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Recommended Citation

Cohen, Jerome A. (2014) "Settling International Business Disputes with China: Then and Now," *Cornell International Law Journal*: Vol. 47: Iss. 3, Article 2.

Available at: <http://scholarship.law.cornell.edu/cilj/vol47/iss3/2>

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Settling International Business Disputes with China: Then and Now

Jerome A. Cohen[†]

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The People’s Republic of China (PRC) has come a long way with respect to settling international business disputes. At the time of my first Chinese business discussions at the Canton Trade Fair in May 1973, the PRC was still using only Soviet-style foreign trade companies to conduct trade with the socialist world and other foreign entities. In early 1979, however, the PRC began to establish many additional companies to meet the needs of Deng Xiaoping’s new “open policy” of broader cooperation with the bourgeois world.

These new companies wanted to attract foreign investment, not merely trade. Yet, in initial contract negotiations, their inexperienced staff often did not want to discuss dispute resolution. The new executives saw no need to include the simple arbitration provision that was commonly used by traditional PRC trading companies¹ or even the customary innocuous clause requiring parties to seek the assistance of a mediator if they were unable to resolve their dispute through their own negotiations.² To justify their position, these newcomers would invoke the analogy of marriage, arguing that the betrothed do not focus on divorce when planning their wedding. Of course, this led me to tell the executives that, outside proletarian China, prenuptial agreements were not uncommon if one or both parties brought substantial assets to their union.

At that time, no Chinese lawyers took part in our contract negotiations, as the “anti-rightist” campaign of 1957-58 decimated their ranks, and these lawyers were not restored to practice until 1981.³

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1. This observation is made based on the author’s personal experience when representing foreign companies in contract negotiations with these newly-established Chinese companies.

2. This observation is also made based on the author’s personal experience when representing foreign companies in contract negotiations with these newly-established Chinese companies.

3. See Shao-Chuan Leng, *Criminal Justice in Post-Mao China: Some Preliminary Observations*, 73 J. CRIM. L. & CRIMINOLOGY 204, 205 (1982).

Although they lacked formal legal education, a handful of trade officials continued to staff the Legal Department of the China Council for the Promotion of International Trade (CCPIT) during and after the Cultural Revolution of 1966–76, but they generally remained in their office.⁴ I called on them at the CCPIT occasionally, but I never encountered any of them in negotiations. So the burden fell on me, in those early 1979 negotiations, to explain that, in the absence of a relevant provision in the contract, any dispute that had to be formally resolved would inevitably end up in court somewhere unless the parties, after occurrence of the dispute, could agree on another method. Such agreements frequently proved impossible.

It was not until the promulgation of contemporary China's first law welcoming foreign direct investment on July 1, 1979—the Equity Joint Venture Law (EJV Law)—that Chinese negotiators, whose companies were new to foreign transactions, began to feel comfortable discussing dispute resolution clauses.⁵ That is because Article 15 provided: “Disputes arising between the parties to an equity joint venture that the board of directors has failed to settle through consultation may be settled through mediation or arbitration by an arbitration agency of China or through arbitration by another arbitration agency agreed upon by the parties.”⁶

This language was permissive and left open the possibility that the parties might also agree upon resort to the courts, a possibility that was later explicitly authorized. Yet, during this initial period for welcoming foreign investment, I knew that the Chinese side would not risk resorting to the courts. Its representatives understood virtually nothing about, and were suspicious of, American state and federal courts, as well as the courts of other countries, including those of the Soviet Union and the other “socialist” countries that had dominated China's business relations since the establishment of the PRC in 1949. Actually, Chinese negotiators knew little even about their own country's courts, which were only beginning to recover from the devastation suffered by the judiciary during the Cultural Revolution.

What surprised me before the promulgation of the EJV Law was the number of investment negotiations in which the Chinese side did not press for an arbitration clause. For three decades, arbitration clauses had been standard in the PRC's specialized foreign trade companies' contracts with the socialist world.⁷ So far as I could tell, in that opaque era, most of the contracts that PRC trading companies had made with European and Japanese companies during the 1970s also contained clauses calling for

4. See Jerome A. Cohen, *The Missionary Spirit Dies Hard*, HK Eco. J. (Sept. 3, 2011), online as part of the “My First Trip to China” series, http://features.hkej.com/template/features/html/first_trip/index.jsp.

5. See Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures (promulgated by the Standing Comm. Nat'l People's Cong., July 8, 1979), available at <http://www.china.org.cn/english/DAT/214773.htm> (China).

