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Benjamin O. Kostrzewa

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## CHINA INTERNATIONAL ECONOMIC TRADE ARBITRATION COMMISSION IN 2006: NEW RULES, SAME RESULTS?

Benjamin O. Kostrzewa<sup>†</sup>

*Abstract:* In May of 2005, the China International Economic Trade Arbitration Commission (“CIETAC”) was updated with new rules designed to bring it into conformity with international arbitration standards. The rules were the most recent efforts by the Chinese government to provide foreign companies with an alternative to the Chinese judiciary, which is often considered parochial, unsophisticated, and unable to handle modern business conflicts. The new rules cure many of the problems associated with arbitration in China and have created a predominantly fair and professional dispute resolution forum. Currently, CIETAC suffers more from award collection problems rather than problems in its rules and procedures. Arbitration in China must still rely on the judiciary for the enforcement of awards. The Chinese government has reformed many aspects of the judiciary to make the enforcement of arbitration awards more uniform and just; yet it remains difficult to seize assets in order to satisfy an arbitral award. This Comment analyzes the 2005 changes to the CIETAC rules, and examines the Chinese government’s efforts to reform the enforcement of arbitration judgments.

### I. INTRODUCTION

In the past twenty-five years, the blistering speed of Chinese economic development outpaced efforts to reform China’s judicial system. The corresponding expansion in legal relationships between foreign and Chinese businesses created a demand for forums to hear legal claims. Recently, professional arbitration organizations have filled that void as an alternative to the Chinese judiciary.<sup>1</sup> Foreign corporations, leery of a Chinese legal system that is widely considered to be parochial, unsophisticated, and unable to handle modern business conflicts, often choose private arbitration institutions to resolve disputes.<sup>2</sup>

The China International Economic Trade Arbitration Commission (“CIETAC”) is the leading arbitration organization for foreign-related legal disputes. CIETAC was established in 1988 out of its predecessor, the Foreign Economic and Trade Arbitration Commission (“FETAC”).<sup>3</sup> CIETAC is now the world’s busiest international business arbitration

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<sup>1</sup> JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA xiv (2004) [hereinafter TAO].

<sup>2</sup> *Id.*

<sup>3</sup> ARBITRATION IN CHINA: A PRACTICAL GUIDE 7 (Jerome A. Cohen et al., eds., 2004) [hereinafter Cohen et al.].

institution, handling over 850 cases in 2004.<sup>4</sup> Yet, in spite of the growing volume of cases CIETAC handles, some international observers believe that it still has institutional problems that chip away at its objectivity and effectiveness.<sup>5</sup>

In 2005, CIETAC issued new arbitration rules to address many of the problems commonly associated with it.<sup>6</sup> Problems with the arbitrator selection process and the efficiency of the tribunal were improved to meet international norms of arbitration.<sup>7</sup> These new regulations are an important step for CIETAC towards fully meeting international arbitration standards, for they solve many of the systemic defects that plagued the CIETAC arbitration process.

The Chinese government is aware of the importance of arbitration and regularly reforms its laws and regulations in order to modernize the legal system. In addition to the CIETAC rules, there have been many changes made to the judiciary to make the enforcement of arbitration awards as fair as possible.<sup>8</sup> The effectiveness of such reforms, however, is often questioned.<sup>9</sup> Post-award problems in the execution of awards continue to plague the Chinese system in spite of reform efforts by the Chinese government.<sup>10</sup>

However, other problems regularly associated with arbitration in China, such as local protectionism, bias against foreigners, and competency of the courts, are more a problem of outside perception of CIETAC rather than actual institutional defects.<sup>11</sup> The widespread reform efforts to ensure

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<sup>4</sup> Darren Fitzgerald, *CIETAC's New Arbitration Rules: Do the Reforms Go Far Enough?*, *ASIAN DISP. REV.*, July 2005, at 51.

<sup>5</sup> See generally Jerome A. Cohen, *Time to Fix China's Arbitration*, *FAR E. ECON. REV.*, Jan. 2005, at 31.

<sup>6</sup> China Int'l Econ. & Trade Arb. Commission Arb. Rules (Revised and Adopted by the China Council for the Promotion of Int'l Trade China Chamber of Int'l Com. on Jan. 11, 2005, effective May 1, 2005) (P.R.C.), available at <http://www.cietac.org> (last visited Feb. 9, 2006) [hereinafter *CIETAC Arb. Rules*].

<sup>7</sup> Fitzgerald, *supra* note 4, at 51.

<sup>8</sup> The Chinese government regularly updates and revises its laws. See generally Jean-Pierre Cabestan, *The Pol. and Prac. Obstacles to the Reform of the Judiciary and the Establishment of a Rule of Law in China*, 10 *J. CHINESE POL. SCI.* 1 (2005) (describing the efforts and difficulties of reforming Chinese law).

<sup>9</sup> See TAO, *supra* note 1, at xv.

<sup>10</sup> See generally HU LI, *ENFORCEMENT OF THE INTERNATIONAL COMMERCIAL ARBITRATION AWARD: WITH SPECIAL REFERENCE TO THE ENFORCEMENT OF THE ARBITRAL AWARD IN THE P.R. CHINA* 148 (2000).

<sup>11</sup> Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 *AM. J. COMP. L.* 249, 253-255 (2001).

the legitimacy of arbitration in China are under appreciated by the business community at large.<sup>12</sup>

In order to solve both the problems that still remain in the seizure of assets to satisfy arbitral awards, as well as the institutional defects that remain in CIETAC, the Chinese government must reduce the gap between the statutory authority granted by the law and the lack of legal power the courts currently hold in China. Comprehensive redrafting of statutes is an important step; however, the Chinese government must also encourage the judiciary to become strong and independent.

This Comment will examine the development of Chinese arbitration law. Part II will discuss international arbitration generally and the development of Chinese arbitration. Part III will analyze the 2005 CIETAC revisions and the problems that were cured by the changes. Part IV will examine the post-award legal regime in China and the problems that remain. Lastly, this Comment will identify remedies to the real and perceived problems that remain after the 2005 arbitration rules in China.

## II. CIETAC HAS DEVELOPED TO MEET INTERNATIONAL ARBITRATION STANDARDS

International arbitration seeks to provide an alternative to traditional litigation by allowing the parties to craft a forum that best suits their individual needs.<sup>13</sup> Rather than the formalism of rules and procedure that colors litigation, arbitration offers flexibility, efficiency, and privacy for the parties involved.<sup>14</sup>

### A. *International Arbitration Tribunals Share Common Norms*

Though there are dozens of arbitration tribunals and courts around the world, they all share similar goals.<sup>15</sup> The London Court of International Arbitration (“LCIA”), for example, advertises the benefits of arbitration as:

Maximum flexibility for parties and tribunals to agree on procedural matters, speed and efficiency in the appointment of arbitrators, including expedited procedures, means of reducing

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<sup>12</sup> Wang Shengchang, *Enforcement of Foreign Arbitral Awards in the People's Republic of China*, in *IMPROVING THE EFFICIENCY OF ARBITRATION AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION* 461, 498-99 (Albert Jan van den Berg ed., 1999).

