The People's Republic of China's Corrupt Culture: Is the PRC's Arbitration Systems Exempt?

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THE PEOPLE'S REPUBLIC OF CHINA'S CORRUPT CULTURE: IS THE PRC'S ARBITRATION SYSTEMS EXEMPT?

by

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A Thesis
Submitted to the
Faculty of The Graduate College
in partial fulfillment of the
requirements for the
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The People’s Republic of China (PRC) has struggled with corruption for decades. The PRC’s admission to the World Trade Organization (WTO) has brought some hope to curtail corruption, but this alone has not eliminated corruption within the PRC. One reason for the prevalence of corruption within the PRC is the intertwined relationship between the Chinese Communist Party and judicial and government officials. The purpose of this Masters thesis is to evaluate whether the relationship between Chinese governmental bodies and the PRC’s arbitration systems makes Chinese arbitration systems susceptible to corruption.

This study examines the PRC’s arbitration systems’ close nexus with the Chinese Communist Party and other Chinese governmental bodies. This study promises to advance our understanding of how corruption may affect both judicial and non-judicial systems.
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Mary Elizabeth Crawford
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CHAPTER I

HISTORICAL BACKGROUND OF THE PRC'S CORRUPT CULTURE

INTRODUCTION

For decades the People’s Republic of China (PRC) has struggled with the problem of social and political corruption within its borders (Chen, Li, & Otto 2002; Tanner 1999). With strong international pressures and a public demand for change, the PRC has engaged in various reforms to curtail corruption. Although there have been positive steps to curtail corruption within the PRC, corruption is still prevalent today. Scholars argue that corruption, within the PRC, has become embedded within Chinese practices and have become customary throughout the PRC. This dilemma often referred to as the PRC’s corrupt culture (Lee 2004; Degoyler & Scott 1996).

GOVERNMENTAL CORRUPTION

Most notably, there is corruption among Chinese governmental officials (Duncan 2002). Corruption among governmental officials includes, but is not limited to, bribery, fraud, and misappropriation of government funds (Duncan 2002). Governmental corruption is problematic because it limits the government in functioning as a
vital source for social change by implementing effective legislation and laws (Hess & Dunfee 2000).

JUDICIAL CORRUPTION

The PRC's judicial system is made up of four levels of courts (Peerenboom 2001, 214; Tanner 1999; China Human Rights 1999): the Supreme People’s Court (SPC), Higher People’s court (HPC), Intermediate People’s Court (IPC), and the Basic People’s Court (BPC).

The Supreme People’s Court, is one of the most important governmental bodies and courts in the PRC (Halverson 2004). However, the Supreme People’s Court and other Chinese courts are not exempt from the PRC’s corrupt culture.
Corruption within Chinese courts is commonly known as judicial corruption (Yu, Chang, Cohen, et al. 2003; Bulger 2000; Clarke 2003; Keyuan 2002; Hung 2004). Judicial corruption in the PRC is not a new phenomenon. It dates back for several decades and may come in various forms. These include, but not limited to, bribery, misappropriation of governmental funds, and the acceptance of "gifts" from the parties involved or the Chinese Communist Party (CCP) (Clarke 2003; Keyuan 2002).

As a result of the demand for change from the Chinese populace, judicial officials, and international community, the PRC has taken measures to curtail judicial corruption. In 2002, the PRC issued a judicial code of ethics to prevent judicial corruption (Chow 2003, 37), but judicial corruption is still rampant throughout the PRC (Jianghua & Guanghua 2004; Chow 2003).

Some Chinese judicial officials have even publicly taken an anti-judicial corruption stance (Jianghua & Guanghua 2004, 393). Even with these public acknowledgements and the enactment of the judicial codes of ethics, bribery and other forms of judicial corruption continue to exist throughout the PRC (Hung 2004, 105). The continuance of judicial corruption, in the PRC, may be a result of institutional flaws associated with the
inadequacies underlying the PRC’s Constitution (Lin 2003, 220).

Another factor for judicial corruption may be associated with the low pay scale and low prestige of judicial positions. Chinese courts are thus dependent on the financial resources of the local government. This inadvertently makes Chinese courts susceptible to governmental influences and pressures (Folsom 1992; Lin 2003; Chow 2003). Additionally, the Supreme People’s Court and other Chinese courts have limited enforcement and interpretation powers. The vagueness of Chinese laws, in turn, provides judges, local governmental officials and administrators with the opportunity to construe laws and regulations in a manner that will serve their personal interests (Lee 2004, 980).

Finally, the close nexus between the Chinese government and judiciary may be an important factor in explaining judicial corruption in the PRC (Lee 1997, xvi). Chinese judicial officials must report to the People’s Congress (Peerenboom 2001, 294). The People’s Congress has the power to remove judges (Peerenboom 2001, 214). Chinese courts’ dependency to the local governments, as well as, the People’s Congress authority to remove judges, is ultimately damaging to the autonomy
of the PRC's judicial system (Peerenboom 2001, 214). This leaves some scholars to view Chinese courts as a bureaucratic organ "and judges as government administrators or bureaucrats." (Peerenboom 2001, 161). This makes Chinese judges and courts impartial and more of an instrument susceptible to governmental influence. Governmental influence and interference further undermines the possibility of judicial independence within Chinese courts (Williams 2001), demoralizes public confidences (Keyuan 2002), and makes it difficult, if not impossible to enforce judicial awards (Lubman 1999; Clarke 2003). Governmental influence and interference is problematic because government officials have substantial power to use bribes or corrupt practices to advance their personal agendas within the Chinese judiciary.

