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ARBITRATION OF COMMERCIAL DISPUTES IN CHINA

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TABLE OF CONTENTS

I. Resolution of Economic Disputes Prior to Reforms .. 4
II. Arbitration of Commercial Disputes during the 1980s and the Early 1990s .......................... 5
III. The Basic Framework of Arbitration in China ....... 8
    General Framework ..................................... 8
    Foreign-Related Arbitration ............................ 12
IV. Arbitration Commissions and Arbitration Rules after 1994............................................. 15
    Arbitration Commissions ............................... 15
    Arbitration Rules ..................................... 17
V. Arbitration of Commercial Disputes in Practice ...... 22
VI. Arbitration versus Litigation .......................... 24
VII. Conclusion ............................................ 25

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In the late 1970s, China decided to modernize its industry, agriculture, national defense, and science and technology. To achieve this goal, China commenced economic reforms and opened its door to the outside world. Among various reform measures, the decollectivization of agricultural production, the decentralization of economic decision-making, and the absorption of foreign investment have been attributed to the country's rapid economic growth. At the same time, the increased quantity and complexity of economic


2. Before 1979, agricultural production in China was collective. Under such a system, the agricultural hierarchy consisted of communes, brigades, production teams, and individual households. Farming households completed production orders from their production teams. In return, the team leader would give households grains and other coupons. Households could also keep a small portion of their produce for consumption. In the late 1970s, farming households began to contract with their production teams. Once they fulfilled an agreed-upon quota, they could keep whatever was left and could even engage in sideline production or planting cash crops. As a result, farming households became more productive, and their income correspondingly increased.

3. Before the implementation of reforms, China had a command economy. The central government made annual economic decisions, on the basis of which regional authorities formulated their economic plans. State enterprises produced under the supervision of their respective departments-in-charge. In addition, since the State meted out subsidies to loss-making enterprises, many state enterprises suffered from inefficiency and low productivity. Owing to the successes in reforming agricultural production, the Chinese government decentralized decision-making in industrial production. That is, local governments and enterprises were given more autonomy to make economic decisions. In consequence, enterprise directors became accountable for profit and loss.

4. To attract foreign capital, technology, and management expertise, China has opened its door to foreign investors. For example, in 1979, China passed its first foreign-investment law—the Sino-Foreign Equity Joint Venture Law. See Zhonghua renmin gongheguo zhongwai hezi qiye fa (Law of the People's Republic of China on Joint Enterprises Using Chinese and Foreign Investment), adopted at the 2nd Session of the 5th National People's Congress on July 1, 1979 and amended at the 3rd Session of the 7th National People's Congress on Apr. 4, 1990 and at the 4th Session of the 9th National People's Congress on Mar. 15, 2001, respectively, available at http://law.people.com.cn/bike/viewnews_no.html?id=6236.

transactions have engendered an upward trend in economic disputes.\textsuperscript{6}

Prior to the implementation of economic reforms, disputes between domestic enterprises in China were principally resolved by administrative orders, whereas disputes involving foreign trade contracts were referred to the Foreign Trade Arbitration Commission. Starting from the early 1980s, commercial disputes\textsuperscript{7} in China have been resolved primarily through arbitration, mediation, and litigation. Among these three modes of dispute resolution, arbitration has been the most important one. This article, therefore, aims at providing an overview of arbitration of commercial disputes in China.\textsuperscript{8}

Toward this aim, the core of this article is divided into six sections. Section I introduces resolution of economic disputes in China before the implementation of reforms. Section II examines arbitration of commercial disputes in China during the 1980s and the early 1990s. Section III outlines the basic framework for arbitration in China. Section IV discusses arbitration commissions and arbitration rules after 1994. Section V highlights arbitration of commercial disputes in practice. Section VI explains why arbitration is chosen over litigation in resolving commercial disputes in China and what limitations still remain. It is hoped that this article will generate useful insights about resolution of commercial disputes in China.

\textsuperscript{6} In the past, economic disputes in China generally referred to disputes between two entities over their economic rights and interests. Nowadays, economic disputes refer to specific kinds of disputes between legal and/or natural persons, including economic contracts, economic rights, bankruptcy, railway transport, aviation transport, etc. In 1983, economic disputes accepted in the court of first instance amounted to 43,553 cases; however, the corresponding figure in 2000 was 1,297,843. \textit{See National Bureau of Statistics, \textit{China Statistical Yearbook 2001}}, Beijing: China Statistics Press, 2001, p. 756. Similarly, from 1977 to 1986, the China International and Economic Trade Arbitration Commission accepted a total of 150 cases; however, in 1995 alone, the figure rose to 902. \textit{See Sheng Chang WANG, \textit{Resolving Disputes in the PRC: A Practical Guide to Arbitration and Conciliation in China}}, Hong Kong: FT Law & Tax Asia Pacific, 1996, p. 68.

\textsuperscript{7} In this article, commercial disputes refer to disputes involving economic contracts, trade, investment, finance, technology transfer, transportation, insurance, etc.

\textsuperscript{8} Arbitration of commercial disputes involving Chinese and foreign parties outside China is beyond the scope of this article. Since China is a signatory of the New York Convention, which is discussed below, Chinese courts will enforce arbitration awards rendered by arbitration tribunals outside China.
1. RESOLUTION OF ECONOMIC DISPUTES PRIOR TO REFORMS

As mentioned above, prior to the adoption of economic reforms, China had a command economy. Under such a system, decisions on production and distribution were administratively determined. Therefore, when economic disputes arose, enterprises would refer them to a common department-in-charge or a higher-ranking organization that had jurisdiction over them.\(^9\) Considering all relevant factors, perhaps even the interests of those who were not the disputants, the higher authority would render a decision akin to an arbitration award.\(^10\) In general, the disputants would comply accordingly.

