arbitral award.¹³⁸ Such protectionism can significantly delay enforcement proceedings and drive up the costs of dispute resolution. As a result, many parties resign themselves to settling for less than the amount specified in the award.¹³⁹

Finally, it should be noted that both Article 260 and Article 217 of the Civil Procedure Law provide a broad catch-all phrase that authorizes courts to refuse the enforcement of any award. These Articles conclude with statements permitting courts to exercise discretion to “cancel” or “disallow arbitration awards” if enforcement is counter to social and public interest.¹⁴⁰

IV. RECENT DEVELOPMENTS AND POSSIBLE TRENDS

A. Liberalization in Interpretation of Requirements for Valid Arbitration Clause

A recent amendment to the PRC Arbitration Law¹⁴¹ liberalizes the interpretation of requirements for a valid arbitration clause and appears to herald a shift away from rigid interpretations of the law leading to inefficient proceedings. Previously, the law required parties to draft arbitration clauses that strictly adhered to the requirements concerning specific designation of forum and institution.¹⁴² If the courts or commissions found the language of the clause to be insufficiently specific, they would invalidate the clause.¹⁴³ Naturally, this proved a major source of distress when parties found themselves ensnared in unplanned-for proceedings on foreign soil contrary to all their contractually-based

¹³⁷ 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.* 12, 12 (2000).

¹³⁸ Heye, *supra* note 129, at 535.

¹³⁹ *Conflict Prevention*, *supra* note 29, at 151.

¹⁴⁰ Civil Procedure Law, *supra* note 5, at arts. 219, 260.

¹⁴¹ Sup. People's Ct. Interpretations of Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China, No. 7 art. 31 (adopted Dec. 26, 2005, effective Sept. 09, 2006) (P.R.C.) [hereinafter Interpretation No. 7].

¹⁴² DLA PIPER, *DOING BUSINESS IN CHINA* 39 (4th ed. 2008), available at <http://www.dlapiper.com/global/publications/detail.aspx?pub=2092>.

¹⁴³ *Apple & Eve v. Yantai North Andre Juice Co.*, 499 F. Supp. 2d 245, 251 (E.D.N.Y. 2007) (quoting *Zublin Int'l GmbH v. Wuxi Woke Gen. Eng'g Rubber Co.* (Sup. People's Ct. July 8, 2004)) (“[A]lthough the expression of intention to apply for arbitration, arbitration rules, and arbitration location are explicitly given, yet however an arbitration institution is not indicated explicitly. Therefore the arbitration clause should be held invalid.”).

expectations.¹⁴⁴

However, the Supreme People's Court has loosened those rules through a 2006 Judicial Interpretation which superseded all contrary previously issued Interpretations.¹⁴⁵ Article 16 of the Arbitration Law specifies that arbitration agreements may take the form of contractual dispute resolution clauses calling for arbitration, as well as "other written forms."¹⁴⁶ However, exactly what "other written forms" a Chinese court might consider valid was previously left unclear. Interpretation No. 7 clarifies the meaning of valid arbitration agreements in "other written forms" to include agreements entered into via "telex, fax, electronic data interchange and email, etc.," thereby expanding the range of options previously hinted at in the original Arbitration Law.¹⁴⁷

Interpretation No. 7 further liberalizes interpretation of the requirements for a valid arbitration agreement as set forth in Article 16 of the Arbitration Law, pursuant to which such agreements must designate an arbitration commission.¹⁴⁸ Previously, failure to explicitly designate a commission would result in the invalidation of the arbitration agreement by a Chinese court.¹⁴⁹ Interpretation No. 7 permits the courts to find a valid arbitration agreement even in the absence of such a designation so long as the identity of the commission can be determined from the available evidence.¹⁵⁰ More generally, Interpretation No. 7 allows parties to return to the original arbitration agreement after the fact and remedy any deficiencies.¹⁵¹ The Interpretation empowers parties to clarify any uncertain language or areas of nebulous intent regarding the original agreement on their own, without interference from the courts.¹⁵² The court will rule on the validity of the clause only after both sides have tried and failed to reach a consensus.¹⁵³

This approach by the Supreme People's Court may be grounds for cautious optimism. Too often, the Chinese system has been characterized by a rigid, almost hidebound adherence to the strict letter of the law. Parties have seen their arbitration agreements curtly invalidated by a court for technical defects that might have been easily remedied *ex post*, such as

¹⁴⁴ *See id.* at 251.

