
SALIENT ISSUES IN ARBITRATION IN CHINA

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Arbitration in China has experienced a major increase over the

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past ten years,¹ and Chinese companies have progressively recognized the advantage of submitting their contractual disputes to arbitration. Accompanying the rapid development are several salient issues worth discussion.

I. PRE-ARBITRATION PHASE

A. ARBITRATION AGREEMENT

The effectiveness of arbitration agreements is the essence of arbitration and also the key target of many judicial reviews in China. This section will briefly discuss the legal form of an arbitration agreement and other elements needed for the effectiveness of arbitration agreements under PRC laws.

1. Written Form

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)² recognizes arbitration agreements in written form, and an “‘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 Such definition is echoed in Article 16 of the Chinese

1.

Year	Number of Chinese Arbitration Institutions	Caseload	Caseload Percentage	Increasing
2001	165	12,127	-	
2002	168	17,959	48%	
2003	172	28,835	60.5%	
2004	185	37,304	29.4%	
2005	185	48,339	23%	
2006	185	60,844	21 %	
2007	200	61,475	1%	
2008	202	65,074	6.6%	
2009	202	74,811	15%	
2010	209	78,923	5.5%	

Source: data collected by author from reports of Chinese National Arbitration Work Conference.

2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter Arbitration Convention].

3. Arbitration Convention, *supra* note 2, at 49 (emphasis added).

Arbitration Law (“CAL”),⁴ which stipulates “[a]n agreement for arbitration shall include the arbitration clauses stipulated in the contracts or other written agreements for arbitration reached before or after a dispute occurs.”

Hence in China, arbitration agreements shall take written form. However, “written form” shall not be interpreted in the traditional manner — digital telecoms such as fax, emails, and online messages are also acceptable under PRC law in the sense of being “written.”⁵

Until now, PRC law has not given effect to arbitration agreements reached via verbal or behavioral manners. In this respect, a new development may be underlined in the CIETAC Rules (2011),⁶ which in principle requires arbitration agreements to be in writing and an exception recognizes the effect of other forms of arbitration agreements as permitted by the law applicable to the arbitration agreements.⁷ The application of this new development will be tested upon the publication of the new Rules.

2. Effectiveness of Arbitration Agreement

The Chinese legal requirement that an arbitration agreement must

4. Arbitration Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective Sep. 1, 1995) (Lawinfochina) (China) [hereinafter China Arbitration Law].

5. Contract Law of the People’s Republic of China Art. 11 (promulgated by the Nat’l People’s Cong., Mar. 15, 1999, effective Oct. 1, 1999) (Lawinfochina) (China) [hereinafter China Contract Law] (“‘Written form’ refers to a form such as a written contractual agreement, letter, electronic data text (including a telegram, telex, fax, electronic data exchange and e-mail) that can tangibly express the contents contained therein.”)

6. Arbitration Rules (promulgated by the China Int’l Econ. And Trade Arbitration Comm’n, effective May 1, 2012) (CIETAC) (China).

7. CIETAC Rule (2011) provides:

Article 5 Arbitration Agreement [author note: the article number may vary in published version]

2. The arbitration agreement shall be in writing. An arbitration agreement is in writing if it is contained in the tangible form of a document such as a contract, letter, telegram, telex, fax, EDI, or email. An arbitration agreement shall be deemed to exist where its existence is asserted by one party and not denied by the other during the exchange of the Request for Arbitration and the Statement of Defense.

3. Where the law as it applies to an arbitration agreement has different provisions as to the form and validity of the arbitration agreement, those provisions shall prevail.

Id. art. 5 (2-3).

designate an arbitration institution to become valid⁸ has drawn enormous criticisms from the international arbitration community.⁹ Indeed, denying the effect of an arbitration agreement that does not designate an arbitration institution blatantly ignores the parties' autonomy and free choice, and it has become a particularity of arbitration in China. Under such circumstances, the ICC International Court of Arbitration has to amend its recommended arbitral clause from "*All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules*" to "*All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules*" to facilitate China-related contracts and for the future enforcement of final awards in China.¹⁰

Another notable issue is the definition of "arbitration commission" as contained in Article 16 of CAL.¹¹ It is not any random arbitration commission, but rather arbitration commissions registered in China

8. Article 16 of CAL stipulates:

An arbitration agreement shall contain the following:

1. The expression of application for arbitration.
2. Matters for arbitration.
- 3) The arbitration commission chosen.

China Arbitration Law, *supra* note 4, art. 16 (emphasis added).

Article 18 of CAL stipulates:

Whereas an agreement for arbitration fails to specify or specify clearly matters concerning arbitration or the choice of the arbitration commission, parties concerned may conclude a supplementary agreement. If a supplementary agreement cannot be reached, *the agreement for arbitration is invalid*.

China Arbitration Law, *supra* note 4, art. 18 (emphasis added).

9. See, e.g., Chi Manjiao, *Is the Chinese Arbitration Act Truly Arbitration-Friendly: Determining the Validity of Arbitration Agreement under Chinese Law*, 4 ASIAN INT'L ARB. J. 104, 111 (2008) ("[s]uch a requirement not only creates an overburden for the parties but also ignores the parties' intention to arbitrate as well as the current trend of international arbitration.")

10. Standard ICC Arbitration Clause, Int'l Chamber of Commerce, <http://www.iccwbo.org/court/arbitration/id4090/index.html> (last visited Mar. 9, 2012).

11. China Arbitration Law, *supra* note 4, art. 16.

under the CAL.¹² A direct consequence becomes that foreign/international arbitration institutions are erased from the list of arbitration institutions available to parties seeking arbitration in China. By metaphor, the Great Wall of China for foreign arbitration institutions was created.¹³ Contrary to the common belief that open competition could nourish the growth of Chinese arbitration, some Chinese scholars believe that international commercial arbitration is by nature a legal service and China has no obligation to open up its market to foreign competitors since China made no commitment toward the WTO and its member states. Furthermore, the legal service sector such as arbitration concerns judicial sovereignty.¹⁴

B. AD HOC ARBITRATION

Ad hoc arbitration, as a well-established form of arbitration¹⁵ that

12. Article 10 of CAL provides:

An arbitration commission may be set up in the domicile of the people's governments of municipalities directly under the Central Government (hereinafter referred to as "municipalities"), provinces and autonomous regions or in other places according to needs. It shall not be set up according to administrative levels.