When China’s trade with Eastern European countries increased in the 1950s, the Foreign Trade Arbitration Commission (FETA) was established within the China Council for the Promotion of International Trade in 1956.\(^11\) The FETA was designed to arbitrate disputes arising from foreign trade contracts; however, over a span of twenty years, it admitted only 27 disputes involving international trade contracts.\(^12\) With respect to maritime matters, the Maritime Arbitration Commission (MAC) was established in

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9. See also Donald C. Clarke, “Dispute Resolution in China,” *Journal of Chinese Law*, Vol. 5 (1991), p. 250 (“the dispute would eventually rise to the first administrator with authority over both plants”); Guiguo WANG, “The Unification of the Dispute Resolution System in China: Cultural, Economic, and Legal Contributions,” *Journal of International Arbitration*, June 1996, p. 5 (“the parties concerned would submit their disagreement to the superior administrative body for settlement”). Moreover, since Party secretaries had significant influence in enterprises or at various levels of government, their views often determined how disputes were finally resolved.

10. See also Clarke, “Dispute Resolution,” supra note 9, p. 249 (“In the realm of internal resolution, . . . the standard will likely be one of what is good for the organization of which the parties and the resolver are members”).


1959 to arbitrate disputes involving salvage, collisions, and charter-parties.\textsuperscript{13}

\section*{II. ARBITRATION OF COMMERCIAL DISPUTES DURING THE 1980S AND THE EARLY 1990S}

After the introduction of economic reforms, dispute-resolution entities in charge of settling economic disputes through means other than litigation were established at various governmental levels in the early 1980s.\textsuperscript{14} In 1983, the State Council promulgated the \textit{Regulations of the People's Republic of China on Economic Contract Arbitration}.\textsuperscript{15} This set of regulations provided that arbitration of economic contract disputes was to be conducted by arbitration organs established at various levels within the State Administration for Industry and Commerce or local bureaus of Administration for Industry and Commerce.\textsuperscript{16} Because the practices of various arbitration organs were different, arbitration in China was not systematic. Moreover, since arbitration organs were not independent of governmental authorities, arbitration was not genuine—it was more a mixture of arbitration, administration, and adjudication.\textsuperscript{17}

On the international front, the Foreign Trade Arbitration Commission was re-named the Foreign Economic and Trade Arbitration Commission (FETAC) in 1980.\textsuperscript{18} The jurisdiction of the FETAC was expanded to handle disputes arising from China’s eco-

\begin{thebibliography}{99}

\textsuperscript{14} G. WANG, “Unification of Dispute Resolution System,” \textit{supra} note 9, p. 6.


\textsuperscript{16} \textit{Ibid.} art. 2.

\textsuperscript{17} S.C. WANG, \textit{Resolving Disputes}, \textit{supra} note 6, p. 26.

\textsuperscript{18} See Guanyu jiang duiwai maoyi zhongcai weiyuanhui gaichengwei duiwai jingji maoyi zhongcai weiyuanhui de tongzhi (Notice concerning the Conversion of the Foreign Trade Arbitration Commission into the Foreign Economic and Trade Arbitration Commission), promulgated by the State Council on Feb. 26, 1980, in \textit{1980 Zhonghua...}
nomic cooperation with foreign countries, such as joint ventures using Chinese and foreign investment as well as credits and loans between Chinese and foreign banks. Nonetheless, in practice, the FETAC confined arbitration only to contractual disputes.

As the number of commercial disputes involving foreign parties increased, the FETAC established offices in Shenzhen and Shanghai in 1989 and 1990, respectively. Moreover, in 1988, the State Council approved the conversion of the FETAC into CIETAC, expanded its jurisdiction to cover “all disputes arising from international economic and trade transactions,” and authorized it to revise arbitration rules thereafter. Likewise, the MAC was re-named the China Maritime Arbitration Commission (CMAC). Subsequently, the CMAC issued a new set of arbitration rules, expanding its jurisdiction to cover cases submitted for arbitration by agreement between the parties and disputes with respect to pollution of the marine environment.

Meanwhile, the Beijing Conciliation Center was established in 1987. This center provided mediation services for disputes relating

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24. The Beijing Tiaojie Zhongxin (Beijing Conciliation Center) is now called the China Council for the Promotion of International Trade/China Chamber of International Commerce Conciliation Center. Since 1992, the China Council for the Promotion
to international economic, trade, finance, investment, technology transfer, project contracting, transportation, insurance, and other commercial transactions.\textsuperscript{25} Since the mediator always looked for common grounds on which an agreement could be based, mediation reduced antagonism between the disputants and allowed the maintenance of any ongoing business relationship. Nonetheless, mediated agreements were not legally binding, except for the fact that they were contracts between the parties.

In 1994, the China Council for the Promotion of International Trade revised the CIETAC Arbitration Rules.\textsuperscript{26} Among other things, the jurisdiction of the CIETAC was expanded to handle “disputes arising from international or foreign-related, contractual or noncontractual, economic and trade transactions, including disputes between foreign legal persons and/or natural persons and Chinese legal persons and/or natural persons, between foreign legal persons and/or natural persons, and between Chinese legal persons and/or natural persons.”\textsuperscript{27} Most importantly, China promulgated the Arbitration Law,\textsuperscript{28} establishing a basic framework for arbitration in China.

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\textsuperscript{27} Ibid., art. 2.

III. THE BASIC FRAMEWORK FOR ARBITRATION IN CHINA

With the passage of the Arbitration Law, arbitration of commercial disputes in China has entered a new epoch. To understand the current framework of arbitration, it is instructive to examine the major provisions that have general applicability as well as those applicable only to foreign-related arbitration.\(^{29}\)

General Framework

According to the Arbitration Law, "contractual disputes and disputes involving rights and interests of property between citizens, legal persons, and other organizations that are equal subjects" may be resolved by arbitration.\(^{30}\) Nonetheless, disputes involving marriage, adoption, guardianship, maintenance, and succession, as well as administrative disputes that must be handled by administrative organs, however, are not arbitrable.\(^{31}\) Hence, except for the enumerated jurisdictional limitations, arbitration can be conducted pursuant to an arbitration agreement between the disputants.