The extent that judicial corruption still plagues the PRC's courts cannot be easily ascertained (Hung 2004, 106). However, an "[o]fficial report [states] that approximately 7,500 judges and other employees in China were punished for violating laws or disciplinary rules from 1998 to 2003" (Hung 2004, 106). It cannot be readily determined whether or not such punishments include, or were the result of, judicial corruption (Hung 2004, 106).
The PRC has tried to implement new rules and regulations to curtail corruption. However, many of these regulations were unsuccessful. Consequently, some Chinese citizens still perceive judicial corruption as a serious problem (Hung 2004, 107). Yet some regulations have enabled the PRC to reestablish confidence among the Chinese populace (Hung 2004, 112-113).

For instance, approximately 89% of senior Chinese officials are confident about the on-going political and judicial reforms, and feel that such reforms are "[p]roperly handling the relation between the [Communist Party] and government" (Survey; Nov. 29, 2004). One must critically examine the validity of these statistics and acknowledge that the reforms were primarily implemented to reduce the intermingling of the Communist Party with local government and Chinese judicial officials. Such statistical analysis, given by the Communist Party or Chinese officials, may be influenced by other variables such as corruption. According to Jian An, a former Chinese official, "[a]s long as . . . absolute leadership [is held] by the Communist Party, there can be no progress in democracy" and legal reforms (Holley; June 2, 1992).
THE PRC'S WTO MEMBERSHIP & JUDICIAL CORRUPTION

The PRC's accession to the WTO is often viewed as an additional incentive for the PRC to curtail judicial corruption. Providing an independent judicial system is a requirement for all signatory nation-states to the WTO (Lin 2003). Thus, it is important for the PRC to minimize governmental interference with its judiciary if it seeks to maintain its WTO membership (Lin 2003). Scholars remain skeptical about the PRC's ability to comply with WTO regulations.

One criticism among scholars is that the Chinese government and judiciary is so intertwined that judicial independence is almost nonexistent. In fact, a majority of Chinese judges are members of the Communist Party (Hung 2004, 122), which leaves judges susceptible to governmental influence and ultimately the PRC's corrupt culture (Zhang 2002). "While Article 5 of the [Chinese] Constitution states that no one is above the law, in practice the will of the Communist Party prevails over the rule of law" (Lee 2004, 982-983). Thus, many foreign parties are still skeptical about litigating in Chinese courts.
CHAPTER II

ALTERNATIVES TO LITIGATING IN CHINESE COURTS

INTRODUCTION

An alternative to litigating in Chinese courts is to resolve foreign or international disputes through the PRC's alternative dispute resolution systems (Synder 2001). Alternative dispute resolution in the PRC comes in three main forms: mediation, conciliation, and arbitration. Research indicates that the Chinese have a preference for mediation, but arbitration is the most common form of dispute resolution involving international parties.

Mediators, conciliators, and arbitrators impartiality and neutrality are essential to the PRC's alternative dispute resolution system. Additionally, these third party neutrals must remain independent from other governmental bodies and governmental influence. However, this is not always the case in practice.

MEDIATION

Parties use mediation in order to preserve privacy (Folsom 1992). Mediation in the PRC is often placed in two categories: informal (people's mediation) and formal
The central problem concerning informal mediation is that the decisions are not enforceable within Chinese courts. In addition, informal mediation (people's mediation) is susceptible to social and political pressures (Folsom 1992).

Formal mediation agreements, however, may be binding within Chinese courts. The Chinese government and judicial officials usually encourage people to mediate rather than litigating in Chinese courts (Lee 1997). Furthermore, Chinese courts often refer parties to formal mediation prior to the commencement of any litigation proceedings.

The popularity of mediation can also be coupled with a history of mediators pressuring participants of conforming to the mediators' recommendations. In post-revolutionary China, for instance, Mao Zedong used the PRC's mediation system to mobilize the Chinese populace to conform to the Chinese Communist Party's initiatives (Folsom 1992). Such measures made Chinese mediators susceptible to governmental influence and corruption. Today, some mediators still pressure parties to conform to their recommendations (Folsom 1992). It is debatable
whether or not this is due to Party initiatives or for mediators to personally "save face."

CONCILIATION

We must distinguish conciliation from mediation. Although both conciliation and mediation, in theory, involve neutral third parties, conciliators have little power to make recommendations for settlements (Folsom 1992). In cases involving international parties, conciliation is sometimes used in conjunction with arbitration proceedings (Onyema 2001, 413-414). Conciliation may be conducted at any point of the arbitration proceeding, unless an arbitration award is rendered (Onyema 2001, 414). Thus, conciliation is treated as part of the arbitration proceedings and is recorded accordingly (Onyema 2001, 414). Successful conciliations result in the signing of an agreement known as a conciliation agreement (Onyema 2001, 413-414).

There are some disadvantages to conciliation agreements. First, conciliation agreements lack res judicata (Onyema 2001, 414). The doctrine of res judicata would prevent an award or agreement from being reargued in Chinese courts (Blacks Law Dictionary 1996, 1306). "It is [also] doubtful if a conciliation
agreement executed by the arbitral tribunal would qualify as a final award for purposes of recognition and enforcement under the New York Convention” (Onyema 2001, 414). Some scholars are even skeptical about the enforceability of conciliation agreements within Chinese courts (Folsom 1992).

Additionally, Chinese governmental departments and officials can carry out conciliation proceedings (Cheng 1996, 291). This is problematic because Chinese governmental departments and officials may use conciliations to advance their own personal objectives. As a result of international concern of governmental entanglement with conciliations, the PRC created a centralized conciliation center in 1987. This center is called the Beijing Conciliation Center (Cheng 1996, 291). However, the PRC lacks laws that regulate conciliations or conciliator’s behaviors. The PRC also fails to penalize conciliators who accept bribes, from local governmental officials or individual parties, or who engage in other corrupt practices. This makes conciliations within the PRC an easy target for governmental abuse.
Arbitration is almost exclusively used to resolve disputes involving international parties within the PRC (Pattison 2003, 503; Mo 2001, 21). There are numerous advantages to using arbitration rather than litigation in the PRC. First, parties can avoid the corrupt culture underlying the PRC’s judicial and political infrastructure. Thus, arbitral independence and impartiality is important to Chinese arbitration systems (Hu 2001, 22).