<sup>13</sup> GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 7 (2d ed. 2001).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

delays and counteracting delaying tactics, tribunals' power to order security for claims and for costs, special powers for joinder of third parties, fast-track option, waiver of first right of appeal, costs computed without regard to the amounts in dispute, [and] staged deposits.<sup>16</sup>

When China signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),<sup>17</sup> arbitration became the chosen method for international dispute resolution.<sup>18</sup> The New York Convention internationalized the enforcement of arbitration awards, and this, in combination with the rising costs of litigation, made it a more amenable forum for international dispute resolution.<sup>19</sup> The convention was particularly important in China, given the many problems of the judiciary.<sup>20</sup> As arbitration institutions in China and around the world became better able to hear disputes, the number of cases also increased markedly.<sup>21</sup> However, the phenomenon of arbitration in China is relatively recent.<sup>22</sup> Prior to the post-Mao economic reforms, little arbitration took place in China.<sup>23</sup>

### B. *Arbitration in China Matured Only After 1978*

Some scholars believe that Chinese culture is more amenable to alternative dispute resolution than litigation, citing Confucian values and an historical emphasis on mediation.<sup>24</sup> The beginnings of modern Chinese arbitration can be traced to 1912, immediately after the end of the Qing

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<sup>16</sup> London Court of International Arbitration, [http://www.lcia.org/ARB\\_folder/arb\\_main.htm](http://www.lcia.org/ARB_folder/arb_main.htm) (last visited Jan. 30, 2006).

<sup>17</sup> Recognition and Enforcement of Foreign Arbitral Awards art. 3, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention]; see Notice of the NSC Concerning the Enforcement of the Convention on the Recognition And Enforcement of Foreign Arbitral Awards, Issued by the NSC on April 10, 1987.

<sup>18</sup> David P. Stewart, *National Enforcement of Arbitral Awards Under Treaties and Conventions*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY 163, 164 (Richard B. Lillich & Charles N. Brower eds., 1992).

<sup>19</sup> *Id.*

<sup>20</sup> Both Chinese and Western scholars have identified many problems with the judiciary, including the competence of judges, the independence of the judiciary, and corruption. See generally STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (1999); Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 AM. J. COMP. L. 793, 795 (1997).

<sup>21</sup> CIETAC cases increased from 267 cases in 1992 to 850 cases in 2004. Other arbitration commissions also saw gains; however, they did not increase at the same pace as CIETAC. For complete statistical information, see Hong Kong International Arbitration Center, International Arbitration Cases Received, [http://hkiac.org/HKIAC/HKIAC\\_English/main.html](http://hkiac.org/HKIAC/HKIAC_English/main.html) (follow "Statistics" link) (last visited Feb. 15, 2006).

<sup>22</sup> JOHN SHIJIAN MO, *ARBITRATION LAW IN CHINA* 21 (2001).

<sup>23</sup> *Id.*

<sup>24</sup> Ellen S. Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China* 6 (2005).

dynasty.<sup>25</sup> However, most of the modern system developed after 1978.<sup>26</sup> Prior to that time, China conducted little foreign trade, and international arbitration was neither necessary nor important to the economy or politics of China.<sup>27</sup>

CIETAC developed from several previous organizations, including the China Council for the Promotion of International Trade (“CCPIT”) and the Foreign Trade Arbitration Commission (“FTAC”).<sup>28</sup> FTAC was established in 1956 under the auspices of CCPIT in order to facilitate trade between foreign and Chinese companies.<sup>29</sup> However, the State Council, one of the top organs of the Chinese state, controlled the jurisdiction, structure, and final decisions of cases adjudicated by FTAC.<sup>30</sup> After the reform period began in 1978, FTAC was renamed the Foreign Economic and Trade Arbitration Commission (“FETAC”) and gained scope and strength as foreign trade flourished in China.<sup>31</sup> Under its new mandate, FETAC could hear disputes involving “business transactions and foreign trade contracts between foreign and Chinese entities to such disputes between totally external parties who may choose China as the arbitration forum.”<sup>32</sup> This expansion of jurisdiction meant that FETAC could hear cases that were wholly outside of China.<sup>33</sup> In 1988, upon the promulgation of new regulations, FETAC officially changed its name to CIETAC in order to underscore the continued changes to its structure.<sup>34</sup>

During the turmoil of the Cultural Revolution, China withdrew from the world.<sup>35</sup> The Chinese government refused to sign multilateral agreements, and from 1965 to 1979, no scholarly writings on international law were published in Mainland China.<sup>36</sup> After 1978, however, the Chinese government quickly signed nearly forty multilateral agreements in less than

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<sup>25</sup> TAO, *supra* note 1, at 1.

<sup>26</sup> Mo, *supra* note 22, at 23.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> TAO, *supra* note 1, at 17.

<sup>30</sup> Cohen et al., *supra* note 3, at 5-6.

<sup>31</sup> State Council’s Notice Concerning the Conversion of the Foreign Trade Arbitration Commission into the Foreign Economic and Trade Arbitration Commission (promulgated by the State Council on Feb. 26, 1980, effective Feb. 26, 1980).

<sup>32</sup> Cohen et al., *supra* note 3, at 7.

<sup>33</sup> TAO, *supra* note 1, at 18.

<sup>34</sup> See The State Council’s Official Reply Concerning the Renaming of the Foreign Economic and Trade Arbitration Commission as the China International Economic and Trade Arbitration Commission and the Amendment of its Arbitration Rules (promulgated by the State Council June 21, 1988).

<sup>35</sup> Cohen et al., *supra* note 3, at 6.

<sup>36</sup> HUNGDAH CHIU, CHINESE ATTITUDES TOWARD INTERNATIONAL LAW IN THE POST-MAO ERA, 1978-1987, at 3 (1988).

ten years.<sup>37</sup> The renewed commitment to arbitration can be traced to the Chinese leaders' desire to benefit from international trade.<sup>38</sup>

Most relevant to the enforcement of arbitration was the ratification of the New York Convention.<sup>39</sup> This Convention provides a basis for CIETAC decisions to be enforced in other countries as well as arbitration decisions from foreign jurisdictions to be enforced within China. This was part of China's broader effort to modernize the economy and enter into the world community.

In the 1990s, the jurisdictional scope and international credibility of arbitration in China grew as state-sponsored arbitration organizations matured.<sup>40</sup> The biggest changes to the law were made in 1994, with the passing of the Arbitration Law.<sup>41</sup> Prior to 1994, arbitration in China was governed solely by the Civil Procedure Law, foreign investment legislation, and the New York Convention.<sup>42</sup> The new Arbitration Law unified and institutionalized arbitration as a dispute resolution system for China.<sup>43</sup> These laws comprise the legal framework for arbitration in China.<sup>44</sup>

As can be seen from the rapid development of arbitration laws and institutions, China's arbitration system is still relatively new. Though it has roots in the reforms immediately after the 1949 revolution, most of the substantial law surrounding arbitration in China was developed after 1978. The changes in the 2005 CIETAC Arbitration Rules represent a continuation of the development of arbitration in China.

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<sup>37</sup> *Id.* at 29-33.

<sup>38</sup> CHIU, *supra* note 36, at 3.

<sup>39</sup> China's two reservations to the treaty were common: the first required reciprocity in order for an arbitration agreement to be enforced; the second limited arbitration to commercial matters. See CHENG DEJUN ET AL., *INTERNATIONAL CUSTOMS AND FOREIGN ARBITRATION PRACTICE* 252 (1993).

