

The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the PRC

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¹ I would like to thank Arthur Rosett for comments on an early version of this article. The research for this article provided the foundation for an empirical survey that I conducted between 1995 and 1998. The results of that survey are presented and examined more fully in Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of the Enforcement of Arbitral Awards in the People's Republic of China* (forthcoming 2000). In addition to thanking once again all of the individuals who participated in and supported the survey, I would like to thank the Smith Richardson Foundation, the UCLA School of Law, the UCLA Council on Research and the International Studies and Overseas Programs for funding the project.

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China's record with respect to the enforcement of arbitral awards leaves much to be desired.³ Recognizing that the failure to enforce awards has damaged its image as an attractive destination for foreign investment and hurt domestic enterprises as well, China has attempted to legislate its way out of trouble. In recent years, China's law-making bodies and the Supreme People's Court (SPC) have unleashed a flurry of laws, regulations, notices, and interpretations addressing enforcement issues more generally and the enforcement of arbitral awards specifically. This article examines the evolving regulatory framework for the enforcement of arbitral awards. Although China has made remarkable strides in overcoming many of the doctrinal obstacles to enforcement, the existing laws are deficient in many respects, and further reforms are needed.

Shortcomings in the regulatory framework are perhaps to be expected given that China essentially has had to create a modern legal system from scratch since 1978. Presumably, the government and the SPC will continue to tinker with the rules. Yet, the inability to enforce an award is often due to broader systemic and institutional problems, such as local protectionism, a weak judiciary, corruption, and the fallout from China's ongoing transition from a centrally planned to a more market-oriented economy.⁴ These obstacles make it difficult to enforce awards even when the rules are clear and can be addressed only through deeper institutional

³ See generally, Peerenboom, *supra* note 1; *Justice and Debt Recovery*, 3 CHINA ECON. Q. 30 (1999); Sally A. Harpole, *Following Through on Arbitration*, THE CHINESE BUS. REV., Sept.-Oct. 1998, at 33, 36-37 (reporting results of a survey by the Arbitration Research Institute, which is a research arm of China International Trade and Economic Arbitration Commission); Greg Rushford, *Chinese Arbitration: Can It Be Trusted?*, ASIAN WALL ST. J., Nov. 29, 1999. To be sure, many of the most extreme claims about the hazards of enforcing arbitral awards in China have been based largely on a single widely reported case, the Revpower case, and are grossly overstated. See, e.g., *Swedish Arbitral Award Enforced in Beijing*, INT'L COM. LITIG., June 1, 1998, at 31 (quoting one lawyer as saying that China "might as well have not bothered signing" the New York Convention). See also Charles Kenworthy Harer, *Arbitration Fails to Reduce Foreign Investors' Risk in China*, 8 PAC. RIM L. & POL'Y J. 393 (1999). Harer claims that Chinese courts "do as they please" when it comes to enforcement of arbitral awards. *Id.* at 414, 419. He cites in support an article in Business China that makes a similar claim without citing any empirical evidence other than the Revpower case. See *China's Rocky Road to Dispute Resolution: Rough Justice*, BUSINESS CHINA, Feb. 2, 1998, reprinted in 1998 WL 16823697.

⁴ See Peerenboom, *supra* note 1. This article and the article cited in note 1 are complementary in the sense that together they present the law and reality of enforcement of arbitral awards in China. While this article focuses on the law of enforcement, the article cited in note 1 deals with the reality of enforcement. Similarly, while this article examines in detail the regulatory framework and recommends doctrinal changes, the other article discusses institutional obstacles and provides recommendations for institutional reforms, particularly with respect to the judiciary.

changes. Indeed, some of the problems are simply not amenable to a quick fix and must be worked out over time. Nevertheless, reformers should do what they can to improve the regulatory framework, particularly because correcting the doctrinal deficiencies is, in many ways, an easier task.

Part I begins with a brief overview of the institutional framework, including the various arbitration commissions and the court system. Part II presents the regulatory framework. Part III concludes with suggested doctrinal reforms.

I. INSTITUTIONAL FRAMEWORK

A. *China's Arbitration Commissions and Related Bodies*

The PRC arbitration system consists primarily of the China International Economic and Trade Arbitration Commission (CIETAC), the China Maritime Arbitration Commission (CMAC), and the more than 140 local arbitration commissions set up in large- and medium-sized cities throughout China.⁵ CIETAC has been by far the most important in terms of foreign investors.

Originally named the Foreign Trade Arbitration Commission, CIETAC was established in 1956 under the auspices of the China Council for the Promotion of International Trade (CCPIT).⁶ Based on the Soviet model, CCPIT was founded as an adjunct to the Ministry of Foreign Trade (since renamed the Ministry of Foreign Trade and Economic Cooperation (MOFTEC)).⁷ Although still popularly known as CCPIT, its name was changed in 1998 to China Chamber of International Commerce (CCOIC). Like its name, CCPIT's legal status and functions have evolved over time. It is now a non-governmental organization whose aim is to promote foreign investment and trade by providing a link between foreign companies and the

⁵ See Jerome A. Cohen & Adam Kearney, *The New Beijing Arbitration Commission*, in *DOING BUSINESS IN CHINA* IV-3.1, IV-3.3 (2000). There are special arbitration bodies that handle labor disputes. See *id.*

⁶ See CHENG DEJUN ET AL., *INTERNATIONAL ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA* 8 (1995).

⁷ See generally CHENG, *supra* note 6, at 6-24; WANG SHENGCHANG, *RESOLVING DISPUTES IN THE PRC* 25-29 (1996).

Chinese government.⁸ CIETAC and CMAC are functionally independent of CCPIT in their handling of arbitration proceedings.⁹ CCPIT maintains a close relation with CIETAC and CMAC, however, and continues to appoint their commission members and arbitration panel members. In addition, many CIETAC and CMAC officials hold concurrent positions in CCPIT's Legal Affairs Department.¹⁰ Moreover, CCPIT is responsible for formulating rules governing foreign-related arbitration.¹¹

The name changes to the Foreign Economic and Trade Arbitration Commission in 1980 and CIETAC in 1988 reflect expansions of CIETAC's jurisdiction. When it was first established, CIETAC's jurisdiction was limited to trade disputes. In 1980, its jurisdiction was broadened to include non-trade matters such as disputes arising in conjunction with joint ventures and other forms of direct investment.¹² In 1988, CCPIT issued new rules further expanding CIETAC's jurisdiction to encompass disputes arising out of international economics and trade.¹³ The new rules also brought CIETAC's procedures more into line with international practices. For instance, the revised rules sanctioned the appointment of foreigners to the panel of arbitrators.¹⁴ CIETAC's rules were subsequently amended in 1994, 1995, and 1998. Again, the amendments expanded CIETAC's jurisdiction and adopted many of the practices of other

⁸ See WANG, *supra* note 7, at 25.

⁹ See *id.*

¹⁰ See CHENG, *supra* note 6, at 34-35.

¹¹ See Arbitration Law of the People's Republic of China (effective Sept. 1, 1995) [hereinafter AL] art. 73.

¹² See Notice of the State Council Concerning Renaming the Foreign Trade Arbitration Commission as the Foreign Economic and Trade Arbitration Commission (issued Feb. 26, 1980), *reprinted in* CHENG, *supra* note 6, at 8 n.16.

¹³ See 1989 CIETAC Rules (effective Jan. 1, 1989) art. 2.

¹⁴ See Michael J. Moser, *China's New Arbitration Rules*, 11 J. INT'L ARB. 5, 9 (Sept 1994). Originally, only thirteen foreign nationals were appointed to the panel, of which eight were Hong Kong Chinese. See *id.* Although now there are some 492 arbitrators on the list, including 124 from foreign countries other than Hong Kong, Taiwan, or Macao, in practice a relatively small number of PRC and foreign arbitrators handle most of the cases. See Liu Yuming & Wang Kaiding, *Choosing CIETAC Arbitrators*, CHINA L. & PRAC., May 20, 2000, at 57.

international arbitration institutes.¹⁵ The most significant of the 1998 changes was the expansion of jurisdiction to include disputes between foreign invested enterprises (FIEs) and wholly domestic PRC companies.¹⁶ CIETAC today is one of the busiest arbitration centers in the world. Its caseload rose to more than 1000 in 1996 before tapering off in recent years.¹⁷ The cases are increasingly complex, with higher amounts at stake, and involve an expanding range of subject matter.¹⁸ The nationalities of the parties have also become more diverse.¹⁹ CIETAC's principal location is in Beijing, although it has sub-commissions in Shanghai and Shenzhen.

CMAC was originally established as the Maritime Arbitration Commission in 1959. Its name was changed in 1988. Although CMAC's jurisdiction has expanded over the years, it remains limited to maritime matters.²⁰ CMAC's rules, first promulgated in 1959, were amended

¹⁵ See 1994 CIETAC Rules art. 2. The 1994 revisions expanded CIETAC's jurisdiction to include "disputes arising from international or external, contractual or non-contractual, economic and trade transactions." *Id.* CIETAC rules were amended in 1995 to bring them into conformity with the AL passed in 1994. See Michael Moser & Zhang Yulin, *The New Arbitration Rules of the China International Economic and Trade Arbitration Commission*, 13 J. INT'L ARB. 15 (1996). For the currently valid 1998 Rules, see 1998 CIETAC Rules (visited Feb. 20, 2000) <<http://www.sinosion.com/rules98.htm>>. Unless otherwise indicated, "CIETAC Rules" refers to the 1998 rules.

¹⁶ See CIETAC Rules art 2(3). Whereas jurisdiction previously was based on the dispute being "international or foreign-related," Article 2 now provides jurisdiction over disputes "arising from economic and trade transactions, contractual or non-contractual." *Id.* art. 2. Article 2 then adds that such disputes include: (i) international or foreign related disputes; (ii) disputes relating to the Hong Kong Special Administrative Region, Macao, or Taiwan regions; (iii) disputes between foreign investment enterprises and disputes between foreign investment enterprises and another Chinese legal person, physical person, and/or economic organization; (iv) disputes arising from project financing, invitation for tender, bidding, construction and other activities conducted by Chinese legal persons, physical persons and/or other economic organizations through utilizing the capital, technology or service from foreign countries, international organizations, or from the Hong Kong Special Administration Region, Macao, and Taiwan regions; and (v) disputes that PRC laws or administrative regulations specially require or specially authorize the Arbitration Commission to take cognizance of. See *id.* This list is presumably meant to be illustrative rather than exhaustive.

¹⁷ For the number of cases up to 1996, see WANG, *supra* note 7, at 68. In 1997, CIETAC resolved 764 cases, of which forty-one were left over from the previous year. See *China Revised Rules Make Arbitration Fairer*, CHINA DAILY, Apr. 13, 1998, reprinted in 1998 WL 7595064.

¹⁸ See *China to Strengthen Trade Arbitration*, ASIA PULSE, May 11, 1998, reprinted in 1998 WL 2961314. In 1997, 17% of the cases involved engineering, real estate, rent, intellectual property rights, and securities. See *id.* Disputes concerning commodity deals accounted for 45%. See *id.*

¹⁹ See *id.* at 70.

²⁰ CMAC's jurisdiction was expanded in 1982 and then again in 1995. See WANG, *supra* note 7, at 61-62. Its current jurisdiction is set out in Article 2 of the 1995 CMAC Rules. See *China Maritime Arbitration Commission Arbitration Rules* (visited June 9, 2000) <<http://www.sinosino.com/rules951.htm>>.

in 1988 and then again in 1995.²¹ There are ninety-one arbitrators on CMAC's panel, six of whom are foreign nationals.²² CMAC's caseload is small in comparison to that of CIETAC, averaging only fifteen to twenty-five cases a year.²³

Prior to the 1995 Arbitration Law, PRC domestic arbitration centers generally operated under the aegis of the local government's administration of industry and commerce.²⁴ In keeping with the transition from a centrally planned economy to a more market-oriented one, the Arbitration Law called for the establishment of arbitration centers independent of the government.²⁵ Existing commissions were to be reorganized as non-government social organizations with legal person status.²⁶ The Arbitration Law sanctioned the establishment of domestic centers in large- and medium-sized cities.²⁷ More than 140 centers have been established, even though in some cases there seems to be little economic demand for such centers.²⁸

Although the Arbitration Law emphasizes the independence of the newly created centers from the government, in practice many centers remain financially dependent on the local government, which provides salaries and housing for commission staff.²⁹ Moreover, at least in

²¹ CMAC reportedly does not have any plans to revise its rules in light of CIETAC's 1998 amendments. See Rajat Jindal, *Foreign Arbitration*, in *DOING BUSINESS IN CHINA* (Juris Publishing) (forthcoming 2000).

²² See *id.*

²³ See *id.*

²⁴ See WANG, *supra* note 7, at 26 (describing the salient features of China's domestic arbitration as the lack of independence from the government, the lack of party autonomy and non-binding arbitral awards).

²⁵ See AL art. 14.

²⁶ See *id.* art. 15.

²⁷ See *id.* art. 10.

²⁸ See Cohen & Kearney, *supra* note 5, at IV-3.3.

²⁹ See *id.* at 5. The Beijing Arbitration Commission ("BAC") apparently has achieved financial independence. See Interview with BAC official, Dec. 1999 (notes on file with author).

some cases, the chairman, vice-chairman, commissioners, and secretary general are appointed directly or indirectly by the local government for three-year terms.³⁰

The caseload of the local commissions varies. While many stand idly by, the Beijing Arbitration Commission (BAC) handled 802 cases from its establishment in 1995 through October 1999.³¹ To date, BAC has handled few cases involving foreign parties.³² Just over half of the cases resulting in an award were resolved through mediation conducted by the arbitrators, while another 20% of the total cases were resolved by mediation outside the framework of the BAC.³³

The Arbitration Law also called for the establishment of the China Arbitration Association (CAA).³⁴ CAA is a self-regulating social organization with legal person status. Its members consist of PRC arbitration commissions, including CIETAC and CMAC. CAA will not accept cases; rather, its main functions are to supervise the other commissions and to formulate rules for domestic arbitration commissions.

Foreign investors need not always choose to arbitrate their disputes with Chinese parties in China. PRC law allows the parties to arbitrate abroad if one of the parties is a foreign person or entity.³⁵ Of course, even where the parties are permitted to arbitrate abroad, they may prefer to arbitrate in China. Indeed, in practice the Chinese side will generally resist the foreign party's suggestion to arbitrate abroad. The foreign party may increase its chances of persuading the Chinese side to accept foreign arbitration by proposing a neutral venue. Historically, the most

³⁰ Cohen and Kearney claim that while some commissions are relatively independent of the government others are, for all practical purposes, arms of the government. *See* Cohen & Kearney, *supra* note 5, at IV-3.4.

³¹ *See Justice and Debt Recovery, supra* note 3. Moreover, the number of cases at BAC has been rising rapidly, from 149 in 1996 to 252 during the first 9 months of 1999. Sixty percent of the cases involve trade disputes, 18% engineering projects, and 15% joint ventures.

³² *See* Interview with BAC official, *supra* note 29.

³³ *See* Cohen & Kearney, *supra* note 5, at 9.

³⁴ *See* AL art. 73.

³⁵ *See* PRC Contract Law (Mar. 15, 1999) art. 126; AL arts. 58, 70, 71; CODE OF CIVIL PROCEDURE OF THE PEOPLE'S REPUBLIC OF CHINA (Apr. 9, 1991) (adopted by the Fourth Session of the Standing Committee of the Seventh National People's Congress) [hereinafter CPL] art. 257. Foreign invested enterprises such as joint ventures are PRC legal persons. While the Contract Law does not expressly prohibit two PRC parties from arbitrating abroad, it is generally understood that the parties are limited to arbitration within China.

common forum has been the Arbitration Institute of the Stockholm Chamber of Commerce. Other popular venues include Geneva, London, Paris, Vienna, Zurich, and New York. Recently, Hong Kong and Singapore have become increasingly popular due to their proximity and the availability of Chinese-speaking lawyers and personnel.³⁶ Whether Hong Kong will remain a popular location now that it has reverted to PRC law remains to be seen.

B. *The Judiciary: Court Structure and the Role of Judges*

As arbitral awards are enforced through the courts, it is necessary to understand something about China's judicial structure.³⁷ The judiciary in China differs in significant ways from its counterparts in developed western countries. PRC courts are much weaker institutionally, and judges and the judiciary have a much lower stature than in the U.S. or even civil law countries. These differences have a direct impact on the enforcement of arbitral awards.³⁸

There are four levels of courts in China: the Supreme People's Court (SPC), High People's Courts (HPC), Intermediate People's Courts (IPC), and Basic Level People's Courts (BPC).³⁹ Each is responsible to the people's congress at the equivalent level, which supervises its work and appoints and removes judges.⁴⁰ Moreover, courts are financially dependent on the corresponding level of government for salaries, housing, and benefits. The lack of security of tenure combined with fiscal dependence has left judges beholden to their government counterparts. Although the judiciary is formally independent with respect to the handling of cases, contacts between government officials and judges, many of whom have known each other

³⁶ See Jindal, *supra* note 21.

³⁷ See generally Donald Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1 (1996); RONALD BROWN, *UNDERSTANDING CHINESE COURTS AND THE LEGAL PROCESS* (1997).

³⁸ See Peerenboom, *supra* note 1.

³⁹ In addition, there are specialized courts for military, maritime, and railway cases.