Secondly, arbitration is a private, expedient, and cost efficient process to resolve international disputes (Martin 1997, 969). However, corruption and ineffective procedures and laws may impede on the PRC’s alternative dispute resolution systems’ ultimate goal—of providing parties a fair, reliable, and effective alternative to litigation.

CHAPTER III
THE HISTORY OF ARBITRATION

THE HISTORY OF ARBITRATION IN THE PRC

A brief examination of the PRC’s history is important to understand how the PRC’s arbitration systems
are institutionalized today (Mo 2001, 7). The PRC has endured centuries of social unrest and has struggled to maintain a "rule of law" within its legal system (Hamilton 2002). Such unrest motivated the Chinese populace to develop alternatives to litigating in Chinese courts (Hamilton 2002).

From early Confucius teachings, the Chinese populace sought to resolve their disputes outside the Chinese legal system (Mo 2001, 1). The PRC has now become well known for its extensive mediation and arbitration history. The history of mediation and arbitration within in the PRC is often referred to interchangeably. This is because "[m]ediation and arbitration were indistinguishable in ancient China" (Mo 2001, 7).

Consequently we cannot find an equivalent translation for the term we now consider 'arbitration' in ancient Chinese history. The discussion of the history or development of arbitration, thus, presupposes a discussion of the history of mediation in the PRC (Mo 2001, 7). It was not until the twentieth century when the PRC used the expression 'zhongcai,' the Western equivalent to 'arbitration' (Mo 2001, 7-8; Hamilton 2002, 10).
The expression ‘tiaojie,’ which is often referred to as the Western equivalent to mediation, was the dominant term used to describe ancient Chinese alternative dispute resolution. This supports the thought that the history of meditation and arbitration were indistinguishable (Mo 2001, 8). However, given the importance of definition, the history of arbitration in China largely depends on the understandings of the meaning of arbitration and mediation in the ancient China” (Mo 2001, 8).

In its early development of alternative dispute resolution, the PRC lacked specified rules and regulations to govern mediation and arbitration. Without such regulations, it was easy for the Chinese government to use its alternative dispute resolution systems to advance their personal or internal goals. In post-revolutionary China, for instance, mediators often served the interests of the Communist Party (Folsom 1992). The Communist Party merely sought to mobilize support for the ideological views of the Communist Party, rather than the interests of the participants involved (Mo 2001, 19). Mao Zedong, for instance, readily used the PRC’s mediation system to mobilize the Chinese populace to conform to the Communist Party’s initiatives (Folsom 1992). Chinese alternative dispute resolution systems
merely an authoritarian tool for the government to regulate the views of populace (McConnaughay 1999, 504).

During the 1920s the Communist Party adopted the PRC's first arbitration and mediation law. It was known as the Charter of Peasant's Association of Juqian (Charter) (Duncan 2002). "Article 5 of the Charter stated that disputes between members were to be arbitrated or mediated by the committee member in charge of arbitration or mediation, and that serious cases should be arbitrated and mediated by the committee" (Mo 2001, 19). Within the Charter, the Communist Party was authorized to establish the arbitration and mediation committees (Mo 2001, 20). This is problematic because of widespread corruption within the Communist Party itself.

CHAPTER IV

INSTITUTIONALIZATION OF THE PRC'S INTERNATIONAL ARBITRATION SYSTEMS

DEFINING INTERNATIONAL ARBITRATION

Parties frequently include international arbitration clauses in contractual agreements. In order to understand international arbitration one must first be familiar with the term 'arbitration.' There are numerous ways to define arbitration. Arbitration can be defined
as another form of "adjudication" (Davis 1998, 259). In addition, arbitration can be characterized as a formalized dispute resolution process where an authorized neutral third party renders a binding and finalized decision in order to resolve the parties' disputes (Harer 1999, 393).

International arbitration, in turn, may also be broadly defined as an alternative and efficient method for parties to resolve their disputes (Harer 1999, 393). The definition of the term 'international' may also vary depending on what statute, treaty, choice of law, or legal system the parties contractually agree to govern the arbitration proceeding (Carbonneau 2003, 1190).

For example, the UNCITRAL Model Law "defines arbitration as international if 'the parties to an arbitration agreement have, at the time of the conclusion for that agreement, their places of business in different States' (Article 1 (3))" (Fishburne 1997, 309). The French N.C.P.C. defines international arbitration to include anything that implicates international commerce (Park 1999, 823). Yet, other nation-states fail to differentiate between domestic or international arbitrations (Park 1999, 822).
International Arbitration in the PRC, is not explicitly defined (Fishburne 1997, 311; Wang 2000, 19). Instead, we must refer to the 1995 China Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules. This is also known as the 1995 CIETAC Arbitration Rules. The 1995 CIETAC Arbitration Rules states that the term 'international,' or 'foreign-related,' arbitration involves:

- economic, trade and other disputes, whether international or foreign related contractual or non-contractual, between foreign legal persons and/or natural persons and Chinese legal persons and/or natural persons, between Chinese foreign legal persons and/or natural persons, and between Chinese legal and/or natural persons in order to protect legitimate rights and interests of the parties concerned and promote the development of domestic and foreign economic relations and trade. (Fishburne 1997, 311-312).

This definition indicates that the PRC defines international arbitration broadly to include disputes arising out of a contractual agreement involving a foreign parties or entities.

There are some general disadvantages to international arbitration within the PRC. A well-recognized disadvantage is that international arbitration is generally unfettered or unregulated. Secondly, arbitrators are often immune from lawsuits and lack
revisions that dictate their professional conduct (Carbonneau 2003, 1201). Furthermore, it is difficult, or even impossible, to appeal or reverse an arbitration ruling. Thus, parties should become aware and understand not only the laws and regulations regarding arbitrating in the PRC, but also other variables that may affect the enforceability of such arbitral awards against local Chinese entities.