<sup>40</sup> Matthew Miller, *Disputes Tribunal Powers Widened*, S. CHINA MORNING POST, Apr. 9, 1998, at 2.

<sup>41</sup> Arbitration Law of the People's Republic of China, (passed on Aug. 31, 1994 by the Nat'l People's Cong., promulgated on Aug. 31 1994 by the Decree No. 31 of the President of the PRC, effective Sep. 1, 1995) [hereinafter Arbitration Law].

<sup>42</sup> MICHAEL J. MOSER ET AL., *HONG KONG AND CHINA ARBITRATION: CASES AND MATERIALS* 305-306 (1994).

<sup>43</sup> Cohen et al., *supra* note 1, at 15.

<sup>44</sup> Chinese arbitration has typically been divided into domestic arbitrations and foreign arbitrations. Domestic arbitrations have different organizations, arbitrators, and are governed by different laws. Then, in 2000, the CIETAC Arbitration Rules were revised to remove jurisdictional distinctions so that domestic arbitration could benefit from the advances in foreign arbitration. Though there are jurisdictional overlaps between domestic and foreign arbitration tribunals in China, the original distinctions remain. See Xiaowen Qiu, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China*, 11 AM. REV. INT'L ARB. 607 (2000).

### III. THE 2005 CIETAC RULES AND AMENDMENTS HELP CREATE A FAIRER AND MORE EFFECTIVE FORUM

On May 1, 2005, the new arbitration rules went into effect as CIETAC attempted to reform some of the institutional problems.<sup>45</sup> The changes target the arbitrator selection process in order to ensure that only unbiased, competent, and objective arbitrators serve on the panel.<sup>46</sup> They also attempted to cure institutional inefficiencies, grant parties greater autonomy, and speed up the arbitration process.<sup>47</sup> The new rules have largely cured the problems previously associated with CIETAC's arbitration rules, leaving mostly post-judgment enforcement problems.<sup>48</sup>

#### A. *The Changes to the Arbitrator Selection Process Create a More Impartial Forum*

The selection of arbitrators is one of the most important and contentious issues facing CIETAC.<sup>49</sup> The arbitration tribunal is the face of CIETAC, as the arbitrators on the panel have control over the outcome of the decision. Therefore, a selection process that guarantees an objective arbitration tribunal is critical to the legitimacy of CIETAC.

The 2005 CIETAC rules made substantial changes to how arbitrators are appointed.<sup>50</sup> The rules create a "list system" for either a sole arbitrator or a presiding arbitrator.<sup>51</sup> When deciding between the two competing lists, "the Chairman of CIETAC shall choose a presiding arbitrator from among the common candidates based on the specific nature and circumstances of the case, who shall act as the presiding arbitrator jointly appointed by the parties."<sup>52</sup> This increases the autonomy of the parties to choose their own arbitrators, but it requires that there be common names on both lists. If there is no agreement, the decision will fall back to the CIETAC Chairman.<sup>53</sup>

The new regulations also allow for non-CIETAC arbitrators to serve on a tribunal.<sup>54</sup> Previously, only CIETAC arbitrators could serve on a

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<sup>45</sup> CIETAC Arbitration Rules (Adopted by the China Council for the Promotion of International Trade and the China Chamber of International Commerce on January 11, 2005, effective May 1, 2005.)

<sup>46</sup> Fitzgerald, *supra* note 4, at 51.

<sup>47</sup> *Id.*

<sup>48</sup> Peerenboom, *supra* note 11, at 3.

<sup>49</sup> Jerome A. Cohen, *Time to Fix China's Arbitration*, FAR E. ECON. REV., Jan. 2005, at 31.

<sup>50</sup> CIETAC Arbitration Rules § 22(3).

<sup>51</sup> In the CIETAC Rules, the two parties can elect to have only one arbitrator. Otherwise, the panel will have three arbitrators, with one serving as the presiding arbitrator. CIETAC Arbitration Rules § 20.

<sup>52</sup> CIETAC Arbitration Rules § 22(3).

<sup>53</sup> *Id.* § 22(4).

<sup>54</sup> *Id.* § 21(2).



tribunal;<sup>55</sup> however, the new rules allow for people who are not on the CIETAC panel of arbitrators to serve, subject to approval by the Chairman of CIETAC.<sup>56</sup>

Disclosure of potential conflicts of interest was a consistent problem for CIETAC.<sup>57</sup> The revisions made in 2000 required arbitrators to disclose if they had a personal interest in the case, and if need be, request removal.<sup>58</sup> However, CIETAC arbitrators often served as personnel within the CIETAC organization, which led to a blurring of the lines between CIETAC arbitrators and the CIETAC staff. This created the impression that CIETAC as an organization is exerting pressure on the arbitrators to decide a case a certain way.<sup>59</sup>

Arbitrators are now required to file a declaration of relevant facts that could give rise to a conflict of interest.<sup>60</sup> Article 25(1) states: "An arbitrator appointed by the parties or by the Chairman of the CIETAC shall sign a declaration and disclose to the CIETAC in writing any facts or circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence."<sup>61</sup> This regulation is an improvement from the previous regulations, which did not have a written declaration requirement.<sup>62</sup>

In addition, the CIETAC regulations now allow for-cause challenges to arbitrators within ten business days of the declaration by the arbitrator.<sup>63</sup> Although the CIETAC chairman is the ultimate adjudicator of such challenges, this is another way parties can remove arbitrators.

#### *B. The Systemic Changes in the New Rules Have Cured Many Institutional Defects*

Some of the most important changes in the new rules are to the arbitral process.<sup>64</sup> As mentioned previously, one of the principal reasons to arbitrate a dispute is flexibility.<sup>65</sup> Parties are able to craft a dispute forum that best suits their needs. The new CIETAC regulations allow for greater

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<sup>55</sup> Fitzgerald, *supra* note 4, at 51.

<sup>56</sup> *Id.*

<sup>57</sup> Cohen, *supra* note 49, at 31.

<sup>58</sup> CIETAC Arbitration Rules §§ 28-29.

<sup>59</sup> Cohen, *supra* note 49, at 31.

<sup>60</sup> Fitzgerald, *supra* note 4, at 52.

<sup>61</sup> CIETAC Arbitration Rules § 25(1).

<sup>62</sup> Fitzgerald, *supra* note 4, at 51.

<sup>63</sup> CIETAC Arbitration Rules § 26.

<sup>64</sup> See Fitzgerald, *supra* note 4, at 51.