⁴⁰ See Judges Law of the People's Republic of China (Feb. 28, 1995) [hereinafter Judges Law] art. 11. Judges are not afforded lifetime tenure. The Judges Law does provide, however, that judges shall not be dismissed, demoted or punished except for legally stipulated reasons and in accordance with legally stipulated procedures. See *id.* art. 8.

for years, is a regular event.⁴¹ Not surprisingly, local protectionism has been a problem as courts refuse to enforce awards and court judgments against parties with strong government support.⁴²

The institutional autonomy of the courts is further diminished by their links to the Chinese Communist Party (CCP). While people's congresses are formally empowered to appoint judges, in practice judges are often selected by the CCP Committee on the same level, and the choices are ratified by the people's congresses.⁴³ Most senior judges are CCP members, including the members of the adjudication committee of the court, which has considerable authority in determining the outcome of difficult or controversial cases.⁴⁴ Further, although direct intervention by the CCP in individual cases is lessening, judges still discuss important political cases or cases involving difficult legal issues with the Political-Legal Committee.⁴⁵ More generally, the CCP exercises control over the court by setting general policies, implicitly accepted by judges, within which the courts must operate.

Answerable to the local government and CCP committees, courts traditionally have been viewed as Party/state organs and judges as government administrators or bureaucrats. Even within the bureaucracy, the stature of the judiciary and judges has been low. Judges, for the most

⁴¹ Article 126 of the PRC Constitution provides that the courts shall "in accordance with law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations, or individuals." ZHONGHUA RENMIN GONGHEGUO XIANFA [Constitution] [XIANFA] art. 126 (1982) (as amended Apr. 12, 1988 and Mar. 29, 1993). At the same time, Article 128 makes clear that, administratively and institutionally, the courts are responsible to the corresponding level people's congresses that created them. *See id.* art. 128.

⁴² Estimates of the percentage of civil judgments that go unenforced vary from 20% to 50%. While a number of factors contribute to the low enforcement rate, local protectionism is often cited as most important. *See Clarke, supra* note 37, at 28-30, 41.

⁴³ *See generally* KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION TO REFORM (1995) (discussing, in detail, the government structure and government-party relations).

⁴⁴ Every court has an adjudication committee that oversees the work of the court and handles difficult cases. Decisions of the adjudication committee are binding on the judge or judicial panel that hear the case (a single judge may hear a minor criminal or civil case of the first instance while other cases are tried by a judicial panel). The president of the court is the head of the adjudication committee and nominates the other members. If the president finds definite error in the determination of facts or the application of law on the part of the judicial panel, he may submit the case to the adjudication committee he nominates for review of the decision. Accordingly, the president of the court retains considerable power to determine the outcome of individual cases. *See Judges Law* art. 11; CPL art. 177.

⁴⁵ *See Peerenboom, supra* note 1.

part, have tended to be poorly educated, many of whom are former military personnel without college education or any formal training in law.⁴⁶

Internally, each court is divided into chambers. In general, courts have an enforcement chamber or at least several judicial personnel responsible for enforcement. Enforcement is not considered one of the choice assignments for judges.⁴⁷ The judges assigned to the enforcement chamber usually have the least legal training.⁴⁸ The work, for the most part, is not as intellectually challenging as the work in other chambers. Moreover, it is difficult.⁴⁹ Judges are often frustrated by the practical and political obstacles to enforcement, most of which are beyond their control. To add injury to insult, judges have in the past been threatened or physically abused by angry parties that did not take kindly to the court's attempts to enforce an award or judgment.⁵⁰

Procedurally, a collegiate bench, consisting of three judges, decides whether to enforce an award. If the bench decides to enforce the award, it then assigns an enforcement officer to carry out the enforcement. The enforcement officer sends a notice of enforcement to the party subject to enforcement, ordering the party to fulfill its obligations within a specified time limit. If the party fails to comply within the time limit, the court may take coercive actions.⁵¹ If necessary, the enforcement officer and court police may seize the respondent's assets. The court police responsible for enforcement, however, are different from regular police and do not have the authority of normal police.

⁴⁶ Efforts are being made to address the situation. The 1995 Judges Law increases the qualification standards for new judges and requires current judges to take steps to meet the standards within a reasonable time. See Judges Law art. 9.

⁴⁷ See Interviews with lawyers (notes on file with author). See also Jianfu Chen, *Enforcement of Civil Judgments and Rulings*, CCH CHINA LAW UPDATE, July 1993, at 7.

⁴⁸ See Clarke, *supra* note 37, at 13.

⁴⁹ For the workload of the enforcement chamber, see Clarke, *supra* note 37, at 13-14.

⁵⁰ See Peerenboom, *supra* note 1.

⁵¹ See CPL art. 220.

II. REGULATORY FRAMEWORK

A. Types of Awards

There are three main types of arbitral awards: foreign, foreign-related, and domestic.⁵² Foreign arbitral awards refer to any awards made outside of China. Foreign awards include both Convention and non-Convention awards. Convention awards are enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”),⁵³ whereas non-Convention awards refer to foreign awards that are not enforceable under the New York Convention.

Foreign-related awards are awards by CIETAC, CMAC, or local arbitration commissions that involve a foreign element. Domestic awards are awards by local arbitration commissions that do not involve foreign elements. According to a Supreme People’s Court (SPC) interpretation, a “foreign element” refers to civil cases in which: one party or both parties are foreigners, stateless persons, foreign enterprises, or foreign organizations; or the legal fact of establishment, modification, or termination of the civil legal relationship between the parties occurred in a foreign country; or the object of the action is located in a foreign country.⁵⁴

As foreign investment enterprises are considered PRC legal persons, a key issue was whether the mere fact that the enterprise was established with foreign investment would provide the necessary foreign element. In a well-known 1992 case, *China International Engineering Consultancy Company v. Lido Hotel Beijing*, the Beijing Intermediate Court held that CIETAC did not have jurisdiction over the case merely, because the defendant was a Sino-Foreign joint venture. In response, CIETAC amended its Arbitration Rules to expressly provide jurisdiction

⁵² Awards from Hong Kong, Macao, and Taiwan fall into another category. Of the three, Hong Kong awards are by far the most significant given the amount of trade between Hong Kong and the mainland and the popularity of Hong Kong as an arbitration site, at least prior to the reversion of Hong Kong to PRC sovereignty on July 1, 1997. For a discussion of the rules for enforcing Hong Kong awards in the mainland and mainland awards in Hong Kong, see *infra* Part II.G.6.

⁵³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, No. 4739 (1959), available at <<http://www.internationaladr.com/tc121.htm>> [hereinafter New York Convention].

⁵⁴ Some Opinions Concerning Implementation of the Civil Procedure Law (1991) (issued by the SPC) (copy on file with author) art. 304. Article 304 deals with civil cases, not arbitrations. It is generally accepted, however, that the interpretation also applies to arbitration cases. See, e.g., WANG, *supra* note 7, at 20.

over disputes between foreign investment enterprises and wholly domestic companies.⁵⁵ Although some commentators have questioned whether CIETAC had the authority to expand its own jurisdiction,⁵⁶ it is highly unlikely in the current legal environment that CIETAC would have acted without first obtaining the consent of the relevant authorities, including the State Council and the SPC.

Arguably, foreign-related awards could be treated as Convention awards. China, however, rejected this possibility when it acceded to the New York Convention. By joining subject to the reciprocity reservation, China ensured that the New York Convention would apply only to arbitral awards made in the territory of other contracting States.⁵⁷

To date, CIETAC and CMAC have handled most of the foreign-related cases. In 1996, however, the State Council authorized domestic arbitration commissions to accept foreign-related cases.⁵⁸ Foreign investors have nonetheless been reluctant to take advantage of the opportunity, preferring instead to arbitrate abroad or with CIETAC for a variety of reasons. CIETAC has appointed a number of foreign arbitrators to its panel and allows parties to choose to conduct the proceedings in a language other than Chinese, steps which domestic arbitration commissions have yet to take. Given the profitability and prestige of foreign arbitration, it is possible and perhaps even likely that at least some of the domestic institutes in major foreign business centers will follow CIETAC's lead and modify their rules to attract more foreign-related cases, including perhaps allowing parties to choose foreign arbitrators and a foreign language for the proceedings. Nevertheless, CIETAC will most likely be the venue of choice at least for the near future. CIETAC enjoys the advantage of a longer track record and a reputation for independence. Its arbitrators are, on the whole, stronger and include a number of nationally known academics and practitioners, many of whom have the necessary language skills to

⁵⁵ See *supra* note 16.

⁵⁶ See, e.g., DONALD CLARKE & ANGELA DAVIS, DISPUTE RESOLUTION IN CHINA: THE ARBITRATION OPTION, China 2000 n.13, (2000), available at <<http://www.asialaw.com/bookstore/china2000/chapter12.htm>>.

⁵⁷ See CHENG, *supra* note 6, at 75.

⁵⁸ See Several Problems to be Clarified Concerning the Thorough Implementation of the PRC Arbitration Law, June 8, 1996 (issued by the State Council): "The main duties of the reorganized arbitration commissions shall be to accept domestic arbitration cases. Where the parties to a foreign-related arbitration case voluntarily select arbitration by a reorganized arbitration commission, such commission may accept the case." *Id.*

conduct an arbitration in English. Furthermore, the rules of domestic institutions relating to foreign investment are not as well-developed or favorable to foreign investors as CIETAC's rules.⁵⁹ Additionally, some of the regulations for enforcing foreign-related arbitral awards do not, on their face, apply to foreign-related awards of domestic arbitration institutions.⁶⁰

It should be noted that PRC arbitration laws and regulations do not expressly address the enforceability of institutional awards. The New York Convention, however, covers both institutional and ad hoc awards. It is now settled that ad hoc awards made in a foreign country may be enforced in China pursuant to the New York Convention. What remains unclear is whether ad hoc awards made in China pursuant to arbitral rules, such as those of the ICC or UNCITRAL, are enforceable in PRC courts. For years, CIETAC enjoyed a virtual monopoly over foreign-related arbitration in China subject to limited competition from CMAC. The recent expansion of the domestic arbitration commissions' jurisdiction to include foreign-related arbitration cases broke the monopoly, although domestic institutions have yet to make much headway in attracting foreign-related cases. Permitting the enforcement of ad hoc awards made in China would further undermine CIETAC's dominance of the market for foreign-related arbitration in China. CIETAC is therefore likely to oppose any such change vigorously.

B. *A Brief Legislative Overview*

Prior to 1982, China lacked a legal basis for the recognition and enforcement of foreign-related arbitral awards. Such awards were considered self-executing and depended on voluntary compliance by the losing party. Similarly, parties seeking to enforce foreign awards were forced to rely primarily on voluntary compliance, although they could seek administrative assistance from government bodies such as CCPIT.⁶¹

⁵⁹ See Sally Harpole, *State Council Circular Creates a New Forum for Disputes*, CHINA LAW & PRACTICE, June 1997, at 46-50.

⁶⁰ See, e.g., *infra* Part II.G.4.

⁶¹ See Andrew Kui-Nung Cheung, *Enforcement of Foreign Arbitral Awards in the People's Republic of China*, 34 AM. J. COMP. L. 295, 297 (1986).

The promulgation of the Civil Procedure Law (for Trial Implementation) in 1982 provided a legal basis for the compulsory enforcement of arbitral awards.⁶² Article 195 of the 1982 CPL addressed foreign-related awards:

When one of the parties concerned fails to comply with a ruling made by a foreign affairs arbitration organization of the PRC, the other party may request that the ruling be enforced in accordance with the provisions of this article by the courts at the place where the arbitration organization is located or where the property is located.⁶³

This article was notable in several respects.⁶⁴ First, it did not contemplate ad hoc awards. Even more remarkably, it contained no provision for the refusal of enforcement; all awards were to be treated as final and enforceable. The court's job was simply to execute the award, not to subject the award to even the limited kind of review allowed under the New York Convention and current PRC laws. Moreover, the article allowed parties to seek enforcement either where the assets were located or at the place of arbitration. Given the problems with local protectionism, the ability to seek enforcement where the arbitration was held, which was usually Beijing, was a major boon to the petitioner in many cases.

The 1982 CPL also provided a legal basis for the enforcement of foreign arbitral awards, though the process was hardly straightforward.⁶⁵ PRC courts could enforce "judgments or rulings" of foreign courts subject to certain restrictions.⁶⁶ Thus, the judgments or rulings had to be final. As arbitral awards are neither court judgments nor rulings, they first had to be converted into a court judgment or ruling to be enforceable. To complicate matters further, the victorious party could not apply directly for enforcement. The request had to come from a foreign court, which is not possible under the laws of some jurisdictions. The PRC court could

⁶² See Civil Procedure Law of the People's Republic of China (for Trial Implementation) (1982) [hereinafter 1982 CPL].

⁶³ 1982 CPL art. 195(a).

⁶⁴ See CHENG, *supra* note 6, at 73-74.

⁶⁵ See 1982 CPL art. 204.

⁶⁶ Michael Moser, *China and the enforcement of arbitral awards (Part 2)*, in ARBITRATION, May 1995, at 132.

then refuse to enforce the award if enforcement would violate fundamental principles of PRC law or national or social interests. Not surprisingly, there were no successful cases of enforcement of foreign arbitral awards prior to China's accession to the New York Convention in 1987.⁶⁷

China became a party to the New York Convention subject to reciprocity and commercial reservations.⁶⁸ Under the reciprocity reservation, China "shall apply the Convention to arbitral awards made in the territory of other contracting states" only on the basis of reciprocity.⁶⁹ Under the commercial reservation, China will apply the New York Convention only to disputes that, according to PRC law, arise from "commercial legal relationships of a contractual nature or a non-contractual nature."⁷⁰ Treaties are self-executing in China and take precedence over domestic law in the case of conflict, except with respect to reservations made by China at the time of accession.⁷¹

On April 10, 1987, the SPC issued the Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁷² The notice clarified issues regarding the commercial reservation, venue, and time limits.⁷³ It also

⁶⁷ See CHENG, *supra* note 6, at 84.

⁶⁸ The NPC Standing Committee adopted the decision on Joining the Convention on the Recognition and Enforcement of Foreign Arbitral Awards on December 2, 1986. See CHENG, *supra* note 6, at 1171.

⁶⁹ Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Apr. 10, 1987) [hereinafter New York Convention Accession Notice], reprinted in CHENG, *supra* note 6, at 1173.

⁷⁰ *Id.*, reprinted in CHENG, *supra* note 6.

⁷¹ See CPL art. 238.

⁷² See New York Convention Accession Notice, *supra* note 69, at 1173.

⁷³ See *infra* Parts II.C and II.D (discussing venue and time limits). The SPC interpreted "commercial relations of a contractual and non-contractual nature" as "relations concerning economic rights and obligations arising out of contract, tort or relevant statutory provisions." See New York Convention Accession Notice, *supra* note 69, at 1173. It then proceeded to list several examples, such as sale of goods, lease of property, technology transfer, maritime accidents, product liability and so on. It expressly excluded any disputes between foreign investors and the Chinese government. See *id.*

sought to promote the smooth enforcement of awards by calling on judicial personnel to study the New York Convention earnestly and conscientiously.⁷⁴

Although the SPC opinion clarified certain matters, it left much to be desired. For instance, the New York Convention provides only that courts *may* refuse enforcement of an award for the reasons set out in Article V. This gives the courts some discretionary power to disregard minor defects. By using the more mandatory *shall* (*yingdang*), however, the SPC arguably requires courts to refuse to recognize the award even if the defect is only a minor one.

The NPC amended the 1982 CPL for trial implementation in 1991. The revised CPL contained a number of new provisions on enforcement of arbitral awards. As discussed more fully below, Articles 217 and 260 provided standards for refusal to enforce domestic and foreign-related awards respectively. Article 269 addressed the inadequate basis for enforcing foreign awards under the 1982 CPL by providing:

Where an award rendered by a foreign arbitration organization requires recognition and enforcement by a People's Court in the PRC, the party shall directly apply to the Intermediate People's Court in the place where the party subject to enforcement is domiciled or where his property is located. The People's Court shall handle the matter pursuant to international treaties which China has concluded or to which China is a party or in accordance with the principle of reciprocity.

The main treaty referred to in Article 269 is the New York Convention. China, however, has also entered into various other bilateral judicial assistance agreements that apply to the enforcement of arbitral awards, as well as the Washington Convention, which applies to the recognition and enforcement of arbitral awards rendered by tribunals established within the International Centre for the Settlement of Investment Disputes.

The next major piece of legislation was the Arbitration Law, which generally tracks the CPL with respect to enforcement. In addition, the SPC has issued a number of notices and regulations regarding enforcement. The most important of these includes a 1995 notice that established a reporting mechanism for courts that intended to refuse enforcement of foreign or

⁷⁴ This would not be the last time the SPC tried to persuade PRC courts to diligently enforce awards. *See, e.g.*, Notice on the Earnest Implementation of the Arbitration Law and Enforcement of Arbitral Awards According to Law (Oct. 1995) (issued by the SPC), *reprinted in* CHENG, *supra* note 6, at 1176.

foreign-related awards.⁷⁵ In 1998, the SPC created a similar mechanism for courts contemplating the setting aside of an award, which was made possible under the Arbitration Law.⁷⁶ The SPC also issued two other notices relating to enforcement in 1998. The first addressed a wide range of issues relating to the enforcement of court judgments, as well as arbitral awards, including time limits for the courts to complete enforcement and guidelines for subrogation.⁷⁷ The second focused on foreign arbitral awards. It imposed various time limits for the different stages of the enforcement process and clarified the fees payable by the applicant.⁷⁸ In early 2000, the Supreme Court issued two more regulations seeking to clarify jurisdictional issues and strengthen the sense of responsibility among enforcement personnel by imposing liability for failure to enforce awards and judgments in accordance with law.⁷⁹

⁷⁵ See Notice of the Supreme People's Court Regarding Several Issues Relating to the People's Courts' Handling of Foreign-related and Foreign Arbitration Matters (Aug. 28, 1995) (issued by the SPC) (copy on file with author) [hereinafter 1995 Notice]. See also *infra* Part II.G.4.

