

8-3-2009

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**“The Diligent Will Be Shown the Path to Heaven”
China’s Implementation of the UN Sales Convention Through Arbitral Tribunals¹**

Mark R. Shulman* and Lachmi Singh**

It is better to die of starvation than to be a thief; it is better to be vexed to death than to bring a lawsuit. In death avoid hell; in life avoid the law courts.²

Chinese Proverb

PART ONE: China’s Legal System and the CISG

1.1 Introduction

Over the past thirty years, the People’s Republic of China (the “PRC”) – with its enormous population,³ rapidly developing economy, and particularly its astounding industrial capacity – has transformed the world’s economy while rapidly developing and reforming its own institutions. Even more noticeably since its accession to the World Trade Organization (the “WTO”) on December 11, 2001, China’s effects on the global system of trade have been immense. China ranks third worldwide among nations engaged in the import and export of merchandise.⁴ In the area of merchandise trade⁵, consisting of agricultural products, fuels

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¹ © Mark R. Shulman and Lachmi Singh, 2009. All rights reserved. The authors are grateful to Albert Kritzer, Executive Secretary of the Pace Institute for International Commercial Law, for introducing them to each other and for proposing a project this topic. Mark Shulman is also grateful to the faculty of the Wuhan University Institute of Law and the China Society of Private International Law which served as gracious hosts for an international seminar co-sponsored with Pace on The Application and Interpretation of the CISG in Member States with Emphasis on Litigation and Arbitration in the P.R. China (October 13-14, 2007). In particular, his understanding of private law in China was greatly enhanced by presentation by and conversations with Professor Huang Jin, Vice President of Wuhan University and President of the China Society of Private International Law and with Professor Guo Yujun. Lachmi Singh would like to thank Thomas Klitgaard of Dillingham & Murphy LLP for his invaluable help and input on arbitration in the PRC.

² J. A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201 Also see T. Klitgaard presented at Mealey’s Product Recall Conference: *Made in China and Beyond* December 10-11, 2007 (Washington, DC).

³ China Population Information and Research Center., available at: <<http://www.cpirc.org.cn/en/eindex.htm>> Accessed: March 28, 2008.

⁴ World Trade Organisation., available at: <<http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CN>> Accessed: March 28 2008.

and mining products and manufactured products, China commands an eight percent share of the world's total exports and over six percent of the world's total imports.⁶ And with long-standing growth rates near ten percent, the Chinese economy is a key driver for development around the world.

Such fast growth and hefty levels of trade have significant implications for the development of sales law and for the PRC's own rule of law system. It is evident to any lawyer that with such enormous amounts of transactions, myriad disputes are certain to follow. In fact, numerous high-profile suits have come to light – most notably when non-conforming goods pose consumer safety concerns. Indeed, during 2007-08, one could hardly turn on the television news or open the newspaper without finding yet another case arising from unsafe products, which had been manufactured in China. Products ranging from melamine, heparin, pet food, tires, toothpaste and toys have all been recalled because dangers to consumers had been discovered.⁷ In 2007, the last year for which reliable figures are available, the European Union reported some 440 different products from China to be unsafe for consumer use.⁸ The Chinese government has responded to the resulting backlash from foreign importers by declaring a 'special battle' against poor product quality. Vice-Premier Wu Yi, head of a Cabinet-level panel on food safety and quality stated, "This is a special

⁵ The share in world total exports and imports of merchandise is broken down by main commodity group: Agricultural products refer to food and raw materials, Fuels and Mining products include ores and other minerals; fuels and non-ferrous metals. Manufactures refer to iron and steel, chemicals, other semi-manufactures, machinery and transport equipment, textiles, clothing and other consumer goods.

⁶ World Trade Organisation., available at:

<<http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CN>> Accessed: March 28 2008.