<sup>65</sup> See Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, in INTERNATIONAL ARBITRATION IN THE 21<sup>ST</sup> CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? 3 (Lillich & Brower eds., 1994).

autonomy for both the tribunal and the parties.<sup>66</sup> They also make two substantial systemic changes that address critical problems of transparency and efficiency: the publication of minority opinions, and the speeding up of the arbitration process.<sup>67</sup>

Under the new regulations, individual arbitral tribunals, rather than CIETAC personnel, have increased powers to shape the nature of the hearings.<sup>68</sup> The new regulations allow for the arbitral tribunal to “examine the case in any way that it deems appropriate unless otherwise agreed by the parties,” including whether the hearing will be inquisitorial or adversarial in nature.<sup>69</sup> The tribunal now decides many of the procedural questions, such as the lists of questions, time and topic of pre-hearing meetings, preliminary hearings, and the terms of reference.<sup>70</sup>

While this seems to give a wide range of options to the arbitration tribunal, it gives even more latitude to the parties involved. Every clause that gives power to the tribunals is prefaced by “unless otherwise agreed by the parties,” essentially giving them veto power over any possible changes, assuming the opposing parties can come to agreement.<sup>71</sup> This change should be welcome to some observers who saw CIETAC’s paternalism over the hearing structures as an impediment to the autonomy of the parties.<sup>72</sup>

In fact, parties can avoid the use of the CIETAC rules altogether. Under Article 4(2), parties that have agreed to other rules, such as the American Arbitration Association or the London Court of International Arbitration, may still have their claims heard by CIETAC.<sup>73</sup> Additionally, new rules have been promulgated for specific industry areas, such as for financial disputes.<sup>74</sup>

The new regulations also allow for dissenting opinions to be attached to the file, though they are not actually part of the award.<sup>75</sup> Prior to the May 2005 regulations, dissenting opinions were not provided to the parties.<sup>76</sup>

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<sup>66</sup> Fitzgerald, *supra* note 4, at 51.

<sup>67</sup> CIETAC Arbitration Rules § 43(4).

<sup>68</sup> *Id.* § 29(1).

<sup>69</sup> *Id.* §§ 29(1), (3).

<sup>70</sup> *See id.* §§ 29, 31, 32, 33(1).

<sup>71</sup> *See, e.g., id.* §§ 29, 31, 32, 33(1).

<sup>72</sup> *See* Xiaowen Qiu, Note & Comment, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of The United States and China*, 11 AM. REV. INT’L ARB. 607, 613 (2000).

<sup>73</sup> The only exception is when “such agreement is inoperative or in conflict with a mandatory provision of the law of the place of the arbitration.” CIETAC Arbitration Rules § 4(2).

<sup>74</sup> CIETAC Financial Disputes Arbitration Rules (revised and adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce on Mar. 17, 2005, effective May 1, 2005), available at [http://cietac.org.cn/english/rules/rules\\_2.htm](http://cietac.org.cn/english/rules/rules_2.htm) (last visited Feb. 6, 2006).

<sup>75</sup> CIETAC Arbitration Rules § 43(4).

<sup>76</sup> Fitzgerald, *supra* note 4, at 52.

Critics claimed that this practice reduced the transparency of the proceedings and limited opportunities to appeal the judgment, as it gave the appearance of unanimity.<sup>77</sup> In the new regulations, however, Article 43(4) states that “[a] written dissenting opinion shall be docketed into the file and may be attached to the award, but it shall not form part of the award.”<sup>78</sup> This provision is a major step toward allowing dissenting opinions, but some observers question the language of the provision.<sup>79</sup> The term “may” seems to allow CIETAC the ability to continue to stifle dissenting opinions as it chooses.<sup>80</sup> It is unclear how the article will be interpreted.<sup>81</sup>

One of the principal changes is to allow faster adjudication of cases by reducing the time in which a decision will be made and reducing the possibility for a rehearing of the case. As the quantity of cases CIETAC hears has grown, the arbitral fees have increased.<sup>82</sup> Because avoiding the expense and the delays of the court systems is one of the major advantages of arbitration, CIETAC addressed the problem by increasing the power of the arbitral tribunal over procedural management, making faster decisions, and allowing for more truncated tribunals.<sup>83</sup>

CIETAC is attempting to reduce institutional delay by reducing the time the panel has to render a decision, as well as other measures.<sup>84</sup> After criticism over the slow rendering of decisions, under the new regulations the arbitration tribunal now has six months to render a decision, rather than the nine months previously allotted.<sup>85</sup> The time period can be extended only with the express consent of the CIETAC Chairman.<sup>86</sup>

The new regulations provide for the replacement of an arbitrator or continuation of the process without one of the original arbitrators.<sup>87</sup> Article 27 provides procedures for the event that an arbitrator is unable to continue his or her duties any time prior to the end of the hearings.<sup>88</sup> If the arbitrator cannot continue because of withdrawal, resignation, health, or any other issue, “a substitute arbitrator shall be appointed within a time period

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<sup>77</sup> Cohen, *supra* note 49, at 32.

<sup>78</sup> CIETAC Arbitration Rules § 43(1).

<sup>79</sup> See Fitzgerald, *supra* note 4, at 52.

<sup>80</sup> CIETAC Arbitration Rules § 42.

<sup>81</sup> Fitzgerald, *supra* note 4, at 51.

<sup>82</sup> Even a relatively small claim can cost over five thousand U.S. dollars in CIETAC fees alone. See Arbitration Fee Schedule, <http://cietac.org.cn/english/fee/fee.htm> (last visited Feb. 8, 2006).

<sup>83</sup> See CIETAC Arbitration Rules §§ 27, 28, 42(1).

<sup>84</sup> See *id.* § 42.

<sup>85</sup> Fitzgerald, *supra* note 4, at 52.

<sup>86</sup> CIETAC Arbitration Rules § 42(1).

<sup>87</sup> *Id.* § 27.

<sup>88</sup> *Id.*

specified by the CIETAC pursuant to the procedure applied to the appointment of the arbitrator being replaced.”<sup>89</sup> Though the CIETAC Chairman has the final decision whether or not an arbitrator should be replaced, the arbitration tribunal “shall decide whether the whole or a part of the previous proceedings of the cases shall be repeated.”<sup>90</sup> This should allow for fewer arbitration interruptions due to an arbitrator being unable to fulfill his responsibilities.

### C. *The New Rules Leave Unresolved Problems*

The new arbitration rules leave several problems unaddressed. One of the most controversial of these problems is the nationality of the presiding arbitrator.<sup>91</sup> After a dispute has been properly filed at CIETAC, each party may choose one of the arbitrators on the three-person panel.<sup>92</sup> The third arbitrator, who presides, is jointly agreed upon by the parties, or assigned by CIETAC in the event that the parties cannot come to agreement.<sup>93</sup> While facially this seems to be a fair result, the practical outcome is that the third arbitrator is often a Chinese national.<sup>94</sup> Also, almost a quarter of the arbitrators are from a country other than China.<sup>95</sup> Because the Chinese corporation is likely to choose a Chinese national and the presiding arbitrator is also likely to be a Chinese national, foreign parties may believe that the tribunal is biased against the foreign party.<sup>96</sup>

This bias, however, may relate more to foreign perceptions of Chinese legal attitudes than demonstrable bias in Chinese arbitrators. The Chinese members of the CIETAC panel are all experts in their field, having graduated from China’s top law schools.<sup>97</sup> Many have also studied law abroad.<sup>98</sup> Their professional credibility is at stake every time they hear a case. Furthermore, foreign arbitrators are equally likely to have relationships with Chinese government institutions, state owned enterprises,

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<sup>89</sup> *Id.* § 27(2).

<sup>90</sup> *Id.* § 27(3).

<sup>91</sup> Cohen, *supra* note 49, at 31.

<sup>92</sup> CIETAC Arbitration Rules § 22(1).

<sup>93</sup> *Id.* § 22(2)–(4).

<sup>94</sup> See Fitzgerald, *supra* note 4, at 53.