6. *Id.*

7. See e.g., Sally L. Ellis & Laura Shea, *Foreign Commercial Dispute Settlement in the People's Republic of China*, 6 MD. J. INT'L L. 155, 161 (1981).

arbitration by what was then known as China's "Foreign Trade Arbitration Commission" (FTAC).⁸

During the 1973 Canton Trade Fair, I spent several evenings in the bar of the Dongfang Hotel avidly listening to the sad tales of European commercial attachés and businessmen who described disputes that had arisen with China and their fruitless efforts to persuade PRC foreign trade companies to honor their contract arbitration clauses in order to settle those disputes. The foreigners were consistently met with the refrain "arbitration is a very unfriendly act,"⁹ and were warned that insistence on invoking the arbitration provision could terminate their cooperation with China. Going to court was even more unthinkable. Instead, the foreigners were offered the option of informally settling the "misunderstanding" by receiving what the Chinese side regarded as generous terms in the next transaction between the parties. In practice, however, that option often disappointed the foreign party. The Chinese preferred the informal option, of course, not only because it often reduced their economic liability for any contractual violation but also because it did not require formal recognition that any Chinese officials had made a mistake. This avoided both loss of face to foreigners and adverse consequences to Chinese officials' careers.

It was discouraging for me to learn of foreign frustrations with Chinese arbitration practice, yet I knew that my foreign investor clients should want even less to do with Chinese courts. To us they were a total black box and an unacceptable risk. Arbitration seemed the only option for foreign businesses, but arbitration outside China was plainly preferable for significant transactions. Some potential investors, such as the major foreign oil companies that Beijing was seeking to attract, were in a strong enough bargaining position to resist persistent PRC demands for arbitration in China. Others had to decide whether profit prospects justified the added risk of agreeing to arbitration in China, which PRC reforms were striving to make more attractive. PRC negotiators were under instruction to try hard, down to the last hours before contract signing, to win foreign acceptance of arbitration in China but to not lose the deal because of this issue.¹⁰

Whether they agreed to arbitration in China or abroad, all foreign firms had to recognize the uncertainty and difficulty they would encounter if they managed to win an arbitration award but the Chinese side refused to comply with its terms. Even after China joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1987,¹¹ if foreign companies had to enforce an award in China, they would face formidable obstacles. In that era before PRC companies began to maintain

8. See e.g., Tang Houzhi, *Arbitration - A Method Used by China to Settle Foreign Trade and Economic Disputes Lecture*, 4 *PACE L. REV.* 519, 520 (1984).

9. This observation is made based on the author's personal experience when representing foreign companies in negotiations with Chinese companies.

10. This observation is made based on the author's personal interviews and own experience when representing foreign companies in negotiations with Chinese companies.

11. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, 21 *U.S.T.* 2517, 330 *U.N.T.S.* 38.

significant assets abroad, foreign firms would in most cases have little choice but to seek enforcement of the award against Chinese property in China. Ultimately, there was generally no way to avoid entanglement with Chinese courts, a course that foreign companies had sought to avoid by opting for arbitration in the first place. But that situation only gradually became apparent as the 1980s wore on and the number of Sino-Western arbitrations began to increase, both in China and other countries.¹²

A Generation Later—Substantial Progress, but

Today, more than a generation later, foreign business confronts a much more sophisticated Chinese dispute resolution scene, one that reveals the substantial progress that has accompanied more than three decades of China's phenomenal economic development and international cooperation. Mediation, arbitration, and adjudication remain the principal methods for third-party participation in settling international business disputes with China, but each now offers more varied and promising options and procedures. Still, many challenges confront each of these methods, as the following brief overview suggests.

I. Mediation

Mediation—the processes by which one or more third parties seek to assist in the resolution of disputes without making a binding decision—was, of course, a distinctive feature of the pre-modern Chinese legal system.¹³ Ever since the dawn of the twentieth century, modernizing elites in China have sought to adapt the traditional preference for mediation to contemporary needs.¹⁴ Indeed, during the PRC's initial decades, Chinese leaders suggested that their adaptation of traditional mediation was their most prominent contribution to the Marxist-Leninist legal system that they had imported from the Soviet Union and shared with other “socialist” countries.¹⁵

In resolving commercial disputes with foreigners, PRC authorities have attempted to build upon this strong domestic tradition. Most of their international trade, licensing, and investment contracts, among other types

12. See Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 424 (2006).

13. See Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1206-09 (1966).

14. See *id.*; see also Stanley B. Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CALIF. L. REV. 1284, 1300-01 (1967).

15. Ye Gulin (叶谷霖) [Yeh Ku-Lin], *Chongfen Fahui Renmin Tiaojie Gongzuo Wei Jian-she Shehui Zhuyi Fuwu De Zuoyong* (充分发挥人民调解工作为建设社会主义服务的作用) [Thoroughly Developing the Construction of Socialistic Service Is a Function of People's Mediation Work], 4 ZHENGFA YANJIU (政法研究) [POLITICAL-LEGAL RESEARCH] 12 (1964). (The Journal later changed its name to FAXUE YANJIU (法学研究) [CHINESE JOURNAL OF LAW]. For English translation of this article, please refer to Yeh Ku-lin, *Thoroughly Developing the Construction of Socialistic Service Is a Function of People's Mediation Work*, SELECTIONS FROM CHINESE MAINLAND MAGAZINES, No. 461, at 1-2 (1965), published by US Embassy in Hong Kong.