An arbitration commission shall be set up by the relevant departments and chambers of commerce under the coordination of the people's governments of the cities prescribed in the preceding paragraph.

The establishment of an arbitration commission shall be registered with the judicial administrative departments of provinces, autonomous regions and municipalities.

China Arbitration Law, *supra* note 4, art. 10.

13. See Jingzhou Tao & Clarisse von Wunschheim, Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions, 23 *Arb. Int'l* 309 (2007) (emphasizing the uncertainty over the interpretation of the term "arbitration commission" in the courts and the disqualification of foreign arbitration institutions and *ad hoc* arbitration).

14. Gao Chengdong, *Debate and Resolution Methods for Recognition and Enforcement of Non-domestic Awards by Courts of Our State*, (Chinese: Wo Guo Fa Yuan Cheng Ren Yu Zhi Xing Fei Nei Guo Cai Jue De Zheng Lun Ji Jie Jue Tu Jing), Commercial Arbitration Review, Vol. 3, University of International Business and Economics Press, P89 (on file with author).

15. The 1958 New York Convention and the 1976 UNCITRAL Arbitration Rules both allow *ad hoc* arbitration. Many countries have incorporated *ad hoc* arbitration into their domestic arbitration law. Countries like Greece and Portugal even take *ad hoc* arbitration as the main form of arbitration. See Arbitration Convention, *supra* note 3, at 49; UNCITRAL Arbitration Rules, G.A. Res. 31/98 (Dec. 15, 1976); Litigants Switch on to Arbitration, *Int'l Fin. L. Rev.* (Aug. 1, 2005), <http://iflr.com/article/1984751/litigants-switch-on-to-arbitration.html>; Norton Rose Group 7, Arbitration in Europe (2008). See generally Chu Yongchang, *Analysis on the Ad hoc Arbitration System- and the Open up of*

appeared earlier than institutional arbitration in the world, is however not recognized in China.¹⁶ As another legal consequence of Articles 16 and 18 of CAL,¹⁷ which require an arbitration agreement to bear the name of an arbitration institution, ad hoc arbitration finds itself no place for existence thereof. A case example can be found in 2004 when the Chinese Supreme People's Court ("SPC") instructed its lower court to refuse recognition of an arbitration clause that read, "Arbitration: ICC Rules, Shanghai shall apply," for the reason that the arbitration clause did not specify an arbitration commission.¹⁸

In the meantime, the Chinese court may recognize the effect of an arbitration agreement of a foreign-related case that provides for the governance of a foreign ad hoc arbitration institution.¹⁹ Attention must be paid here because pure domestic cases do not fall in such scope and normally could not be referred to foreign arbitration institutions for arbitration,²⁰ no matter if the institution is permanent or ad hoc.

Although ad hoc arbitration in China is legally impossible, ad hoc arbitration awards rendered in foreign countries can still seek recognition and enforcement in China through reliance on the New York Convention.²¹ For special jurisdictions such as Hong Kong, there is a bilateral arrangement between mainland China and Hong

Chinese Arbitration Market, (Oct. 24, 2011), available at <http://cn.cietac.org/magazine/100-8.shtml>.

16. "[C]urrently there is no legal space for the existence of ad hoc arbitration awards [in China] . . ." Zhao Xiuwen, *Review of Recognition and Enforcement of Foreign Ad Hoc Arbitration Awards in China through the Aoetker Case*, Zheng Fa Lun Cong, June 10, 2007, No.3.

17. See China Arbitration Law, *supra* note 4, arts. 16, 18.

18. See SPC (2003) Min Si Ta Zi No. 23.

19. On October 20, 1995, in a letter issued to Guangzhou High People's Court, the SPC held that, for foreign-related cases, if the Parties agreed previously in the contract or after the occurrence of the dispute, the dispute shall be submitted to foreign ad hoc arbitration institutions or non-standing arbitration institutions for arbitration, in general; such arbitration agreement shall be given validity; and the court shall not accept such case. See SPC Fahan [1995] No.135.

20. See discussions *infra* Section III.B (Chinese Parties Having Arbitration Outside China).

21. A successful precedent can be found in *Guangzhou Ocean Shipping Co. Ltd. v. Marships Connection*, the award was rendered in Britain via ad hoc arbitration and was recognized and enforced by Chinese local court. Arbitration Convention, *supra* note 2, arts. 1, 10.

Kong, effective since February 1, 2000,²² regarding the mutual recognition and enforcement of arbitral awards, which later on expanded its effect to arbitral awards rendered in Hong Kong via ad hoc arbitrations.²³

It should be mentioned that there was once a successful ad hoc arbitration heard in China by Professor Zhengliang Hu of Dalian Maritime University. The arbitration agreement provided “*Arbitration if any be held in Dalian and Chinese law to apply.*”²⁴ It was successful mainly because the parties honored the final award and did not challenge the award in Chinese court.

C. DOCTRINE OF KOMPETENZ-KOMPETENZ

The doctrine of *kompetenz-kompetenz* provides that the arbitral tribunal has the power to review and decide the effectiveness of an arbitration agreement and consequently the jurisdiction of the arbitral tribunal. It evolves from the theory of autonomy and emphasizes the independence and competence of the arbitral tribunal.

This doctrine is well-established both in theory and in practice. However, China has not yet embraced this concept. Article 20 of the CAL stipulates that where the parties challenge the validity of an arbitration agreement, a request can be made to the arbitration institution for a decision or to the People’s Court for a ruling.²⁵ If one party requests the arbitration institution for a decision and the other party requests the People’s Court for a ruling, the arbitration institution shall stay the proceeding while the People’s Court shall have jurisdiction to decide the validity of the arbitration agreement.