⁷ The news about tainted products from China has become so frequent and important that the *New York Times* website includes a special page dedicated to surveying it:

http://topics.nytimes.com/top/reference/timestopics/subjects/c/consumer_product_safety/china/index.html. See also, David Barboza, *China Orders New Oversight of Heparin, With Tainted Batches Tied to U.S. Deaths* N.Y. TIMES (March 22, 2008); David Barboza, *China Begins Inspections of Ingredient Tied to Tainted Pet Food*, N.Y. TIMES (May 5, 2007); Andrew Martin, *Chinese Tires Are Ordered Recalled* N.Y. TIMES (June 26, 2007); David Barboza, *China to Revise Rules on Food and Drug Safety* N.Y. TIMES (June 7, 2007); Louise Story & David Barboza *Mattel Recalls 19 Million Toys Sent From China* N.Y. TIMES (August 15, 2007).

⁸ *China Declares War on Unsafe Products*, ENV. NEWS SERVICE. August 24, 2007, available at: <<http://www.ens-newswire.com/ens/aug2007/2007-08-24-01.asp>> Accessed: March 31 2008.

battle to protect the safety and interests of the general public, as well as a war to safeguard the made-in-China label. . . .”⁹ While Chinese authorities scramble to implement new safety and product standards regulations, there are still outstanding issues arising from these unfortunate cases; some of these appear to be currently pending in courts and arbitral tribunals across China.

The United Nations Convention on Contracts for the International Sale of Goods (1980) (hereinafter referred to as the “CISG” or the “Convention”) has been in effect in China since January 1, 1988, and provides the default scheme regulating all eligible international sales of goods transactions between parties within Contracting Member States.¹⁰ The Convention’s significance can hardly be over-stated given that China’s largest trading partners are the United States, the European Union,¹¹ and the Republic of Korea, each of which is a Contracting State under the CISG.

In contrast to most scholarly material written on the CISG which focuses on the decision-making of national courts,¹² this article examines decisions made by panels of a particular arbitral association – the China International Economic and Trade Arbitration Commission (“CIETAC”).¹³ Many contracting parties choose arbitration as their preferred method of dispute resolution because they appear to offer efficiencies of speed and costs, as well as the advantages of courts because their decisions are binding and enforceable in the domestic courts pursuant to the terms of the 1958 Convention on the Recognition and

⁹ *China Declares War on Unsafe Products* ENV. NEWS SERVICE. August 24, 2007, available at: <<http://www.ens-newswire.com/ens/aug2007/2007-08-24-01.asp>> Accessed: March 31 2008.

¹⁰ The PRC has made an Article 95 CISG declaration and is therefore not bound by Article 1(1)(b) of the Convention. See: <http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html>

¹¹ All EU members are states parties to the CISG with the notable exceptions of the United Kingdom, Ireland, and Portugal.

¹² See the UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods <http://www.cisg.law.pace.edu/cisg/text/digest-toc.html>.

¹³ See: http://www.cietac.org.cn/english/introduction/intro_1.htm.

Enforcement of Foreign Arbitral Awards (the “New York Convention”).¹⁴ These nominal advantages appear to be particularly applicable in China where courts have long been considered susceptible to the vicissitudes of corruption or political influence. CIETAC is one of the largest and most important arbitration institutions in China. And while both China and arbitration itself are generally regarded as employing relatively opaque decision-making, we are fortunate to have available and in translation access to reasoned opinions issued as a result of over 300 arbitrated disputes involving the application of the CISG in China. Professor Albert H. Kritzer and his colleagues in the Pace Law School Institute of International Commercial Law have collected these decisions directly from CIETAC and had them meticulously translated before posting them on the Institute’s website.¹⁵ These decisions appear to be particularly indicative of the state of the law because of the 345 reported Chinese cases applying the CISG, 290 of these were CIETAC awards.¹⁶

This article will examine the role of CIETAC in China’s dispute resolution system, discussing its practices, procedures, and some of the problems which have arisen in regards to settling disputes with foreign parties. It then proceeds to examine decisions reached in the cases dealing with defective and unsafe products and discusses how this might impact the decisions in those disputes currently pending before the tribunal.¹⁷ It concludes with a more wide-ranging discussion of the implications of our findings for the development of the rule of law in China. Comparing the situation today to conditions thirty years ago when the PRC launched its massive post-Mao reforms, we conclude that the glass is at least half full and