An arbitration agreement can be evidenced by either an arbitration clause stipulated in a contract or an agreement to refer to arbitration that is concluded in writing before or after the dispute arises.\(^{32}\) An arbitration agreement must indicate the parties' intention to submit their disputes to arbitration, the matters to be arbitrated, and the choice of arbitration commission.\(^{33}\) If an arbitration agreement contains no or unclear provisions regarding the matters to be arbitrated or the choice of an arbitration commission, the parties may conclude a supplementary agreement; otherwise, the arbitration agreement will be void.\(^{34}\) In any case, the revision, rescission, termination, or invalidity of a contract will not affect the validity of an arbitration agreement.\(^{35}\)

\(^{29}\) In foreign-related (shewai) arbitration, one or both of the disputants are foreign legal or natural persons, and/or the dispute involves international trade or economic transactions.


\(^{31}\) Arbitration Law, supra note 28, art. 3.

\(^{32}\) Ibid., art. 16.

\(^{33}\) Ibid.

\(^{34}\) Ibid., art. 18.

\(^{35}\) Ibid., art. 19.
Nonetheless, a disputant may challenge the validity of an arbitration agreement either with the arbitration commission or in court.\textsuperscript{36} If one party requests the arbitration commission to determine the validity of an arbitration agreement while the other party applies to the court for a ruling on the same issue, the court should make a ruling.\textsuperscript{37} In addition, if one party files a lawsuit in court despite the existence of a valid arbitration agreement, the court will not accept the case.\textsuperscript{38} Even so, if one party files a lawsuit without revealing the existence of an arbitration agreement and the other party fails to object by appearing before the court, the latter will be deemed to have abandoned the arbitration agreement and the court will continue to handle the case.\textsuperscript{39}

To initiate an arbitration proceeding, one party must submit an application, together with a copy of the arbitration agreement, to the arbitration commission.\textsuperscript{40} The application must state the names, addresses, and legal representatives of the disputants; the claims with supporting facts and reasons; evidence or information about evidence; and names and addresses of witnesses.\textsuperscript{41} Upon receipt of the application, the arbitration commission must decide whether or not to accept the case within five days.\textsuperscript{42} If an application is accepted, the arbitration commission should follow its procedure rules to notify the respondent.\textsuperscript{43} Upon notification, the respondent may accept or deny the claim or make a counterclaim.\textsuperscript{44} Meanwhile, the applicant may request interim measures to preserve property.\textsuperscript{45} In that case, the arbitration commission must submit the application to the people's court in accordance with the Civil Procedure Law.\textsuperscript{46}

To proceed to arbitration, an arbitration tribunal must be established. An arbitration tribunal may be composed of either three arbitrators or a single arbitrator.\textsuperscript{47} Arbitrators are chosen from a list, which is delivered to the applicant and the respondent upon

\textsuperscript{36} Ibid, art. 20.
\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid., art. 5.
\textsuperscript{39} Ibid., art. 26.
\textsuperscript{40} Ibid., art. 22.
\textsuperscript{41} Ibid., art. 23.
\textsuperscript{42} Ibid., art. 24.
\textsuperscript{43} Ibid., art. 25.
\textsuperscript{44} Ibid., art. 27.
\textsuperscript{45} Ibid., art. 28.
\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid., art. 30.
acceptance of the case. If the arbitration tribunal is made up of three members, each party may appoint one and the third one, the presiding arbitrator, is to be appointed by agreement between the parties or by the chairperson of the arbitration commission. If the arbitration tribunal consists of only one arbitrator, the parties may appoint the arbitrator by agreement or may request the chairperson of the arbitration commission to make the appointment. In any event, either party may challenge an arbitrator. If an arbitrator is a close relative of a party or its agent, has a conflict of interest with the case, has a relationship with a party or its agent that may affect his or her impartiality, has ex parte communication with a party or its agent, or has accepted an invitation or a gift from a party or its agent, he or she must withdraw from the case.

After the formation of a tribunal, arbitration may be conducted by oral hearings or on the basis of documents submitted if the parties so agree. The hearing itself is not open to the public, unless the parties otherwise agree. If the applicant does not appear before the hearing or leaves without permission at the hearing, its application will be considered withdrawn. If the respondent does not appear before the hearing or leaves without permission at the hearing, the arbitration tribunal can render an award in its absence. At the hearing, the parties should produce supporting evidence. If the evidence may be lost or is difficult to obtain afterward, the applicant may apply for preservation of evidence. In such a case, the arbitration commission should submit the application to the basic people’s court of the place where the evidence is located. Meanwhile, the arbitration tribunal may obtain necessary evidence on its own initiative. Furthermore, the parties may en-

48. Ibid., art. 25.
49. Ibid., art. 31.
50. Ibid.
51. Ibid., art. 34.
52. Ibid.
53. Ibid., art. 39.
54. Ibid., art. 40.
55. Ibid., art. 42.
56. Ibid.
57. Ibid., art. 43.
58. Ibid., art. 46.
59. Ibid.
60. Ibid., art. 43.
gage legal counsel, debate over the issues, and make a final submission before the closing of the hearing. During the arbitration proceedings, the parties may try to resolve their dispute through mediation. If a settlement is reached, the arbitration tribunal may either produce a mediated agreement or render an award based on the outcome of the settlement. A mediated agreement and an arbitration award have the same legal effect. If mediation proves unsuccessful, the arbitration tribunal must proceed to render an award.

An arbitration award is made on the basis of a majority vote. Any dissenting arbitrator may file an opinion but may not sign the award. If the arbitration tribunal fails to reach a majority vote, the arbitration award will be made pursuant to the view of the presiding arbitrator. Once an award is made, it is final because another arbitration commission or the court will not hear the same dispute. Even so, the parties can request the court to set aside an award. Alternatively, if one party does not comply with the

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62. Arbitration Law, supra note 28, art. 47.