INTERNATIONAL ARBITRATION WITHIN THE PRC

Unlike many other countries, institutionalized arbitration has been in existence within the PRC for nearly forty-nine (49) years. The PRC’s first international arbitration system dates back to the mid-1950s (Qiu 2000, 608). The PRC’s Council for the Promotion of International Trade (CCPIT) established its first arbitration commission in 1956, called the Foreign Trade Arbitration Commission (FTAC) (Qiu 2000, 608).

In 1980, the FTAC was renamed the Foreign Economic and Trade Arbitration Commission (FETAC) (Qiu 2000, 608). The FETAC was subsequently identified as the China International Economic and Trade Arbitration Commission (CIETAC) in 1988 (Qiu 2000, 608). Since the establishment of the CIETAC and CMAC, in the mid-1950s,
arbitration has become the primary means for resolving disputes in which involve foreign parties (Mo 2001, 22). The CIETAC has adopted another name on October 1, 2000, the Court of Arbitration of China Chamber of International Commerce (CCOIC) (Qiu 2000, 608). The terms CIETAC and CCIC have been used interchangeably (Qiu 2000, 608). For purpose of this thesis, I will refer to the latter as CIETAC.

CHINA CHAMBER OF INTERNATIONAL COMMERCE (CCOIC)

Research indicates that the China Council for the Promotion of International Trade’s (CCPIT) relationship with the PRC’s arbitration systems was quite influential. The CCPIT was considered the empowering body of the PRC’s arbitration systems (Hu 2001, 14-15). The CCPIT has the authority to establish domestic and foreign-related arbitration commissions. Yet, it has only established two arbitration commissions: the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC) (Hu 2001, 14-5). In 1988, the CCPIT was renamed the China Chamber of International Commerce (CCOIC) and has maintained the role as China’s liaison per se for
disputes arising out of international commerce (Dejun, Moser, & Wang 1995).

The CCOIC is the main body of the arbitration commissions. With the authorization of the CCOIC, and the Chinese Arbitration Law, the Chinese Arbitration Commission (Arbitration Commission) was created (Dejun, Moser, & Wang 2000, 11). The Arbitration Commission was officially established, in 1994, to formulate rules and regulations for Arbitration Commissions throughout the PRC (Pattison & Herron 2003, 503).

The Arbitration Commission, in theory, is independent from the Chinese Communist Party (Brown & Rogers 1997, 338). Accordingly, the Arbitration Commission is seen as “a non-governmental, self-regulating organization of the Arbitration Commission” (Brown & Rogers 1997, 338). However, whether the Arbitration Commission acts as an independent entity in practice is debated among scholars (Brown & Rogers 1997; Claver-Carone 2002).

The CCOIC’s authority expanded with the implementation of the PRC’s 1994 Arbitration Law (Claver-Carone 2002, 378-379). “The 1994 Arbitration Law authorized the [CCOIC] to organize and establish foreign-related arbitration commissions in addition to local
commissions" (Claver-Carone 2002, 378; Hu 2001, 14). The 1994 Arbitration Law is silent on whether or not these local arbitration commissions are authorized to accept foreign-related or international disputes (Claver-Carone 2002, 379; Hu 2001, 15).

The General Office of the State Council provided some clarifications to this problem when it issued the 1996 Notice on Several Issues that Need to be Clarified in Order to Implement the Arbitration Law of the People's Republic of China ("1996 Notice") (Claver-Carone 2002, 379). The 1996 Notice stated that these local arbitration commissions were allowed to accept both foreign-related and domestic disputes (Claver-Carone 2002, 379; Hu 2001, 15). Since 2002, the CCOIC has organized approximately 401 local arbitration commissions (Claver-Carone 2002, 379).

However, the PRC has failed to create specific rules and regulations to supervise the enforceability of foreign-related or international awards within these local arbitration commissions (Claver-Carone 2002, 379). In addition, there are no ethical or administrative provisions that monitor whether local arbitrators are susceptible or influenced by local governmental officials or susceptible to the PRC's corrupt culture.
FRAMEWORK OF THE CHINESE ARBITRATION COMMISSIONS

The Arbitration Commission is comprised of one Chairman, several Vice-Chairman, a Secretary-General, and a Secretariat (Simpson, Thacher, & Barlett, LLP 2003, A8).

![Diagram of CCOIC, Chinese Arbitration Commission (CAC), Chairman of the CAC, Vice-Chairman(s) of the CAC, Secretary General of the CAC, and Secretariat of the CAC.]

Figure 2. COMPOSITION OF THE CHINESE CHAMBER OF INTERNATIONAL COMMERCE

The Chairman of the Arbitration Commission is responsible for making sure that the arbitration proceeding is consistent with the CIETAC Rules (Simpson, Thacher, & Barlett, LLP 2003, A6). The Vice-Chairman's duties are limited to the delegated duties vested to them by the Chairman of the Arbitration Commission. The Chairman of the Arbitration Commission may authorize the Vice-Chairman to perform the functions under the Chairman's duties (Simpson, Thacher, & Barlett, LLP 2003, A6). The Secretary-General monitors the duties of the Secretariat (Simpson, Thacher, & Barlett, LLP 2003, A6).
The Arbitration Commission's Secretariat is responsible for examining all applications for arbitration within the CIETAC (Simpson, Thacher, & Barlett, LLP 2003, A7). After a thorough examination of the application for arbitration the Secretariat will, if the application is completed properly, send both parties of the dispute a notice of Arbitration along with a copy of the CIETAC Rules, Arbitration Fee Schedule, and Panel of Arbitrators (Simpson, Thacher, & Barlett, LLP 2003, A7).