Therefore, in China, both the People’s Courts and the arbitration

22. *Arrangement Between the Mainland and Hong Kong SAR Concerning the Mutual Recognition and Enforcement of Judgments of the Civil and Commercial Cases Under the Jurisdiction as Agreed to by the Parties Concerned* (July 14, 2007) (Asianlii) (China) [hereinafter Hong Kong Arrangement].

23. In 2009, the SPC issued a letter stating ad hoc arbitration awards rendered in Hong Kong SAR shall be reviewed in accordance with the Mutual Enforcement Arrangement and could be enforced in mainland China. This becomes the legal basis for enforcing Hong Kong ad hoc arbitration awards in mainland China. See Notice of Relevant Issues on the Enforcement of Hong Kong Arbitral Awards in the Mainland (promulgated by Supreme People’s Court, Dec. 30, 2009) (China).

24. See Chu Yongchang, *Analysis on the Ad hoc Arbitration System and the Open up of Chinese Arbitration Service Market* (on file with author).

25. See China Arbitration Law, *supra* note 4, art. 20.

institutions have the power to review the effectiveness of arbitration agreements; the arbitral tribunal has no authority to rule on the validity of an arbitration agreement.

The deficiencies are obvious: 1) an arbitration institution ought to commit itself to the role of administration and case management. It does not have the competence or expertise to make decisions regarding the effectiveness of an arbitration agreement. It may, as the international practice, decide that a case may proceed upon *prima facie* evidence supporting the existence of an effective arbitration agreement, it however, shall not make the eventual decision regarding the arbitral tribunal's jurisdiction. 2) Passing the case to a People's Court for ruling is neither time nor cost efficient, although it is in line with the international practice that a judicial court normally has the power to review and rule on the effectiveness of an arbitration agreement. The special circumstance in China is that the People's Courts have the tendency to enlarge its jurisdiction by implementing strictly the Arbitration Law.

D. ARBITRATORS

1. *Panel of Arbitrators*

The panel system for arbitrators is a well-kept tradition since the establishment of Chinese arbitration regime in 1954 and such practice has been reconfirmed by Article 21 of the CIETAC²⁶ Rules (2005).²⁷ By definition, the panel of arbitrators is a pool of arbitrators

26. China International Economic and Trade Arbitration Commission, the leading arbitration institution established in China in the 1950s, dealt only with foreign related arbitration cases in its early stages. It is expanding by establishing liaison offices in different regions and specific sectors while providing online dispute services. *See* About Us – Introduction, China Int'l Econ. & Trade Arbitration Comm'n, <http://www.cietac.org/index.cms> (last visited Mar. 8, 2012).

27.

1. The parties shall appoint arbitrators from the Panel of Arbitrators provided by the CIETAC.

2. Where the parties have agreed to appoint arbitrators from outside of the CIETAC's Panel of Arbitrators, the arbitrators so appointed by the parties or nominated according to the agreement of the parties may act as co-arbitrator, presiding arbitrator or sole arbitrator after the appointment has been confirmed by the Chairman of the CIETAC in accordance with the law.

CIETAC Arbitration Rules Art. 21 (promulgated by China Int'l Econ. & Trade Arbitration Comm'n, Jan. 11, 2005, effective May 1, 2005) (Kluwer Arbitration)

available for parties' selection. Contrary to some arbitration institutions where the list of arbitrators was for reference only,²⁸ the Chinese system for the panel of arbitrators is also a limitation, which excludes parties' free choice of arbitrators outside the panel.

Theoretically, parties shall be free to choose any person they trust and they feel comfortable with to be their arbitrator, provided that they are and remain independent and impartial – this is the essence of arbitration, but it is not the case in China. Although in principle, parties are allowed to nominate arbitrators from outside of the panel, such nomination is subject to CIETAC's approval, which, in most cases, would turn out to be a rejection.

As an embodiment of the spirit of free choice, arbitration shall not set limitations on the parties when it comes to their choice of arbitrators. The parties shall be able to submit their case to anyone they trust, and they are willing to be bound by the decision made by that person. Of course, the arbitration institution, out of the purpose of service, could recommend a list of persons with expertise in different areas, but it shall not limit the parties to that list.

2. Nationalities of Arbitrators

The requirement that the sole arbitrator or the chief arbitrator of a three-member tribunal shall have a different nationality from those of the parties can be found in many arbitration rules of international arbitration institutions, such as HKIAC²⁹ and the ICC.³⁰ Such a

(China).

28. For example, HKIAC provides the parties a panel list of arbitrators but the parties are not required to select from the list. *See* Hong Kong Int'l Arbitration Centre, Revised Guide to Arbitration Under the Domestic Arbitration Rules 2-3 (1993).

29. Article 11.2 of the Administered Arbitration Rules of Hong Kong International Arbitration Centre provides: "Where the parties to an arbitration under these Rules are of different nationalities, a sole arbitrator and the chairman of a three-member arbitral tribunal shall not have the same nationality as any party unless specifically agreed otherwise by all parties in writing." HKIAC Administered Arbitration Rules, Hong Kong Int'l Arbitration Centre, <http://www.hkiac.org/index.php/en/arbitration-rules-a-guidelines/hkiac-administered-arbitration-rules> (last visited Mar. 8, 2012).

30. Article 9 of the Rules of Arbitration of ICC Court of Arbitration provides: The sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that neither of the parties objects within the time limit fixed by the Court, the sole arbitrator

requirement originates from the consideration that a sole arbitrator or chief arbitrator with an independent nationality from the parties could be perceived as more fair to the parties. Regretfully, there is no similar clause available in the arbitration rules of Chinese arbitration institutions, and, unless the parties have agreed in their arbitration clause that the sole arbitrator or the chief arbitrator shall be a third-country citizen, most of the foreign-related cases arbitrated in Chinese arbitration institutions ended up with Chinese nationals as their chief arbitrators.

3. Immunity of Arbitrators

In most countries, it is prescribed in law that the arbitrators are immune from civil liabilities arising from arbitration, but there is no explicit prescription in PRC law.