⁷⁶ See Notice of the Supreme People's Court Regarding Matters Relating to People's Courts' Setting Aside of Foreign-related Arbitral Awards, (Mar. 23, 1998) (issued by the SPC) (copy on file with author) [hereinafter Setting Aside Notice]. See also *infra* II.L.

⁷⁷ See SPC Provisions on Certain Issues Relating to the People's Courts Enforcement Work Regulation (Trial Implementation) (July 8, 1998) (issued by the SPC's Adjudication Supervision Committee and adopted June 11, 1998) [hereinafter Enforcement Regulation], reprinted in CHENG, *supra* note 6, at 940. The SPC does not have legislative power. The SPC, however, has stated that SPC regulations are legally binding provided that they do not contravene national regulations. See Certain Provisions on Judicial Interpretation (June 23, 1997) (issued by the SPC).

⁷⁸ See Regulation of the Supreme People's Court Regarding the Problems of Collecting Fees and Time Limits for Review of Recognition and Enforcement of Foreign Arbitral Awards (Oct. 21, 1998) (adopted by the SPC Adjudication Supervision Committee) (copy on file with author) [hereinafter Fee Regulation].

⁷⁹ See Regulations of the Supreme Court Concerning Several Issues Related to the Unified Administration of Enforcement Work by the High People's Courts (Jan. 14, 2000) (adopted by the SPC Adjudicative Supervision Committee) (copy on file with author) [hereinafter Unified Administration Regulation]; Certain Regulations for Strengthening and Improving Entrustment Enforcement Work (effective Mar. 11, 2000) (adopted by the SPC Adjudicative Supervision Committee) (copy on file with author). The latter regulation attempts to address the problem of lack of enforcement by a local court asked to enforce a judgment or order of another PRC court against a local company. It also clarified jurisdictional issues and how enforcement cases are to be handled when the party has assets in more than one jurisdiction. The regulation is more applicable to enforcement of civil judgments than arbitral awards because, in most cases, the applicant in an arbitral award case will apply for enforcement where the respondent's assets are located, and there will be no occasion to seek enforcement by entrustment.

C. *Venue and Jurisdiction*

The Supreme Court Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards clarified the venue for enforcement of foreign awards. The venue depends on whether the respondent is a natural person or a company. If the respondent is a natural person, the proper venue is the IPC where the respondent has his or her registered domicile (*hukou*) or where the person is actually located. If the respondent is a legal person or organization, the proper venue is the IPC where its principal business office is located. If the respondent has no registered domicile or place of residence or principal business office, then the applicant may seek enforcement at the IPC where the property is located.⁸⁰ The Notice appears to establish a hierarchy. Accordingly, the applicant may seek enforcement where the property is located only as a last resort. Given the problem with local protectionism, however, applicants should be able to go directly to an IPC where the property is located, assuming that would be a different location than the principal place of business or domicile of the respondent.

The venue for foreign-related awards is the IPC at the place of the respondent's legal domicile or where the property is located.⁸¹ The revised CPL no longer provides jurisdiction based on the place of arbitration, as under the 1982 CPL. The venue for domestic arbitration is the basic level court where the respondent is domiciled or where the property is located.⁸²

D. *Application Process*

1. *Documentation*

Article IV of the New York Convention requires the applicant to provide the duly authenticated original award and arbitration agreement or a duly certified copy. If the award or agreement is not made in the language of the country in which the award is to be enforced, the party applying for recognition and enforcement of the award must produce a translation of the

⁸⁰ See New York Convention Accession Notice, *supra* note 69.

⁸¹ See CPL art. 259.

⁸² See *id.* art. 217; AL art. 63.

documents. The translation must “be certified by an official or sworn translator or by a diplomatic or consular agent.”⁸³

Typically, in China, the applicant must provide the following:⁸⁴ an application;⁸⁵ an original or notarized copy of the award; an original or notarized copy of the arbitration agreement; a power of attorney⁸⁶ and documentation of the applicant’s legal representative; and a notarized and consularized certificate of incorporation or analogous documentation.⁸⁷ These

⁸³ New York Convention art. IV, ¶ 2.

⁸⁴ See Enforcement Regulation art. 20.

⁸⁵ The application should include:

- (i) Title - Application for (recognition and) enforcement of arbitral award.
- (ii) Applicant Information: name, address, legal representative.
- (iii) Respondent Information: name, address, legal representative.
- (iv) Nature of Award. The purpose is to verify that the award is suitable for enforcement: is the award binding? Is the award an ad hoc or institutional award? Is the award a commercial award?
- (v) Relief Sought and Supporting Reasons. The application should set forth a request for enforcement. If applicant should state whether it is seeking specific performance, money damages or both. The applicant should set forth the time limit for compliance with the award and the specific legal basis for enforcing the award, and also confirm that the claim for enforcement is within the statute of limitations period.
- (vi) Respondent Information. The applicant should state which obligation(s) the respondent has failed to perform. If possible, the applicant should also provide information regarding the respondent’s economic situation and provide detailed information about the respondent’s assets against which the award could be enforced.
- (vii) Signature or seal of the applicant.

See WANG, *supra* note 7, at 170-71.

⁸⁶ See CPL art. 242.

⁸⁷ This requirement serves a three-fold purpose. First, it serves to verify the identity of the applicant. Second, it establishes the legal status of the applicant. The time limitation for recognition and enforcement provided in Article 219 of the Code of Civil Procedure may vary, from six months to one year, depending on the applicant’s status as a natural or legal person. Third, it allows the court to verify that the party is a commercial entity rather than a government entity for the purposes of the Commercial Reservation.

documents must be translated into Chinese.⁸⁸ The applicant must also pay the fees for enforcement.⁸⁹

In practice, applicants often confront problems at the application stage. According to one survey, judges sometimes did not know what documents were required.⁹⁰ At other times, judges required the applicant to provide a number of documents not required by PRC law such as evidentiary documents relied on by the arbitration tribunal in making its award. They also insisted that such documents be translated, notarized, and consularized. The lawyers involved in the cases believed that the court's demands were excessive and motivated by local protectionism.⁹¹

The need to rely on authorized translators further complicates matters. The translators are often slow and not up to the task of translating the technical subject matter of some of the contracts. In response, many parties handle the translations themselves. The authorized translation agency then simply reviews the translation and applies its seal, although the applicant pays the agency the full fee.

2. *Statute of limitations*

Parties may apply for enforcement after the deadline for voluntary compliance set forth in the award has elapsed.⁹² The statute of limitations period is short in China.⁹³ If all parties are companies or other organizations, the statute of limitations is just six months. If one of the parties is a natural person, the period is one year. The statute of limitations begins to run on the last day of the period for performance prescribed by the award. If the award calls for the

⁸⁸ See Enforcement Regulation art. 20.

⁸⁹ See Measures for the Charging of Court Costs by People's Courts (June 29, 1989) (adopted by the SPC Adjudication Committee) (effective September 1, 1989), reprinted in CHENG, *supra* note 6, at 825.

⁹⁰ See Peerenboom, *supra* note 1.

⁹¹ See *id.*

⁹² The AL does not address the situation where the award fails to specify a time for performance. Under CIETAC rules, the losing party is required to implement the award immediately. See CIETAC Rules art. 63.

⁹³ See CPL art. 219.

performance to be carried out in different periods, it begins on the last day of each performance period as prescribed.

In practice, the deadlines are often too short, particularly given the need to translate many documents into Chinese and get them notarized and consularized.⁹⁴ Moreover, it is not clear what actions will stay the statute of limitations. Parties often attempt to negotiate a settlement even after the award is issued. In the process, the parties may exchange various letters. The losing party may ask for additional time or make promises to pay within a certain time. Although the exchange of documents for the purposes of seeking settlement or the granting of additional time by the applicant presumably may stay the statute of limitations, there is no firm legal basis for this conclusion.

3. Fees

The New York Convention requires that court fees for enforcing foreign and domestic awards be the same.⁹⁵ According to the Measures for the Charging of Court Costs by People's Courts, the fee amount varies depending on the size of the award.⁹⁶ Where the amount of the award is less than RMB 10,000, the fee is RMB 50; where the amount is RMB 10,001 to 500,000, the fee is 0.5%; and where the amount exceeds 500,000, the fee is 0.1%.⁹⁷ In addition, the court may collect other actual expenses incurred during enforcement. The respondent is responsible for the fee, unless the applicant's application is denied in whole or in part, in which case applicant may be responsible for all or part of the fee.⁹⁸

In some cases, courts have treated the decision to accept the case and the determination of whether or not to enforce the award as one matter, and then the enforcement itself as a separate

⁹⁴ In the U.S., for example, the period is three years from the time the award is made. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 207 (U.S.). In Hong Kong, the period is generally six years. *See* Limitation Ordinance (Cap 347), § 4(1)(c) (1991).

⁹⁵ *See* New York Convention art. III.

⁹⁶ *See* Measures for the Charging of Court Costs by People's Courts (June 29, 1989) (adopted by the SPC Adjudicative Committee) art. 8.

⁹⁷ *See id.*

⁹⁸ *See* WANG, *supra* note 7, at 173.

matter. Thus, the foreign applicant seeking to enforce an award has had to pay two fees. In response to complaints from foreign investors and their lawyers, the SPC issued a notice in October 1998 that clarified the fee issue at least with respect to Convention awards.⁹⁹ According to the Fee Regulation, the applicant for enforcement of foreign awards pursuant to the New York Convention first pays RMB 500 when submitting the application for recognition and enforcement. If the court then decides to recognize and enforce the award, it will collect an application fee in accordance with the fee schedule just mentioned. If, however, the court then decides to recognize but not enforce the award, it shall return the amount collected after deducting the RMB 500.

E. *Representation at the Enforcement Proceedings*

As a rule, foreign lawyers are not allowed to appear in PRC courts as lawyers.¹⁰⁰ They may, however, assist local lawyers and will often continue to monitor progress and liaise between the foreign client and local lawyer even after local counsel has been engaged. There have even been a few cases where foreign lawyers, acting as agent *ad litem* of the defendant, rather than as lawyers, have appeared as the sole representative on behalf of the client.¹⁰¹

In virtually all cases, parties seeking enforcement of arbitral awards will rely on local counsel. Most foreign lawyers practicing in China specialize in transactional commercial work and generally lack litigation experience. Moreover, given the practical and political problems

⁹⁹ The Fee Regulation, *supra* note 78, appeared to be a response to complaints of foreign lawyers at the Ninth Sino-U.S. Commercial Seminar held by the U.S. Dept. of Commerce and the PRC Ministry of Foreign Trade and Economic Cooperation (MOFTEC) in April, 1998.

¹⁰⁰ Article 241 of the CPL states: "Where foreigners, stateless persons, foreign enterprises and organizations want to have legal representatives in taking or responding to actions in the people's court, they must entrust their cases to lawyers of the PRC." CPL art. 241. The Provisional Regulations on the Establishment of Representative Offices in the PRC by Foreign Law Firms, issued May 26, 1992 by the Ministry of Justice, prohibits foreign lawyers from practicing or "interpreting" PRC law.

¹⁰¹ See *Justice and Debt Recovery*, *supra* note 3, at 28 (reporting that one foreign lawyer claimed to have advocated cases in PRC courts hundreds of times). In one case in which I was involved, however, the judge responsible for enforcement was extremely reluctant to allow me to be present at any of the proceedings. I was initially told when I showed up for a court mediated settlement conference that I could not enter the court without a variety of documentation, including a power of attorney from the client. After several rounds of discussion, including some private conversations between local counsel and the judge, the judge finally relented. He attributed his reluctance to the worry that the proceedings would have to be translated. Yet, because I did not need a translator, he felt that it would be acceptable for me to be present, though I was instructed to remain silent.

associated with enforcement, many foreign lawyers simply do not want to get involved and are happy to turn the work over to their local counterparts. Because of the special nature of enforcement and the importance of personal connections (*guanxi*), local lawyers are generally better positioned than foreign lawyers for this type of work.

F. *Mediation*

There has been a long-standing preference for mediation of disputes in China.¹⁰² One of the more novel features of arbitration in China has been the attempt to combine mediation with arbitration. One of the advantages of combining mediation with arbitration is said to be that the parties enjoy the benefits of both types of dispute resolution. In some cases, mediation may offer a more flexible approach than arbitration and, thus, facilitate compromise. Parties may be more likely to compromise in the context of mediation combined with arbitration than in pure mediation, because they know that the arbitrators stand ready to issue an award if mediation fails. Moreover, whereas mediation agreements are generally non-binding, the settlement agreement can be converted into a binding arbitral award through the issuance of a consent award.

The argument against combining mediation with arbitration centers on the parties' fears that the arbitrators may become biased or even corrupted as a result of the mediation. During the mediation process, arbitrators may meet *ex parte* with one of the parties to promote settlement, thus increasing the opportunities for corruption. At minimum, the parties will have an opportunity to provide information that might not be allowed during the formal arbitration process or that could be challenged by the other party.¹⁰³ Parties may also be concerned that the arbitrators may be more likely to base their decision on equity rather than strict application of the

¹⁰² See Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201 (1966); STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM AFTER MAO* 315-317 (1999). As Lubman demonstrates, mediation has evolved over time in terms of its purposes, proceedings, institutions, and relative importance to other means of resolving disputes. See *id.*

¹⁰³ The arbitration rules of CIETAC, CMAC, and other arbitration commissions attempt to mitigate some of these concerns by providing that should mediation fail, any statement, opinions, views or proposals raised or made by the parties or arbitrators during mediation, whether rejected or accepted, shall not be invoked as grounds for any claim, defense, or counterclaim in the arbitration proceedings or in any other proceedings. See, e.g., CIETAC Rules art. 51.

law when mediating the case.¹⁰⁴ Once the arbitrators have indicated their views, the parties may feel pressured to settle even if they think they are entitled to a more favorable award under the law, for fear of angering the arbitrators.¹⁰⁵ Others fear that mediation will be a waste of time and will result in undue delay, particularly because mediation is less likely to succeed when the cultural values of the parties differ. The delay may work to the disadvantage of the foreign party given the worsening economic condition of many state-owned enterprises in China. Parties likely to lose at arbitration may also take advantage of the delay to transfer or hide assets.

Notwithstanding such reservations, mediation during arbitration has been common. From 1983 to 1988, about 50% of CIETAC cases were settled through mediation.¹⁰⁶ The settlement rate has fallen since 1989 to about 20-30%.¹⁰⁷ The lower rates may be attributable to several factors.¹⁰⁸ Cases are now more complicated, and the amounts at stake are higher than in the past. Also, parties may be more confident that the arbitrators will make a just decision based on the law.¹⁰⁹ Further, more and more PRC entities are effectively judgment-proof and, thus, unable or unwilling to compromise.

If the parties are able to reach settlement, they may seek to have the case dismissed, request that the arbitration tribunal issue a mediation agreement (*tiaojie shu*) in accordance with the terms of the settlement agreement (*hejie xieyi*), or request the tribunal issue an arbitral award

¹⁰⁴ See Stanley Lubman & Gregory Wajnowski, *International Commercial Dispute Resolution in China: A Practical Assessment*, 4 AMER. REV. INT'L. ARB. 107, 127 (1993) (suggesting that CIETAC's emphasis on mediation and negotiation may unduly benefit the disputant with the weakest legal case).

¹⁰⁵ See Luming Chen, *Some Reflections on International Commercial Arbitration in China*, 13 J. INT'L. ARB. 121, 152 (1996).

¹⁰⁶ See WANG, *supra* note 7, at 52. Chen attributes the seemingly high success in part to the non-voluntary nature of the process. See Chen, *supra* note 105, at 152.

¹⁰⁷ See WANG, *supra* note 7, at 52. In contrast, about 45% of Beijing Arbitration Commission's cases are resolved through mediation, 26% through mediation by the arbitrators, and 19% through mediation by non-arbitrators. See *Justice and Debt Recovery*, *supra* note 3, at 30.

¹⁰⁸ The decline in mediation in favor of binding arbitration is consistent with the general pattern away from mediation toward litigation. Although more civil disputes are settled through mediation than litigation, mediation has been decreasing while litigation has been increasing for the last decade. See LUBMAN, *supra* note 102, at 244. I found that parties attempted mediation in 37% of the CIETAC cases. See Peerenboom, *supra* note 1.

¹⁰⁹ Attitudes toward mediation may be changing. Foreign investors, in particular, may be losing patience with PRC parties that breach a contract and then expect the foreign party to compromise.

(*caijue shu*) in accordance with the terms of the settlement agreement. In most cases, parties will not withdraw their claims or counterclaims until the terms of the settlement agreement have been performed or they receive a guarantee or some other assurances of performance. If one of the parties fails to fulfill its obligations under the settlement agreement, the performing party may re-apply for arbitration in accordance with the original agreement.¹¹⁰ Alternatively, the performing party may pursue its options under the settlement agreement itself, which may provide for arbitration. If not, the performing party may initiate litigation in a court with jurisdiction and sue under general contract principles.