CHINA ECONOMIC AND TRADE ARBITRATION COMMISSION (CIETAC)

The Chinese Chamber of International Commerce (formerly CCPIT) established the CIETAC in 1956 (Hamilton 2002). The CIETAC has become one of the most utilized international commercial arbitration commissions in the world (Perez 2000, 494; Pattison & Herron 2003, 503; Martin 1997, 968). "In 1985, the ... CIETAC heard only 37 disputes; in 1995 it handled nearly 1000" (Synder 2001, 440). The popularity of the CIETAC can be associated with its respective jurisdictional requirements (Dejun, Moser, & Wang 2000, 11). The CIETAC handles a broad range of international and foreign-
related disputes including trade, maritime, and economic disputes (Fisherburne 1997, 311-312).

The CIETAC's popularity can also be linked with the fact that it is one of the only institutionalized alternatives that foreign parties have to litigating in Chinese courts. Additionally, the CIETAC's popularity can be associated with the presumed benefits in choosing arbitration over litigating in Chinese courts. The CIETAC provides parties with procedural flexibility. Thus, stringent rules of evidence and procedural formalities (e.g. preliminary meetings), like in some Western arbitration systems, may not be applicable in the CIETAC's arbitration proceedings (Dejun, Moser, & Wang 2000, 14). Foreign parties can agree to conduct arbitration proceedings in languages other than Mandarin or Cantonese Chinese (Martin 1997, 968; Dejun, Moser, & Wang 2000, 13). In addition, the CIETAC often renders awards with a comparatively expedient time frame (Dejun, Moser, & Wang 2000, 14). Furthermore, CIETAC proceedings are often less expensive than litigating in Chinese courts (Dejun, Moser, & Wang 2000, 14).
SELECTION OF CIETAC ARBITRATORS

Another benefit to the CIETAC is that parties have the ability to actually select the arbitrators to preside over the CIETAC arbitration proceedings. The CIETAC arbitration proceeding may be composed of either a panel of three arbitrators or a single arbitrator (Dejun, Moser, & Wang 2000, 21) from the Chinese Arbitration Commission (Simpson, Thacher, & Barlett, LLP 2003, A9). When a panel of three arbitrators is chosen, each party selects an arbitrator they wish to preside over their CIETAC arbitration proceedings (Simpson, Thacher, & Barlett, LLP 2003, A9). Then the parties must jointly agree on the selection of the third arbitrator.

If the parties fail to select a third arbitrator within twenty days after receiving notice of the CIETAC arbitration proceedings (Simpson, Thacher, & Barlett, LLP 2003, A9), then the Chairman of the Arbitration Commission is entrusted with the authority to appoint a third arbitrator. This is true even when the parties fail to give the Chairman of the Arbitration Commission such powers (Simpson, Thacher, & Barlett, LLP 2003, A9-A10).

Although the opportunity to appoint arbitrators to preside over the CIETAC arbitration proceedings exists,
the main authority to appoint an arbitrator for the CIETAC still lies within the CCOIC (Dejun, Moser, & Wang 1995). This is because the ultimate CCOIC has the authority to appoint arbitrators to the Chinese Arbitration Commission (Dejun, Moser, & Wang 2000). Parties, in turn, are limited to the Chinese Arbitration Commission in their arbitrator selection process.

The relationship between the CIETAC and the CCOIC may go even further. Members of the CCOIC are often Chinese officials. These Chinese officials may simultaneously hold, for instance, a Vice Chairman position within the CCOIC and also be the presiding arbitrator over a CIETAC arbitration proceeding. This is problematic because Chinese officials have a long history of corruption, deceptive practices, and governmental influence (Simpson, Thacher, & Barlett, LLP 2003, A6). Furthermore, it is debatable whether or not they can remain neutral throughout the arbitration proceedings if the parties decide to challenge the authority of the arbitrator. However, some scholars indicate that even though this close relationship exists between the CCOIC and the PRC’s arbitration system, they contend that arbitrators can still act independently in
spite of potential influences from the CCOIC (Dejun, Moser, & Wang 1995).

CHINA MARITIME ARBITRATION COMMISSION (CMAC)

The PRC increasingly emerged as a major maritime nation-state (Hamilton 2002). Consequently, the PRC faced international pressures to provide regulations to protect foreign traders. As a result, in 1952, the PRC attempted to draft and implement its first maritime law. This attempt was unsuccessful. Consequently, it took nearly forty years to enact its first maritime law (Hamilton 2002).

In the meantime, CCOIC established the Maritime Arbitration Commission (MAC) in 1958 to strengthen foreign confidence in the Chinese maritime industry (Hamilton 2002; Peerenboom 2000, 5). In 1988, the MAC was renamed the China Maritime Arbitration Commission (CMAC). The CMAC’s jurisdiction is limited to maritime law or disputes (Hamilton 2002). However, the CMAC does not have exclusive jurisdiction over maritime disputes because “CIETAC and local arbitration commissions are permitted to hear maritime cases” (Hamilton 2002).

The CMAC is comprised of approximately ninety-one (91) arbitrators (Peerenboom 2000, 6), who are
knowledgeable about maritime disputes and laws (Hamilton 2002). Its caseload is relatively smaller than the CIETAC (Carbonneau 2002, 789). This may be a result of the limitations to the CMAC’s jurisdiction, “averaging only fifteen to twenty-five cases per year” (Peerenboom 2002, 6). Although the CMAC hears a relatively small number of cases, this does not determine the wide-range of issues arising out of maritime contracts. Such disputes include, but are not limited to, bills of laden, marine insurance, pollution, towage, sales, repairs, building and dismantling vessels, contracts for fuel, and labor (Hamilton 2002).

CHAPTER V
THE RULES GOVERNING ARBITRATIONS IN THE PRC

THE CHINESE ARBITRATION LAW

Prior to 1994, the PRC lacked a regulatory or monitoring scheme for arbitration proceedings that involved international or foreign parties (Wang 1996, 6; Liu & Lourie 1995, 540; Hu 2003). “Rather, arbitration appeared to be regulated by a combination of central government decrees, statutes, referring to arbitration, regulations enacted by arbitration authorities, and
common practice" (Liu & Lourie 1995, 540). On August 31, 1994, the National People's Congress enacted the PRC's first arbitration legislation, known as the Chinese Arbitration Act (Hu 2003). This Act is also known as the Chinese Arbitration Law (Wang 1996, 11).