63. Ibid.

64. Ibid., art. 51. Joint mediation is available in international arbitration proceedings, depending on whether the Chinese arbitration or mediation body and its foreign counterpart have made such an arrangement. For example, the Beijing Conciliation Center and the New York Mediation Center have reached a cooperative agreement on joint conciliation. See S.C. WANG, Resolving Disputes, supra note 6, p. 34.

65. Arbitration Law, supra note 28, art. 51.

66. Ibid.

67. Ibid.

68. Ibid., art. 53.

69. Ibid., arts. 53 & 54.

70. Ibid., art. 53.

71. Ibid., art. 9.

72. Ibid., art. 58. The Arbitration Law allows the intermediate people's court to set aside an arbitration award under the following circumstances: (1) the parties did not
award, the other party can ask the people’s court to enforce it.\textsuperscript{73} Nonetheless, the court can refuse to enforce an arbitration award.\textsuperscript{74}

**Foreign-Related Arbitration**

Unless otherwise provided, the preceding provisions apply to both domestic and foreign-related disputes. Since the Arbitration Law and the Civil Procedure Law both contain a special section on foreign-related arbitration, it is imperative to highlight the major provisions here.

First of all, if either party wants to preserve evidence, the foreign-related arbitration commission should submit the application to the intermediate people’s court of the place where the evidence is located.\textsuperscript{75} Likewise, if one party wants to preserve property, the arbitration commission should submit the application to the intermediate people’s court of the place where the property is located or the respondent resides.\textsuperscript{76} Indeed, if one party does not comply with the arbitration award, the other party may apply to the intermediate people’s court of the place where the property is located or the respondent resides.\textsuperscript{77} Consequently, in the case of foreign-related arbitration, the parties should, whether through the CIETAC or di-

\textsuperscript{73} Ibid., art. 62.

\textsuperscript{74} The people’s court can refuse to enforce an arbitration award under these circumstances: (1) the parties had no arbitration clause in their contract or had not subsequently reached any arbitration agreement; (2) the matters decided in the arbitration exceeded the scope of the arbitration agreement or the authority of the arbitration commission; (3) the formation of the arbitration tribunal or the arbitration proceedings did not conform to the statutory requirements; (4) the evidence on which the award was based was fraudulent; (5) the other party withheld evidence sufficient to affect the impartiality of arbitration; (6) the arbitrators committed bribery or bent the law out of personal considerations; or (7) the award violated a social or public interest. Ibid.

\textsuperscript{75} Arbitration Law, supra note 28, art. 68. Cf. text accompanying supra notes 58-59.

\textsuperscript{76} Civil Procedure Law, supra note 61, art. 258. Cf. text accompanying supra notes 45-46.

\textsuperscript{77} Ibid., art. 259. Cf. text accompanying supra note 73.
rectly, seek preservation of evidence or property, or obtain enforcement of the arbitration award, from an intermediate people's court.78

Furthermore, a people's court may set aside or refuse to enforce a foreign-related arbitration award in accordance with article 260 of the Civil Procedure Law.79 That is, the court may set aside or


79. Arbitration Law, supra note 28, arts. 70 & 71. These two articles refer only to “people’s court”; therefore, it is not clear whether the disputants should ask a basic people’s court or an intermediate people’s court to set aside a foreign-related arbitration award, or which levels of people’s courts have the power to enforce or not to enforce a foreign-related arbitration award. However, since article 58 of the Arbitration Law designates the intermediate people’s court to set aside domestic arbitration awards, it is reasonable to conclude that the parties in the case of foreign-related arbitration should also go to the intermediate people’s court if they want the award to be set aside. Furthermore, the Supreme People’s Court mandates that five types of foreign-related civil and commercial cases be centrally handled by five groups of courts of first instance. The five types of foreign-related cases are (1) foreign-related contractual and infringement disputes; (2) letter-of-credit disputes; (3) application for the setting aside, recognition, and enforcement of international arbitration awards, (4) examination of the validity of arbitration provisions in foreign-related civil and commercial cases; and (5) application for the recognition and enforcement of civil- and commercial-case judgments and rulings rendered by foreign courts. However, trade disputes at the Chinese borders, foreign-related real estate cases, and foreign-related intellectual property cases are not covered. The five groups of courts of first instance consist of (1) State Council-approved people’s courts established in Economic and Technological Development Zones; (2) intermediate people’s courts located in provincial capitals, autonomous-region capitals, and municipalities directly under the central government; (3) intermediate people’s courts in Special Economic Zones and Separately Planned Cities;
not enforce a foreign-related arbitration award if (1) the parties had no arbitration clause in their contract or had not subsequently reached any arbitration agreement; (2) the party against whom the application was made did not have its appointed arbitrator, was not duly notified of the arbitration proceedings, or was not able to state its views due to reasons for which it was not responsible; (3) the formation of the arbitration tribunal or the arbitration procedure did not conform to the arbitration rules; or (4) the matters decided exceeded the scope of the arbitration agreement or the authority of the arbitration commission. 80 Thus, compared with domestic arbitration, the scope of judicial review of foreign-related arbitration is more limited. 81

In applying for enforcement of a foreign-related award, the applicant may find that the respondent or its property is not in China. If such a situation arises, the applicant should directly go to the foreign court having jurisdiction to obtain recognition and enforcement of the award. 82 Generally, CIETAC arbitration awards are enforceable outside China because China is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 83 In 1999, the Supreme People’s Court and the Hong Kong Special Administrative Region Government made arrangements to allow the reciprocal enforcement of arbitration awards. That is, the High Court of the Hong Kong Special Administrative Region will enforce arbitration awards rendered by mainland arbitration commissions, and the intermediate people’s court of the place where the respondent resides or the property is located will enforce arbitration awards made in Hong Kong. 84

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(4) other intermediate people’s courts designated by the Supreme People’s Court; and
(5) high people’s courts. See Guanyu shewai minshangshi anjian susong guanxia ruogan wenti de guiding (Rules regarding Several Questions of Litigation Jurisdiction of Foreign-Related Civil and Commercial Cases), promulgated by the Supreme People’s Court on Feb. 25, 2002, available at http://www.chinalawinfo.com/newlaw/ReportShowContent.asp?ID=3500, arts. 1, 3 & 4. Since the CIETAC is an international arbitration commission, this set of rules is applicable to its arbitration awards.