of contracts, obligate the parties to resort to mediation before they invoke more binding measures,¹⁶ and the PRC has established some separate institutions for promoting the mediation of foreign-related disputes. The China Council for the Promotion of International Trade operates a Mediation Center, formerly known as the Beijing Conciliation Center.¹⁷ In 2004, the CCPIT and the North America CPR Institute for Dispute Resolution jointly founded the US-China Business Mediation Center.¹⁸ Although only one of several bilateral institutions established by the CCPIT with other countries to foster commercial mediation, it was touted as a “landmark program” designed to demonstrate, through a broad range of related methods, “the tremendous advantages of mediated negotiation over litigation”¹⁹

Moreover, the CCPIT’s China International Economic and Trade Arbitration Commission (CIETAC)—the successor to the original FTAC—and China’s many other flourishing arbitration organizations, as well as foreign organizations, all offer procedures and resources for disputing parties to attempt informal settlement through mediation before completing the arbitration process itself.²⁰ China’s courts also emphasize opportunities for mediation, before and in the midst of trials and even on appeal, especially during one of the Communist Party’s periodic campaigns to favor mediation over adjudication.

As presiding arbitrator in an International Chamber of Commerce arbitration between PRC and European companies in Geneva, I personally reconciled the parties after the arbitration hearing, having failed to attain a settlement in a pre-hearing mediation session. And as a member of a Shanghai arbitration panel operating under the auspices of CIETAC, I observed our highly-experienced Chinese presiding arbitrator, acting in the capacity of mediator, subject Hong Kong and Mainland disputants to a seemingly endless, high pressure but unsuccessful effort to knock heads together.

My impression is that in many important disputes with China, as with other countries, foreign firms do not often take formal mediation seri-

16. At that time, many substantive Chinese laws either mandated or encouraged the disputing parties to use the mechanism to solve their problems before formal recourse to arbitration and litigation. See e.g., The Economic Contract Law of the People’s Republic of China, art. 42 (promulgated by the 5th Nat. People’s Cong., Dec. 13, 1981); the Equity Joint Venture Law, art. 14 (promulgated at the 2d Session of the 5th Nat. People’s Cong., July 1, 1979); the Law of China on Economic Contracts Involving Foreign Interest (promulgated at the 10th Session of the Standing Comm. of the 6th Nat. People’s Cong., Mar. 21, 1985).

17. See *Mediation Center*, CHINA COUNCIL FOR THE PROMOTION OF INTERNATIONAL TRADE, <http://adr.ccpit.org/english/typeinfo.aspx?t1=117&t2=123>.

18. *The US-China Business Mediation Center in Beijing and New York City*, ADR-RESOURCES (Feb. 5, 2004), <http://adrresources.com/adr-news/148/us-china-business-mediation-center-beijing-new-york-city#sthash.xnjF13Go.dpuf> (last visited Oct. 17, 2014).

19. *Id.*

20. See Justin D’Agostino, *Key changes to the CIETAC Arbitration Rules*, KLUWER ARBITRATION BLOG (Apr. 11, 2012), <http://kluwarbitrationblog.com/blog/2012/04/11/key-changes-to-the-cietac-arbitration-rules/>.

ously. If unable to settle matters through bilateral negotiations, they tend to be pessimistic about mediation's prospects for success, and avoid or short-circuit the process, instead opting for some type of formal decision rather than further delay the outcome. Nevertheless, in recent years the CCPIT Mediation Center has reportedly experienced an enormous increase in its activity.²¹ It is not clear how much of this increase can be attributed to international disputes, domestic disputes involving foreign elements such as EJVs, or purely domestic disputes. Undoubtedly, a major portion of the increase can be attributed to the renewed emphasis that the Communist Party placed on mediation during the period of 2006-12, which led the Party and the judiciary to instruct all legal institutions to prioritize mediation over litigation.²² The burgeoning statistics probably do not reflect a heightened foreign enthusiasm for mediation but, rather, the CCPIT Mediation Center's desire to tout its efforts to meet the demands of the latest political-legal campaign emphasizing mediation.

We also should not overlook the roles of more informal and less visible mediators. For example, lawyers for the contending sides, on some occasions, while participating in bilateral dispute resolution negotiations on behalf of their clients, actually serve as *de facto* co-mediators. I have done it myself. And ethnic Chinese employees of the foreign firm often seek solutions in informal meetings with PRC counterparts. Many a problem has been resolved over late night drinks.

Much more sinister, although seldom discussed in academic meetings, is the role of the Chinese police as *de facto*, highly coercive "mediators." They are occasionally called in by a Chinese party that is dissatisfied with

21. Wang Chengjie, Speech at the 2013 Mediator Appointment and Training Conference of the Mediation Center of China Council for the Promotion of International Trade (CCPIT)/China Chamber of International Commerce (CCOIC): New Development of Business Dispute Resolution in China and Foreign Countries (Dec. 19, 2013), available at <http://lad.ccpit.org/second/index.aspx?nodeid=235&page=ContentPage&contentid=1392>.