The Chinese Arbitration Law brought instrumental changes to the structure of the PRC's Arbitration Commissions (Dejun 2000, 7; Brown & Rogers 1997, 338; Wang 1996, 11). The Chinese Arbitration Law provided a basic framework for both domestic and international arbitrations (Dejun, Moser, & Wang 2000, 7). CHAPTER 7 and Articles 66 through 73 of the Chinese Arbitration Law provide special provisions that pertain only to foreign-related or international arbitrations (Dejun, Moser, & Wang 2000, 15). Article 66 of the Chinese Arbitration Law, for example, indicates that the China Chamber of International Commerce (CCOIC) may establish a commission of arbitrators when foreign concerns or foreign parties are involved within the arbitration proceeding (Arbitration Law, last visited Mar. 12, 2005).
The 1998 CIETAC Arbitration Rules (modification of the 1995 CIETAC Arbitration Rules) were formed in accordance with the Chinese Arbitration Law (Simpson, Thacher, & Barlett, LLP 2003, A4). Prior to the 1998 CIETAC Arbitration Law, the PRC's jurisdiction was quite limited to economic disputes. The 1998 CIETAC Arbitration Rules legitimizes the CIETAC's expansive jurisdiction. Article 2 of the 1998 CIETAC Arbitration Rules provides:

China International Economic and Trade Commission (CIETAC) . . . independently and impartially resolves, by means of arbitration, disputes arising from international or foreign-related, contractual or non-contractual, economic and trade transactions. The disputes stated in the proceeding paragraph include: (1) international and foreign-related disputes;

(Dejun, Moser, & Shangcheng 2000, 559).

The 1998 CIETAC Arbitration Law enables the CIETAC to arbitrate expansive foreign-related cases.

The 1998 CIETAC Arbitration Rules also explains the application process, proceedings, defenses, notices, and the authority of the Chinese Arbitration Commission (CAC or Arbitration Commission). Article 3 of the 1998 CIETAC Arbitration Rules indicates that the Arbitration Commission will accept cases "upon the written
application by one of the parties" (Simpson, Thacher, & Barlett, LLP 2003, A5-A7).

If a party disputes the validity of the arbitration agreement or the jurisdiction of the CIETAC, the 1998 CIETAC Arbitration Rules gives the Arbitration Commission authority to determine the validity of the issue at hand (Simpson, Thacher, & Barlett, LLP 2003, A5). The 1998 CIETAC Arbitration Rules are consistent with other international arbitration systems. Under the ad-hoc arbitration rules, found in the UNCITRAL Model Law, an arbitral tribunal or arbitration commission may provide rulings in cases regarding its own jurisdiction, "including any objections with respect to the existence or validity of the arbitration agreement' (Bowman 2000, 144). Likewise, the 1998 CIETAC Arbitration Rules allow the Chinese Arbitration Commission, who's members may also be arbitrating the case, to rule on its own jurisdiction.

This is quite controversial among scholars. Some fear that arbitrators may not be able to remain neutral if they conduct dual roles throughout the arbitration (e.g. arbitrator and decision-maker of jurisdiction). Secondly, some president arbitrators may be self-
interested (e.g. bribes) in the case and should not be able to decide their own jurisdiction.

Parties may contractually agree to modify the 1998 CIETAC Arbitration Rules in which their dispute may be arbitrated. This allows parties an avenue to avoid challenges to arbitrator impartiality by limiting members of their arbitration panel from deciding jurisdictional issues. Article 7 of the 1998 CIETAC Arbitration Rules states:

If the parties agree to submit their disputes to the Arbitration Commission for arbitration, it will be taken that they have agreed to the case being arbitrated under these Rules. However, if the parties have agreed otherwise, and subject to consent by the Arbitration Commission, the parties' agreement will prevail.

(Simpson, Thacher, Barlett, LLP 2003, A5) (emphasis added).

However, the parties' agreement is subject to the approval of the Arbitration Commission. Since the parties' agreement is subject to the consent of the Arbitration Commission, it is uncertain whether or not the parties' agreement to revise the CIETAC Arbitration Rules would be honored. One must further scrutinize the language of Article 7 of the CIETAC Arbitration Rules. In order to modify the CIETAC Arbitration Rules a party must not only demonstrate that there was an agreement.
among the parties, but also obtain the consent of the Arbitration Commission in order for that agreement to be honored. This places a heavy, and possibly unobtainable, burden on parties who seek to modify the CIETAC Arbitration Rules.

COMBINING ARBITRATION AND CONCILIATION

Arbitration, within the PRC, is sometimes combined with conciliation. Article 46 of the 1998 CIETAC Arbitration Rules provides:

If both parties have a desire for conciliation or one party so desires and the other party agrees to it when consulted by the arbitration tribunal, the arbitration tribunal may conciliate the case under its cognizance in the process of arbitration.


If the conciliation is successful, then a conciliation agreement is made (Bakovic 1999, 116). Then the CIETAC arbitrator will write an arbitration award in accordance with the conciliation agreement. (Bakovic 1999, 116).

The arbitration presides over both the arbitration and conciliation proceedings.

“The crucial question is, 'How does the same person act both as [conciliator] and arbitrato in the same dispute without offending these rules of due process?”"
(Onyema 2001, 416-417). Many scholars believe that it is difficult to maintain neutrality when presiding over the same dispute while acting in diverse roles (Onyema 2001, 416-417). The same is true if a Chinese judge was presiding over a case and decided to send the dispute to mediation. The Chinese judge, in turn, should not play the role of the mediator due to fear of that the judge will not remain neutral throughout both proceedings. This example can also be applied in cases where an arbitrator serves in multiple roles (e.g. conciliator, trier-of-fact) because the arbitrator may incorporate information obtained in one proceeding into in his or her deliberations of the arbitration award. Thus, a separate entity should act as a conciliator and arbitration.