If the parties request that the tribunal issue a mediation agreement, the agreement will be signed by the arbitrators, stamped by the arbitration commission, and served on the parties.¹¹¹ The statement becomes legally effective upon signature by the parties. Accordingly, any party may repudiate the mediation agreement by refusing to sign for its receipt. In such cases, the tribunal must then proceed with the arbitration.¹¹²

The Arbitration Law states that a mediation agreement and an arbitration award have equal validity and effect.¹¹³ The New York Convention, however, does not apply to a mediation agreement. In contrast, the parties may request that the tribunal issue an arbitral award based on the terms of the settlement agreement. Such awards are enforceable under the New York Convention, assuming that jurisdictional and other conditions are met.¹¹⁴

G. *Grounds for Refusal to Enforce Arbitral Awards*

In general, the grounds for refusing to enforce Convention and foreign-related awards are limited to procedural violations. In contrast, PRC courts may also refuse to enforce domestic awards on substantive grounds.

¹¹⁰ See AL art. 50; CIETAC Rules art. 44.

¹¹¹ See AL art. 52.

¹¹² See *id.*

¹¹³ See *id.* art. 51.

¹¹⁴ For instance, the subject matter of the award must be commercial for signatory countries that have made the commercial reservation.

1. *New York Convention awards*

Article V of the New York Convention allows for the refusal to recognize and enforce foreign arbitral awards where:¹¹⁵

- (a) The parties to the agreement referred to in article II were,¹¹⁶ under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contain decisions on matters submitted to arbitration may be recognized and enforced;
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement,

¹¹⁵ See New York Convention art. V(1).

¹¹⁶ Article II(1) of the New York Convention provides:

Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

New York Convention art. II(1).

was not in accordance with the law of the country where the arbitration took place; or

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

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the dispute is not capable of settlement by arbitration under the law of that county; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.¹¹⁷

2. *Non-Convention foreign awards*

Although Article 269 of the CPL provides a possible legal basis for the enforcement of foreign awards that are not New York Convention awards, in practice it would be difficult to obtain enforcement. A PRC court would only enforce the award pursuant to a treaty or in accordance with the principle of reciprocity. To enforce under the principle of reciprocity would require that the award be rendered in a nation that was not a party to the New York Convention but had previously recognized and enforced arbitral awards or judicial judgments issued in the PRC. More than 100 countries are now parties to the New York Convention, including most of China's major trading partners.¹¹⁸ Thus, the likelihood of such situations arising is extremely small. China has entered into bilateral judicial assistance treaties and investment protection agreements with several countries, some of which contain provisions relating to arbitration. For

¹¹⁷ New York Convention art. V.

¹¹⁸ See *International Alternate Dispute Resolution* (visited May 20, 2000) <<http://www.internationaladr.com/tc.htm>> [hereinafter *International ADR*].

the reasons already noted, however, enforcement under such agreements would be cumbersome.¹¹⁹

3. *Foreign-related awards*

Article 260 of the CPL provides the grounds for refusing to enforce foreign-related awards:

- (1) The parties have neither included an arbitration clause in their contract or subsequently reached a written arbitration agreement;
- (2) The respondent did not receive notification to appoint an arbitrator or to take part in the arbitration proceedings, or the respondent could not state his opinions due to reasons for which he is not responsible;
- (3) The formation of the arbitration tribunal or the arbitration proceedings do not conform to the rules of arbitration;
- (4) The matter decided in the award exceeds the scope of the arbitration agreement or is beyond the authority of the arbitration institution.¹²⁰

A court may also refuse to enforce an award where enforcement would be contrary to social public interests (*shehui gonggong liyi*). Despite minor differences, the grounds for refusing to enforce foreign-related awards under Article 260 of the CPL are similar to the grounds for refusing a foreign award under Article V of the New York Convention.

4. *The 1995 Reporting Mechanism Notice*

In 1995, the SPC issued the Notice on Courts' Handling of Issues in Relation to Matters of Foreign-related Arbitration and Foreign Arbitration ("1995 Notice").¹²¹ According to the 1995 Notice, if an IPC intends to refuse either to recognize or to enforce a foreign or foreign-related award, it must first submit a report to the HPC. If the HPC agrees with the IPC that the

¹¹⁹ Article 269 of the CPL does not specify any grounds for refusing to enforce an award. Presumably, non-Convention awards could also be refused enforcement on public policy grounds. See WANG, *supra* note 7, at 177.

¹²⁰ CPL art. 260.

¹²¹ 1995 Notice, *supra* note 75.

award should not be enforced, the HPC must report the case to the SPC. Only after the SPC approves can the IPC refuse to recognize or enforce the award.

Investors warmly welcomed the notice. According to one report, the SPC has denied 80% of the requests to refuse enforcement.¹²² By itself, however, that figure reveals little, as there is no way of knowing how often the IPCs and HPCs actually submit reports to the SPC. Rather than seeking higher level approval and running the risk of being denied, courts often simply sit on the award. As a result, cases have been left pending for years. Courts have been able to get away with taking no action, because the 1995 Notice failed to provide a time limit.¹²³

Moreover, the Notice has a number of other shortcomings. The Notice did not provide the parties a right to participate in the hearing by the HPC; nor did it allow the SPC to decide whether to enforce the award. It did not even provide the parties the right to be notified about the hearing or to submit written documents.

Further, the reporting mechanism applies only to foreign awards issued by foreign arbitration institutions and awards issued by PRC foreign-related arbitration institutions (*woguo shewai zhongcai jigou caijue*). Accordingly, the 1995 Notice apparently does not apply to ad hoc foreign awards; nor does it apply to domestic awards. On a strict reading, it would not even apply to the foreign-related awards of domestic arbitration commissions. Arguably, however, the 1995 Notice should be given a broader interpretation in light of the fact that the State Council did not clarify the right of domestic commissions to handle foreign-related cases until 1996. At the time the Notice was issued, the language used was broad enough to cover all foreign-related awards, which presumably was the intent of the SPC. Now that domestic centers can handle foreign-related cases, they arguably should be considered “foreign-related arbitration institutions” within the meaning of the 1995 Notice.

¹²² See Wang Shengchang, *Enforcement of Foreign Arbitral Awards in the People's Republic of China*, in ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 461-504 (Albert Jan van den Berg ed., 1999). A member of the SPC in charge of enforcement provided the figure. In my survey, there were six cases where lower courts sought SPC approval. The SPC upheld the lower court's decision to refuse enforcement in two cases, rejected it in two others, and had yet to decide what to do in the remaining two. See Peerenboom, *supra* note 1.

¹²³ The SPC apparently learned from its mistakes and included time limits in the notice that created an analogous reporting mechanism for setting aside foreign-related awards. See *infra* Part II.L. The SPC also attempted to plug the loophole by imposing a deadline for completing enforcement of six months, from the time the application

Whether the Notice applies to Hong Kong awards made after Hong Kong's reversion to PRC sovereignty on July 1, 1997 is also unclear. One could argue that the 1995 Notice was issued before the reversion when Hong Kong awards still counted as Convention awards and thus it was meant at the time to include Hong Kong awards even after the handover. Moreover, Hong Kong, Taiwan, and Macao are often treated as foreign entities. Indeed, Article 1 of the 1995 Notice requires courts to seek higher level approval if they intend to hold an arbitration clause invalid in contracts where one of the parties is a foreign party or from Hong, Taiwan, or Macao. On the other hand, whereas the SPC expressly referred to Hong Kong, Taiwan, and Macao in Article 1, it did not do so in Article 2, suggesting that the omission may have been intentional. The enforcement of Hong Kong awards after the handover was the subject of much controversy until 1999. The SPC may at the time simply have been uncertain whether to characterize post-handover Hong Kong awards as domestic or foreign awards. Interestingly, the Memorandum of Understanding ("1999 Memorandum")¹²⁴ negotiated between the PRC government and the Hong Kong Special Administrative Region (SAR) on the enforcement of Hong Kong awards in the mainland and mainland awards in Hong Kong in 1999 failed to address the reporting mechanism issue. As a result, it remains unclear whether courts intending to refuse to enforce a Hong Kong award must first seek approval.

5. *Domestic awards*

Article 217 of the CPL provides the grounds for refusing to enforce domestic awards:

- (1) The parties have neither included an arbitration clause in their contract or subsequently reached a written arbitration agreement;
- (2) The matters decided in the award exceed the scope of authority of the arbitration agreement or are beyond the arbitral authority of the arbitration institution;

is accepted. *See* Enforcement Regulation art. 107. The Enforcement Regulation, however, has its own loopholes. *See* Part III.

¹²⁴ *See* Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region (June 1999) (effective Feb. 1, 2000) (copy on file with author) [hereinafter 1999 Memorandum]. *See also infra* Part II.G.6.

- (3) The formation of the arbitration tribunal or the arbitration proceedings were not in conformity with statutory procedures;
- (4) The main evidence for establishing the facts was insufficient;
- (5) The application of the law is incorrect;
- (6) The arbitrator is found to have committed embezzlement, accepted bribes, practiced graft or distorted the law in making an award.¹²⁵

The court may also refuse to enforce a domestic award that runs counter to social public interests.

6. *Hong Kong awards*

Prior to 1997, Hong Kong was a party to the New York Convention by virtue of the United Kingdom's ratification thereof. After 1997, Hong Kong became a party to the New York Convention via the PRC's ratification. Accordingly, even after Hong Kong reverted to PRC sovereignty, Hong Kong awards were enforceable in other Convention States. What was uncertain was whether Hong Kong awards would be enforceable in the mainland and mainland awards in Hong Kong under the terms of the New York Convention. Article 1 of the New York Convention applies to recognition and enforcement of arbitral awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought."¹²⁶ It also applies to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."¹²⁷ An argument could therefore have been made that Hong Kong awards were not "domestic awards" under PRC law given the nature of the one country, two systems approach. This argument, however, most likely would have run afoul of the reciprocity reservation made by China at the time of accession. Under the reservation, China

¹²⁵ CPL art. 217.

¹²⁶ New York Convention art. 1.

¹²⁷ *Id.*

agreed to apply the New York Convention on a reciprocal basis to other arbitral awards “made in the territory of other contracting states.”¹²⁸

With respect to the enforcement of mainland awards in Hong Kong, the Hong Kong High Court ruled in 1998 that CIETAC awards were not enforceable under the Arbitration Ordinance either as international arbitration agreements or as domestic arbitration agreements, because these refer to arbitration where the place of arbitration is Hong Kong.¹²⁹ The parties conceded that CIETAC awards rendered after the handover were not Convention awards. Justice Findlay pointed out that the plaintiff was not without remedy in that the award could be enforced, as a debt owed by the defendant to the plaintiff, though he noted that, “it is a pity that such an award cannot be enforced directly.”¹³⁰

The uncertainty regarding the enforcement left some parties without a means of enforcing arbitral awards and threatened Hong Kong’s reputation as a desirable site for arbitration. In an effort to overcome the uncertainty, representatives of the PRC government and the Special Administrative Region of Hong Kong signed the 1999 Memorandum.¹³¹ The 1999 Memorandum became effective as of February 1, 2000 in the mainland pursuant to a SPC public announcement (*gonggao*) that restated the terms of the 1999 Memorandum in their entirety.¹³² Implementation of the 1999 Memorandum in Hong Kong was somewhat more difficult, as it required the amendment of the Hong Kong Arbitration Ordinance. The Legislative Council enacted the Arbitration (Amendment) Ordinance, which amended the Arbitration Ordinance, in January 2000.¹³³ Article 2(1) provided that the Ordinance would be effective on a day to be

¹²⁸ New York Convention Accession Notice, *supra* note 69.

¹²⁹ *See Ng Fung Hong Ltd. v. ABC* [1998] 1 HKC 213, reprinted in 1998 HKC Lexis 6 at *3-*7.

¹³⁰ *See id.*

¹³¹ *See* 1999 Memorandum, *supra* note 124.

¹³² *See Public Announcement of the PRC SPC, January 20, 2000* (visited May 10, 2000) <<http://www.legaldaily.com.cn/20000128/200001280201.html>>.

¹³³ *See* Arbitration (Amendment) Ordinance, (2 of 2000) (Commencement) Notice 2000, L.S. No. 2 to Gazette No. 4/2000, L.N. 26 of 2000.

appointed by the Secretary for Justice by Notice in the Gazette. Elsie Leung, the Secretary for Justice, then stipulated February 1, 2000 as the effective date.¹³⁴

The 1999 Memorandum provides that the venue for Hong Kong awards will be the IPC where the party is domiciled or the place where the property is located.¹³⁵ Mainland awards are enforced at the Hong Kong High Court where the party is domiciled or the property is located.¹³⁶

The application documents are the same for Hong Kong and mainland awards. The applicant must provide an application for enforcement, the arbitral award, and the arbitration agreement.¹³⁷ The application should include the name and address of the applicant if the applicant is a natural person. If the applicant is a legal person or organization, the application should include applicant's name, address, and name of its legal representative, as well as similar information regarding the respondent.¹³⁸ If the applicant is a legal entity or other organization, a copy of the enterprise registration is also required.¹³⁹ The document must be notarized and authenticated (consularized) if the applicant is a foreign entity.¹⁴⁰ Finally, the applicant must set forth the grounds for and particulars of the application for enforcement, the place where respondent's property is located, and the status of the property (*caichan zhuangkuang*).¹⁴¹ Applications in the mainland must be in Chinese. If the arbitral award and agreement are not in

¹³⁴ See *id.* The Notice excluded certain sections of the Ordinance that were deemed to have come into effect as of July 1, 1997.

¹³⁵ See 1999 Memorandum art. 1. As the parties have the option of choosing among IPCs if more than one IPC has jurisdiction, the 1999 Memorandum is more favorable to the applicant than the SPC interpretation of the Convention.

¹³⁶ See *id.*

¹³⁷ See *id.* art. 3.

¹³⁸ See *id.* art. 4(1)-(2).

¹³⁹ See *id.* art. 4(3).

¹⁴⁰ See *id.*

¹⁴¹ See *id.* art. 4(4).

Chinese, a duly certified Chinese translation of award and agreement is required.¹⁴² Application fees are determined in accordance with local court standards.¹⁴³

The statute of limitations is determined by local law.¹⁴⁴ Thus, in the PRC, the statute of limitation is six months where the parties are legal persons or organizations and one year if one of the parties is a natural person.¹⁴⁵ In Hong Kong, however, the statute of limitations is generally six years.¹⁴⁶ Parties that did not apply for enforcement of PRC or HK awards between July 1, 1999 and the coming into force of the current arrangement on February 1, 2000 are provided a grace period. Beginning February 1, 2000, legal persons are given six months and natural persons one year.¹⁴⁷ Applicants who were refused enforcement between July 1, 1997 and the coming into force of the 1999 Memorandum on February 1, 2000 may reapply for enforcement.¹⁴⁸

Foreign investors were worried that Hong Kong awards enforced in the mainland would be reviewed under the more lax standards for domestic awards that allowed courts to examine the substantive merits rather than under the more limited procedural standards set out in the New York Convention. At the same time, the New York Convention could not be applied directly to Hong Kong awards as the PRC government did not want to give the appearance of recognizing Hong Kong as a state. The solution was to incorporate the standards set out in Article V of the New York Convention into the 1999 Memorandum, with slight revisions to allow for the fact

¹⁴² *See id.* art. 4.

¹⁴³ *See id.* art. 8.

¹⁴⁴ *See id.* art. 5.

¹⁴⁵ *See* CPL art. 219.

¹⁴⁶ *See supra* note 94.

¹⁴⁷ *See* 1999 Memorandum art. 10.

¹⁴⁸ *See id.*

that Hong Kong is not a country, but rather a region.¹⁴⁹ Thus, the 1999 Memorandum provides for refusal where:¹⁵⁰

- (1) A party to the arbitration agreement was, under the law applicable to him, under some incapacity, or the arbitration agreement was not valid under the law to which the parties subjected it, or, failing any indication thereon, under the law of the place in which the arbitral award was made;
- (2) The party against whom the application is filed was not given proper notice of the appointment of the arbitrator or was otherwise unable to present his case;
- (3) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or the award contains decisions on matters beyond the scope of the submission to arbitration. However, if the award contains decisions on matters submitted to arbitration that can be separated from those not so submitted, that part of the award, which contains decisions on matters submitted to arbitration shall be enforced;¹⁵¹
- (4) The composition of the arbitral authority or the arbitral procedure was not in accordance with agreement of the parties or, failing such agreement, with the law of the place where the arbitration took place;
- (5) The award has not yet become binding on the parties, or has been set aside or suspended by the court or in accordance with the law of the place where the arbitration took place.¹⁵²

The court may also refuse to enforce the award if it finds that under the law of the place of enforcement that the dispute is incapable of being settled by arbitration.¹⁵³ Finally, mainland courts may refuse to enforce awards that run counter to social public interests (*shehui gonggong*

¹⁴⁹ For example, references to the law of the country were changed to law of the place where the award was made or enforcement was sought.

¹⁵⁰ See 1999 Memorandum art. 7.

¹⁵¹ This article is even more favorable to the applicant than the equivalent clause in the Article V of the New York Convention in that it states the courts “shall” (*yingdang*) enforce parts of the award where possible whereas the New York Convention merely states that courts “may” (*keyi*) enforce parts of the award.

¹⁵² See 1999 Memorandum.

¹⁵³ See *id.* art. 7.

liyi), while Hong Kong courts may refuse to enforce awards that run counter to the public policy (*gonggong zhengce*) of Hong Kong.¹⁵⁴

H. *Time for Decision to Enforce or Refuse Enforcement*

One of the major problems for parties seeking enforcement of foreign, foreign-related, or even domestic arbitral awards has been the lack of a firm deadline with respect to whether to accept the application for enforcement, whether to enforce the award, and when to actually carry out the enforcement. It was not uncommon for the court just to sit on an application or else accept the case, but then never decide whether to enforce the award or to refuse enforcement. In some cases, a court would recognize a foreign award, but would then run into practical and political obstacles in actually enforcing it. Accordingly, many cases fell into the purgatory known as “pending.”