22. See *Decision of the CPC Central Committee on Major Issues of Building A Socialist Harmonious Society*, XINHUA NEWS (Oct. 18, 2006), available at http://news.xinhuanet.com/politics/2006-10/18/content_5218639.htm; see also *Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation* (promulgated by the Sup. People's Ct., Jul. 24, 2009) (Lawinfochina) (China), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=7744&CGid=>; *Notice of the SPC on Issuing Several Opinions on Further Implementing the Work Principle of "Giving Priority to Mediation and Combining Mediation with Judgment"* (promulgated by the Sup. People's Court, Jun. 27, 2010) (Lawinfochina) (China), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=8397>; *Guiding Opinions on Further Promoting the General Mediation of Conflicts and Disputes* (jointly issued by 16 departments, May 2011) available at <http://politics.people.com.cn/GB/1027/14557800.html>; *People's Mediation Law of the People's Republic of China* (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 28, 2010), available at <http://en.pkulaw.cn/display.aspx?id=8266&lib=law&SearchKeyword=&SearchCKeyWord=GMvlwR%2f7pHQGIiOGJbVvEQa%3d%3d>; Article 122, *Civil Procedure Law of the People's Republic of China (2012 Amendment)* (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 31, 2012), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=11161&CGid=>.

the progress of negotiations to settle a dispute with a foreign company.²³ This is more likely to happen when the foreign company is either owned or represented by someone of Chinese ethnicity, especially a former or present Chinese national.²⁴ A favorite pattern is for the Chinese company to lure the foreign firm's negotiator to a city in China that is not the home base of the Chinese company—an apparently neutral location.²⁵ Then, as discussion gets underway, police from the home base descend and spirit the foreign company's representative away to detention in one of their city's jails, ostensibly to begin an investigation of alleged "criminal fraud."²⁶ They make it clear that the investigation can promptly terminate if the hapless detainee "agrees" to the terms of settlement that the local company desires.²⁷ Chinese-Americans, Taiwanese and Hong Kong residents, and Chinese nationals have all proved particularly vulnerable to such tactics. In one such incident, a stubborn detainee remained locked up for five years.²⁸ The families of such detained persons have consulted me on several occasions.

II. Arbitration

Arbitration in China has flourished in recent decades, at least statistically, and vigorous competition has developed among PRC arbitration organizations. CIETAC no longer has a monopoly over foreign-related and international disputes, and the PRC now has over 200 cities with their own local arbitration commissions that are permitted to deal with such disputes, as well as the domestic disputes that are grist for their mill.²⁹

23. See e.g., Joseph Kahn, *Dispute Leaves U.S. Executive in Chinese Legal Netherworld*, N.Y. TIMES, Nov. 1, 2005, available at <http://www.nytimes.com/2005/11/01/international/asia/01kidnap.ready.html?ei=5088&en=2a8d69f92570931f&ex=1288501200&partner=rssnyt&emc=rss&pagewanted=print> (last visited Nov. 4, 2014); see also Chris Buckley, *Efforts Continue to Win Release of American in China*, N.Y. TIMES, May 18 2005, available at <http://www.nytimes.com/2005/05/18/business/worldbusiness/18detain.html?pagewanted=print> (last visited Nov. 4, 2014); Stephane Fitch, *Held Hostage in China*, FORBES, Nov. 14, 2005, available at <http://www.forbes.com/global/2005/1114/030A.html> (last visited Nov. 4, 2014); Jeffrey Hays, *Problems with Doing Business in China*, FACTS AND DETAILS, available at <http://factsanddetails.com/china/cat9/sub59/item2281.html> (last visited Nov. 4, 2014).

24. See sources cited *supra* note 23.

25. See sources cited *supra* note 23.

26. See sources cited *supra* note 23.

27. See sources cited *supra* note 23.

28. See *Complaint, Tiangang Sun v. China Petroleum & Chemical Corp. Ltd.*, No. 13-cv-05355, at ¶ 75 (C.D. Cal. 2013), available at <http://nebula.wsimg.com/955cfb43f1312ffb661d61a026276edd?AccessKeyId=2EE73AAF1C9284F03994&disposition=0>; see also Edvard Pettersson, *Sinopec Sued by Hong Kong Businessman for Imprisonment*, BLOOMBERG, July 24, 2013, available at <http://www.bloomberg.com/news/2013-07-25/sinopec-sued-by-hong-kong-businessman-for-imprisonment.html>; Eric Ng, *Jailed ex-chair of GeoMaxima Energy Sun Tiangang sues Sinopec in LA*, SOUTH CHINA MORNING POST, July 26, 2013, available at <http://www.scmp.com/business/commodities/article/1290728/jailed-ex-chair-geomaxima-energy-sun-tiangang-sues-sinopec-la>.