80. Civil Procedure Law, supra note 61, art. 260.
81. Cf. supra notes 72 & 74.
82. Arbitration Law, supra note 28, art. 72.
83. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) is an international treaty that obliges contracting members to enforce foreign arbitration awards. China acceded to the Convention in 1987.
84. See Zuigao renmin fayuan guanyu neidi yu xianggang tebie xingzhengqu xianggu zhixing zhongcai caijue de anpai (The Supreme People’s Court regarding the Arrangements for Reciprocal Enforcement of Arbitration Awards Made by the Mainland and the Hong Kong Special Administrative Region), adopted by the 1069th Ses-
Lastly, the General Principles of the Civil Law mandate that provisions in an international treaty to which China is a signatory and has not made a reservation will take precedence over domestic law.\textsuperscript{85} Because China is a signatory to a number of international conventions, such as the United Nations Convention on Contracts for the International Sale of Goods, the CIETAC will apply relevant provisions of international conventions in deciding substantive issues. Moreover, in cases where no domestic provisions or international conventions apply, the CIETAC may refer to international commercial practices or international customs.\textsuperscript{86}

IV. ARBITRATION COMMISSIONS AND ARBITRATION RULES AFTER 1994

Apart from establishing a basic framework for arbitration, the Arbitration Law professionalizes and systematizes arbitration commissions. As previously discussed, arbitration organs were established at various levels of the Administration for Industry and Commerce to resolve economic contract disputes through a combination of arbitration, administration, and adjudication. To reform arbitration commissions, the Arbitration Law provides for the establishment of the China Arbitration Association, delineates the basic requirements of arbitration commissions, outlines the qualifications of arbitrators, and renders arbitration commissions independent of local administration.

Arbitration Commissions

The China Arbitration Association, an independent social organization with the status of a legal person, is empowered to superintend arbitration commissions and to formulate rules of arbitration to be applied by arbitration commissions.\textsuperscript{87} Arbitration commission

\textsuperscript{85} Zhonghua renmin gongheguo minfa tongze (General Principles of the Civil Law of the People’s Republic of China), in Guowuyuan Fazhi Bangongshi comp., Xinbian zhonghua renmin gongheguo changyong falu fazui quanshu (Newly Edited Compendium of Frequently Used Laws and Regulations of the People’s Republic of China), Beijing: Zhongguo Fazhi Chubanshe, 2000, p. 227, art. 142.

\textsuperscript{86} Ibid. See also 2000 CIETAC Arbitration Rules, supra note 61, art. 53.

\textsuperscript{87} Arbitration Law, supra note 28, art. 15. To facilitate the implementation of the Arbitration Law, the State Council promulgated a set of Model Arbitration Rules in 1995. See Zhongcai weiyuanhui zhongcai zanxing guize shifan wenben (Provisional Model Arbitration Rules for Arbitration Commissions), promulgated by the State
sions may be established in cities where the governments of provinces, municipalities directly under the central government, and autonomous regions are located; and must be registered with the local judicial-administrative departments.\textsuperscript{88} An arbitration commission must have (1) its own name, domicile, and article of association, (2) the necessary assets, (3) constituent personnel, and (4) appointed arbitrators.\textsuperscript{89} More specifically, an arbitration commission must have one chairperson, two to four vice-chairpersons, and seven to eleven members, of whom at least two-thirds must be experts in the fields of law, economy, and trade.\textsuperscript{90}

Each arbitration commission is required to maintain a specialty-based list of arbitrators, from which the disputants may appoint their own arbitrators.\textsuperscript{91} To be qualified as an arbitrator, a person must have (1) engaged in arbitration work, served as a judge, or worked as a lawyer for eight years; (2) engaged in legal research or education work and held a senior position; or (3) acquired legal knowledge, engaged in such professional work as economics and trade, and held a senior position or attained the equivalent professional standard.\textsuperscript{92} As a result, arbitration commissions and arbitrators are now required to meet a minimum level of professional competency.

More importantly, the Arbitration Law renders arbitration commissions independent of local administration because local arbitration commissions do not have subordinate relationships with administrative organs or any subordinate relations of their own.\textsuperscript{93} In other words, the Arbitration Law abolishes the much criticized past practice of "jurisdiction by level" and territorial jurisdiction.\textsuperscript{94} Consequently, the then-existing arbitration commissions must be reorganized in order to meet the new standards.

With respect to foreign-related arbitration, the Arbitration Law continuously empowers the China Council for the Promotion of International Trade (China Chamber of International Com-

\begin{itemize}
\item[88.] Arbitration Law, supra note 28, art. 10.
\item[89.] Ibid., art. 11.
\item[90.] Ibid., art. 12.
\item[91.] Ibid., art. 13.
\item[92.] Ibid.
\item[93.] Ibid., art. 14.
\item[94.] Ibid., art. 6; G. WANG, "Unification of Dispute Resolution System," supra note 9, p. 10.
\end{itemize}
Arbitration of Commercial Disputes in China

merce) to organize foreign-related arbitration commissions95 and to formulate rules for foreign-related arbitration commissions.96 As such, the China Council for the Promotion of International Trade can decide for itself whether or not to reorganize the CIETAC and the CMAC. Until now, the China Council for the Promotion of International Trade has focused its efforts on revising arbitration rules.