<sup>95</sup> Michael Moser, *CIETAC Arbitration: A Success Story?*, 15 J. INT’L ARB. 27 (1998).

<sup>96</sup> Fitzgerald, *supra* note 4, at 53.

<sup>97</sup> See Lingyun Gao, *What Makes a Lawyer in China? The Chinese Legal Education System After China’s Entry into the WTO*, 10 WILLAMETTE J. INT’L L. & DISP. RES. 197 (2002).

<sup>98</sup> CIETAC Arbitrator Panel List, [http://www.cietac.org.cn/english/arbitrators/arbitrators\\_2.htm](http://www.cietac.org.cn/english/arbitrators/arbitrators_2.htm) (last visited Jan. 30, 2006).

and private Chinese companies.<sup>99</sup> Therefore, attempting to paint Chinese arbitrators as being biased against foreign companies based solely on nationality seems unfounded. Furthermore, even absent an explicit provision in the CIETAC rules requiring a foreign arbitrator, an attorney drafting the arbitration clause may require that the presiding arbitrator be a national of a third country.<sup>100</sup> Such clauses have been consistently upheld by CIETAC.<sup>101</sup>

Finally, while some have called for a specific CIETAC regulation requiring the presiding arbitrator to be a national of a third country, such a regulation might run counter to international arbitration standards. The United Nations Commission on International Trade Law (“UNCITRAL”) model arbitration statute states, “[n]o person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed to by the parties.”<sup>102</sup> While the UNCITRAL model statute is not binding law on CIETAC, it could be considered a normative argument against such a provision.

#### D. *Limited Empirical Evidence Casts CIETAC in a Positive Light*

Empirical evidence regarding the objectivity of CIETAC is limited. Given the vast scale of China and the limited access to reliable information, comprehensive data collection on arbitration award collection rates is all but impossible.<sup>103</sup> The few studies done on CIETAC competency were overwhelmingly positive, even prior to the 2005 amendment.<sup>104</sup> The American Chamber of Commerce in Beijing conducted a survey of American companies.<sup>105</sup> They found that the respondents who had actual experience with CIETAC and arbitration in China found it to be fair and

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<sup>99</sup> Similarly, foreign arbitrators are often just as well connected in the Chinese business environment as their Chinese counterparts. Also, because the foreign business community in China is still relatively small, their professional and social circles are likely to be very close. This is stated only as a way of showing how all arbitrators can become biased, regardless of citizenship or nationality.

<sup>100</sup> Fitzgerald, *supra* note 4, at 53.

<sup>101</sup> *Id.*

<sup>102</sup> United Nations Commission On International Trade Law: Model Law On International Commercial Arbitration art. 11(1), 24 I.L.M. 1302 (June 10, 1958).

<sup>103</sup> In addition to the problems of gathering reliable information in China, there are also legal restrictions on such studies. In 1998, the CCP Central Committee created a regulation which requires foreign individuals doing research in China with Chinese entities or people to register with the government. See Peerenboom, *supra* note 11, at 258.

<sup>104</sup> *Id.* at 249.

<sup>105</sup> Timothy O. Stratford, Views of American Companies Regarding Arbitration in China, <http://www.AmCham-China.org.cn> (last visited Feb. 9, 2006) (on file with the Pacific Rim Law & Policy Journal).

efficient.<sup>106</sup> Oddly, those without arbitration experience in China tended to have negative views of arbitration in China.<sup>107</sup> Furthermore, the foreign party won more than half of all CIETAC decisions. While this statistic is not dispositive, it does indicate that concerns of local protectionism are largely unsubstantiated.<sup>108</sup>

#### IV. THE CHINESE JUDICIAL SYSTEM'S LAWS FOR ENFORCING ARBITRATION AWARDS ARE FAIR AND OBJECTIVE

The CIETAC hearings are only part of the process. As is true for all arbitration centers, they are unable to enforce arbitration awards without the assistance of the courts.<sup>109</sup> In China, however, the problems of enforcement are exacerbated by other problems in the judiciary.

Like most countries in the world, China relies on its courts to enforce arbitration awards.<sup>110</sup> Until recently, after the arbitration tribunal rendered an award, the winning party would take the award to a court in the jurisdiction where the losing party was domiciled.<sup>111</sup> However, under the Supreme People's Court's Notice on Accession, it is now possible to file in the jurisdiction where the assets are located.<sup>112</sup> In Chinese law, as well as under the New York Convention, a court has a legal obligation to enforce the award unless it falls within a few enumerated exceptions.<sup>113</sup> This makes arbitration awards far easier to enforce in a foreign country than judicial decisions. For judicial decisions from other countries, only principles of comity,<sup>114</sup> rather than legal obligation, dictate the enforcement of such judgments in domestic courts.<sup>115</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Cohen et al., *supra* note 3, at 66 (provided by Wang Shengchang in an event sponsored by the Chartered Institute of Arbitrators in Hong Kong in April 2003).

<sup>109</sup> Because arbitration centers are generally non-governmental, they do not have the legal power to seize assets. Instead they rely on the courts to enforce an arbitration award. *See generally* New York Convention, *supra* note 17.

<sup>110</sup> Cohen et al., *supra* note 3, at 63.

<sup>111</sup> *Id.* at 320.

<sup>112</sup> SPC Notice on Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (promulgated by the Supreme People's Court Apr. 10, 1987, effective Apr. 10, 1987).

<sup>113</sup> New York Convention, *supra* note 17, § 5.

<sup>114</sup> Comity is an international principle which states that while a certain act is not a legal obligation, it is considered more binding than custom. *See* Jake S. Tyshow, *Informal Foreign Affairs Formalism: The Act of State Doctrine and the Reinterpretation of International Comity*, 43 VA. J. INT'L L. 275, 279 (2002).

<sup>115</sup> GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 935-43 (3d ed. 1996).

A foreign company receiving an arbitration award from CIETAC must turn to the Chinese courts in order to get the award enforced.<sup>116</sup> The Chinese courts are widely considered to be unfair forums for disputes,<sup>117</sup> but the Chinese government has instituted several critical reforms related to arbitration that make the process distinct from the rest of the judicial system.

A. *The PRC Improved the Procedure for Enforcement of Foreign Awards*

In May of 2002 the Supreme People's Court ("SPC") issued a directive entitled "Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements"<sup>118</sup> in which it declared that the jurisdiction over arbitration awards is to be limited to a small number of Intermediate People's Courts ("IPCs")<sup>119</sup> near the capital cities of provinces and special economic zones.<sup>120</sup> This centralization reflects the greater sophistication in the cities concerning international business and the presence of better-trained, English speaking judges.<sup>121</sup> Additionally, in these specialized courts there are special sections that deal only with arbitration awards.<sup>122</sup> This increased sophistication and specialization greatly assists the arbitration process because judges are now better able to weigh the merits of enforcement and are more familiar with the international business environment.<sup>123</sup>

B. *There Are Limited Grounds for Refusal of Enforcement in China*

After an arbitration award has been set out and an application for enforcement has been filed, the courts may still set aside an award on a number of enumerated grounds.<sup>124</sup> Article 260 of the Civil Procedure Law

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<sup>116</sup> Cohen et al., *supra* note 3, at 296.

<sup>117</sup> See RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 280 (2002).