29. See Nicholas Song, *Arbitration in China—Progress and Challenges*, MONDAQ, Apr. 17, 2013, <http://www.mondaq.com/x/233922/Arbitration+Dispute+Resolution/Arbitration+In+China+Progress+And+Challenges>.

Although the Beijing Arbitration Commission, the most impressive in China even including CIETAC, still handles more purely domestic disputes than foreign-related and international ones, and not as many of the latter two categories as CIETAC, it has steadily increased its reputation for professionalism among foreigners.³⁰

CIETAC, by contrast, has suffered a loss of prestige. In 2005, reflecting not only my own experiences as both a CIETAC arbitrator and an advocate before it but also those of many others, I called for CIETAC to undertake many reforms in its rules and practice.³¹ I had become progressively disillusioned by instances of corruption, government influence over decisions, ethical deficiencies, conflicts of interest, bias against foreign companies, faulty methods of selecting arbitrators, lapses in confidentiality, failure to provide opportunity for a dissenting arbitrator's opinion, and other unfair practices.

After my published criticisms, CIETAC did take steps to remedy several of these defects. Its principal response to me, however, was a decision not to renew my appointment to its roster of authorized foreign arbitrators, effectively preventing my future service on its arbitration tribunals.³² Shortly thereafter, amid a virtual news blackout, CIETAC's able Vice Chairman/Secretary General was convicted and sentenced to five years in prison for alleged corruption relating to his service as an arbitrator in a major Sino-American dispute decided by a Stockholm Chamber of Commerce arbitral tribunal.³³ Although his CIETAC successor announced to a large arbitration conference in New York in 2007 that CIETAC had been wrong to remove me from its roster and would soon remedy that mistake,³⁴ I am still awaiting reappointment.

CIETAC has since revised its rules to eliminate several of the deficiencies I had pointed out, but many persist.³⁵ The recent book by Professor Fan Kun of the Chinese University of Hong Kong gives an excellent point-by-point analysis of the extent to which CIETAC arbitration still differs

30. See Ellen S. Reinstein, *Finding a Happy Ending for Foreign Investors: the Enforcement of Arbitration Awards in the People's Republic of China*, 16 *IND. INT'L & COMP. L. REV.* 37, 44-45 (Mar. 13, 2005).

31. See generally Jerome A. Cohen, *Time to Fix China's Arbitration*, 168 *FAR E. ECON. REV.* 31 (Jan. 2005).

32. See Reinstein, *supra* note 30, at 45-46.

33. See Luo Changping, *Wang growth of First Instance collar criminal five years*, *CAIJING* (July 28, 2008), available at <http://www.caijing.com.cn/2008-07-28/100076639.html>.

34. At an international workshop held by Juris Conference LLC on "Managing Business Disputes in Today's China" on March 26, 2007 in New York, Mr. Yu Jianlong, the newly-appointed successor to Mr. Wang as Vice Chairman and Secretary General of CIETAC, stated that Prof. Cohen would be reappointed to the CIETAC roster of arbitrators. However, this statement was omitted from CIETAC's official news release about the workshop. See China International Economic and Trade Arbitration Commission, *Yu Jianlong, deputy director and secretary general of the United States led a delegation to attend an international seminar and visits to relevant agencies* (Apr. 5, 2007), available at n.cietac.org/newsfiles/NewsDetail.asp?NewsID=55.

35. See Reinstein, *supra* note 30, at 45.

from generally accepted international standards.³⁶ In the meantime, CIETAC has suffered the great public embarrassment of having its sub-commissions in Shanghai and Shenzhen declare their independence from its central office in Beijing and begin competing, under new names, not only with the local arbitration commissions already existing in those cities but also with CIETAC itself.³⁷ This has considerably muddied the waters for parties whose contracts have provided for CIETAC arbitration in those places, and in certain cases it has cast doubt about the judicial enforceability of awards made under the auspices of the feuding organizations.³⁸

Wholly apart from the peculiar difficulties that civil war within CIETAC has raised for enforcement of some arbitration awards, we should note that, despite the continuing efforts of China's Supreme People's Court (SPC), a considerable measure of uncertainty still exists regarding the enforceability in China's courts of all China-related arbitration awards affecting foreigners, whether made abroad or in China. There is especially a need to clarify and make more efficient the civil procedures for judicial scrutiny of the awards made by Chinese arbitration tribunals in foreign-related cases, and the courts reportedly have often refused to enforce such awards.³⁹ The more rigorous SPC requirements for higher court review of lower court refusals to recognize and enforce foreign awards, i.e., those made by non-Chinese tribunals operating under the New York Convention, have resulted in more frequent enforcement of such awards.⁴⁰

36. Fan Kun, *ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS* 235-39 (2013).

37. China International Economic and Trade Arbitration Commission, *Announcement On Issues Concerning CIETAC Shanghai Sub-Commission and CIETAC South China Sub-Commission* (Dec. 31, 2012), available at <http://www.cietac.org/index/aboutUs/importantNotice/477c27336b878a7f001.cms?forIndex=index>.