ARBITRATION SUB-COMMISSIONS

The CIETAC Arbitration Rules also gives the Arbitration Commission, whose headquarters are in Beijing, the authority to create Arbitration Sub-Commissions (Sub-Commissions) (Simpson, Thacher, & Barlett, LLP 2003, A5). To date, the CIETAC has only established sub-commissions in Shenzhen and Shanghai handle international and foreign-related arbitrations.
The sub-commissions are, in theory, considered "an integral part of the arbitration commission" (Dejun, Moser, & Wang 2000, 37). But it is debatable whether the Arbitration Commission in Beijing can effectively monitor the arbitration commissions in different Chinese provinces. It is argued that the local or arbitration sub-commissions should have the capacity to monitor the arbitration proceedings within that province. However, as we can see in the Chinese legal system, the implementation of laws, rules, and regulations may vary from province to province.

CHAPTER VI
ENFORCEMENT OF ARBITRATION AWARDS

The Chinese Arbitration Law does not contain a provision regarding the enforcement or enforceability of foreign arbitration awards. Instead it relies on the Chinese Civil Procedure Law (Claver-Carone 2002, 380; Dejun, Moser, & Wang 2000, 28). Article 206 of the 1991 Chinese Civil Procedure Law states that the People's Court may refuse enforcement of an arbitral award if a party presents evidence that:
(1) the parties neither included an arbitration clause in their contract nor subsequently reached a written arbitration agreement; (2) the party against whom the application for enforcement is sought was not requested to appoint an arbitrator or to take part in the arbitration proceedings or such party was unable to present its case due to reasons for which it was not responsible; (3) the composition of the arbitral tribunal or the arbitration procedure was not in conformity with the applicable rules of arbitration; or (4) the matters decided in the award exceeded the scope of the arbitration agreement or fell outside the competence of the arbitration organization.


Such grounds for refusing to enforce an arbitral award mirrors the grounds states within Article V, Sections 1 and 2 of the New York Convention (Harpole 1998). In theory Chinese arbitration systems should enforce arbitration awards outside these elements.

A party seeking to enforce or set aside an arbitral award under the Article 206 of the Chinese Civil Procedure Law must first file a claim with the Intermediate People’s Court (IPC) (Fishburne 1997, 333). Once the IPC has refused to enforce a foreign arbitration award rendered by the CIETAC or CMAC, the party must either request a new arbitration or file an action within the Supreme People’s Court (SPC) (Liu & Lourie 1995, 551). The SPC may rule that the foreign arbitral award
should be enforced. However, the SPC, as described above, does not have any authority to force parties to abide by this decision. Thus, parties may either ignore the SPC’s decision altogether or take an indefinite time to abide by the court’s decision.

SOCIAL AND PUBLIC INTERESTS

Chinese courts may also refuse to enforce arbitration awards if it is inconsistent with ‘social and public interests’ (Claver-Carone 2002, 398). This is commonly referred to as the public policy exception. This public policy exception is quite vague, and the standard for applying this public policy exception may vary from case-to-case (Claver-Carone 2002, 400).

CHAPTER VII

LOCAL PROTECTIONISM

THE HISTORY OF LOCAL PROTECTIONISM IN THE PRC

The term ‘local protectionism’ was associated with the PRC in the late 1980s. This is when reports of the internal trade barriers were prevalent throughout the PRC (Rawski 2005, last visited Mar. 13, 2005). The term local protectionism is not limited to economic or
microeconomic problems. Instead, local protectionism also describes policy implementation problems, the judicial integrity and enforcement (Rawski 2005, last visited Mar. 15, 2005).

Local protectionism in Chinese courts affects the integrity of judicial officials and the enforceability of judicial awards. "Local protectionism in judicial affairs can be defined in two ways. In the narrow sense, it refers to the practice of a local court being partial to and siding with a local litigant in handling a case that involves litigants from two different localities" (Yang last visited Mar. 13, 2005). As a result, there have been significant problems with courts enforcing arbitration awards against local Chinese parties or entities. (Yang last visited Mar. 13, 2005).

Even if Chinese courts rule to enforce an arbitration award, local protectionism among local governmental officials prevent the implementation of such rulings. Official statistics indicate that between 1995 and 1998, alone, the Chinese courts reported that in approximately 3,473 cases, there was a refusal to comply with the court's ruling (Yang last visited Mar 13, 2005). Over 2,378 police officers, which responded to this problem, were wounded during their attempts to make the
parties comply with the court’s ruling. Four of these officers were actually killed (Yang last visited Mar. 13, 2005). "At the end of June 1999, some 850,000 court rulings with a face value of more than 259 billion yuan awaited execution" (Yang last visited Mar. 13, 2005).

**LOCAL PROTECTIONISM IS A PROBLEM FOR ARBITRATIONS**

Although there are arbitration rules and the Arbitration Commission that dictate arbitration proceedings (Dejun 2000, 23), there is still a problem with local protectionism (difang baohu zhuyi) throughout Chinese arbitration systems. Local protectionism is commonly found when foreign parties try to enforce an arbitration award against a Chinese or Chinese-based party (Peerenboom 2001, China Review). Since Chinese arbitration systems do not have the power to force parties to adhere to its arbitration awards or rulings, parties must seek the assistance of Chinese courts. Unfortunately, Chinese courts and local governmental officials often refuse to enforce such awards because of local ties and personal interests with local Chinese entities (Peerenboom 2001, 215).

Since the local government in the PRC has a substantial influence on the enforceability of judicial
and arbitral awards their unwillingness to enforce such awards is critical. This is because local governmental officials are often appointed to serve as judicial officers or have ties to the government (Yang last visited Mar. 13, 2005). Local governments are often unwilling to enforce judicial and arbitration awards by foreign parties because they seek to protect the ties that they have with a local entity or party (Lee 2004, 984-985).