Arbitration Rules

In 1995, the China Council for the Promotion of International Trade revised the CIETAC Arbitration Rules.97 Among other things, the 1995 CIETAC Arbitration Rules expanded the jurisdiction of the CIETAC by allowing it to accept cases in accordance with special provisions or special authorization contained in Chinese laws or administrative regulations.98 Moreover, to conform to the Arbitration Law, the 1995 CIETAC Arbitration Rules provide that if one party requests the CIETAC to determine the validity of an arbitration agreement while the other party applies to the court for a ruling on the same issue, the decision of the latter will prevail.99 Furthermore, when the summary procedure is used, the Secretariat of the Arbitration Commission must inform the parties of the date of hearing fifteen days, rather than the previously ten days, in advance.100

95. Arbitration Law, supra note 28, art. 66. Unlike article 12 of the Arbitration Law, this article does not specify the number of vice-chairpersons or members in order to form a foreign-related arbitration commission.
96. Ibid., art. 73.
97. See 1995 CIETAC Arbitration Rules, supra note 78.
98. Ibid., art. 2. By 1995, the China Council for the Promotion of International Trade had also expanded the jurisdiction of the CMAC to resolve contractual or non-contractual maritime disputes arising from transportation, production, and navigation by or at sea in coastal waters and other waters connected with the sea. See Zhongguo haishi zhongcai weiyuanhui zhongcai guize (China Maritime Arbitration Commission Arbitration Rules), revised and adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce on Sept. 4, 1995, in S.C. Wang, Resolving Disputes, supra note 6, p. 266, art. 2.
100. 1995 CIETAC Arbitration Rules, supra note 78, art. 69. The summary procedure applies to cases where the amount in dispute is less than 500,000 yuan. Ibid., art. 64.
In 1998, the China Chamber of International Commerce revised the CIETAC Arbitration Rules again.\textsuperscript{101} Prior to this revision, the CIETAC did not arbitrate disputes arising between Sino-foreign equity joint ventures, between Sino-foreign equity joint ventures and domestic entities, or between Sino-foreign equity joint ventures and wholly foreign-owned enterprises, because equity joint ventures and wholly foreign-owned enterprises were Chinese legal persons and no foreign-related elements were involved.\textsuperscript{102} The 1998 CIETAC Arbitration Rules, however, expanded the jurisdiction of the CIETAC such that disputes arising between foreign investment enterprises, or between foreign investment enterprises and Chinese legal persons, natural persons and/or economic organizations, would also be arbitrated.\textsuperscript{103} Moreover, the CIETAC was authorized to arbitrate disputes arising from project financing, invitation to tender, bidding, project construction, and other activities conducted by Chinese legal persons, natural persons or economic organizations using capital, technology, or services originating from foreign countries, international organizations, or Hong Kong, Macao, and Taiwan.\textsuperscript{104} In the same vein, the CIETAC was to arbitrate disputes related to the Hong Kong Special Administration Region, Macao Special Administration Region, or the Taiwan Region.\textsuperscript{105} Furthermore, the CIETAC would arbitrate disputes for which special provisions in or special authorization from Chinese laws or administrative regulations required arbitration.\textsuperscript{106} As a result, the scope of authority of the CIETAC was further extended.

To make foreign-related arbitration more in line with international practices, the 1998 CIETAC Arbitration Rules provided the disputants with more flexibility. For instance, subject to the ap-

\textsuperscript{101} See 1998 CIETAC Arbitration Rules, supra note 78.


\textsuperscript{103} 1998 CIETAC Arbitration Rules, supra note 78, art. 2.

\textsuperscript{104} Ibid.

\textsuperscript{105} Ibid.

\textsuperscript{106} Ibid.
Arbitration of Commercial Disputes in China

approval of the CIETAC, the parties could agree to use other arbitration rules for arbitrating their case. In addition, if the parties agreed to hold arbitration at a particular place, the case would be heard at the agreed location. Based on these two provisions, an arbitration tribunal comprised of CIETAC arbitrators could, in theory, conduct a hearing in Hong Kong in accordance with the arbitration rules of the International Chamber of Commerce. However, given the fact that an arbitration commission generally prefers to follow its own rules and/or to conduct arbitration at a familiar place, the likelihood of having this kind of scenario play out in real life seems to be small.

In preparation for China’s entry into the World Trade Organization (WTO) and to make arbitration services more readily accessible, the China Council for the Promotion of International Trade revised the CIETAC Arbitration Rules once more in 2000. Among various things, the 2000 CIETAC Arbitration Rules expand the jurisdiction of the CIETAC to domestic disputes that the parties have agreed to submit to the CIETAC for arbitration. Moreover,

107. Ibid., art. 7.
108. Ibid., art. 35.
109. The ICC International Court of Arbitration is a renowned institution for the resolution of international commercial disputes.
111. 2000 CIETAC Arbitration Rules, supra note 61, art. 2. Moreover, to conform to the Arbitration Law, the CIETAC will not accept cases on marriage, adoption, guardianship, and succession; administrative disputes that are required by law to be handled by administrative organs; labor disputes; and disputes within the agricultural collective economic organizations over agricultural management contracts. Id. According to Sheng Chang WANG, the legal basis for expanding the CIETAC’s jurisdiction to other domestic disputes that the parties have agreed to submit to the CIETAC is two-fold. First, the Arbitration Law authorizes the China Council for the Promotion of Interna-
a new set of special provisions is provided for domestic arbitration. Indeed, a relatively cheap fee schedule is established for domestic arbitration, while arbitration fees for foreign-related arbitration have been reduced.

To prevent disputants from raising belated objections to the arbitration agreement and/or the jurisdiction of the CIETAC to delay or destroy the arbitration proceedings, the 2000 CIETAC Arbitration Rules provide that such objections will not affect the progress
of the arbitration hearing. Likewise, if a disputant requests an arbitrator to withdraw, until a decision is made by the Chairperson of the Arbitration Commission, the challenged arbitrator should continue to perform his or her duties. On the other hand, to further promote resolution of disputes by mediation, the 2000 CIETAC Arbitration Rules provide that if the parties have an arbitration agreement but reach a settlement agreement before the commencement of arbitration proceedings, they may request the Arbitration Commission to appoint a sole arbitrator to render an arbitration award based on the contents of their arbitration agreement. In so doing, the settlement agreement will gain legal effect.