Article 38 of CAL provides:

An arbitrator who is in serious violation of one of the circumstances as described in Item 4, Article 34,³¹ or an arbitrator who is involved in those prescribed in Item 6, Article 58,³² shall bear legal liabilities in accordance with the law and the arbitration commission shall remove his name from the list of arbitrators.

The above provision puts in general terms that arbitrators will “bear legal liabilities” when committing certain offenses; however, it does not address the questions of 1) will the arbitrators be exempted of liabilities for gross negligence and 2) what types of legal liabilities (civil, criminal, or administrative) will the arbitrators bear?

The obscure legislation makes it difficult for the judges to refer to when adjudicating similar cases, which often resulted in the exemption of arbitrators from all liability. In the Chinese academic

or the chairman of the Arbitral Tribunal may be chosen from a country of which any of the parties is a national.

Int'l Chamber of Commerce, Rules of Arbitration (2010).

31. Article 34(4) of CAL states: “the arbitrator meets the parties concerned or their attorneys in private or has, accepted gifts or attended banquets hosted by the parties concerned or their attorneys.” China Arbitration Law, *supra* note 4.

32. Article 58(6) of CAL states: “Arbitrators have accepted bribes, resorted to deception for personal gains or perverted the law in the ruling.” China Arbitration Law, *supra* note 4.

community, the prevailing trend says that the arbitrators shall bear limited civil liabilities and be exempted from criminal or administrative responsibilities.³³

E. COUNSEL OF THE PARTIES

Another salient issue of arbitration in China is that, after China has officially allowed a foreign law firm to open their offices in China, in particular, since China became a member of WTO, foreign law firms are prohibited from issuing opinions in the capacity of an attorney on the application of Chinese laws³⁴ in arbitration activities, thus it is nearly impossible for foreign law firms to represent clients in arbitration in China. This restriction has modified the practice since 1956 and in existence even during the darkest period which had allowed free representation for arbitration by foreign nationals.³⁵ When Chinese law is the applicable law to the contract in dispute, foreign law firms have to hire a local law firm, and also advise and supervise the local law firms in their representation of foreign clients in arbitration in China.

The Chinese government's purpose is apparent: to protect local lawyers and limit competition from outside. The lack of certainty for the representation in arbitration in China will inevitably make foreign law firms, when drafting the underlying contract, choose a venue outside of China. It is therefore understandable why CIETAC

33. Yang Zhizhong, *Analysis of the Responsibilities of Arbitrators* (Oct. 31, 2011), available at www.cietac.org.

34. See Regulations on Administration of Foreign Law Firms' Representative Offices in China (promulgated by the St. Council of the People's Republic of China, art. 15, Dec. 19, 2001, effective Dec. 22, 2001) (gov.cn) (China) ("A representative office and its representatives may only conduct the following activities that does not encompass Chinese legal affairs."); Rules for the Implementation of the Administrative Regulations on Representative Offices of Foreign Law Firms in China (promulgated by the Ministry of Justice, effective Sept. 1, 2002) (hfgjj.com) (China) ("Chinese law affairs" include "expression in arbitration activities in the name of attorney, of attorney opinions or comments on application of Chinese law and facts involving Chinese law.")

35. It was the practice of CIETAC to allow the parties to be represented by foreign citizens. See Article 18 of CIETAC Rules (1956), Article 12 of CIETAC Rules (1988), Article 22 of CIETAC Rules (1994), Article 22 of CIETAC Rules (1995), Article 22 of CIETAC Rules (1998), Article 22 of CIETAC Rules (2000), and Article 16 of CIETAC Rules (2005). See also CIETAC Arbitration Rules, *supra* note 27, art. 16.2.

has been lobbying the Chinese government to lift the restriction.

F. PARTY AUTONOMY

“One of the criteria for evaluating whether a country is a friendly venue for international arbitration is to see how the judges of the jurisdiction support arbitration and whether they recognize that their role is primarily that of support of the process.”³⁶

In China, one could notice that judicial review is conducted almost throughout the whole arbitration procedure, which may well jeopardize party autonomy. For instance, as mentioned previously, CAL implements a rather stringent requirement on the effectiveness of arbitration agreements, and the People’s Courts are empowered, along with arbitration institutions, to review and decide the validity of arbitration agreements. Furthermore, People’s Courts are empowered to — where neither the arbitral tribunal nor the arbitration commission could — review, decide and implement provisional/interim measures. People’s Courts could also set-aside an arbitral award upon reviewing the merits of the case.³⁷

The frequent use of judicial review in arbitration procedures could not make the arbitration more “legal,” but rather it adversely affected the development of arbitration as a dispute resolution mechanism by parties’ free choice.

II. ARBITRATION PHASE

A. INTERIM MEASURES

Unlike the international commercial arbitration practice that along with judicial courts, the arbitral tribunals also have the power to grant interim measures upon parties’ application,³⁸ in China, only the

36. Jingzhou Tao, *Chinese Legal Environment for International Arbitration*, 2 *Dispute Resolution Int’l* 295, 299 (2008).

37. This applies only to domestic awards. For foreign-related awards or foreign awards, people’s courts cannot review the merits of the case but only the procedural matters.

38. Article 26 of UNCITRAL Arbitration Rules (1976) provides:

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute

UNCITRAL Arbitration Rules, *supra* note 16, art. 26.

Article 17 of UNCITRAL Model Law on International Commercial Arbitration

People's Courts are empowered to do so. According to Chinese laws,³⁹ upon receipt of the parties' application for preservation of property or evidence, the arbitral tribunal shall, through the arbitration commission, submit the application for determination to the relevant competent court; neither the arbitral tribunal nor the arbitration commission may issue an order for the preservation of evidence or property.⁴⁰ The shortcomings are obvious: where there is

(1985) provides:

Article 17 - Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."

UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 40/72 (Dec. 11, 1985). Article 23 of ICC Rules of Arbitration (1998) provides:

Article 23 Conservatory and Interim Measures

1 Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.

Rules of Arbitration, *supra* note 31, art. 23. Article 24 of the Administered Arbitration Rules of Hong Kong International Arbitration Centre provides:

"Article 24.1 At the request of either party, the arbitral tribunal may order any interim measures it deems necessary or appropriate.