<sup>118</sup> Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases involving Foreign Elements (promulgated by the Supreme People's Court, effective Mar. 1, 2002).

<sup>119</sup> China's judiciary is divided into a four-level court system. At the highest is the Supreme People's Court (SPC). Local People's Courts are the courts of first instance for most criminal and civil cases, and are divided into Higher People's Courts (HPCs), Intermediate People's Courts (IPCs), and Basic People's Courts (BPCs). See generally Congressional-Executive Commission on China, *China's State Organizational Structure*, <http://www.cecc.gov/pages/virtualAcad/gov/statestruct.php#spc> (last visited Feb. 16, 2006).

<sup>120</sup> Cohen et al., *supra* note 3, at 319-20.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> The enumerated provisions are: (1) The parties have neither included an arbitration clause in the contract nor subsequently reached a written arbitration agreement; (2) the person against whom the application is made was not notified to appoint an arbitrator, or take part in the arbitration proceedings; or

(“CPL”) provides for four exceptions to enforcement.<sup>125</sup> These provisions are largely similar to the New York Convention grounds for non-enforcement.<sup>126</sup> While there are some criticisms, such as the lack of discretion by the court if they find one of these grounds for refusal, this criticism stems more from the differences in common law and civil law jurisdictions rather than a substantive disagreement about the law.<sup>127</sup> The grounds for refusal of enforcement are supplemented by the 1994 Arbitration Law, which allows for termination of enforcement in several other situations.<sup>128</sup>

In addition to the exceptions enumerated by statute, there is a Chinese version of the concept of “void against public policy.”<sup>129</sup> The Chinese version is that a particular act would be contrary to the social and public interests of China.<sup>130</sup> Though not explicitly defined in Chinese foreign arbitration law, the void against public policy language is included in the grounds to refuse domestic arbitration agreements and in Article V of the New York Convention.<sup>131</sup> It has rarely been cited as actual grounds for refusal to enforce a foreign-related arbitration award; but at least one case has raised such concerns. In *Dongfeng Garments Factory v. Henan*

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(3) the said person was unable to state his opinions due to reasons which he is not responsible the composition of the arbitral tribunal or the arbitration procedure was not in conformity with the rules or arbitration; or (4) matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration organ. Civil Procedure Law of The People’s Republic of China art. 260 (adopted at the Fourth Session of the Seventh National People’s Congress on Apr. 9, 2001, promulgated by Order No. 44 of the President of the People’s Republic of China on Apr. 9, 2001, effective Apr. 9, 1991) [hereinafter Civil Procedure Law].

<sup>125</sup> *Id.*

<sup>126</sup> New York Convention, *supra* note 17, § 5.

<sup>127</sup> Cohen et al., *supra* note 3, at 329.

<sup>128</sup> The 1994 law includes such situations as if the applicant withdraws the application, the legal documents in which the arbitration is enforced is quashed or revoked, the subject of enforcement dies without an estate or is unable to pay due to poor financial circumstances, or other circumstances that the People’s Court deems to call for a termination of enforcement. Of these terms, only the provision concerning those unable to pay due to poor financial circumstances and the last, open-ended provision have received much criticism. However, the provision relating to those unable to pay is limited to real persons (rather than corporations) and only for loans, rather than awards, which limits the extent of the law. Arbitration Law of the People’s Republic of China art. 17 (adopted at the Ninth Meeting of the Standing Committee of the Eighth National People’s Congress on Aug. 31 1994, promulgated by Order No. 31 of the President of the People’s Republic of China on Aug. 31, 1994, effective Sept. 1, 1995) (P.R.C.).

<sup>129</sup> While the international community has struggled for a universal definition, U.S. courts have stated that a judgment is void under the public policy when “enforcement would violate the forum state’s most basic notions of morality and justice.” See ILC Committee on International Commercial Arbitration, *Public Policy as a Bar to the Enforcement of International Arbitral Awards*, LONDON CONFERENCE REPORT (2000), available at [www.ila-hq.org](http://www.ila-hq.org).

<sup>130</sup> See Civil Procedure Law, *supra* note 124, art. 260(2).

<sup>131</sup> New York Convention, *supra* note 17, § 5(2)(b).



*Garments*,<sup>132</sup> the IPC found that in spite of the fact that CIETAC rendered an award for the claimant, the enforcement would be against the state and public interests of society. The justification was that the defendant was a significant economic factor in the local economic area; therefore, if the defendant paid damages it would harm the local economy.<sup>133</sup> Fortunately, the SPC ultimately overruled this decision by the IPC; otherwise, the IPC decision would have confirmed some of the worst fears about the Chinese judicial system. As it stands, the IPC decision raises concerns that without a specific statutory definition, the void against public policy argument could become a source of government interference in arbitration enforcement.<sup>134</sup>

In 1995, the Chinese judicial system further cemented its commitment to enforce foreign-related arbitration awards by requiring that all refusals to enforce an award be approved by the SPC.<sup>135</sup> If the IPC finds grounds for refusal to enforce under the Civil Procedure Law, it is required to submit the case to the relevant Higher People's Court ("HPC").<sup>136</sup> From there, the HPC can either remand it back to IPC for enforcement, or submit it to the Supreme People's Court for final approval of the refusal for enforcement.<sup>137</sup>

This three-tiered review of arbitration awards makes it extraordinarily difficult for an arbitration award to be refused.<sup>138</sup> Some observers have stated that more than eighty percent of the cases submitted to the SPC for refusal of enforcement are ultimately rejected.<sup>139</sup> This means that only twenty percent of cases submitted to the SPC are actually refused enforcement.<sup>140</sup> This centralized system greatly reduces the possibility of local protectionism, as it reduces the opportunity for local officials or judges to interfere with the enforcement of arbitration awards.

These changes to Chinese law have created an environment that, contrary to common perception, makes it relatively easy to go to a court and enforce an award. The Chinese government has effectively amended the

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<sup>132</sup> This case was unreported, but has been cited in numerous secondary sources. See CHENG DEJUN, ET AL., *INTERNATIONAL ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA* (1995).

<sup>133</sup> Xiaowen Qiu, *supra* note 72, at 612.

<sup>134</sup> Gu Weixia, *RECOURSE AGAINST ARBITRAL AWARDS: HOW FAR CAN A COURT GO? SUPPORTIVE AND SUPERVISORY ROLE OF HONG KONG COURTS AS LESSONS TO MAINLAND CHINA ARBITRATION* (1999).

<sup>135</sup> Zuigao renmin fayuan guanyu renmin fayuan chuli yu chuwai zhongcai ji waiguo zhongcai shibei youguan wenti de tongzhi [Supreme People's Court Notice on the Problems of Handling of Foreign Arbitration Cases by the People's Courts] (promulgated by the Supreme People's Court Aug. 28, 1995) (P.R.C.).

<sup>136</sup> Cohen et al., *supra* note 3, at 333-34.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Wang Shengchang, *Enforcement of Foreign Arbitral Awards in the PRC*, in *INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, CONGRESS SERIES NO. 9* (van den Berg ed., 1999).

laws to make it amenable for CIETAC awards to be enforced by local courts, overcoming such previous obstacles as local protectionism. However, there are still many difficulties in seizing assets to satisfy an arbitration award.