¹⁴⁵ Interpretation No. 7, *supra* note 141.

¹⁴⁶ Arbitration Law, *supra* note 5, at art. 16.

¹⁴⁷ Interpretation No. 7, *supra* note 141, at art. 1.

¹⁴⁸ Arbitration Law, *supra* note 5, at art. 16.

¹⁴⁹ *See Apple & Eve*, 499 F. Supp. 2d at 251.

¹⁵⁰ Interpretation No. 7, *supra* note 141, at art. 3.

¹⁵¹ *Id.* at arts. 5–10 (allowing parties to remedy deficiencies in the original agreement or clarify equivocal language through mutual agreement).

¹⁵² *Id.*

¹⁵³ *Id.*

the failure to identify a preferred arbitration commission with sufficient specificity.¹⁵⁴ This has resulted in parties being forced to endure wasteful, duplicative proceedings at great expense and at the cost of efficiency.¹⁵⁵ However, the issuance of Interpretation No. 7 signifies an official endorsement of a more flexible approach, one that allows parties to remedy technical defects in an agreement and reduce the risk that a clerical error or drafting oversight will automatically invalidate the agreement and condemn them to potentially wasteful and inefficient parallel proceedings.

B. No Change Expected in Status of Enforcement of Foreign Court Judgments

Civil Procedure Law, as mentioned, contains no provision authorizing parties to include a contractual dispute resolution clause calling for litigation in a non-Chinese forum. Yet the absence of such a provision might very well be moot in a legal system that refuses to recognize or enforce the judgments of foreign courts. Nor does it appear that China has any intention of changing the status quo in the near future. Indeed, the Standing Committee of the National People's Congress recently had occasion to address and revise issues in the Civil Procedure Law at the Seventeenth National Congress of the Communist Party.¹⁵⁶ During this session, the Committee officially adopted a draft amendment to the Civil Procedure Law dealing only with enforcement of domestic civil judgments.¹⁵⁷ The amendment is intended to improve the enforcement and execution of domestic court judgments by increasing the authority of the courts to administer fines and even detention for those who obstruct enforcement.¹⁵⁸

The efficacy of this amendment and its effect on enforcement of judgments remains to be seen. It may conceivably provide solace to a U.S. party by holding out hope that when all is said and done, a ruling by a Chinese court calling for enforcement either of the court's judgment or of an arbitral award may be more likely to bear fruit. However, neither the Standing Committee nor the Supreme People's Court has indicated any change to the policy against enforcement of foreign court judgments.

¹⁵⁴ See *China Nat'l Metal Products v. Apex Digital*, 379 F.3d 796 (9th Cir. 2004) (stating that failure to specify the precise forum for CIETAC arbitration in the arbitration agreement required separate proceedings on the claim and counterclaim in Beijing and Shanghai, respectively; defendant subsequently attempted to seek relief in a U.S. court, to no avail).

¹⁵⁵ *Id.*

¹⁵⁶ Nat'l People's Cong. of the People's Republic of China, *NPC Standing Committee Adopts Four Law Bills*, Oct. 31, 2007, http://www.npc.gov.cn/englishnpc/news/2007-10/31/content_1372632.htm.

¹⁵⁷ Amendment by Standing Comm. Nat'l People's Cong. to the Civil Procedure Law of the People's Republic of China, (drafted Oct. 28, 2007, adopted Apr. 1, 2008).

¹⁵⁸ *Id.*

China's increasingly important role in the world of international business underscores the disparity between its internal regulations and international standards. Whether China's increased visibility on the world stage will induce further changes in its laws remains to be seen. With its untapped resources, its trade surplus with the United States, and its powerhouse economy, China may simply lack any urgent incentive to satisfy international standards. Those very same companies and countries currently competing for their slice of the Chinese market will likely be unwilling to risk their profits by defying the government and exerting any significant pressure for serious legal reform. In the short term, it is more likely that foreign countries and parties will simply continue to view compliance with Chinese regulations as a necessary sacrifice in order to dance with the dragon.