In 1998, the SPC passed two regulations (*guiding*) that sought to impose some time constraints on courts.¹⁵⁵ The Enforcement Regulation provides that the court shall decide within seven days whether or not to accept an application for enforcement.¹⁵⁶ The Fee Regulation, also

¹⁵⁴ *See id.*

¹⁵⁵ The Enforcement Regulation applies to arbitration awards by Chinese arbitration bodies, as well as awards by foreign arbitral bodies. *See* Enforcement Regulation art. 1(3), (5). The Enforcement Regulation’s reference to foreign arbitral bodies could be seen as excluding ad hoc awards made outside of China, which are considered New York Convention awards and, thus, would be covered by the Fee Regulation. The reference to foreign arbitral bodies, however, is more likely the result of sloppy drafting than evidence of intent to exclude ad hoc awards issued abroad, which China must enforce under the New York Convention. In contrast, the Fee Regulation only addresses expressly foreign arbitral awards under the New York Convention. Again, whether the drafters intended to exclude non-Convention foreign awards and foreign-related awards is unclear. The rationale for excluding non-Convention and foreign-related awards, both of which were covered by the 1995 Notice, is difficult to fathom. As with the Enforcement Regulation, a more likely explanation is sloppy drafting.

¹⁵⁶ The application must meet the following standards:

- (i) the legal documents on which the application (e.g., the court judgment or arbitral award) is based are already valid;
- (ii) the applicant is the subject of the rights of the legal document or the assignee or beneficiary of such rights;
- (iii) the application is within the statute of limitations;
- (iv) the legal documents provide a remedy, and the amount and respondent are clear; the respondent has failed to perform its obligations within the time limits set by the judgment or award;

issued by the SPC adjudicative supervision committee four months later, states that the court must issue “a decision” within two months of receiving the application for recognition and enforcement of a Convention award.¹⁵⁷ If the court decides to enforce the award, it must complete enforcement within six months from the time it makes its decision, unless there are special circumstances (*teshu qingkuang*).¹⁵⁸ Thus, the maximum time for the court to complete enforcement of Convention awards under the Fee Regulation, barring unusual circumstances, would be *eight* months from the time of accepting the application.

In contrast, the Enforcement Regulation provides that, in general, courts shall enforce awards (including Convention and non-Convention foreign awards and foreign-related awards) within *six* months from the time of acceptance of the application, excluding time during which enforcement was suspended.¹⁵⁹ Where there “really are special circumstances necessitating extension,” the president of the court may approve an extension of unspecified duration.¹⁶⁰ The reason for the inconsistency between the Fee Regulation’s requirement that awards be enforced within eight months and the Enforcement Regulation’s requirement that they be enforced within six months is not clear. The SPC Adjudicative Supervision Committee adopted both resolutions within four months of each other.

As discussed previously, if a court decides not to enforce a foreign or foreign-related award, it must report to the HPC under the 1995 Notice.¹⁶¹ If the HPC agrees with the IPC’s decision to refuse enforcement, it must in turn obtain approval from SPC. Unfortunately, the 1995 Notice did not set any deadlines for reporting. In contrast, the Fee Regulation requires that

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- (v) the enforcement action falls within the jurisdiction of the court.

Enforcement Regulation art. 18.

¹⁵⁷ Fee Regulation art. 4. Presumably, the “decision” refers to whether to recognize and enforce the award rather than whether to accept the case or not, given that the Enforcement Regulation required a decision whether to accept the case within seven days.

¹⁵⁸ *See id.* The SPC did not define “special circumstances” or provide any examples.

¹⁵⁹ *See* Enforcement Regulation art. 107. *See infra* Part II.J for the circumstances under which enforcement may be suspended.

¹⁶⁰ Enforcement Regulation art. 107.

¹⁶¹ *See supra* Part II.G.

any decision not to recognize or enforce a Convention award be submitted to the SPC for review within two months of accepting the application for enforcement.¹⁶² It is not clear under the Fee Regulation whether the court's obligation to make a decision to enforce or refuse to enforce the award within two months is suspended once the HPC submits the matter to the SPC. As a practical matter, however, the clock must stop ticking, because in some cases the SPC has not made its decision within the two-month period.¹⁶³

I. *Consequences of Refusal to Recognize Awards*

The court's decision to enforce an award or to refuse an award cannot be appealed.¹⁶⁴ It is, however, subject to a special review process known as adjudicative supervision.¹⁶⁵ Applicants presumably, however, would gain little in challenging a court's decision to refuse enforcement of a foreign or foreign-related award by requesting adjudicative supervision from a higher court. Given the reporting mechanism established under the 1995 Notice, the SPC will have already reviewed the case and approved the decision to refuse enforcement. On the other hand, a *respondent* may wish to challenge the decision to enforce such an award through adjudicative supervision. The enforcement would not, however, be suspended while adjudicative supervision is occurring.¹⁶⁶

¹⁶² See Fee Regulation art. 4. The first step in the process is for the IPC to report its decision not to recognize or enforce an award to the HPC. Unfortunately, the Fee Regulation does not state the time limit for the IPC to report its decision to the HPC. As noted, the Fee Regulation only applies expressly to foreign Convention awards, even though the 1995 Notice that it explicitly cites applies to Convention and non-Convention foreign awards and foreign-related awards.

¹⁶³ See Peerenboom, *supra* note 1.

¹⁶⁴ See CPL art. 140.

¹⁶⁵ See, e.g., *Dongfeng Garments Factory of Kai Feng City and Tai Chun International Trade (HK) Co. Ltd. v. Henan Garments Import & Export (Group) Co.*, reprinted in CHENG, *supra* note 6, at 131. In this 1992 case, the IPC held that enforcing a CIETAC award against the local Chinese party in favor of the foreign applicant would violate the social public interests of China. The court accepted that the respondent had breached the contract. It held, however, that to enforce the award and compel the Chinese party to pay substantial damages would have a negative adverse impact on the economy. The SPC subsequently overturned the decision through adjudicative supervision. See CHENG, *supra* note 6, at 78.

¹⁶⁶ See CPL art. 178. If the court decides to retry the case, enforcement shall be suspended. See *id.* art. 183.

As the arbitral award remains valid, a party may apply for enforcement in another court that has jurisdiction either in China or abroad. Whether the party would succeed depends on the location of the respondent's assets and the reasons for refusal to enforce the award. Presumably, if the applicant was a foreign party and the respondent a PRC party, and the respondent had assets abroad, the foreign applicant would have first sought enforcement abroad in light of the problems enforcing awards in China.¹⁶⁷ As for seeking enforcement in another court in China, if the award is a foreign or foreign-related one, the SPC will already have decided that the award should not be enforced under the 1995 Notice. Any of the grounds for refusing to enforce the award under the New York Convention or Article 260 of the CPL would apply to any court within China. If the award is a domestic one, the applicant might find a court that takes a different view than the first one, particularly given that the broader standards under Article 217 of the CPL allow a court to review both substantive and procedural issues.

Alternatively, the parties may attempt to rearbitrate pursuant to the original agreement.¹⁶⁸ This may be possible where the ground for refusal was lack of notice, improper formation of the arbitration tribunal, or some other procedural flaw. Obviously, this remedy will be of no avail if the ground for refusing to enforce the award was that the parties had failed to conclude an arbitration agreement in the first place. It also might not be possible where the ground for refusal was that the arbitration tribunal had exceeded its authority in making the award or the award exceeded the scope of the arbitration agreement. In some cases, though, it might be possible for the tribunal to tailor the award in a way that brings it into compliance with the arbitration agreement and that does not exceed the authority of the tribunal.

The parties may also attempt to reach a new agreement and then rearbitrate. But, the chances of the parties reaching an agreement, at least to arbitrate at the same institute with the same arbitrators, would in most cases be next to nil. Finally, the unhappy applicant could try its luck in court.¹⁶⁹

¹⁶⁷ It is conceivable that the respondent may not have assets abroad at the time of initial application but might at a later date. In such cases, the applicant could seek enforcement abroad, subject to statute of limitation restraints.

¹⁶⁸ See AL art. 9; CPL arts. 217, 261.

¹⁶⁹ See AL art. 9; CPL arts. 217, 261.

J. *Suspension of Enforcement*

Assuming the court decides to enforce an award, it can suspend enforcement under the following circumstances:¹⁷⁰ (i) the applicant asks that enforcement be suspended; (ii) a third party raises a reasonable objection to enforcement;¹⁷¹ (iii) the respondent dies and it is necessary to wait for a successor to be named to assume the respondent's obligations; (iv) a legal person or organization is terminated and a successor has not yet been determined; or (v) other circumstances deemed appropriate by the court. The court may suspend enforcement if one party seeks to have the award set aside.¹⁷² In some cases, the parties may agree to seek an amicable settlement. If so, the court may stay enforcement.¹⁷³ The enforcement shall resume when the circumstances leading to the suspension have disappeared. Similarly, if the respondent provides security to the court, the court may also stay enforcement. If the respondent then fails to perform its obligations within the stipulated time period, the court may enforce against the security or against other assets of the respondent.¹⁷⁴

K. *Termination of Enforcement*

The court may terminate enforcement where:¹⁷⁵ (i) the applicant withdraws its application; (ii) the legal document on which the enforcement is based is quashed or revoked; (iii) a natural person respondent dies without a successor; (iv) the applicant in a case involving overdue alimony, maintenance, or child support dies; (v) a natural person respondent is unable to repay a loan due to financial hardship and is unable to work; or (vi) other circumstances deemed

¹⁷⁰ See CPL art. 234.

¹⁷¹ Article 102(5) of the Enforcement Regulation states enforcement will be suspended if the respondent objects to enforcement of a domestic award, because the matters decided by the tribunal exceeded the scope of the award or exceeded the authority of the tribunal only if the respondent provides security.

¹⁷² See AL art. 64; New York Convention art. VI.

¹⁷³ See CPL art. 211.

¹⁷⁴ See *id.* art. 212.

¹⁷⁵ See *id.* art. 235.

appropriate by the court. The court may also terminate enforcement if the award has been set aside.¹⁷⁶

L. *Setting Aside Awards*

Disgruntled parties may challenge an arbitral award by seeking to have the award set aside (*chexiao*).¹⁷⁷ This procedure differs from a challenge to the recognition and enforcement of an award in several respects. First, either party may seek to have an award set aside. Next, whereas the respondent bears the burden of proof in an enforcement proceeding, the burden of proof shifts to the party seeking to set aside the award. Further, awards may be set aside only by courts at the place where the arbitral body is located. Accordingly, a party seeking to have a foreign award set aside would have to do so in the country and city where the award was made. With respect to both domestic and foreign-related awards made by PRC arbitration institutions, Article 58 of the Arbitration Law confers jurisdiction on the IPC in the place where the arbitral body is located. This is interesting in that basic level courts have jurisdiction with respect to applications for enforcement of domestic awards.

Apart from the procedural differences, the consequences of setting aside an award are different than those for refusal to recognize or enforce an award. An award that is set aside becomes invalid in the country where the award was rendered. In contrast, if a court refuses to recognize or enforce an award, the award remains valid, provided the court has jurisdiction, and the applicant may still apply for enforcement in another court in that country.

Because both the New York Convention and domestic PRC laws allow (but do not require) the court to suspend enforcement if a party petitions to have the award set aside, some parties will apply to have an award set aside simply as a delay tactic. In one case, for instance, the losing party was advised by its lawyer that the grounds for setting aside an award were not applicable. Nevertheless, the client insisted that the lawyer seek to have the award set aside simply to delay the day of reckoning.¹⁷⁸

¹⁷⁶ See AL art. 64.

¹⁷⁷ Other expressions for the same act are to “annul” or “vacate” an award.

¹⁷⁸ See Peerenboom, *supra* note 1.

The statute of limitations for setting aside an award is six months from the date of receipt of the award, regardless of whether the petitioner is a natural or legal person.¹⁷⁹ The Arbitration Law does not specify the application requirements. They are, however, presumably the same as for enforcement.

The grounds for setting aside a *foreign-related* award are the same grounds for refusing to enforce such awards as set forth in Article 260 of the CPL. Interestingly, the grounds for setting aside *domestic* awards provided in the Arbitration Law differ from the grounds for refusing to enforce such awards as set forth in Article 217 of the CPL (and incorporated by reference in the Arbitration Law).¹⁸⁰ Article 58 of the Arbitration Law provides that an award may be set aside where: (1) there is no arbitration agreement; (2) the matters decided in the award exceed the scope of authority of the arbitration agreement or are beyond the arbitral authority of the arbitration institution; (3) the formation of the arbitration tribunal or the arbitration proceedings were not in conformity with statutory procedures; (4) the evidence on which the arbitration is based is forged; (5) the other party has concealed evidence sufficient to affect the impartiality of the arbitration; or (6) the arbitrator is found to have committed embezzlement, accepted bribes, practiced graft, or distorted the law in making an award. The court may also set aside an award that is contrary to social public interests.

In contrast, Article 217 of the CPL gives the courts more leeway to look into the substantive merits of the arbitrators' decision. Courts may refuse to enforce awards where there is insufficient evidence to ascertain the facts or where the application of law is incorrect. Presumably, the NPC Standing Committee intended to provide more limited remedies with respect to setting aside awards, which has more severe consequences than a refusal to enforce an award. This is suggested by the more restrictive grounds for setting aside awards and the decision to give jurisdiction to the IPCs rather than BPCs. In any event, the Arbitration Law expressly states that provisions of the Arbitration Law prevail over any inconsistent provisions regarding arbitration in earlier laws.¹⁸¹

¹⁷⁹ See AL art. 59.

¹⁸⁰ See *id.* art. 63.

¹⁸¹ See *id.* art. 78.

In 1998, the SPC issued a notice that clarified some issues that had arisen with respect to the setting aside of awards (“Setting Aside Notice”).¹⁸² The notice only applied to foreign-related awards and established an analogous reporting mechanism for refusal to enforce awards for setting aside awards. An IPC that intends to set aside foreign-related awards must report the matter to the HPC, which must in turn report to the SPC if it agrees with the decision to set aside the award.¹⁸³ Only upon approval by the SPC may the IPC set aside the award.

Unlike the 1995 Notice for refusal to recognize and enforce foreign-related or foreign awards, the 1998 Setting Aside Notice sets deadlines. The IPC must report to the HPC within thirty days of accepting the case. If the HPC agrees the award should be set aside, it must report to the SPC within fifteen days of receiving the IPC’s report. The Setting Aside Notice states that the courts must strictly abide by the two-month deadline for deciding whether to set aside the award stipulated in Article 60 of the Arbitration Law. Accordingly, the SPC will have approximately fifteen days to make a decision, assuming the lower courts use the entire time allotted them. The Setting Aside Notice does not state what the consequences are for failing to abide by the deadlines. It is not clear, for example, that individuals would have the right to petition the court to make a prompt decision or to seek compensation under the State Compensation Law. Presumably, mere expiration of the two-month period does not mean that the award can no longer be set aside.

Parties have limited options if the court decides to set aside an award. Unhappy parties cannot appeal a decision whether or not to set aside an award.¹⁸⁴ The court does, however, have the power to send the case back for re-arbitration,¹⁸⁵ but only in certain circumstances. It would not be possible to re-arbitrate, for example, where the ground for setting aside the award was that

¹⁸² See *supra* note 76 and accompanying text.

¹⁸³ See Setting Aside Notice art. 1.

¹⁸⁴ See Official Reply of the SPC to the Question Whether a People’s Court Should Accept a Retrial Request by a Party Who is Not Satisfied with the People’s Court Ruling to Set Aside an Arbitral Award (Jan. 29, 1999) (passed by the SPC Adjudicative Supervision Committee and effective as Feb. 16, 1999). The Reply does not permit *zai shen* (retrial). It is not clear, however, whether the request for retrial refers to a normal appeal (*shangsu*) or includes a petition for adjudicative supervision (*shensu*) as well under Articles 177 and 178 of the CPL. Presumably, the decision could be challenged through adjudicative supervision.

¹⁸⁵ See AL art. 61.

there was no arbitration agreement, the subject matter was non-arbitrable, or where the matters decided in the award exceeded the scope of the arbitral body. Moreover, if the original arbitral tribunal was not properly formed, a properly formed tribunal would need to be established before the case could be sent back for re-arbitration. Of course, the parties could in, theory, reach a new agreement to rearbitrate the dispute. The chances of reaching such an agreement would, however, be extremely low in most cases. Alternatively, either party could sue in court.

A potentially more promising approach for foreign parties would be to attempt to enforce the award outside of China, notwithstanding the fact that it has been set aside by a PRC court. Whether courts of other states will enforce such awards depends on the national arbitration laws of the country in which enforcement is sought.¹⁸⁶ The traditional view was that the setting aside of a Convention award made the award unenforceable anywhere under the New York Convention.¹⁸⁷ Recently, however, there have been a number of cases where courts have enforced the award despite its being set aside by another Convention country.¹⁸⁸

Parties can minimize the risk of a PRC court setting aside an award due to bias or local protectionism by choosing to arbitrate outside of China. That option may not, however, always

¹⁸⁶ See William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INTL. L. 805, 810 (1999).

¹⁸⁷ See, e.g., P. Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 6 NETH. I.L.R. 43, 55 (1959); ALBERT JAN VAN DEN BERG, *THE NEW YORK CONVENTION OF 1958* 331-58 (1981). But see Jan Paulsson, *The Case for Disregarding Local Standard Annulments under the New York Convention*, 7 AM. REV. INTL. ARB. 99 (1996).