Local protectionism enables the local government to side with Chinese parties because they have a stake in the survival of the local entity. As we acknowledge the downfalls of local protectionism within the PRC, we must also examine how the PRC is attempting to remedy this problem. With the challenge to local protectionism, the PRC has moved towards regional specializations (Bai & Tao last visited Mar. 13, 2005).

Since the local government in the PRC has a substantial influence on the enforceability of judicial and arbitral awards their unwillingness to enforce such awards is critical. This is because local governmental officials are often appointed to serve as judicial officers or have ties to the government (Yang last visited Mar. 13, 2005). Local governments, thus, are
unwilling to enforce judicial and arbitration awards by foreign parties because they seek to protect the ties that they have with a local entity or party (Lee 2004, 984-985).

Local protectionism enables the local government to side with Chinese parties because they have a stake in the survival of the local entity. As we acknowledge the downfalls of local protectionism, we must also examine the PRC’s attempts to prevent local protectionism from spreading from the Chinese judiciary to its arbitration systems. The Chinese Arbitration Law attempts to curtail local protectionism from spreading from the Chinese judiciary to the PRC’s arbitration systems. “Article 8 of the [Chinese Arbitration] Law requires that arbitration should be conducted independently, according to the law and free from any interference from the administrative authorities, social organizations or individuals” (Beaumont 1995, 22).

Despite the proclamation of independence in the Chinese Arbitration Act, it is debatable whether such autonomy exists in the Chinese legal and arbitration systems. The Chinese arbitration system, like the Chinese courts, suffers from local protectionism (Harer 1999, 394). Yet, local protectionism is only one
obstacle in which foreign parties must face when seeking to enforce an arbitration award against a Chinese party (Peerenbom 2001, 279). Parties must also consider procedural problems that may affect the enforceability of the arbitration award.

CHAPTER VIII
PROCEDURAL PROBLEMS

PROCEDURAL PROBLEMS

There may be procedural problems that foreign or international parties may face when they attempt to enforce or appeal an adverse arbitration award against a Chinese or China-based party. A common procedural problem one may face in arbitration is that the parties’ lacked notice of the arbitration proceeding. Secondly, the jurisdiction over the arbitration proceeding is also a procedural problem that parties may face. Furthermore, the perceived enforceability of the arbitration award is of great importance to parties who undergo costly and long arbitration proceedings.
Arbitration, in theory, is an expedient and cost efficient process. Additionally, arbitration proceedings are independent from other governmental bodies and influence. However, this is not always the case in practice. In the PRC, arbitration proceedings are intertwined with the Chinese Communist Party and judicial system. This relationship makes it difficult for the PRC's arbitration system to be completely independent. Sequentially, this relationship also makes the PRC's arbitration systems susceptible to governmental influence and the PRC's corrupt culture.

The PRC's arbitration systems lack power to compel parties to adhere to its arbitration awards or rulings. Parties must rely on Chinese courts to administer justice and enforce arbitration awards. Chinese courts also lack power to require parties to comply with its rulings. So even if Chinese courts rule that an arbitration award should be enforce, it cannot oblige parties to follow their judicial decisions. Additionally, there isn't an explicit speed in which a judicial ruling must be applied. Thus, foreign parties are at the mercy of the
Chinese Communist Party and local governments to apply such rulings and arbitration awards.

Local protectionism by the Chinese Communist Party and local governments can prevent the implementation of arbitration awards. Since local Chinese entities may be affected by the implementation of a particular arbitration award, the Chinese Communist Party and local government indefinitely avoid implementing the arbitration award.

As a political and legal scholar, I would advise parties to first and foremost contractually agree to an arbitration forum outside the PRC. If this is not possible, then parties should contractually agree to establish a panel of three arbitrators to oversee the arbitration proceeding and a separate panel to decide any disputes arising out of the agreement to arbitrate and jurisdictional issues. This will, for the most part, ensure the neutrality of presiding arbitrators.

I also advise parties to establish a contract that has a combination of arbitration and conciliation for more complex international transactions. There have not been any reported cases of corruption or governmental influence in Chinese conciliation procedures. However, I would advise, as stated above, that the parties elect a
separate panel from the Arbitration Commission to preside
over the conciliation proceedings.

Additionally, I would advise parties to research the
enforceability of prior arbitration awards with foreign
companies within the PRC. This will give parties an
idealistic view of the possibility that their arbitration
awards will be enforced in the future or to contractually
agree on other methods to resolve their disputes.

Finally, parties should research Chinese
confidentiality rules and exceptions to confidentiality
in the PRC's alternative dispute resolution systems in
order to make sure that conciliators, presiding
arbitrators, and other Arbitration Commission members
cannot share information about the same case. This is
important if parties seek to avoid challenges to
impartiality of arbitrators presiding over arbitration
proceedings.

Parties can avoid the hassle of either litigating in
Chinese courts or arbitrating in the PRC altogether by
engaging in settlement negotiations. In such cases, we
can observe parties negotiating a settlement without the
assistance of Chinese courts. Of course, with any
negotiations or settlement agreements each party usually
has to make concessions. Such concessions may mean that
a party will only be able to obtain a portion of what is owed to them. For instance, "in 70% percent of the settlement cases, the applicant was able to recover at least 75% of the award. Other compromises included accepting yuan (RMB) rather than foreign currency, or agree to offset the amount owed against future purchases from the respondent" (Peerenboom 2001, 281).

Ultimately parties must be aware that corruption, local protectionism, ineffective procedures, and governmental influence may impede on international arbitration’s ultimate goal - of providing parties a fair, reliable, and effective alternative to litigation. Parties must thus consider alternative to arbitrating in the PRC.


Black’s Law Dictionary 1306 (5th ed. 1996)