38. A judgment of the Shenzhen Intermediate Court in November 2012 enforced an arbitration award by what had been CIETAC's Shenzhen sub-commission despite the fact that one party to the arbitration agreement had argued that, at the time the award was rendered, the former CIETAC sub-commission was no longer the agreed arbitration body because it had not only changed its name from "South China CIETAC" but also made itself independent from CIETAC. See Civil ruling by the Shenzhen Intermediate People's Court of Guangdong Province, (2012) Shen Zhong Fa She Wai Zhong Zi No. 226 [(2012) 深中法涉外仲字第226号].

Yet, roughly half a year later, the Suzhou Intermediate Court denied enforcement of an arbitral award by the successor to CIETAC's Shanghai sub-commission. The arbitration clause had provided that any dispute should be submitted to CIETAC (Seat of Arbitration: Shanghai) in accordance with the valid arbitration rules of CIETAC. After the dispute was submitted to CIETAC Shanghai, the Shanghai sub-commission altered its identity, but applied CIETAC's 2005 Arbitration Rules to accept the case and deliver the award on December 7, 2012. Suzhou Intermediate Court, however, decided that the former CIETAC Shanghai sub-commission had made itself independent from CIETAC and therefore could no longer serve as the agreed arbitration body referred to in the arbitration clause. (See the "Civil Order" Suzhongshangzhongshenzi No. 0004 (2013) made by The Intermediate People's Court of Suzhou, Jiangsu on May 7, 2013; 江苏省苏州市中级人民法院2013年5月7日作出的(2013)苏中商仲审字第0004号《民事裁定书》)

39. See Yang Honglei, *Report on the Judicial Review of International Arbitration in Chinese Courts*, 9 WU DA INT'L L. REV. 1-6 (2009).

40. See e.g., Symposium, *Making the Most of International Investment Agreements: a Common Agenda*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2005).

In a speech delivered at Columbia Law School in 2013, SPC Judge Song Jianli stated that the SPC had reviewed 64 proposed lower court refusals of foreign awards and had only approved 24 of them, remanding the other 40 for recognition and enforcement.⁴¹ The great majority of these SPC decisions turned on the proper interpretation of Article V of the New York Convention.⁴² It is encouraging that thus far the SPC and the lower courts have not broadly interpreted the Convention provision that authorizes a reviewing court to deny enforcement to an award that it deems to violate national public policy.⁴³ Although many parties have opposed Chinese enforcement of foreign awards on this ground, only one has been successful since the special SPC review process began in 2000.⁴⁴

Some unresolved issues relating to the legality of foreign ad hoc arbitrations in China, which are not explicitly authorized by the country's Arbitration Law, have raised doubts about the enforceability of such awards.⁴⁵ There are also more general questions about the reliability of the courts for enforcing awards due to the well-known serious problems of political instructions to the courts, local protectionism, corruption, and personal influences upon judges.⁴⁶

It is also worth mentioning the special aspects of the Chinese government's obligation to recognize and enforce arbitration awards rendered against it in favor of foreign investors under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).⁴⁷ As Professor Julian Ku has pointed out, the PRC "has also been one of the world's most enthusiastic signatories of bilateral investment treaties that grant binding mandatory jurisdiction to ICSID arbitration tribunals."⁴⁸ Yet the PRC, for almost two decades, has not taken the steps required to assure its recognition and enforcement of ICSID awards through legislation, an interpretation by the Supreme People's Court, or a government declaration that the courts can directly apply the ICSID Convention without legislative or judicial implementation. Apparently, the PRC is not eager to facilitate ICSID foreign investor arbitrations in practice. Only one has been brought to date, and it was subsequently suspended by agreement of the parties.⁴⁹

41. Song Jianli, *Supreme People's Court of China Judge Speaks on Arbitral Awards*, Feb. 19, 2013, available at http://www.law.columbia.edu/media_inquiries/news_events/2013/february2013/chinese-arbitral-awards?&layout=print&main.showmenu=0&main.showjumplin%E2%80%A6 (last visited Feb. 18, 2014).

42. See Xiaohong Xia, *Implementation of the New York Convention in China*, 1 INT'L COM. ARB. BRIEF 20, 22 (2011).

43. See Jianli, *supra* note 41.

44. See Jianli, *supra* note 41.

45. See Jingzhou Tao, *Salient Issues in Arbitration in China*, 27 AM. U. INT'L L. REV. 807, 812-13 (2012).

46. Weixia Gu, *The Judiciary in Economic and Political Transformation: Quo Vadis Chinese Courts?*, 1(2) CHINESE J. COMP. L. 303, 313-15, 327 (2013).

47. See Julian Ku, *The Enforcement of ICSID Awards in the People's Republic of China*, 6 CONTEMP. ASIA ARB. J. 31, 33 (2013).

48. *Id.* at 32.

49. *Id.* at 32-33.