V. THE EXECUTION OF ARBITRAL AWARDS IN CHINA REMAINS A SIGNIFICANT PROBLEM

The statutory regime only tells part of the story of award enforcement in China. The practical problems of execution of arbitration awards overshadow the problems that arbitration faces generally in China.<sup>141</sup> Under the CPL and the Enforcement Regulation, courts and enforcement officers have the legal authority to enforce awards.<sup>142</sup> However, the courts suffer from macro-level problems of separation of political powers that limit their actual power to seize assets and enforce awards.<sup>143</sup>

A. *The Courts Have the Requisite Judicial Authority but Not the Legal Power to Successfully Enforce Awards*

Enforcement officers suffer from a gap between the authority the law purportedly gives them and the lack of power that still haunts the courts today and continues to pervade Chinese society.<sup>144</sup> Chapter 20 of the CPL gives relatively broad powers to enforcement officers,<sup>145</sup> including the power to garnish wages,<sup>146</sup> freeze or auction property,<sup>147</sup> evict,<sup>148</sup> and other powers to seize assets.<sup>149</sup> Aside from the physical search and seizure of assets, the courts wield a broad array of other powers, including the ability to freeze and transfer monies in the banking system.<sup>150</sup>

The problem is not in the drafting of the law. Under the law, enforcement officers have broad powers of seizure as well as mechanisms to punish those who do not comply.<sup>151</sup> However, it is rare for the courts, through its officers, to actually use such mechanisms.<sup>152</sup> This is often blamed on the overall low stature of the Chinese judiciary, though the

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<sup>141</sup> Cohen et al., *supra* note 3, at 360.

<sup>142</sup> *Id.* at 360.

<sup>143</sup> *Id.* at 354.

<sup>144</sup> *Id.* at 360.

<sup>145</sup> *Id.* at 352.

<sup>146</sup> Civil Procedure Law, *supra* note 124, § 222.

<sup>147</sup> *Id.* § 223.

<sup>148</sup> *Id.* § 299.

<sup>149</sup> *See, e.g., id.* §§ 228, 231.

<sup>150</sup> *See id.* § 22.

<sup>151</sup> *See id.* §§ 100-105.

<sup>152</sup> Cohen et al., *supra* note 3, at 361.

judiciary has claimed that to use such powers “will prevent the company from operating, which could in turn result in greater unemployment and social unrest.”<sup>153</sup>

*B. The Courts Lack the Independence and Strength to Effectively Execute Arbitration Awards*

The courts in China suffer from their diminished authority under the Leninist system of governance.<sup>154</sup> The Chinese judiciary is formally independent, but in reality is treated like any other state organ.<sup>155</sup> Because they treat the judiciary like a bureaucracy, other government organizations feel they can ignore judicial orders with impunity.<sup>156</sup> Banks have been known to notify parties that their accounts were about to be seized<sup>157</sup> and then transfer the accounts before the courts had a chance to act.<sup>158</sup> Banks are often reticent to cooperate with the government out of “fear of damaging relationships with their customers.”<sup>159</sup> Other critics of the system cite corruption within the judicial system. One Chinese lawyer stated that she was aware of situations in which court clerks would receive the award and then tell the winning party that the losing party did not have the assets to pay.<sup>160</sup> Though rumors and gossip about such nightmare scenarios are widely circulated, they can rarely be corroborated by objective studies.<sup>161</sup>

Illegal interference by Communist Party officials is another problem many observers fear reduces the power of the courts.<sup>162</sup> However, at least one survey (perhaps surprisingly) found that Party members and officials

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<sup>153</sup> Peerenboom, *supra* note 11, at 296.

<sup>154</sup> See generally RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS (1997).

<sup>155</sup> Susan Armour, *China, Hong Kong, and the Enforcement of Arbitral Awards Post-1997*, at 58 (Spring 1998) (unpublished L.L.M. thesis, University of Washington School of Law) (on file with Gallagher Law Library, University of Washington).

<sup>156</sup> Reinstein, *supra* note 23, at 9.

<sup>157</sup> Cohen et al., *supra* note 3, at 361.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Author’s Interview with Chinese attorney, in Seattle, Wash. (Nov. 2005).

<sup>161</sup> The most common reason cited for non-enforcement is lack of assets by the losing party, accounting for almost half of all non-enforcement cases according to one study. Many companies are able to give the appearance of few assets for the purposes of enforcement of awards. Though there are a variety of ways in which companies are able to hide assets, one of the more common methods is referred to as triangular debt. This problem may have been resolved by an amendment to the Contract Law, allowing the cycle of debt to be more easily broken. See Peerenboom, *supra* note 11, at 273 (citing the survey); Cohen et al., *supra* note 3, at 362 (explaining triangular debt); Contract Law, art. 73 (adopted at the 2d Sess. of the 9th Nat’l People’s Cong., Mar. 15, 1999, promulgated by Order No. 15 of the President of the People’s Republic of China on Mar. 15, 1999, effective Oct. 1, 1999) (P.R.C.) (new amendment).

<sup>162</sup> See Peerenboom, *supra* note 11, at 273.

were only rarely involved.<sup>163</sup> In fact, they have been known to promote arbitral enforcement when involved.<sup>164</sup> This is welcome news as it demonstrates that in spite of the problems of the judicial system, Chinese officials recognize the importance of arbitration in China.

### C. *Empirical Evidence Demonstrates the Difficulties of Asset Seizure*

Award enforcement statistics show the difficulties of seizing assets. Approximately half of all foreign and CIETAC awards were enforced, at least to some degree.<sup>165</sup> However, in only thirty-four percent of the cases could more than half of the award be recovered; and in more than forty percent of the cases, less than half of the award was recovered.<sup>166</sup>

Attempts at surveying the judiciary directly about arbitration enforcement have encountered great difficulty. In 1997, CIETAC attempted to survey the IPCs about enforcement of arbitration awards in China.<sup>167</sup> Only 43 out of 310 courts completed the survey.<sup>168</sup> The Chinese state secret laws, which are broadly construed, may have made judges reticent to fill out the survey.<sup>169</sup> Furthermore, professional jealousy and a history of rivalry with CIETAC gave the courts little incentive to cooperate.<sup>170</sup>

The problem of asset seizure in China will not be solved overnight, as it requires systemic changes in many aspects of the Chinese business environment. Changes to the law, financial institutions, and business organizations must all be realized before asset seizure becomes more reliable. Unfortunately, the failure of the Chinese arbitration regime to guarantee the ability of winning parties to claim their award diminishes all of the statutory changes to CIETAC and Chinese law.

## VI. ARBITRATION IN CHINA NEEDS ADDITIONAL REFORM

Facially, the laws that govern arbitration in China are fair. However, few parties to arbitration would be satisfied with well-written laws unsatisfactorily enforced. China must seek to not only promulgate new

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<sup>163</sup> *Id.*

<sup>164</sup> "On balance, party members played a positive role in promoting enforcement in the few cases where they did get involved." *Id.* at 284.

<sup>165</sup> Peerenboom, *supra* note 11, at 254.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 258.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 259.

<sup>170</sup> *Id.* at 258-59.

laws, but also ensure that parties receive the compensation that a CIETAC arbitration award entitles them to.