Article 24.2 Such interim measures may be established in the form of an interim award."

HKIAC Administered Arbitration Rules, *supra* note 30, art. 24.

39. Article 256 of Chinese Civil Procedure Law provides:

If a party applies for the property preservation measure, the foreign-affair arbitration institution of the People's Republic of China shall submit the party's application to the intermediate people's court of the place where the person against whom the application for the property preservation is filed has his domicile or where the person's property is located.

Law on Civil Procedure (promulgated by Standing Comm. People's Cong., Apr. 9, 1991, effective Oct. 28, 2007) (Lawinfochina) (China). Article 46 of CAL provides:

Whereas evidences are vulnerable to be destroyed or missing and would be hard to be recovered, the parties concerned may apply for [preservation of evidence]. When a party applies for [preservation of evidence], the arbitration commission shall submit the evidences to the people's court of the place where the evidences are obtained.

China Arbitration Law, *supra* note 4, art. 46.

40.

Article 17 Preservation of Property

When any party applies for the preservation of property, the CIETAC shall forward the party's application for a ruling to the competent court at the place where the domicile

an application for interim measures, the need must be urgent. By passing the application for ruling to a People's Court that has no knowledge of the case will inevitably cost more time and thus is procedurally redundant. The arbitral tribunal is sufficiently competent to render the decision.

Another notable issue is, as noted above, there are only two categories of interim measures existing in China — preservation of property and protection of evidence. Other forms of interim measures such as destruction of defective goods, sale of perishable goods⁴¹ or anti-suit injunctions⁴² are not given by Chinese law.

III. POST-ARBITRATION PHASE

A. ENFORCEMENT OF ARBITRAL AWARDS

1. General⁴³

There are two main ways to block the execution of an arbitral award: initiate a set-aside procedure or object to its enforcement. The specific remedy, the procedure and the relevant grounds differ according to the nationality of the arbitral award, and also on whether it involves any foreign-related element.⁴⁴

For pure domestic arbitral awards, i.e. awards rendered by an

of the party against whom the preservation of property is sought is located or where the property of the said party is located.

Article 18 Protection of Evidence

When a party applies for the protection of evidence, the CIETAC shall forward the party's application for a ruling to the competent court at the place where the evidence is located.

CIETAC Arbitration Rules, *supra* note 27, arts. 17, 18.

41. For example, Article 26 of UNCITRAL Arbitration Rules provides:

Article 26

At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.”

UNCITRAL Arbitration Rules, *supra* note 15, art. 26.

42. See Jingzhou Tao, *Arbitration Law and Practice in China* 118 (2008).

43. See generally Tao Jingzhou, *One Award – Two Obstacles: Double Trouble When Enforcing Arbitral Awards in China*, 4 ASIAN INT'L ARB. J. 83 (2008) (discussing the legal framework, cancellation, non-enforcement, and procedural issues surrounding arbitral awards with a foreign-related element).

44. *Id.* at 83-84.

arbitral tribunal sitting in China that involves no foreign elements, the People's Court may review the procedures and merits of the case before granting enforcement, cancellation, or non-enforcement of the award.⁴⁵

For foreign-related arbitral awards, i.e. awards rendered by foreign-related arbitration commissions,⁴⁶ the People's Court may only review the procedural matters of the case and may grant enforcement, cancellation or non-enforcement of the award.⁴⁷

45. Article 58 of CAL set forth six grounds for cancellation of a pure domestic award:

Article 58 If parties concerned have evidences to substantiate one of the following, they may apply for the cancellation of arbitral award with the intermediate people's court at the place where the arbitration commission resides.

1. There is no agreement for arbitration.
2. The matters ruled are out the scope of the agreement for arbitration or the limits of authority of an arbitration commission.
3. The composition of the arbitration tribunal or the arbitration proceedings violate the legal proceedings.
4. The evidences on which the ruling is based are forged.
5. Things that have an impact on the impartiality of ruling have been discovered concealed by the opposite party.
6. Arbitrators have accepted bribes, resorted to deception for personal gains or perverted the law in the ruling. The people's court shall form a collegial bench to verify the case. Whereas one of the aforesaid cases should be found, arbitral award should be ordered to be cancelled by the court. Whereas the people's court establishes that an arbitral award goes against the public interests, the award should be cancelled by the court.

China Arbitration Law, *supra* note 4, art. 58; Article 63 of CAL and Article 213 of CPL (2007) set forth six grounds for non-enforcement of a pure domestic award, among which, only the fifth ground is materially different from Article 58 of CAL, which stipulates: "(5) Where there is an error in the application of the law." See China Arbitration Law, *supra* note 4, art. 63; Law on Civil Procedure, *supra* note 39, art. 213.

46. Prior to the enforcement of CAL in 1995, there were only two foreign-related arbitration commissions in China, the CIETAC and CMAC (China Maritime Arbitration Commission). After enforcement of CAL, all newly established arbitration commissions were allowed to arbitrate foreign-related cases.

47. Article 258 of CPL (2007) set forth five grounds for cancellation or non-enforcement of a foreign-related award:

If a defendant provides evidence to prove that the arbitration award made by a foreign-affair arbitration institution of the People's Republic of China involves any of the following circumstances, the people's court shall, after examination and verification by a collegial bench, rule to disallow the enforcement of the award:

- (1) The parties have not stipulated any clause regarding arbitration in their contract or have not subsequently reached a written agreement on arbitration;
- (2) The defendant is not duly notified of the appointment of the arbitrators or the

As can be seen from comparison of Article 58 of CAL⁴⁸ and Article 258 of CPL,⁴⁹ the grounds for cancellation of domestic awards are much wider than those for foreign-related awards.