¹⁴ The New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards) has been acceded to by 143 countries as of November 25, 2008. The Convention came into force for China as of April 22, 1987. See: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

¹⁵ This number is an indication of those cases which are accessible and translated on the Pace database. For a recent description of these cases and this database, see Albert H. Kritzer, *Application and Interpretation of the CISG in the P.R. of China – Progress in the Rule of Law in China* 40 U.C.C. L. J. Professor Kritzer has also conducted a statistical analysis of the first 290 reported cases these figures are presented in section 2.6

¹⁶ <http://www.cisg.law.pace.edu/cisg/text/casecit.html#china> Accessed: June 10, 2009. See also F. Yang, *CISG in China and Beyond*, 40 U.C.C. L. J. 3 (2008) Art .5.

¹⁷ China March 30, 1999 CIETAC Arbitration proceeding (*Flanges case*), available at: <http://cisgw3.law.pace.edu/cases/990330c2.html>.

generally becoming fuller – at least for the peaceful and just resolution of international commercial disputes. Moreover, we believe that the development of reliable and increasingly fair commercial arbitration is likely to have beneficial effects throughout China.

1.2 Legal System in China

One cannot sensibly commence an examination of the procedures and practices of the arbitral system in China without first briefly discussing the political, legal and economic situations as they shape the circumstances in which arbitration arises. Since the end of the Revolution in 1949, the political branches and the interests they represent have systematically dominated China's legal apparatus. Since the death of Mao Zedong in 1976, however, the PRC has undergone spectacular transformations, including the establishment of a less personal and more institutionalized and codified system of laws. Although the change has been dramatic and meaningful, the will of the Chinese Communist Party (the "CCP" or the "Party") still pervades the legal apparatus, both officially and unofficially. The legal system in China now operates on a five-tiered governmental structure with central, provincial, municipal, county and village levels. These five different tiers are designated with political, legislative, governmental, administrative and judicial responsibilities at their respective levels, each complete with its own institutions.¹⁸ Likewise, the Party has branches in all levels of state affairs. At the apex, the Supreme People's Court is responsible to the National Party Congress and its Standing Committee. Likewise, the budgets of each of the local People's courts are subject to the approval of the respective local governments, and it seems logical to deduce that these judicial bodies are subject to interference from the government.¹⁹ In addition, the vice-presidents of the Supreme People's Court and other top level members and judges are usually appointed by the National Party Congress, making the lines of judicial

¹⁸ K. WANG, CHINESE COMMERCIAL LAW (2005) 14.

¹⁹ K. WANG, CHINESE COMMERCIAL LAW (2005) 26.

impartiality even harder to distinguish. Thus, even though Article 126 of the Constitution of the PRC states, “[t]he people’s courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals,” in practice this is not always the case.²⁰ Because of the integrated nature of this framework, many have criticized the government for its continuing failure to provide for a more thorough separation of political and judicial functions, a shortcoming that seems inevitably to lead to the subjugation of the resolution of individual disputes to political pressure.²¹ Typically such interference involves members of the judiciary and the government working together to protect their own interests (as opposed to an entirely objective application of the facts presented to the law).²²

The professionalization of the judiciary – increasing its capacity, integrity and political independence – is proceeding unevenly and from a very low base line. Chapter III of the Organic Law of the People’s Courts of the PRC sets of the eligibility criteria for judicial personnel of the People’s courts. Specifically, Article 34 states, “[c]itizens who have the right to vote and to stand for election and have reached to age of 23 are eligible to be elected presidents of people’s courts or appointed vice-presidents of people’s courts, chief judges or associate chief judges of divisions, judges or assistant judges; but persons who have ever been deprived of political rights are excluded.” This article was amended in 1983 to add a requirement for office: “[j]udicial personnel of people’s courts must have an adequate knowledge of the law.”²³ It seems that prior to this reform in the 1980s, legal knowledge was not considered a priority, let alone a requirement, for eligibility to serve as a member of the judiciary. Instead, the emphasis had been placed on the political qualifications of candidates, including such apparently irrelevant factors as service in the People’s Liberation Army. As

²⁰ XIAN FA art. 126 (P.R.C.)