A. *CIETAC Operations Must Continue to Update and Revise the Arbitration Rules*

CIETAC has emerged as the leading dispute resolution forum in China, and one of the most sought after forums in the world.<sup>171</sup> The new CIETAC regulations continue the trend of increased professionalism and credibility within the organization. The greater flexibility in the hearing structure, arbitrator selection process, publication of dissenting opinions, and the other transparency and accountability issues addressed by the new regulations should be commended. However, CIETAC must continue to revise its rules and ensure that they are strictly enforced. Because arbitration is a business, customers must be satisfied with the objectivity of the tribunal. Therefore, the most effective way for CIETAC to address these concerns is to be as transparent as possible, leaving no room for doubt in its integrity. As cases are decided under the new rules, CIETAC, in conjunction with international observers, should evaluate the successes and failures of the new rules. Any violations of the regulations or international arbitration norms should quickly be made public and the violators should be dismissed.<sup>172</sup>

The 2005 amendments to the rules address many, though not all, of the defects identified by international scholars.<sup>173</sup> There are reports that expert witnesses, rather than being called into the hearing, were informally contacted outside of the hearing process.<sup>174</sup> Perhaps more disconcertingly, CIETAC administrators, rather than the tribunal, are known to draft the arbitrator opinions and order decisions on certain cases.<sup>175</sup> These allegations are serious, and CIETAC's reputation suffers greatly as a result of such reports. As cases are decided under the new rules, CIETAC personnel, in conjunction with international observers, should evaluate their successes and failures.

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<sup>171</sup> Hong Kong International Arbitration Centre, International Arbitration Cases Received, [http://hkiac.org/HKIAC/HKIAC\\_English/main.html](http://hkiac.org/HKIAC/HKIAC_English/main.html) (follow "Statistics" link) (last visited Feb. 15, 2006).

<sup>172</sup> As this Comment went to press, an alarming story came to light that Wang Shengchang, the Secretary-General of CIETAC, was arrested due to financial impropriety. At this point, it remains unclear whether the arrest was actually because of any illegal action by Wang or a government act to gain additional control over CIETAC. See *Arbitration Boss Arrested in Swoop on Staff 'Fees'*, S. CHINA MORNING POST, Mar. 23, 2006.

<sup>173</sup> For example, Jerome Cohen identified the nationality of the arbitrator selection process and the continued exertion of pressure on arbitrators by CIETAC personnel as some of the chief problems facing CIETAC. See Cohen, *supra* note 49, at 31.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

Finally, the contentious issue of the nationality of the presiding or sole arbitrator must still be considered. If clients continue to feel as though the tribunals are not objective as the result of the nationality of the arbitrators, those feelings will continue to erode the reputation of CIETAC. Therefore, if the new rules do not clear up perceptions of bias, an amendment that forces the presiding or sole arbitrator to be a national of a third country should be considered.

*B. Post-Award Problems Can Only Be Solved Through Comprehensive Legal Reform*

After the award, the problems within the Chinese judiciary emerge. The post-judgment problems are far more difficult to measure or solve, as they are relevant to the Chinese judiciary as a whole. Problems with judicial competency, local protectionism, corruption, and a host of other problems are well documented.<sup>176</sup>

The government is committed, at the very least, to insulating the arbitration process from these problems. Limiting the jurisdiction of arbitration awards to a few IPCs with dedicated courts to hear the cases allows for more competent, experienced judges to hear cases.<sup>177</sup> Many of these judges speak English and have gone through training offered by the central government.<sup>178</sup> The Civil Procedure Law contains multiple provisions allowing coercive measures to be employed to reduce obstacles to enforcement.<sup>179</sup> The direct approval by the SPC for non-enforcement of judgments also greatly reduces the risk of local protectionism.<sup>180</sup>

In spite of these changes, the courts are still unable to consistently seize assets in order to fulfill arbitral awards. This is not for lack of well-drafted statutes, but rather the lack of political power and will. The Chinese judiciary must use the law available to it to enforce the arbitral awards. This will only be achieved when the judiciary is able to operate independent of the rest of the government. Therefore, the government must endeavor to free the judiciary from the controls of other organs of government and encourage it to use its legal power authorized by the National People's Congress.

In addition to long-term development of the judiciary, the government should allow immediate transparency in the system. Researchers currently

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<sup>176</sup> Peerenboom, *supra* note 11, at 276-80.

<sup>177</sup> *Id.* at 298.

<sup>178</sup> *Id.* at 291.

<sup>179</sup> See Civil Procedure Law, *supra* note 124, §§ 100-105.

<sup>180</sup> Cohen et al., *supra* note 3, at 334.

face enormous difficulties in doing empirical research in China; courts are unwilling to cooperate because they are afraid of the repercussions of providing information to foreign researchers.<sup>181</sup> A broad study of arbitration and enforcement in China would likely increase the trust in the arbitration process, and it would allow for better identification of areas in need of improvement. While the study should ultimately be conducted by an objective third-party, governmental cooperation is necessary. Arbitration is expressly limited to commercial activities, so the government has little reason to fear such changes in arbitration.<sup>182</sup> In fact, a strong, transparent arbitration system, like a strong judiciary, can have only positive effects on the economy of China.

The actual execution of awards will likely continue to be difficult in China, as better enforcement is contingent upon the reformation of a wide swath of Chinese statutes and regulations.<sup>183</sup> Essentially, greater success rates in the seizure of assets are dependent upon greater transparency and access to financial records of corporations by the courts. Because this touches on such disparate topics as corporate formation, bankruptcy, and debt, the Chinese government can only improve the rates of successful recovery of arbitral awards through comprehensive reform.

Though such a task is daunting, there is some cause for optimism. Lawmakers in China are promulgating new laws that better protect creditors by forcing more disclosure. The new Company Law, which became effective January 2006, now requires the disclosure of the company's legal representative, its address, and the names of all shareholders.<sup>184</sup> These new provisions have the potential to solve many of the problems of finding assets. However, the courts must also have the resolve to use this information to enforce arbitral awards.

## VII. CONCLUSION

Arbitration in China has developed at a fast pace over the past thirty years, and CIETAC should be commended for its progress. In that brief time period, it has developed into the world's leading arbitration center, become a dependable dispute resolution forum, and assisted in the buildup of China's flourishing market.<sup>185</sup> However, because CIETAC is still plagued by the

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<sup>181</sup> Peerenboom, *supra* note 11, at 259.

<sup>182</sup> See generally New York Convention, *supra* note 17; Civil Procedure Law, *supra* note 124.

<sup>183</sup> See Cohen et al., *supra* note 3, at 362.

<sup>184</sup> Steve Dickinson, *Introduction to the New Company Law of the People's Republic of China*, (publication forthcoming in PAC. RIM L. & POL'Y J.).

<sup>185</sup> Fitzgerald, *supra* note 4, at 51.

traditional misperceptions linked to the Chinese justice system, the government must find ways to eliminate these perceptions. The principal way for this to happen is to maximize transparency; cooperation with professionals and academics would allow for greater trust in the system.

The present condition of arbitration law in China, perhaps like much of Chinese law, is not as dire as some analysts would believe. There are operating institutions with objective standards. The legal regime governing arbitration, while far from perfect, offers protection from egregious deviations from justice. However, China must continue to pursue a legal environment that encourages the judiciary to act independently of the other bodies of government. Through this, not only will arbitration in China improve, but it will also further the overall goal of rule of law in China.