¹⁸⁸ In *Hilmarton v. OTV*, a French court upheld an award set-aside in Switzerland. In *In re Chromalloy*, 939 F. Supp. 907 (D.D.C. 1996), a U.S. federal court ordered enforcement of an award against the defendant's assets located in the U.S., even though an Egyptian court had vacated the tribunal's award on the ground that the tribunal's failure to apply the correct law was a non-waivable ground for annulment in Egypt. But see *Baker Marine (Nig.), Ltd. v. Chevron (Nig.), Ltd.*, 191 F.3d 194 (1999) (refusing to enforce an award set aside by a Nigerian court and distinguishing *Chromalloy*). For the pros and cons of enforcing awards that have been set aside and suggestions as to possible standards, see generally Park, *supra* note 186; Jan Paulsson, *Rediscovering the New York Convention: Further Reflections on Chromalloy*, MEALEY'S INT'L ARB. REP., Apr. 1997, at 20; Albert Jan van den Berg, *Enforcement of Annulled Awards?*, ICC INT'L CT. ARB. BULL., Nov. 1998, at 15; Stephen Ostrowski & Yuval Shany, *Chromalloy: United States Law and International Arbitration at the Crossroad*, 73 N.Y.U. L. REV. 1650 (1998); Ray Chan, *The Enforceability of Foreign Arbitral Awards in the United States*, 17 B.U. INT'L L. REV. 141 (1999); Georgios Petrochilos, *Enforcing Awards Annulled in Their State of Origin Under the New York Convention*, 48 INT'L & COMP. L.Q. 856 (1999).

be available. PRC law may not allow the parties to choose foreign arbitration;¹⁸⁹ the PRC party may not agree to arbitration; or the cost of arbitrating abroad may be too high.¹⁹⁰

To what extent the setting aside of awards is a problem in practice is difficult to gauge, as there are no reliable statistics.¹⁹¹ There is some reason to believe that setting aside domestic awards is more common than the setting aside of CIETAC awards. In 1997, the SPC observed that some courts were setting aside domestic awards on the ground that an arbitration commission's failure to deliver the arbitral award to the parties within six months violated the time limit set forth in a 1995 State Council notice.¹⁹² The SPC clarified that arbitral bodies had to decide the case within the six-month time limit, but that it was not necessary that the arbitral award be delivered during that period. In practice, the chances of getting a domestic award set aside will depend in part on the location and stature of the domestic arbitration commission. As of June 1999, parties had applied to Beijing IPC No. 2 to set aside Beijing Arbitration Commission awards in thirty-eight cases. The court accepted thirty-four such applications for review. It set aside the award in two or three cases and asked the Commission to re-arbitrate one case pursuant to Article 61 of the AL.¹⁹³

M. *Interim Measures: Preservation of Assets and Evidence*

Parties may wish to apply for preservation of assets in order to avoid finding, after a long and expensive arbitration, that the other side has hid or transferred its assets. This is particularly

¹⁸⁹ See, e.g., Contract Law art. 126.

¹⁹⁰ Such legal and practical limitations undermine, to some extent, the argument that courts should enforce an award set aside in another jurisdiction only in special circumstances, because the market itself will provide a remedy. The market-remedy view assumes that commercial actors will factor into the choice of arbitration venue a state's policy and record (assuming it has one) with respect to setting aside awards and then choose accordingly. See Park, *supra* note 186.

¹⁹¹ My survey turned up only a handful of cases where parties sought to have a CIETAC award set aside. In one instance, a party tried to set aside seventeen awards arising out the same set of facts but separate agreements. The party was unsuccessful. One Beijing firm reported that it had handled four applications to have an award set aside, but only one was successful. There were also three other instances where parties sought to have an award set aside. In two cases, the court refused to set aside the award. The other case was still pending. See Peerenboom, *supra* note 1.

¹⁹² See Notice on How to Further Accomplish the Reorganization of Arbitration Institutions (Apr. 6, 1997) (issued by the State Council).

¹⁹³ See Cohen & Kearney, *supra* note 5, at IV-3.27.

important in China where local protectionism can mean that local governments help companies in which they have an economic interest hide assets or dodge debts. Once the court issues an order to freeze a bank account or seal a factory, the defendant cannot transfer or encumber the assets, and local government and Party officials are less likely to try to prevent enforcement of the judgment. PRC law allows for preservation of assets where it might become impossible or difficult to implement an award due to an act of the other party or other causes.¹⁹⁴ Parties may also apply for preservation of *evidence* where the evidence may be destroyed, lost, or difficult to obtain at a later time.¹⁹⁵

It is not clear under existing laws whether the parties to arbitration may apply directly to the court or whether the arbitration commission must apply on their behalf. The relevant provisions in the Arbitration Law all provide that the arbitration commission shall submit the application to the court.¹⁹⁶ Wang Shengchang, the Vice-Director of CIETAC, argues, however, that PRC law does not expressly exclude a direct application by a party.¹⁹⁷

While prelitigation preservation is possible under PRC laws,¹⁹⁸ it is unclear whether a party may apply for preservation prior to commencing arbitration. If the party has to wait until arbitration is initiated, the other side will have a window of opportunity to hide or transfer assets or destroy evidence. Having to apply through the arbitration commission rather than directly could cause even greater delays. Apparently, some courts have permitted pre-arbitration preservation by analogy.¹⁹⁹

The IPC where the respondent is domiciled or the property is located has jurisdiction over foreign-related arbitration cases.²⁰⁰ In domestic arbitration cases, the BPC has jurisdiction.²⁰¹

¹⁹⁴ See AL art. 28; CPL arts. 92, 258.

¹⁹⁵ See AL arts. 46, 68.

¹⁹⁶ See *id.* arts. 28, 46, 68.

¹⁹⁷ See WANG, *supra* note 7, at 103.

¹⁹⁸ See CPL art. 93. In practice, prelitigation preservation is seldom granted.

¹⁹⁹ See WANG, *supra* note 7, at 105.

²⁰⁰ See CPL art. 258 (property); AL art. 68 (evidence).

The application generally should include the name and addresses of the parties, the arbitration case number and name of the commission, the reasons for seeking preservation, and the location of the property or evidence.²⁰² The applicant must also pay a fee based on the value of the assets.²⁰³

The court will usually also require that the applicant post security in the amount of the assets to be preserved.²⁰⁴ If the application turns out to be wrongfully made and causes the other party damages, the court will compensate accordingly.²⁰⁵

In urgent circumstances, the court will decide whether to take action within forty-eight hours.²⁰⁶ The court's decision cannot be appealed, though dissatisfied parties may petition the same court for reconsideration.²⁰⁷

In practice, applications for asset preservation are common. According to a CIETAC spokesperson, parties seek preservation in 30% of CIETAC cases.²⁰⁸ A member of BAC claims that parties have frequently been successful in obtaining property and evidence preservation from the court.²⁰⁹ Several lawyers, however, have complained about the difficulty of persuading courts to order preservation of assets. Judges sometimes deny the request, because they fear that

²⁰¹ For property, see Supreme People's Court Notice Regarding Several Problems in the Implementation of the PRC Arbitration Law (Mar. 26, 1997), ¶ 2. For evidence, see AL art. 46.

²⁰² See WANG, *supra* note 7, at 103.

²⁰³ If the value of the property is less than RMB 1000, the applicant is charged RMB 30; if the value is between 1001 and 100,000, the fee is 1%; if the value is over RMB 100,000, the fee is 0.5%. See 1989 Court Fees Regulation, *supra* note 96 art. 8.

²⁰⁴ See CPL art. 92.

²⁰⁵ See *id.* art. 254.

²⁰⁶ See *id.* arts. 92-93.

²⁰⁷ See *id.* art. 99.

²⁰⁸ See Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 JOHN MARSHALL L. REV. 539, 561 n.134 (1995) (citing interview with Wang Shengchang).

²⁰⁹ See Cohen & Kearney, *supra* note 5, at IV-3.15. An official from the Beijing Arbitration Commission claims that there have been no cases where the applicant has been held liable for negligently or intentionally causing damage to the assets among the applications forwarded by the Commission. In fact, she stated that applicants have only been held liable in 1% of the non-arbitration related cases in Beijing.

the plaintiff is simply trying to gain settlement leverage by tying up assets and interfering with the defendant's ability to operate a company. Yet, in most cases, local protectionism is the cause as judges, under pressure from the local governments that fund the courts and make personnel decisions, find excuses to deny the plaintiff's application.

Moreover, before the court can attach assets, it must know where they are located. Respondents are required to provide the court with information about their assets.²¹⁰ In addition, courts may seek information from the respondent, other organizations or third parties.²¹¹ The court may subpoena the respondent or the respondent's legal representative to appear before the court to provide information about its assets.²¹² If necessary, the court may issue a search warrant to investigate assets.²¹³

Despite such seemingly strong weapons available to the court, in practice it is generally up to the party seeking preservation to provide the necessary information to the court. Unfortunately, it is often extremely difficult, if not impossible, for parties to ascertain the whereabouts and status of the assets of PRC companies. Parties will often work with professional investigation companies. These companies are usually affiliated with various ministries or started by ex-members of the ministries who then rely on their connections with their former colleagues to obtain information.

Different types of assets present different discovery issues. Typically, parties prefer to attach bank accounts, because the subsequent enforcement is easiest. Should the party prevail at arbitration, the court will simply order the funds in the account transferred to the plaintiff. Although seemingly straightforward, discovering and attaching bank accounts is difficult in China.²¹⁴ Even though companies often need multiple accounts for legitimate business reasons, under PRC laws, companies are limited to one basic bank account for settling normal business

²¹⁰ See Enforcement Regulation art. 28.

²¹¹ See *id.* The court may copy or take pictures of the relevant materials.

²¹² See *id.* art. 29.

²¹³ See *id.* art. 30; CPL art. 227. The court may use compulsive measures to discover concealed assets. See Enforcement Regulation art. 31.

²¹⁴ See Commercial Banking Law of the PRC art. 48.

transactions.²¹⁵ Less scrupulous companies, nonetheless, open multiple accounts to evade taxes and creditors. Tracking down all of the accounts of a company is difficult, because companies can open accounts in various names and there are no central records. Moreover, banks are usually not willing to divulge account information for fear of damaging relations with their customers. Accordingly, banks have been known to postpone taking action on a court's order until they have had time to notify the customer and the customer could transfer the money to another account.²¹⁶

Nevertheless, persevering parties may obtain information about bank accounts through a variety of channels. Parties can start with information provided by the other side through the normal course of business, although in most cases the other party will make sure there is little money in any such accounts. A more promising source of information is third parties with whom the other side is doing business; however, it is not always easy to identify third parties and they are under no obligation to provide any information about the defendant.

Administrative entities are another potential source of information about bank accounts. As part of an annual review, all companies must submit materials, including bank account information, to the Administration of Industry and Commerce (AIC). The AIC compiles a Registration Record Book (*zhuci dengji bu*), which contains, among other information, a company's financial statements. Although the Record Books are supposed to be open to the public, in fact only the courts, procuracy, and public security bureau have free access. Lawyers, who are sometimes granted access to the record books, usually must present a court notice demonstrating that a case has been accepted, even though there is no legal basis for such a restriction. Even then, the AIC typically will provide only a computer printout with a company's basic information such as place of registration, registered capital, legal representative, and so on.

²¹⁵ *See id.*

²¹⁶ *See* Peerenboom, *supra* note 1. In some cases, the banks will have a direct conflict of interest because they will have provided loans to the respondent. Banks may first attempt to collect on the loan before seizing the account, although law prohibits the practice. Clarke also reports that local governments have issued orders prohibiting courts from transferring funds from local parties to outside parties. *See* Clarke, *supra* note 37, at 74. It is unclear whether the practice, which is illegal, continues today, and if so how often or how seriously the banks take such orders. According to the Article 33 of the Enforcement Regulations, banks that transfer funds from frozen bank accounts shall be liable for the debt out of their funds.

The applicant may also obtain bank account information from the tax bureau. Although tax bureau officials are not prohibited by law from providing information about a party's bank accounts, they will usually not do so, unless they know the inquiring lawyer personally. If the respondent is likely to have a foreign exchange account, the applicant may also try contacting the State Administration of Foreign Exchange, although again personal connections will usually be necessary.

A party may wish to attach the other side's equity interests in other companies. Some information about a respondent's investments in other companies is often publicly available in the defendant's prospectus or annual report, which may be found in such publications as the China Securities Report or Shanghai Securities. The applicant may also find useful information in shareholder meeting minutes, board meeting minutes, and financial statements on file with the AIC.

Real estate is another likely target for preservation. Again, the applicant must provide details of the respondent's real estate holdings to the court. Although such records filed with the real estate bureau are supposed to be available to the public, personal connections are often necessary to access the records.

N. *Coercive Enforcement: Sanctions for Failing to Comply with an Award*

A number of laws confer on the courts a range of contempt powers to deal with individuals and entities that fail to comply with the terms of an award or other court order or otherwise attempt to obstruct the enforcement process. Article 102 of the CPL prohibits:²¹⁷

- (1) forging or destroying important evidence, which would obstruct the trial of a case by the people's court;
- (2) using violence, threats or subordination to prevent a witness from giving testimony, or instigating, suborning, or coercing others to commit perjury;
- (3) concealing, transferring, selling or destroying property that has been sealed up or detained, or property of which an inventory has been made and which has been put under his

²¹⁷ For a similar but somewhat more expanded list, see Enforcement Regulation art. 100. Whereas Article 102 of the CPL deals with the parties, Article 103 covers non-parties.

care according to court instruction, or transferring the property that has been frozen;

- (4) insulting, slandering, incriminating with false charges, assaulting or maliciously retaliating against judicial officers or personnel, participants in the proceedings, witnesses, interpreters, evaluation experts, inspectors, or personnel assisting in execution;
- (5) using violence, threats or other means to hinder judicial officers or personnel from performing their duties; or
- (6) refusing to carry out legally effective judgments or orders of the people's court.²¹⁸

The court may impose a fine up to RMB 1000 on individuals and fine companies between RMB 1000 and 30,000. Alternatively, individuals or the senior officers of the company may be subject to administrative detention by public security bureau (*gongan*) for up to fifteen days.²¹⁹ The court may also impose punitive damages on a party that fails to comply with an award within the prescribed time limit in the amount of twice the interest from the time of default.²²⁰

In a show of increasing intolerance, the NPC made failure to comply with an award or court order, where the circumstances were serious, subject to imprisonment for up to three years when it amended the Criminal Law in 1997.²²¹ The SPC, in interpreting the 1997 Criminal Law, has declared the following circumstances to be serious:²²²

²¹⁸ CPL art. 102. *See also* Several Questions Concerning the Applicability of the PRC, Civil Procedure Law Opinion art. 123 (July 14, 1992) (issued by the SPC) [hereinafter 1992 SPC CPL Opinion]. The 1992 SPC CPL Opinion confirmed that the following constituted violations of 102(6): "hiding, transferring or destroying property such that the court could not enforce the award or judgment or refusing to carry out a legally effective judgment, order, award or payment order, even though one has the capacity to carry it out."

²¹⁹ *See* CPL art. 104. During the detention, if the detainee admits his error and rectifies the situation, the people's court may decide to lift the detention ahead of time. *See id.*

²²⁰ *See id.* art. 232. The court may also impose a fine of unspecified amount. *See id.*

²²¹ *See* PRC Criminal Law (July 1, 1979) (as amended by the NPC on March 14, 1997) art. 313. Destruction of evidence is also punishable by up to three years in prison, as is the transfer, hiding, destruction or damaging of property sealed, attached or frozen by the court. *See id.* arts. 307, 314.

²²² *See* Interpretations of the Application of Laws in Regard to Refusal Cases of the Enforcement of Judgments and Rulings (Apr. 17, 1998) (issued by the SPC).

- (1) after the issuance of the enforcement notice by the court, a person who conceals, conveys, sells, destroys the frozen assets or those assets entrusted by the court, and which makes a verdict or ruling unenforceable;
- (2) a person who conceals, conveys, sells, destroys the mortgaged assets or those assets entrusted by the court, which makes a verdict or ruling unenforceable;
- (3) a person via violence or threats, resists enforcement which makes a verdict or ruling unenforceable;
- (4) a person assembles a crowd to impact the enforcement, or besieges, seizes, or beleaguers the executors;
- (5) a person damages, destroys or snatches the enforcement documents which detrimentally effects enforcement proceedings.

Although comprehensive statistics are lacking, there are numerous reported cases of courts using their coercive powers to deal with enforcement problems.²²³ Generally, the court will resort to such drastic measures as detention or imprisonment only when there are aggravating circumstances.²²⁴ For instance, the Enforcement Regulation provides for detention where the respondent has refused without reason to comply with two subpoenas issued by the court.²²⁵ PRC courts, however, are reluctant to detain someone simply for failing to comply with an award.

²²³ See, e.g., Shao Zongwei, *Courts Try Cases on Impeding Verdicts*, CHINA DAILY, Aug. 19, 1999, at 2 (reporting five cases in different provinces involving the punishment of seven individuals for impeding the execution of court rulings, including a one year sentence for one individual who lied about his ability to pay an award).

²²⁴ See *id.* (reporting a thirteen-year sentence for attempted murder and impeding execution for someone who lobbed a grenade at court officials trying to enforce a court ruling). In *Jilin Yanbian Shoe Co. v. Heilongjian Mishan Shoe Co.* (Longjing District Court, 1993), the defendant organized several workers, preventing judges from enforcing the judgment. Thereafter, the defendant transferred the property frozen by the court. The court arrested and fined the representatives of the defendant for obstructing enforcement. In *Linghe People's Procuratorate v. Zhang Wei* (Linghe District Court, 1996), the defendant refused to pay taxes in the amount of RMB 10,000 and transferred his property, violating a court order. Accordingly, the defendant was found guilty for evasion of taxation. The defendant was sentenced to one year in jail and was fined RMB 15,000.