Notwithstanding that the CIETAC is the designated forum for foreign-related arbitration, the disputants in an international case may choose to have their dispute resolved by a domestic arbitration commission. Even so, it is unlikely that the parties in a foreign-

115. 2000 CIETAC Arbitration Rules, supra note 61, art. 6; S.C. WANG, “Guanyu xiuding,” supra note 110. Under the 1998 CIEATC Arbitration Rules, when a party challenged the arbitration agreement or the jurisdiction of the CIETAC, the arbitration proceedings were stayed until a decision was made on the issue. See 1998 CIETAC Arbitration Rules, supra note 78, art. 6 (without mention of the lack of effect upon the arbitration proceedings).

116. 2000 CIETAC Arbitration Rules, supra note 61, art. 30; S.C. WANG, “Guanyu xiuding,” supra note 110. Under the 1998 CIEATC Arbitration Rules, when a party challenged an arbitrator, the arbitration proceedings were stayed until a decision was made on the issue. See 1998 CIETAC Arbitration Rules, supra note 78, art. 30 (without mention of the duty to continue the arbitration work).

117. 2000 CIETAC Arbitration Rules, supra note 61, art. 44; S.C. WANG, “Guanyu xiuding,” supra note 110. Under the 1998 CIETAC Arbitration Rules, if the disputants reached a settlement agreement by themselves during the arbitration proceedings, they could request the arbitration tribunal to render an award based on their settlement agreement or to dismiss the case. See 1998 CIETAC Arbitration Rules, supra note 78, art. 44 (without the newly added provision). Based on the 2000 CIETAC Arbitration Rules, the disputants may first ask the China Council for the Promotion of International Trade/China Chamber of International Commerce Conciliation Center to mediate, and then request the CIETAC to render a legally enforceable arbitration award based on the settlement agreement through the summary procedure. Article 64 of the 2000 CIETAC Arbitration Rules provides that the summary procedure should be used when the amount in dispute is below 500,000 yuan, or when one party applies for summary procedure and the other party agrees in writing.


related case would prefer a domestic arbitration commission to the CIETAC for two reasons. First, the CIETAC is more experienced in handling cases involving foreign parties and international economic or trade transactions. Second, in deciding whether or not to enforce an award rendered by a domestic arbitration commission, the court can review both the law and evidence upon which the award is based.\footnote{120} With the latest revision of the CIETAC Arbitration Rules, disputants in domestic cases may now choose the CIETAC to arbitrate their disputes. It is true that the CIETAC has established a relatively cheap fee schedule for domestic arbitration, but many disputants may still be concerned about the cost of using its services. Thus, to what extent the latest expansion of CIETAC jurisdiction will decrease the caseload of domestic arbitration commissions remains to be seen.

V. ARBITRATION OF COMMERCIAL DISPUTES IN PRACTICE

With the passage of the Arbitration Law, the then-existing arbitration organs have been dissolved or reorganized to meet the required standards. As of June 30, 1998, 137 arbitration commissions were established in accordance with the Arbitration Law, with 17,257 arbitrators appointed and a total of 6,629 cases accepted.\footnote{121} By May 31, 1999, the number of domestic arbitration commissions had increased to 146.\footnote{122} Moreover, in 1998, of the 736 cases concluded by arbitration, 45 cases were resolved by mediation (6 percent).\footnote{123} Since arbitration is not open to the public, cases handled by domestic arbitration commissions are seldom reported. Nonetheless, it has been reported that the rate of voluntary compliance with arbitration awards has been increasing over the years, while

\footnote{Compendium of the Laws of the People's Republic of China (1996)), Jilin: Jilin Renmin Chubanshe, 1997, p. 135.}

\footnote{120. See supra note 74.}

\footnote{121. See “Hsinhsi cunghui” (“Database”), China Law, Dec. 15, 1998, p. 35 (citing Fazhi Ribao (Legal Daily), Sept. 1, 1998).}

\footnote{122. In promulgating the Mainland-Hong Kong Reciprocal Enforcement, supra note 84, the Supreme People's Court also attached a list of domestic arbitration commissions, the awards of which would be enforced by the High Court of the Hong Kong Special Administrative Region. The list contained a total of 146 arbitration commissions.}

the applications for setting aside arbitration awards have declined.\textsuperscript{124}

With respect to foreign-related arbitration, there were 492 arbitrators with the CIETAC in 2001, of whom 158 came from Hong Kong, Macao, and various parts of the world.\textsuperscript{125} Moreover, two volumes of CIETAC cases—international trade and foreign investment—have been published, enabling legal scholars and practitioners to better understand foreign-related arbitration in practice.\textsuperscript{126} The international trade cases covered a variety of topics, ranging from the dispute over the quality of goods to the effect of trading with a Chinese company that has not been authorized to engage in foreign trade.\textsuperscript{127}

Foreign investment cases, for the most part, concerned disputes between the Chinese and foreign partners of equity or cooperative joint ventures.\textsuperscript{128} In particular, the disputes between joint-venture partners focused on two respects: the contribution of capital to and the management of the joint venture.\textsuperscript{129} The first type of dispute often arose when one partner of the joint venture failed to fulfill its obligation to contribute the required amount of capital within a certain time period, or when the joint-venture agreement did not specify the times for further contributions after the initial contribution.\textsuperscript{130} Sometimes the parties agreed to contribute in kind, but there were problems with either the ownership or the value of the contributed property.\textsuperscript{131} The second type of dispute often arose when the Chinese and foreign parties could not resolve conflicts over the management of the joint venture, rendering the joint venture unable to continue operations.\textsuperscript{132}