For foreign awards, i.e. awards rendered by arbitral tribunals sitting outside of mainland China, there are six different scenarios:

(i) if the award is rendered in a member state of the New York Convention, the People's Court will rely on the New York Convention when deciding whether to recognize and enforce the award;⁵⁰

(ii) if the award is rendered in a non-member state of the New York Convention, the People's Court will rely on the principle of reciprocity, which usually makes it difficult to have the award enforced in China;⁵¹

(iii) if the award is rendered in a country that has a Bilateral Investment Treaty ("BIT") with China and the BIT contains an enforcement mechanism, the People's Court will rely on such mechanism when reviewing the enforcement application;

(iv) if the award is rendered in Hong Kong SAR, the People's Court will rely on the Mutual Enforcement Arrangement;⁵²

arbitration proceeding, or the defendant fails to express his defense due to the reasons for which he is not held responsible;

(3) The formation of the arbitration panel or the arbitration procedure is not in conformity with rules of arbitration; or

(4) The matters decided by arbitration exceed the scope of the arbitration agreement or the authority of the arbitration institution. If a people's court determines that the enforcement of an award will violate the social and public interest, the court shall make a ruling to disallow the enforcement of the arbitration award.

Law on Civil Procedure, *supra* note 40, art. 258.

48. China Arbitration Law, *supra* note 4, art. 58.

49. Law on Civil Procedure, *supra* note 39, art. 258.

50. Article V of the New York Convention set forth seven grounds for non-enforcement of a foreign award. *See* Arbitration Convention, *supra* note 2, art. V.

51. Article 267 of CPL (2007) provides:

If an award made by a foreign arbitration institution needs the recognition and enforcement of a people's court of the People's Republic of China, the party shall directly apply to the intermediate people's court located in the place where the party subject to the enforcement has its domicile or where its property is located. The people's court shall deal with the matter according to the relevant provisions of the international treaties concluded or acceded to by the People's Republic of China or on the principle of reciprocity."

Law on Civil Procedure, *supra* note 39, art. 267.

52. Hong Kong Arrangement, *supra* note 22.

(v) if the award is rendered in Macau, the people's court will refer to *the Arrangement Between Mainland and Macau SAR on Reciprocal Recognition and Enforcement of Arbitral Awards*;⁵³

(vi) if the award is rendered in Taiwan, the people's court will refer to the *Supreme People's Court's Provisions on the People's Courts' Recognition of Civil Judgments Made by Courts in Taiwan Region*⁵⁴ and the *Supplementary Regulations of the Supreme People's Court Regarding the Recognition by the People's Courts of Civil Judgments Rendered by Relevant Courts of the Taiwan Region*.⁵⁵

2. Awards Rendered in China by Foreign Arbitration Institutions

There are different voices regarding the nature of the arbitral awards rendered in China by foreign arbitration institutions. Some believe that such awards are neither foreign nor domestic, but non-domestic awards shall be enforced pursuant to the New York Convention;⁵⁶ some argue that there is no concept of non-domestic awards in China because China made its reciprocity reservation when acceding to the New York Convention, the awards rendered in China by international arbitration institutions shall be considered as Chinese domestic awards, thus the New York Convention should not apply to its enforcement.⁵⁷

In practice, the Chinese courts also have different interpretations of awards rendered in China by foreign arbitration institutions. For example, in 2003, an arbitration clause which provides "ICC Rules, Shanghai shall apply" was declared invalid by the SPC for lack of

53. See *Arrangement Between the Mainland and the Macau SAR on Reciprocal Recognition and Enforcement of Arbitration Awards* (promulgated by the Judicial Comm. Supreme People's Court, Sep. 17, 2007, effective Oct. 30, 2007) (Lawinfochina) (China).

54. See *Provisions on the People's Court's Recognition of the Verdicts on Civil Cases Made by Courts of Taiwan Province* (promulgated by Judicial Comm. Supreme People's Court, Jan. 15, 1998, effective May 26, 1998) (Lawinfochina) (China).

55. See *Supplementary Provisions of the Supreme People's Court on the People's Court's Recognition of Civil Judgments of the Relevant Courts of the Taiwan Region* (promulgated by Judicial Comm. Supreme People's Court, Mar. 30, 2009, effective May 14, 2009) (Lawinfochina) (China).

56. Zhao Xiuwen, *Analysis on the Recognition and Enforcement of ICC Award in China*, available at www.civillaw.com.cn.

57. Wang Shengcheng, *Can ICC International Court of Arbitration Conduct Arbitration in Mainland China?*, available at www.cietac.org.

designation of arbitration institution, consequently, the relevant award rendered by ICC International Court of Arbitration was denied enforcement by Chinese local court.⁵⁸ However, on April 22, 2009, the Ningbo Intermediate People's Court ruled to recognize and enforce an ICC award (14006/MS/JB/JEM, Dufercos A vs Ningbo Arts and Crafts Imp & Exp Co.) made in Beijing in September 2007, and it became the first ICC award rendered in mainland China that has been recognized and enforced by a Chinese local court. The Ningbo Court held that an ICC award made in China shall be a "non-domestic award" under Article I of the New York Convention,⁵⁹ and therefore shall be enforced. However, the decision of the Ningbo Intermediate People's Court has no binding effect upon other People's Courts.

It should be noted that, unlike the international practice of

58. *Zublin International GmbH v. Wuxi Woke General Engineering Rubber Co., Ltd.* The Chinese party in the case filed a request at the Chinese court, claiming that the arbitral clause was invalid because it did not specify the arbitration institution. After consideration, the SPC made its decisive legal explanations in Letter of Reply of the Supreme People's Court to the Request for Instructions on the Case concerning the Application of Zublin International GmbH and Wuxi Woke General Engineering Rubber Co., Ltd. for Determining the Validity of the Arbitration Agreement, dated 8 July 2004, which ruled in favor of the Chinese party and held that the arbitral clause was invalid. The legal reasoning was as follows:

In determining the validity of the arbitral clause, there is no applicable law agreed in the contract. Therefore, according to general legal principles, the applicable law should be the law of the arbitration venue, which will be PRC law in this case (the venue is "Shanghai"). According to stipulations of Arbitration Law of PRC, the arbitral clause will be invalid if it does not indicate the arbitration institution. Therefore, the arbitral clause herein is considered to be invalid.