²²⁵ See Enforcement Regulation art. 97.

Courts are hesitant to subject individuals to coercive sanctions for a variety of reasons.²²⁶ One reason for this reluctance is that individuals and companies are often, for all practical purposes, judgment-proof and thus simply not in a position to comply with the court's order. Even when their company is not technically insolvent, managers regularly find their hands tied by local government officials who pressure or instruct them not to comply with the court's orders. Nor are courts eager to seize a respondent's assets when doing so will prevent the company from operating, which could in turn result in greater unemployment and social unrest. Moreover, judges have little incentive to impose coercive sanctions. Enforcement work is notoriously difficult. As a result, it is hard to evaluate the performance of particular judges or the enforcement chamber as a whole since there are many reasons why courts are unable to enforce awards that go beyond the power of individual judges.²²⁷ Finally, the low stature of courts may explain in part their reluctance to employ coercive measures. Courts may fear that they will not be able to make good on their threats to fine or detain officials from administrative organizations or bank employees who do not comply with their orders.

O. *Other Coercive Enforcement Remedies*

If the court decides to grant preservation of assets or to enforce an award, it can make inquiries to banks or other financial institutions, freeze bank accounts, and transfer funds to the prevailing party.²²⁸ It can also seal up, detain, or freeze assets and then sell or auction the assets.²²⁹ Where the respondent is a person, the court can withhold or garnish wages²³⁰ or evict the person from a house or piece of land.²³¹

²²⁶ Clarke attributes the court's reluctance to employ compulsive measures in part to the continuing ideological force of the Maoist dichotomy between antagonistic and non-antagonistic contradictions: coercion is reserved for the enemy while disputes among the people are resolved through persuasion and education. *See* Clarke, *supra* note 37, at 35. Although Maoist doctrine plays a less visible role in China these days, and references to the two contradictions are rare, it is possible that the basic spirit of the distinction remains deeply embedded in the psyches of PRC judges. *See id.*

²²⁷ The SPC has issued a notice that attempts to make judges more accountable for their performance. *See infra* Part III.

²²⁸ *See* CPL art. 221.

²²⁹ *See id.* arts. 225, 226.

²³⁰ *See id.* art. 222.

The prevailing party in arbitration cases will generally be satisfied with money damages.²³² In some cases, however, arbitral tribunals have granted specific performance. For instance, one early CIETAC award required the Chinese party to cure the breach of contract resulting from its tendering of subpar products by delivering products that met the quality standard agreed to in the contract. Unfortunately for the foreign purchaser, CIETAC did not award money damages in the alternative. The foreign party then had problems enforcing the award when the Chinese party, after several tries, was not able to meet the standards.²³³ More recently, parties have had difficulty enforcing specific performance awards that called for the dissolution and liquidation of joint ventures.²³⁴

In an effort to be more aggressive, some courts have taken to publishing the name of the company that fails to comply with an award or judgment in the newspaper. Such publication serves two purposes. First, it puts pressure on the defaulting company to pay up or suffer damage to its reputation. Second, it provides notice to other companies that the company in question may be unreliable or in poor economic condition.

Notwithstanding the various coercive sanctions at their disposal, courts have encountered problems in enforcing awards. In China, assets are subject to either hard or soft seizure. Soft seizure prevents the party from transferring or encumbering the asset. Hard seizure prevents the party from using the asset at all. Courts are reluctant to order hard seizure, because they do not want to prevent the company from operating. The lack of clear title is another obstacle to enforcement.²³⁵ In the transition from a centrally planned economy to a more market-oriented

²³¹ See *id.* art. 229. In the past, given the lack of a housing market, courts were reluctant to evict persons from their homes. See Clarke, *supra* note 37, at 65.

²³² See Clarke, *supra* note 37, at 65. Clarke also mentions cases in which the party satisfied its debt through labor services or payment in kind. See *id.* at 77-78.

²³³ See Mathew Bersani, *Enforcement of Arbitration Awards in China: Foreigners Find the System Sorely Lacking*, 19 CHINA BUS. REV. 10 (1992).

²³⁴ See *infra* note 246 and accompanying text.

²³⁵ The incomplete, complex, contradictory, and rapidly evolving regulatory framework for land makes it particularly difficult to enforce against a party's land use rights. Moreover, parties will often have allocated as opposed to granted land use rights. In general, allocated land use rights must be converted to granted land use rights by payment of a large, one-time grant fee before it can be transferred to a creditor. The result is that there is usually little left to satisfy the award after the grant fee is paid out of the proceeds of the sale of the land use rights.

economy, many companies have been merged or reorganized or have set up spin-off companies. In the process, state-owned assets have been transferred around. In many cases, either intentionally or simply for lack of legal expertise, the transfers have been inadequately documented or have been done in violation of the legal requirements.²³⁶ As a result, it is often difficult to sort out who owns what assets.

Enforcing against a party's equity interest in other companies can also be difficult in some cases, although enforcing against a party's equity interest in a non-listed company is relatively straightforward. In the latter case, the court will simply issue a Notice for Assistance in Enforcement to the AIC where the company is registered requesting either that the AIC not approve any transfer by the party of its interest to a third party or that the AIC sell off the interest.

Attaching a defendant's interest in a listed company is even more complicated. The court has the legal authority to issue an order to the securities exchanges and securities registration companies to prevent the transfer of state and legal person shares or to auction the shares to pay a debt.²³⁷ Sometimes plaintiff's counsel will need to persuade securities exchanges and securities registration companies that the order will not cause the controlling shareholder to lose control of the company or cause a swing in the price of the stock. Despite such difficulties, there have been a number of court auctions of shares in listed companies.

P. *Subrogation*

The single most common reason why awards are not enforced in China is that the respondent lacks assets and is, therefore, effectively judgment-proof.²³⁸ Rarely, however, is the

²³⁶ In virtually every one of the half dozen instances where I had the pleasure of conducting due diligence on PRC companies while practicing in Beijing, we encountered problems following the paper trail with respect to key assets. In several cases, the parties noted that the deals were completed under the guidance of the local government but without the aid of lawyers, or at least qualified lawyers. In one case, the Chinese party wanted to contribute certain assets that belonged to a subsidiary. When we pointed out that the assets belonged to the subsidiary and not to the parent company that was the joint venture partner, he promised to resolve the problem, which he did the next day by producing a letter from the mayor assuring us that it was alright to contribute the assets! Our attempts to explain that the mayor could not resolve the legal problem of ownership simply by waving a magical wand or issuing a letter fell on deaf ears.

²³⁷ See Enforcement Regulations art. 52.

²³⁸ See Peerenboom, *supra* note 1.

respondent officially bankrupt. In many cases, the respondent has considerable uncollected accounts receivable, often from state-owned enterprises, that in turn are owed money by other state-owned enterprises. In an effort to deal with this phenomenon, known as triangular debt, the National People's Congress and the SPC have taken steps to create and strengthen creditors' subrogation rights. Article 73 of the Contract Law passed in March 1999 provides that if a debtor neglects to exercise its own matured claim against a third party debtor, thereby causing harm to a creditor, the creditor may petition the court to be subrogated in the debtor's name, unless the claim is exclusively personal to the debtor.²³⁹ The scope of exercise of the right of subrogation is limited to the scope of the claim of the creditor. The necessary costs incurred by the creditor in exercising its right of subrogation shall be borne by the debtor.²⁴⁰

Later in 1999, the SPC issued an interpretation of Article 73 ("SPC Interpretation (1)").²⁴¹ According to SPC Interpretation (1), a party may petition for subrogation where the creditor's claim is legal; the delay by the debtor in performing a matured debt obligation has caused the creditor harm; the debtor's claim against the third party debtor has matured; and the claim against the third party debtor is not exclusively personal to the original debtor.²⁴² The Interpretation clarified that the third party debt being unpaid and the debtor not having initiated arbitration or litigation to collect the debt is enough to constitute harm to the creditor.²⁴³

Jurisdiction for subrogation petitions lies with the court where the original debtor is domiciled.²⁴⁴ Where the creditor has already brought suit against the original debtor, and then

²³⁹ See Contract Law art. 73.

²⁴⁰ See SPC Interpretation of Several Issues Relating to the Application of the PRC Contract Law (1) (Dec. 1, 1999) (adopted by the SPC Adjudicative Supervision Committee and effective as of December 29, 1999) [hereinafter SPC Interpretation (1)] art. 29 (clarifying that if the creditor prevails in the subrogation suit, the litigation costs shall be borne by the third party debtor and shall be paid on a priority basis out of the realized debt).

²⁴¹ See *id.*

²⁴² See *id.* art. 11. Article 12 adds that "exclusively personal to the debtor" refers to rights to social security benefits such as family support, alimony, retirement benefits and so on.

²⁴³ See *id.* art. 13. If the third party debtor does not believe the original debtor has been remiss in exercising its claim, the third party debtor can object. See *id.* The third party debtor, however, bears the burden of proof. See *id.*

²⁴⁴ See *id.* art. 14. The Interpretation does not specify what level of court will have jurisdiction. The nature of the dispute and the size of the claim against the defendant will determine the level of court.

raises a subrogation claim against the third party debtor in the same court, the court shall accept the case provided the creditor meets the requirements set out in Articles 13 and 108 of the CPL.²⁴⁵ If the creditor brings suit directly against the third party debtor without also naming the debtor as defendant, the court may compel the debtor to join the litigation.²⁴⁶ In the event two or more creditors bring a subrogation claim in the people's court against the same third party debtor, the people's court may consolidate the cases.²⁴⁷ If the creditor petitions the court for preservation of the third party debtor's assets, the creditor should provide security correspondingly (i.e., equal to the amount of the assets).²⁴⁸ The third party debtor may challenge the alleged debt it owes the original debtor at the subrogation proceeding.²⁴⁹

The Contract Law and the SPC Interpretation build on the SPC's 1998 Enforcement Regulation, which also addressed subrogation issues. The Enforcement Regulation gave the court the power to issue an enforcement notice to a third party debtor ordering the third party debtor to pay the amount owed directly to the court and not to the party against which enforcement is sought.²⁵⁰ The third party debtor has fifteen days from receipt of the notice to perform its debt obligations. If the third party debtor has an objection, it must bring the objection to the court's attention within the fifteen-day time-period.²⁵¹ The court shall not take

²⁴⁵ *See id.* art. 15. Article 108 of the CPL requires that (i) the plaintiff is a citizen, legal person or other organization with a direct interest in the case; (ii) there is a specific defendant; (iii) there is a specific claim, a specific factual basis, and reasons; (iv) the case falls within the range of civil actions accepted by the people's court and within the jurisdiction of the people's court with which it is filed.

²⁴⁶ *See* SPC Interpretation (1) art. 16. If the original debtor tries to make a claim against the amount owed by the third party debtor in excess of the amount claimed by the creditor, the court shall instruct the original debtor to bring a separate claim in a court with jurisdiction. The court should accept a suit brought by the original debtor provided it meets the legal requirements. If the court accepts the suit before the subrogation claim decision becomes legally valid, the court should suspend the second action (until the subrogation claim is decided and the remaining amount of the debt owed by the third party is clear). *See id.* art. 22.

²⁴⁷ *See id.*

²⁴⁸ *See id.* art. 17.

²⁴⁹ *See id.* art. 18.

²⁵⁰ *See* Enforcement Regulation art. 61. The notice is supposed to state the legal consequences for failing to comply with the court's order.

²⁵¹ Third party debtors should generally object in writing. They, however, can raise objections orally, in which case the enforcement personnel shall make a written record. *See id.* art. 62.

coercive measures to enforce against assets of third party debtor if the third party debtor raises objections. A third party debtor cannot, however, simply object that it does not have the capacity to pay the debt or that there is no legal relationship between the applicant and the third party debtor.²⁵² If the third party objects in part to the debt, the court may enforce the uncontested part of the debt.²⁵³

The court may employ coercive measures against the assets of the third party debtor if the third party does not raise an objection but later fails to comply with the court's order.²⁵⁴ If, upon receiving an enforcement notice from the court, the original debtor waives its rights or postpones performance with respect to a third party debt, the court may still enforce the award against the third party debt.²⁵⁵ Moreover, if the third party debtor pays its debts directly to the respondent after receiving an enforcement notice, it shall be jointly and severally liable with the respondent.²⁵⁶

Creditors seeking to enforce against state-owned enterprises and other companies that are owed money by third parties may take advantage of the Contract Law's relaxed assignment provisions. Under the Contract Law, a party may assign its rights under a contract to a third party by providing notice to the other party to the contract.²⁵⁷ There is no need to obtain the consent of the other party to the assignment, as had been the case under the General Principles of Civil Law.²⁵⁸

²⁵² *See id.* art. 64.

²⁵³ *See id.*

²⁵⁴ *See id.* art. 65.

²⁵⁵ *See id.* art. 66.

²⁵⁶ *See id.* art. 67.

²⁵⁷ *See* Contract Law art. 80. A party may not assign its rights to a third party if the nature of the contract does not permit their assignment, the parties have agreed that the rights may not be assigned in the contract or the law prohibits assignment. *See id.* art. 79. Assignment of contractual obligations still requires the consent of the other party. *See id.* art. 84.

²⁵⁸ *See* General Principles of Civil Law (Apr. 12, 1986) (adopted by the NPC) [hereinafter Civil Law] art. 91. The inconsistency between the Contract Law and the Civil Law on the issue of consent for assignment of contractual rights raises the interesting interpretation question of which law prevails. According to Article 123 of the Contract Law, if other laws make other provisions concerning a contract, those provisions shall apply. Thus, it would appear that Article 91 of the Civil Law should apply. Such a conclusion, however, would make little sense as

Generally, creditors may benefit from the new Contract Law provision in two ways. First, they may benefit directly by virtue of an assignment from the respondent of debts owed to it by third party debtors. They may also benefit by being able to assign their claims against the respondent to a third party. Presumably, the third party would purchase the claims at a steep discount, given the risks and costs associated with enforcement. Yet, it is conceivable that companies with better connections, more resources, and more appetite for risk might be interested, and the practice of factoring, as it is known elsewhere, may emerge in China.²⁵⁹

Q. *Fraudulent Transfers*

Unlike some jurisdictions, the PRC does not have a unified fraudulent transfer or conveyance statute. There are, however, a number of laws and regulations that prohibit parties from concealing or transferring assets or undergoing reorganization to avoid liabilities.²⁶⁰ The Civil Law has long provided that an enterprise as a legal person shall bear liability; its legal representative may additionally be subject to administrative sanctions and fined; and, if the offense constitutes a crime, subject to criminal punishment. Offenses constituting a crime include: secretly withdrawing funds or hiding property to evade repayment of debts; disposing of property without authorization after the enterprise is dissolved, disbanded, or declared bankrupt; or failing to apply for registration and make a public announcement promptly when the enterprise undergoes a change or terminates, thus causing interested persons to suffer heavy

a practical matter and runs counter to other widely accepted canons of interpretation: namely, that the more specific (i.e., the Contract Law) prevails over the more general, and that the last in time prevails over earlier rules. *See, e.g.*, Law on Legislation (Mar. 15, 2000) (adopted by the NPC).

²⁵⁹ The SPC Interpretation (1) contains several provisions relating to disputes that arise out of assignment of contractual rights and obligations. *See* SPC Interpretation (1) arts. 27-29. Basically, these provisions permit the court to compel joinder of the assignor in the event a dispute arises between the assignee and the other party to the contract. *See id.*

²⁶⁰ Within a period of six months prior to the acceptance of the bankruptcy application by the court to the date of announcement of the bankruptcy, the following acts of the bankrupt enterprise are invalid giving the liquidation group the right to recover property: (i) concealment of assets, illicit distribution, or gratuitous assignment; (ii) irregular underselling; (iii) furnishing of security to previously unsecured creditors advance discharge of unmatured obligations; and (iv) renunciation of its own claims against others. *See* Law of the People's Republic of China on Enterprise Bankruptcy (Trial Implementation) (Dec. 2, 1986) (adopted by the NPC) art. 35. The Bankruptcy Law only applies to state-owned enterprises. *See also* Notice on Several Questions to be Attended to When Hearing Trials on Bankruptcy Cases (Mar. 6, 1997) (issued by the SPC) arts. 6-7; Enforcement Regulation art. 26.

losses.²⁶¹ The relevant provision is loosely drafted, however, and does not expressly cover transfer of assets at prices below market value or dissolving a company to avoid debt. Nor does it provide for avoidance of the transfer.

The Contract Law tightened up some of these loopholes. Article 74 provides that where the debtor waives its right to mature claims or assigns property without compensation, thereby harming the creditor, the creditor may petition the court for avoidance of the debtor's act. Where the creditor assigns its property at a price that is clearly unreasonably low and the assignee was aware of the situation, the creditor may also petition the court to have the transfer avoided (*chexiao*). The creditor's right to have the transaction avoided is limited to the extent of the debtor's obligation to the creditor.²⁶² The debtor bears the necessary expenses incurred by the creditor in avoiding the transfer.²⁶³

The creditor has one year from the time it knew or should have known of the fraudulent transfer to petition to have the transfer avoided and, in any event, must bring the claim within five years of the transfer.²⁶⁴ SPC Interpretation (1) clarified that jurisdiction resides with the court where the defendant is domiciled.²⁶⁵ Where the creditor claims only against the defendant and does not claim against the third party beneficiary or assignee, the court may compel its participation.²⁶⁶ If a court decides to avoid the debtor's waiver of a debt or its transfer of property, the act shall be deemed void ab initio (*zishi wuxiao*).²⁶⁷

²⁶¹ See Civil Law art. 49.