\footnotesize
\textsuperscript{125} These figures are available at http://www.cietac.org.cn/cd1/frame_1.htm.
\textsuperscript{126} Apart from these two volumes (discussed below), the CIETAC publishes selected cases on its Web site.
\textsuperscript{129} \textit{Ibid.}, p. 2.
\textsuperscript{130} \textit{Ibid.}, pp. 2-3.
\textsuperscript{131} \textit{Ibid.}, pp. 4-5.
\textsuperscript{132} \textit{Ibid.}, p. 7.
VI. ARBITRATION VERSUS LITIGATION

As a general rule, disputants choose arbitration to resolve disputes because of its flexibility (they can choose the forum of arbitration, arbitrators, arbitration procedures, and substantive laws),\textsuperscript{133} finality (arbitration awards may be challenged in enforcement or annulment suit but are not subject to appeal),\textsuperscript{134} enforceability (arbitration awards are enforced pursuant to domestic law as well as international conventions and treaties),\textsuperscript{135} and confidentiality (arbitration proceedings are not open to the public).\textsuperscript{136} In the Chinese context, other significant reasons exist for the popularity of arbitration.

First, the government encourages the use of arbitration to resolve commercial disputes involving foreign investors.\textsuperscript{137} Second, there is a general distrust of the judiciary, especially with respect to the quality of judges.\textsuperscript{138} Third, the lack of systematic protection against biases toward foreign entities in local courts has made arbitration a viable choice for foreign investors.\textsuperscript{139} Fourth, with years of experience in handling foreign-related commercial disputes, the CIETAC apparently has more expertise than most local courts.\textsuperscript{140} Fifth, the CIETAC is a centralized institution in which a uniform


\textsuperscript{134} S.C. WANG, Resolving Disputes, supra note 6, p. 5.

\textsuperscript{135} Ibid.

\textsuperscript{136} Ibid.

\textsuperscript{137} See, e.g., Equity Joint Venture Law, supra note 4, art. 15; Zhonghua renmin gongheguo zhongwai hezuo jingying qie fa (Law of the People’s Republic of China on Sino-Foreign Cooperative Enterprises), adopted at the 1st Session of the 7th National People’s Congress on Apr. 13, 1988 and amended by the 18th Session of the Standing Committee of the 9th National People’s Congress on Oct. 31, 2000, in China Laws for Foreign Business—Business Regulation, Vol. 1, Australia: CCH Ltd., 1999, pp. 6-100, art. 25. Although the CIETAC did not arbitrate disputes between Sino-foreign joint ventures before 1998, it did handle disputes between foreign and Chinese partners of joint ventures.


\textsuperscript{139} Brown and Rogers, “The Role of Arbitration in Resolving Transnational Disputes,” supra note 133, p. 333.

\textsuperscript{140} Chen, “Some Reflections,” supra note 138, p. 129.
practice can be adopted, while the courts at various levels and in
different regions tend to have varying practices.141

Notwithstanding the preceding advantages or reasons, arbitra-
tion in China still has limitations. First, arbitration does not func-
tion completely independently of the Chinese court system.142 For
instance, since Chinese state-owned enterprises are not likely to
have assets abroad, a foreign investor who is able to obtain a
favorable arbitration award against a Chinese party must ultimately
go to a Chinese court to seek enforcement.143 Second, enforcement
of arbitration awards may encounter obstacles similar to those in
the case of a court judgment, namely, local protectionism, corrup-
tion of judicial personnel, courts experiencing pressure from local
authorities, difficulty in obtaining the cooperation of local officials,
and the under-funded enforcement division of the court.144

VII. CONCLUSION

Since the promulgation of the Arbitration Law, the China Ar-
bitration Association has acted as a supervisory institution. Accord-
ingly, domestic arbitration practices have become more
professional and systematic. At the same time, the China Council
for the Promotion of International Trade has revised the CIETAC
Arbitration Rules thrice. These revisions reflect the necessity to
conform to the Arbitration Law, further efforts of the CIETAC to
bring foreign-related arbitration more in line with international
norms, and China's preparation for its entry into the WTO. De-
pending on the nature of the case and the nationality of the parties,
arbitration in China can be designated as domestic or foreign-rel-
lated. Nonetheless, with the latest revision of the CIETAC Arbitra-
tion Rules, the disputants may now choose whatever arbitration
commission they want to arbitrate their dispute, irrespective of
whether the dispute is domestic or foreign-related.

Given the general distrust of the Chinese judiciary, it is under-
able that arbitration, rather than litigation, has been a more
popular means for foreign investors to resolve their disputes. With
the intensification of current institutional reforms, such as enhanc-

141. Ibid.
142. Brown and Rogers, "The Role of Arbitration in Resolving Transnational Dis-
143. Ibid., p. 336.
144. G. WANG, "Unification of Dispute Resolution System," supra note 9, p. 39;
Brown and Rogers, "The Role of Arbitration in Resolving Transnational Dis-
putes," supra note 133, p. 342.
ing the competency of judges and promoting judicial independence,\textsuperscript{145} as well as more vigorous enforcement efforts, it is likely that enterprises will increasingly resort to litigation in resolving commercial disputes. Nonetheless, the inherent merits of arbitration will continue to make it an attractive mode of dispute resolution. In truth, the enactment of the Arbitration Law reflects the integral significance of arbitration in China’s dispute resolution scheme.

\textsuperscript{145} See Zhonghua renmin gongheguo faguan fa (Judges Law of the People’s Republic of China), adopted at the 12th Session of the Standing Committee of the 8th National People’s Congress on Feb. 28, 1995, in Guowuyuan Fazhi Bangongshi comp., Xinbian zhonghua renmin gongheguo changyong falu fagui quanshu (Newly edited compendium of frequently used laws and regulations of the People’s Republic of China), Beijing: Zhongguo Fazhi Chubanshe, 2000, p. 94.
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