III. Adjudication

Despite the persistence of the serious problems affecting judicial reliability mentioned above, China's courts have made significant progress in the past twenty years, and they have gradually come to play an increasing role in the resolution of international and foreign-related business disputes. They offer the full judicial consideration of such disputes in addition to enforcing arbitration awards.

Recent years have witnessed a dramatic increase in the number of foreign-related and international civil and commercial disputes to come before China's courts for trial.⁵⁰ This has brought forth both legislative and judicial responses. Because this new litigation has involved many difficult choice of law and related issues, the Standing Committee of the National People's Congress adopted the Statute on the Application of Law to Foreign Civil Relations (Choice of Law Statute), which went into effect in April 2011.⁵¹ The 2012 Amendments to the Civil Procedure Law were also designed to smooth the course of foreign-related and international litigation as well as domestic matters.⁵² Subsequent practice has demonstrated that, while the new legislation has introduced improvements, it has left certain problems unresolved and spawned some new ones.

In order to cope with the rising tide of foreign-related and international civil and commercial cases, the judiciary has vastly increased the number of courts authorized to handle these matters. Prior to 2011, only the intermediate courts in provincial capitals and equivalent major cities could exercise *initial* jurisdiction over these cases.⁵³ Such jurisdiction was then expanded so that 167 intermediate courts and 67 basic courts can now hear these cases.⁵⁴

Advances in legal education and training have importantly raised the professional competence of the country's roughly 200,000 judges and the even larger body of lawyers who are now qualified to assist in this process.⁵⁵ Thus, foreign negotiators should no longer automatically exclude Chinese courts from their consideration of the appropriate arena for settling business disputes. In some circumstances, especially in financial transactions, it may now be more desirable to choose Chinese litigation

50. Jin Huang & Huan Fang Du, *Chinese Judicial Practice in Private International Law* 2002, 4 CHINESE J. INT'L L. 643, 657 (2005).

51. Lu Song, *Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations*, 1 CHINESE J. COMP. L. 1 (2013).

52. See Ashley M. Howlett, Sonny Payne & Leanne Zheng, *Adding more Strings to the Bow: the 2012 Amendments to China's Civil Procedure Law*, Commentary (Jones Day), Jan. 2013, at 4.

53. Zhang Yan (张琰), Wang Jingqiong (王京琼) and Cao Yin (曹音), *Zhuanfang Zuigao Renmin Fayuan Shewai Fating Tingzhang Liu Guixiang* (专访最高人民法院涉外法庭庭长刘贵祥) [An Interview of Justice Liu Guixiang, Presiding Judge of the Foreign-related Tribunal of the Supreme People's Court], ZHONGGUO RIBAO (中国日报) [CHINA DAILY], Dec. 18, 2010, available at http://www.chinadaily.com.cn/zgrbjx/2010-12/18/content_11727442.htm (last visited Nov. 5, 2014).

54. *Id.*

55. Jerome A. Cohen, *China's Legal Reform at the Crossroads*, 169 FAR E. ECON. REV. 23, 25 (Mar. 2006).

over Chinese arbitration if it is not possible to obtain agreement to litigation or arbitration in a favored forum abroad.

After a five-year period when China's previous political leadership downplayed judicial professionalism in favor of informal dispute resolution through mediation, the successor Xi Jinping government has recently given renewed, top-level support for improvements in the formal judicial process.⁵⁶ Party General Secretary Xi himself, the new President of the SPC Zhou Qiang, and his colleagues have repeatedly advocated strengthening the independence and integrity of the local courts against all the well-known but persistent influences that have often plagued their decisions.⁵⁷ Their efforts amount to more than talk. For example, plans are reportedly being implemented to take away the powers of local authorities to appoint and remove judges and to approve judicial budgets, and then transfer those powers to the level of provincial governments. It is too early to tell to what extent these efforts to strengthen provincial controls over local courts will prove successful. Earlier attempts at such reforms were unsuccessful. Yet I know, from personal experience during an earlier campaign to bolster the formal legal system, that on some occasions local courts have vindicated foreign legal claims against local parties, if only because judges were given to understand by local leaders that such decisions would promote the enthusiasm of foreign investors for the locality in question.

Nevertheless, in most cases even today, if the foreign firm's bargaining position does not permit it to obtain agreement to dispute resolution abroad, the better part of wisdom would be to opt for arbitration in China rather than litigation. This assumes that the contract negotiation can yield a fairly-constituted arbitration tribunal, which, to assure foreign confidence in the arrangement, usually requires that not more than one of the three arbitrators be PRC nationals.

Before closing our discussion on the roles of Chinese courts in foreign-related dispute resolution, it remains necessary to say a brief word about the possibilities of enforcing foreign judicial judgments. Unlike judicial enforcement of foreign arbitration awards, not much progress has been made in this respect. Chinese courts continue to resist enforcement of foreign judgments, often finding either that sufficient reciprocity does not exist between the courts of the country of the party seeking enforcement and those of China, or that arrangements for the exchange of judicial documents between the countries do not meet the requirements of "due service."⁵⁸

I know of only two cases in which Chinese courts have recognized and

56. See Stanley Lubman, *An Encouraging Sign for (Limited) Legal Reform*, WALL ST. J. (Feb. 25, 2014, 11:02 AM), at 1-3, available at <http://blogs.wsj.com/chinarealtime/2014/02/25/an-encouraging-sign-for-limited-legal-reform-in-china/>.