On the other hand, the foreign party filed for arbitration with the ICC, and the ICC decided that it had jurisdiction over the case. The ICC Court of International Arbitration then proceeded with the arbitration, even though the Chinese court announced the arbitral clause to be invalid. Subsequently, the arbitral award of the ICC Court was denied of recognition and enforcement by the Chinese courts based on the SPC's decision on validity of the arbitration clause. *Cf.* Min Si Ta Zi No. 23 (2003) and Xi Min San Zhong Zi No.1 (2004).

59. Article I of *New York Convention* provides:

1. This Convention shall apply to the 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, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Arbitration Convention, *supra* note 2, art. I.

geographical standard,⁶⁰ China adopts an institutional standard measuring the nationality of arbitral awards. According to international practice, the arbitral awards rendered outside China are deemed as foreign awards, and the arbitral awards rendered inside China are considered Chinese awards. Contrarily, according to Chinese standards, arbitral awards rendered outside China by the ICC will be deemed a French award, since the ICC is an arbitration institution located in France,⁶¹ regardless of whether the place of arbitration is France or elsewhere. As to awards rendered in China by foreign institutions, as noted above, the People's Courts may take it as non-domestic awards or Chinese awards.

In summary, it remains unclear regarding the legal status of the arbitral awards rendered in China by foreign arbitration institutions. Therefore, it is a better option for foreign parties to designate the place of arbitration to places such as Hong Kong or Singapore, so that the enforcement of the arbitral award in China will be less problematic.

In the meantime, the lack of clarification in the legislation has caused inconsistencies in judicial decisions. Further clarifications in the law and judicial interpretations regarding the status of foreign arbitration institutions in China is urged, in order to remove the remaining doubts and to promote China as an attractive seat of arbitration in the international community.⁶²

60. "Geographical standard has been commonly recognized by various countries as the standard distinguishing domestic awards and foreign awards." Zhao Xiuwen, *Analysis on the Application of New York Convention in China*; published on the Academic Conference Celebrating the 50th Anniversary of the New York Convention, sponsored by CIETAC and Renmin University of China Law School.

61. In a reply letter issued by the SPC concerning non-enforcement of ICC Court Award No. 1033/AMW/BWD/TE, despite of the fact that ICC Court rendered the Award in Hong Kong, the SPC noted that "since ICC Court is an arbitration institution established in France, and our country and France are both member states of New York Convention, therefore, New York Convention shall apply in reviewing the recognition and enforcement of this case."

62. Fan Kun, *Prospects of Foreign Arbitration Institutions Administering Arbitration in China*, *Journal of International Arbitration*, 28 J. INT'L ARB. 343, 343-353 (2011) (arguing that there is a growing need for foreign arbitration institutions in China and that these institutions will not enter until the law is clarified).

B. CHINESE PARTIES HAVING ARBITRATION OUTSIDE CHINA

In 2007, Beijing No.1 Intermediate Court ruled in a case that, since there are no explicit legal restrictions, a pure Chinese arbitration clause providing for arbitration in Hong Kong shall be deemed valid. However, the SPC holds a different view that a pure Chinese contract without a foreign element shall not be allowed to be submitted to arbitration outside China because it violates public policy, and any such arbitration agreement/clause shall be deemed invalid. SPC expressly set forth such opinion in 1) *Reply to Practical Questions Concerning Foreign-related Commercial and Maritime Trial* of 2004;⁶³ and 2) its ruling of a case in 2010 — but this case was not handled by the relevant chamber in charge of the international arbitration but by another chamber of SPC. In fact, SPC never incorporated such opinion in its published judicial interpretation; therefore, the position of the SPC is still uncertain.

Academic analysis in such respect suggests that both Article 128 of PRC Contract Law⁶⁴ and Article 255 of CPL⁶⁵ stipulate that only parties of foreign related cases may file for arbitration with Chinese arbitration institutions or other (i.e. foreign) arbitration institutions, thus Contracts among Chinese parties may not be submitted to foreign arbitration institutions. The former director of CIETAC Dr. Wang Shengchang was also of the view that:

63. In article 83 of this Reply, the SPC held that “law does not allow domestic parties to submit their disputes without foreign elements to foreign arbitration; thus, the People’s Court shall deem such arbitration agreement invalid...”.

64. Article 128 of PRC Contract Law provides:

The parties may resolve a contractual dispute through settlement or mediation. Where the parties do not wish to, or are unable to, resolve such dispute through settlement or mediation, the dispute may be submitted to the relevant arbitration institution for arbitration in accordance with the arbitration agreement between the parties. *Parties to a foreign-related contract may apply to a Chinese arbitration institution or another arbitration institution for arbitration.*

China Contract Law, *supra* note 5, art. 128 (emphasis added).

65. Article 255 of CPL (2007) provides:

For disputes involving foreign economic, trade, transport, or maritime activities, if the parties have stipulated clauses on arbitration in their contracts or have subsequently reached written agreements on arbitration, they shall submit such disputes for arbitration to the foreign-affair arbitration institutions of the People's Republic of China or other arbitration institutions for arbitration and shall not bring lawsuits in a people's court.

Law on Civil Procedure, *supra* note 39, art. 255.

Article 128 of PRC Contract Law only allows parties of foreign related contracts to apply for arbitration with foreign arbitration institutions pursuant to their arbitration clause, and it does not allow parties of domestic contracts to submit their disputes to foreign arbitration institutions. For domestic economic disputes, the parties shall submit their case to the permanent arbitration institutions established in China⁶⁶

This matter is of particular interest to foreign-invested Chinese legal entities, who have a desire to conduct arbitration somewhere else than mainland China. Although there are some suggested solutions such as:

(1) The simplest would be to do away with the restrictive and ambiguous definition of ‘foreign-related arbitrations,’ replacing it with a concept consistent with the UNCITRAL Model Law definition of ‘international arbitration’ and permitting all such arbitrations to be conducted outside mainland China” (2)Alternatively, expand the definition of ‘foreign-related’ so as to provide for a foreign-invested Chinese legal entity to be treated as foreign (3) As a further alternative, clarify the law so as to permit domestic Chinese commercial arbitrations to be held in Hong Kong,⁶⁷

it may not be politically feasible for Chinese to choose the first two options.