²⁶² See *id.*

²⁶³ See *id.* The debtor shall bear all necessary expenses incurred by the creditor, including attorney's fees, transportation, room, and board. If a third party is also culpable, the third party shall share costs appropriately. See SPC Interpretation (1) art. 26.

²⁶⁴ See SPC Interpretation (1) art. 26.

²⁶⁵ See *id.* art. 23.

²⁶⁶ See *id.* art. 24. If two or more creditors seek cancellation against the same debtor for the same subject matter, the court may consolidate the cases. See *id.* art. 25.

²⁶⁷ See *id.* art. 25.

Remedies for fraudulent conveyance range from avoiding the transfer to warning, fines and suspension, or revocation of a company's business license.²⁶⁸ In addition, the legal representative may be subject to administrative sanctions, including detention or even criminal punishment. There have been a number of recorded fraudulent conveyance cases where the court has set aside the transfer or taken other actions.²⁶⁹

R. *Piercing the Corporate Veil*

In some cases, companies try to escape liability by dissolving the company or through reorganization, where the company is left in existence but is just a hollow shell with only debts and no assets. Other times, a subsidiary will turn out to have no assets, because the assets have been transferred to sister companies, or because the parent company has kept the subsidiary undercapitalized. In such cases, parties want to go after the newly created companies, the sister companies, the parent company, or the owners of the companies. A number of PRC laws and regulations address such issues. The Civil Law, for instance, provides that where an enterprise as legal person is divided or merged, its rights and obligations shall be enjoyed and assumed by the new legal person that results from the change.²⁷⁰

The Enforcement Regulation does not provide general criteria for piercing the corporate veil or determining when one person or company will be held responsible for the liability of another. It does, however, provide some guidelines for specific circumstances that will be of use to some parties in enforcement of their awards.²⁷¹ For instance, the Regulation provides that where the respondent is unable to pay the amount owed, the applicant may obtain payment from

²⁶⁸ See Criminal Law arts. 159, 313; Normative Opinion on Limited Liability Company (May 15, 1992) (issued by the State Council); Normative Opinions on Joint Stock Limited Company (May 15, 1992) (issued by the Economic System Reform Committee).

²⁶⁹ In *Hebei Baoding Mancheng County Plastic Co. v. Xinjiang Shihezi Credit Union* (Nongbashi IPC, 1991), the court froze the defendant's account based upon the plaintiff's request. The defendant then transferred the money in that account. The court fined the defendant RMB 30,000 and the representative RMB 1000. In *Huangshi Branch Bank of China v. Huangshi Chemical Knitting Factory* (Huangshi IPC, 1989), the defendant reached a settlement agreement with the plaintiff, which was approved by the court. The defendant then transferred its property to other companies to avoid performance. Accordingly, the court fined the representatives of the defendant. Thereafter, the defendant paid its debts.

²⁷⁰ See Civil Law art. 44. See also CPL art. 213; 1992 SPC CPL Opinion arts. 271-274.

²⁷¹ See Enforcement Regulation arts. 76-83.

the entity that established the respondent if the establishing entity's contribution of registered capital into the respondent was not paid in full or it withdrew some of its registered capital from the respondent.²⁷² Similarly, if the respondent is unable to pay the award amount, because assets have been transferred without compensation to the department in charge or to the establishing entity, the applicant may seek compensation from such entities up to the amount of the value of such assets.²⁷³ Companies shall also be responsible for the liability of their branches.²⁷⁴

III. CONCLUSION

There are many causes of China's arbitral award enforcement problem, some of which apply, to one degree or another, to enforcement difficulties in other areas of law as well. Culture and tradition play a role, as evidenced in an enduring emphasis on settlement, the lack of respect for law, and the continued reliance on relationships often to subvert the legal process.²⁷⁵ China today is also confronting a crisis of values as a result of the loss of faith in socialism. Plagued by corruption, the Party is seen by many as nothing more than a vehicle for personal enrichment and power. At the same time, the Party's efforts over the years to destroy traditional normative systems, such as Confucianism, Daoism, and Buddhism, have taken their toll. To fill the void, many have turned to money-worshipping, a hard-edged capitalist materialism in which the only goal is to acquire as much money as possible, as soon as possible, and in any way possible. The get-rich-quick mentality fuels corruption, undermines respect for the law, and encourages people to disregard their legal obligations and resist the court's orders.

Economic reforms have resulted in an increase of insolvent companies as state-owned enterprises are cut off from government support and subjected to the rigors of the market. As a consequence, many PRC respondents are judgment-proof. Indeed, by far the biggest reason for

²⁷² See *id.* art. 80.

²⁷³ See *id.* art. 81.

²⁷⁴ See *id.* art. 78. If the enterprise legal person that established a branch does not itself have sufficient assets, the court may enforce against the assets of the enterprise's other branches. See *id.*

²⁷⁵ See Peerenboom, *supra* note 1.

non-enforcement is the insolvency of the respondent.²⁷⁶ Reforms have also led to increased central-local tensions and forced many local governments to fend for themselves, resulting in widespread local protectionism. In addition, reforms have contributed to the rapid change in the laws, inconsistencies in the regulatory framework, and problems clarifying title and tracking down assets. They have also provided an opportunity for corruption, fraudulent transfers, and the siphoning off of state-owned assets, all of which make enforcement more difficult.

To be sure, many of the problems are due to shortcomings in the legal system. Clearly, deficiencies in the regulatory framework make enforcement more difficult. Yet, the larger obstacles are institutional in nature. Simply put, the courts are weak.²⁷⁷ They are institutionally dependent on local governments for funding and people's congresses for personnel decisions, and they are still politically subservient to the Party. As a result, the courts lack the necessary authority within the Chinese political structure to ensure that enforcement issues are handled in accordance with law over the objections of other state actors.

Ultimately, the institutional causes must be addressed for there to be much improvement in enforcement. Tinkering with the rules will not address many of the more fundamental obstacles to enforcement, which are economic or institutional in nature. Deeper reforms are required.²⁷⁸ Nevertheless, there are a number of ways in which the regulatory framework could be strengthened that could make enforcement easier in some cases.

Beginning with venue, the SPC Notice regarding China's accession to the New York Convention established a hierarchy whereby the applicant may bring an enforcement action where the respondent's assets are located only if the respondent has no established domicile. The SPC should clarify that the applicant has the option of bringing suit where the respondent is domiciled or where its assets are located, if different, as stipulated in the 1999 Memorandum for Hong Kong awards. In most cases, the location of the assets and the respondent's domicile will be the same place. In those cases where the assets are located elsewhere, however, local protectionism may be less of a factor.

²⁷⁶ Lack of assets accounted for 43% of non-enforcement cases in both my survey and the 1997 survey by the Arbitration Research Institute. *See id.*

²⁷⁷ The low level of judicial professionalism and competence is also a factor.

²⁷⁸ *See* Peerenboom, *supra* note 1.

Although a welcome improvement, the Unified Administration Regulations²⁷⁹ issued by the SPC in January 2000 require further clarification. For instance, the Regulations allow HPCs to take cases away from lower level courts and, where applicable, either to enforce the cases themselves or to assign them to an IPC where applicable. The HPC may also order a lower court to change its decision. It is not clear, however, how the HPC will hear about cases in the first place. In particular, it is not clear whether parties will have the right to petition the HPC. If they are to have such a right, a number of procedural issues need further clarification. Given that courts typically just let the case sit, rather than issuing an order refusing to enforce the award, the party should have the right to lodge an interlocutory appeal after a certain time, say six months, if the lower court has yet to make a decision. Moreover, the regulations do not stipulate the standards to be applied by the HPC either when deciding whether a case has been wrongly decided or when reassigning responsibility for enforcement to another court. Furthermore, it is unclear whether the applicant or the court will bear the burden of proof with respect to such issues as whether the court has been negligent in discovering the respondent's assets or delayed unreasonably in enforcing the award.

Confusion about application requirements has also been a problem. The SPC should clarify what documents are required. In addition, the court should lighten the translation requirements; not all documents need be translated in full. For instance, it should suffice to translate only the relevant clauses pertaining to arbitration. There is no need to insist that parties translate the entire 200 pages of a construction contract, including all of the technical appendices. The statute of limitations should also be extended from the current six months where the parties are legal persons. At minimum, the SPC should clarify the circumstances that toll the running of the six-month period.

The rules regarding the grounds for refusal could also be tightened. The SPC's Notice regarding the New York Convention provided that the courts must refuse to enforce an award if any of the circumstances of Article V are present, whereas the New York Convention provides that courts may refuse to enforce an award under such circumstances. The SPC could bring the PRC's rules into line with the New York Convention.

²⁷⁹ See Unified Administration Regulations, *supra* note 79.

One crucial issue that continues to haunt investors is the lack of guidance on what constitutes “social public interests.” The fear has long been that PRC courts would find that enforcement of virtually any award against a Chinese party would violate the social public interests. Such fears were not entirely groundless. In one well-publicized case, the court refused enforcement of a substantial award, simply because enforcing the award would not be in the economic interests of China.²⁸⁰ Public interest has not, however, been a common ground for refusing to enforce awards.²⁸¹

By far the toughest issue with respect to standards for refusing enforcement is whether to continue to allow substantive review of domestic awards. On the one hand, substantive review is arguably needed to address problems resulting from the low level of competence and lack of independence of some local arbitration commissions. On the other hand, the court’s power of substantive review is itself subject to abuse due to corruption in the courts and local protectionism. If substantive review is to continue, it might be possible to mitigate the impact of corruption and local protectionism by shifting jurisdiction over domestic award enforcement cases from BPCs to IPCs. In addition, the SPC could institute the same or a similar type of reporting mechanism for domestic awards as now exists for foreign and foreign-related awards so any court contemplating refusal to enforce an award must first obtain the approval of a higher court.²⁸²

The existing reporting mechanism could also be improved. First, the SPC should make clear that the 1995 Notice applies to foreign-related awards by domestic bodies and ad hoc awards. The SPC should also clarify the deadlines for the IPC to seek approval from the HPC, and then for the HPC to submit the case to the SPC. The SPC should also impose a deadline on itself. Moreover, the SPC’s decision-making process currently lacks transparency. There is no hearing, and parties are not allowed to submit documents in support of their position. Parties are

²⁸⁰ See *Dongfeng Garments*, *supra* note 165, reprinted in CHENG, *supra* note 6. The SPC later overruled the court through adjudication supervision.

²⁸¹ See Peerenboom, *supra* note 1 (finding that only two out of eighty-nine cases involved refusal to enforce on public interest grounds).

²⁸² As it is unlikely that the SPC would want to take on the additional burden of reviewing all refusals to enforce domestic awards, the mechanism could be adjusted so that only one level of approval is required. Another possibility would be to require approval only where the reason for refusal is substantive rather than procedural.

not even entitled to notification that their matter has been forwarded to the SPC and that the SPC will be deciding the matter. The court might wish to consider the possibility of a hearing. At minimum, the parties should be notified that their case has been forwarded to the SPC and given the opportunity to provide additional documentation if they so desire.

The SPC has issued several regulations that attempt to impose time limits with respect to acceptance, the decision whether to recognize and enforce an award, and the completion of enforcement; however, the regulations suffer from various shortcomings. For instance, the Fee Regulation applies only to New York Convention awards.²⁸³ In addition, the Fee Regulation is inconsistent with the Enforcement Regulation in that the former provides a maximum of eight months to complete enforcement, whereas the latter would require completion within six months. Moreover, both allow for extensions in the event of undefined special circumstances. Further, the procedures for obtaining an extension are unclear and lack transparency. Under the Enforcement Regulation, the president of the court may approve an extension of unspecified duration, but the Regulation does not stipulate the grounds for such extension. Nor does it require the court to notify the parties, hold a hearing, or give the parties the right to submit documents that might be relevant to the court's decision. Most important, the Regulation does not provide for appeal of the decision or even that the court notify the parties of its decision and reasons. Apparently, the only way a disgruntled party could challenge the decision would be under the State Compensation Law.²⁸⁴ Setting aside the implausibility of a party suing the same court the party will ultimately need to rely on to enforce the award, the chances of prevailing are next to nil given that the Enforcement Regulation does not define "special circumstances" or require the president of the court to provide any reasons for its decision.

In practice, courts continue to ignore the time limits for accepting a case and leave enforcement cases pending, thus circumventing the 1995 Notice's reporting mechanism. The Unified Administration Regulations²⁸⁵ may help address the problem in that they empower the

²⁸³ See *supra* Part II.H.

²⁸⁴ PRC State Compensation Law (May 12, 1994) (adopted by the NPC Standing Committee) art. 2. Courts are not administrative entities, which forecloses the possibility of a challenge under the Administrative Reconsideration Law or Administrative Litigation Law.

²⁸⁵ See *supra* note 79.

HPC to reassign cases or to take over enforcement where the lower level court has delayed unreasonably. The SPC could further improve the situation by stipulating more clearly the time limits for each stage of the process and ensure the deadlines apply to all types of awards. It should also provide clearer guidelines as to what constitutes “special circumstances,” limit the circumstances under which deadlines may be suspended, and should require a hearing to extend a deadline. At minimum, the court should be required to set forth the facts and reasoning in support of its decision. The parties should then be able to appeal the court’s decision to the HPC. If after some period, say six months, from the date of application the award has yet to be enforced, the HPC should be deemed to have refused to enforce, which would then require the HPC to submit the matter to the SPC for approval.

Enforcement of arbitral awards calling for the liquidation of a company is another area where enforcement problems are attributable to shortcomings in the existing legal framework. PRC regulations make it difficult for a joint venture party to unilaterally terminate and liquidate a joint venture in that they require a unanimous board resolution and approval of the approval authorities, generally the MOFTEC or its local affiliates. Most joint venture contracts include provisions whereby one party may terminate the joint venture contract under certain conditions, such as a material breach of the other party. The early termination provisions are usually combined with clauses that obligate both parties to cause their appointed directors to vote in favor of termination and to take whatever steps are necessary to terminate the joint venture. In some cases, however, a party will have breached the contract or one of the other early termination events will have occurred but the other party will still refuse to consent to termination. In such cases, the non-breaching party may ask the arbitral tribunal to order the joint venture terminated as part of the award. The 1996 Measures on Liquidation Procedures for Foreign Investment Enterprises (“Liquidation Measures”) appeared to offer a way out of the deadlock by providing that liquidation shall commence on the date the joint venture contract is terminated pursuant to a ruling of the court or an award by an arbitration body.²⁸⁶

In two cases, however, a foreign party was stymied in its attempts to enforce CIETAC awards calling for the liquidation of the joint venture. In the first case, the IPC claimed that the

²⁸⁶ See Measures on Liquidation Procedures for Foreign Investment Enterprises (June 15, 1996) (approved by the State Council) [hereinafter Liquidation Measures] art. 5.

joint venture company was not itself a party to the arbitration agreement and therefore could not be the subject of enforcement.²⁸⁷ The court suggested that the foreign party bring a suit against the joint venture seeking liquidation, which the foreign party did. Before the IPC could take up the case, however, the SPC declared, in a written response to the Shandong HPC, that there was no legal basis for courts to organize liquidation.²⁸⁸ If a party seeks liquidation and damages, the court is only able to decide matters such as the validity of the contract, whether or not to terminate the contract, and liability for breaching the contract. Under the Liquidation Measures, MOFTEC or its local counterparts are responsible for handling “special liquidation” where the parties are unable to agree on the appointment of a liquidation committee.²⁸⁹ Unfortunately, in this instance, the local approval authority refused the foreign party’s request to organize a committee under the special liquidation procedures.²⁹⁰

In the second case, the court refused to enforce the award also on jurisdictional grounds, claiming that the court did not have the authority to oversee liquidation of the joint venture. Again, the local approval authority refused to organize a liquidation committee.

One possible solution for such enforcement problems would be for the State Council and MOFTEC to rein in local authorities and to ensure that approval authorities organize liquidation committees. Yet, this approach bucks the general trend of economic reforms, which has resulted in increasingly autonomous and aggressive local governments and administrative entities willing to bend or ignore the rules to promote local interests. A better solution would be for the State Council and MOFTEC to amend the 1996 Measures to allow the court to take over the duties assigned to the approval authorities, at least in cases involving enforcement of an arbitral award or court judgment.

Finally, although there are various regulations that touch on issues relating to piercing of the corporate veil, this remains a relatively undeveloped area of law. Again, this is one area that

²⁸⁷ See Peerenboom, *supra* note 1.

²⁸⁸ See SPC Reply Regarding the Handling of Joint Venture Disputes over How to Liquidate the Joint Venture (Jan. 15, 1997) (issued by the SPC Adjudicative Supervision Committee).

²⁸⁹ Liquidation Measures art. 35.

²⁹⁰ The foreign party did not challenge the approval authority’s decision through administrative reconsideration or litigation, because it had other projects in the area and wanted to maintain good relations.

is likely to remain in flux as China continues the process of state-owned enterprise reform and implements the policy of separating the state and commercial enterprises. Moreover, legal doctrine will need to reflect the particular realities of China, where corporate forms are often disregarded or looked on as no more than a formality. Simply importing laws and regulations from other countries without adaptation is likely to result in the rules being ignored in practice.

Predicting where China will be in five years, much less twenty years, is risky business. The road ahead is likely to be a long and bumpy one, but at least the way forward seems clear. Without deeper institutional reforms, it is unlikely that China will be able to address its enforcement problems. Whether China's leaders have the political will to carry out deeper institutional reforms remains to be seen. In the meantime, they can begin by tightening the rules for enforcement and patching up holes in the regulatory framework.