57. See *id.* at 2.

58. See Wenliang Zhang, *Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity"*, 12 CHINESE J. INT'L L. 143, 146-47, 153, 160 (2013).

enforced foreign judgments,⁵⁹ and neither in those cases nor in the many decisions refusing recognition and enforcement have the courts reportedly chosen to do more than make cryptic allusions to the principles underlying their invocation of the reciprocity and due service requirements.

Conclusion

Settling international business disputes is usually a messy, expensive, slow, and irritating process. Is it any worse with Chinese companies than most others? We do not have enough empirical studies or other data about relevant experiences with either China or other countries to answer this question. There have been a few useful empirical studies seeking to evaluate the enforcement of foreign arbitration awards in Chinese courts, and there are one or two studies concerning relevant judicial trials. Yet they leave us with further questions, and more comprehensive and up to date analysis is needed.

We are necessarily consigned, in the absence of sufficient research, to the impressions of different observers who inevitably see different sides of the elephant. My own overall impression is that dispute resolution with Chinese companies is improving, but not fast enough to meet current demands.

Mediation's low-key, informal, non-binding processes seem to be less prominent and successful than one might expect, given traditional Chinese preferences for avoiding binding decisions. Arbitration administered by PRC institutions varies immensely in quality depending on the organization selected, with the Beijing Arbitration Commission offering the service closest to international standards. Many of the other local arbitration commissions leave much to be desired in terms of their expertise, impartiality, and independence from local government, Communist Party, and business

59. The first one is the 2000 *B&T Ceramic Group S.R.L.* case before the Foshan Intermediate Court in Guangdong Province (an Italian bankruptcy judgment). In its decision, the Foshan court mainly resorted to the Sino-Italian Bilateral Treaty on Civil Judicial Assistance in 1991 as the legal basis without examining the principle of reciprocity or due service requirement. It only made some basic assertions that the Italian judgment was effective and that there were no refusal grounds such as basic principles of Chinese law, national sovereignty, security or social and public interests. See The *B&T Ceramic Group S.R.L. Case*, the Foshan Intermediate People's Court of Guangdong Province (2000) Fo Zhong Fa Jing Chuzi No. 633, delivered on 13 November 2001 (佛山市中级人民法院 (2000) 佛中法经初字第633号民事裁定 (2001年11月13日)).

The second one is the 2005 *Antoine MONTIER* Case before the Zhongshan Intermediate Court of Guangdong Province (a French bankruptcy judgment). The court simply held that the French judgment satisfied the requirements set forth by Chinese law on recognition and enforcement of foreign judgment, and therefore its effects were recognized. The judgment provided no explanation as to what roles the principle of reciprocity or the due service requirement played, or how the French judgment satisfied these requirements. See *Antoine MONTIER Case*, The Intermediate People's Court of Zhongshan City of Guangdong Province, (2005) Sui Zhong Fa Minsan Chuzi No. 146, delivered on 20 June 2005 (广州市中级人民法院 (2005) 穗中法民三初字第146号民事裁定 (2005年6月20日)).

influences. CIETAC is struggling to regain ground lost because of its internal contradictions and increasing foreign awareness of its defects.

Starting from scratch at the end of the Cultural Revolution, the courts, with the aid of legislation adopted by the National People's Congress, have made significant progress in developing an appropriate institutional and procedural framework for deciding, among other things, foreign-related business disputes. An increasingly impressive legal education system has been training a growing number of future judges and lawyers to take part in this effort. Yet these reforms have not been able to assure foreign firms a consistently fair and reliable judicial forum for resolving their disputes, including enforcement of arbitral awards. In too many cases, local judges continue to be subject to so many distorting factors that their decisions still lack credibility and public confidence.

Sadly, the same must be said of some Chinese arbitrators. A generation ago, I wanted to believe that resorting to arbitration in China would enable parties to escape the adverse influences that have traditionally plagued the nation's courts. Experience gradually taught me that all legal institutions in a country are subject to its political, social, economic and ethical climate, and customs.

Much is currently riding on the extent to which China's new leaders can be successful in reforming the courts. The outcome will even affect the decisions of American and other foreign courts when they are presented with disputes relating to China. For example, assuming that the plaintiff meets jurisdictional requirements, how should an American court treat the defendant's argument that the American court does not constitute as convenient a forum as its Chinese counterpart? Should the American court decide that plaintiff cannot receive a fair trial in China and therefore the doctrine of "*forum non conveniens*" should not apply? How many times can a foreign country's judges decide that China's courts do not provide a fair trial without damaging bilateral diplomatic relations? In the current circumstances, how should an American judge balance the demands of comity with those of justice?