C. PUBLIC POLICY

Public policy, although a concept accepted almost in all countries’ legislation, has rather different contexts and meanings. It may cover a broad scope of interests in some countries while a limited scope in others. From the perspective of international commercial arbitration, public policy is an exceptional reason for rejecting the enforcement of a foreign arbitral award.⁶⁸ The doctrine of public policy has

66. Wang Shengchang, *Can ICC International Court of Arbitration Hold Arbitration in Mainland China?* (Oct. 31, 2011), available at www.cietac.org.

67. Graeme Johnston, *Bridging the Gap Between Western and Chinese Arbitration Systems*, 24 *J. Int’l Arb.* 565, 579 (2007).

68. Article V of the New York Convention provides:

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: . . .

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Arbitration Convention, *supra* note 2, art. V. Article 258 of CPL provides:

experienced certain changes in China for the past ten years from a broad interpretation to a narrower interpretation, and from a general application to a stricter application.

The following cases can serve as a reflection of Chinese courts' attitude in interpreting the doctrine of Public Policy:

1. American Production Co. & Tom Wright Hu Co. v. China Women Travel Service

In 1992, American Production Co. and Tom Wright Hu Co. (collectively referred to as "Claimants") signed a performance agreement with China Women Travel Service ("Respondent"), undertaking to conduct performance in China. However, Claimant's performance was stopped by the Chinese Cultural Ministry due to cultural differences. Claimants thus filed for arbitration with China International Economic and Trade Arbitration Commission ("CIETAC"), claiming for the contract price from Respondent, which was later on supported by the Tribunal. However, when Claimants applied to Beijing No.1 Intermediate People's Court ("Beijing Intermediate Court") for enforcement of the award, Beijing Intermediate Court ruled not to enforce the award based on the reason that the performance of Claimants award in China violated Chinese Public Policy. In 1997, the SPC issued a reply letter according to Prior-reporting system, approving the standing of the Beijing Intermediate Court.

2. Haimufamu Company, Ma Ge International Trade Co., Sulame Media Co., Ltd ("the Foreign Parties") v. Jinan Yongning Pharmaceutical Co. ("the Chinese Party")

In 1995, the above parties concluded a JV Contract, establishing a JV Company. Later on, the JV signed a Lease Contract with the Chinese Party. In 2002-2004, the Chinese Party filed an action with a Chinese court against the JV, claiming that the JV should pay rents to it according to the Lease Contract. The Court supported the Chinese Party and implemented a preservation measure on the JV's asset, which later directly caused the JV's loss of profit and final dissolution. In 2004, according to the arbitration agreement

If a people's court determines that the enforcement of an award will violate the social and public interest, the court shall make a ruling to disallow the enforcement of the arbitration award.

Law on Civil Procedure, *supra* note 39, art. 258.

contained in the JV Contract, the Foreign Parties filed for arbitration with the ICC International Court of Arbitration against the Chinese Party, claiming for damages caused by the dissolution of the JV. The ICC Court rendered an award in favor of the Foreign Parties (ICC Court: Arbitration Award No. 13464/MS/JB/JEM). When the Foreign Parties came to China, applying for enforcement of this award, the local Chinese court decided that this award shall not be enforced because it violated Chinese Public Policy based on the argument that the ICC Court rendered an award regardless of the fact that the Chinese court had already made a ruling on the same dispute previously. The Chinese SPC issued a reply letter on June 2, 2008, ruling that

under the condition that the relevant Chinese court has made a verdict to preserve the assets of the JV Company and issued a further judgment thereof concerning the Lease Contract dispute between Yongning Co. and the JV Company, the ICC Court re-examined the Lease Contract dispute between Yongning Co. and the JV Company and rendered an award thereof, which violated Chinese judicial sovereignty and the judicial jurisdiction of Chinese courts . . . thus [the court] shall refuse to recognize and enforce this award . . .⁶⁹

D. PRIOR REPORTING SYSTEM

Prior reporting system established by the SPC in 1995⁷⁰ is a mechanism whereby the Intermediate People's Court must report via the Higher People's Court and thence to the SPC for a prior approval if it intends to deny the validity of a foreign-related arbitral agreement or refuse the enforcement of a foreign-related or foreign arbitral award.⁷¹ It was designed to prevent local protectionism in

69. Min Si Ta Zi No. 11 (2008), available at www.pkulaw.cn.

70. *The Notice of the SPC on Several Issues Regarding the Handling by the People's Court of Certain Issues Relating to Foreign Related Arbitration and Foreign Arbitration* (28 August 1995) provides:

[W]here, pursuant to a suit brought by a party, a court determines that an arbitration agreement involving foreign elements is invalid, ceases to be valid or that its contents are unclear and unenforceable, then prior to rendering such decision, the court shall report its determination to the High People's Court in its own area of jurisdiction for the purpose of examination, and, if the High People's Court agrees with the determination of the lower court, it shall report its examination opinion to the Supreme People's Court. No determination to the application may be rendered pending a reply from the Supreme People's Court.

71. Tao, *supra* note 36, at 300.

Chinese local courts and to cure the deficiencies of Chinese judiciaries in interpreting and implementing the New York Convention. It does not apply to domestic arbitral awards.

Such mechanism has functioned well in practice, however, it is not free from defects. For example, 1) it has been criticized for breaching the independence of the lower courts; 2) it has not been officially incorporated in law, thus its legal status is uncertain; 3) there is no clear time limitation as to the implementation of such mechanism; and 4) there is no transparency throughout the whole process.

IV. CONCLUSION

There remain many unresolved issues in Chinese arbitration laws and practice, and we can hardly say that China is already an arbitration-friendly venue or is to become an international arbitration center anytime soon. Political factors and legislation loopholes are important elements attributable to the existence of these issues, and incompetency or suspicion towards arbitration of Chinese judiciaries is also playing a significant role. The cure to these issues lies in the revision of the laws⁷² as well as the development of China's overall legal system.

72. See, Manjiao, *supra* note 9, at 119.