²¹ See K. WANG, CHINESE COMMERCIAL LAW (2005) 16.

²² K. WANG, CHINESE COMMERCIAL LAW (2005) 27.

²³ Organic Law of the People’s Courts (P.R.C.). This paragraph was added on September 2, 1983.

recently as twenty years ago, a mere 10% of judges had enjoyed higher education in the law.²⁴ More recent statistics offer signs that the situation is improving, but of the approximate 200,000 judges in the PRC only 50% of those had a university degree of any sort.²⁵ The government has recognized that the lack of formal judicial training has had a negative impact on the nation's international business dealings.²⁶ It has been argued that without a proper legal education, judges often struggle to cope with decisions involving complex legal issues such as intellectual property rights.²⁷ To address these problems, all judges must now pass an examination of domestic administrative, civil and criminal law. However, their knowledge of private international law remains an issue of significant concern, particularly for those who recognize its importance for developing China's economy. As a result of this growing recognition, the P.R.C. is implementing new initiatives to offer judges the chance to complete an LL.M. at City University in Hong Kong. This program is thought to provide a significant improvement on the existing level of international law expertise of the judges.²⁸ The results of this and similar initiatives will require more time to take effect, particularly in light of the large number of judges to be trained and the costs involved.

In addition to these factors it has also been noted by observers that many of the legal proceedings that take place in the courts often lack some measure of transparency, sometimes even failing to disclose what rules apply.²⁹ And with this opacity and the pervasiveness of the Communist Party, politics – and all too often the material interests of influential people – frequently prevail over an impartial application of the law. Nor is it of much reassurance to a

²⁴ H. Zhou, *The Re-establishment of the Chinese Legal System: Achievements and Disappointments* (1991) 10 CIV. JUST. Q. 55.

²⁵ B. Liebman, *Judges Becoming Judges? Judicial Innovation in China*, FIRST ANNUAL CONFERENCE: CHINA LAW STUDIES IN EUROPE (2007).

²⁶ L Zhang. *Hong Kong launches Masters program for mainland judges* <http://asia.legalbusinessonline.com/news/breaking-news/32198/details.aspx> (January 23, 2009).

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ D. Livdahl, *International Arbitration in the PRC*. Paul, Hastings, Janofsky & Walker, LLP (2006).

non-Chinese trader to read that, “[l]aws and regulations have to be understood in this wider context of a society in which the formal legal position is only one consideration and still often not the most prominent.”³⁰ The difference between the Westerner’s formalistic approach to the rule of law and that of the Chinese is further illustrated in the ways that contracts are perceived. For example, according to some experts the Chinese may see a contract not as a legal binding document with predictable legal consequences. Rather it is seen as a way to express willingness to co-operate and enter into a friendly relationship.³¹ Westerners tend to view the wording of the contract as the decisive factor when faced with a dispute interpretation (*pacta sunt servanda*). This however is not the case from the Chinese point of view. Chinese businesspeople tend to shy away from detailed clauses within the contract, especially where this would weaken their position. Instead it is the negotiation process which is given greater influence, it is argued that as a result it would be best to keep detailed notes of all negotiations however informal the exchange.³² Furthermore subsequent amendments and cancellations of the contract after final approval has been given is not unheard of. Westerners are advised not try to resort to making claims based on the breach of specific contractual terms as this is seen as a breakdown in relations between the parties.³³ This difference in attitude can be summed up in the Chinese Proverb, “It is better to keep a friend than to win a victory.”³⁴ Notwithstanding this difference of approach to the deal, Westerners and Chinese still manage to conduct enormous volumes of business successfully; however Westerners should bear these differences in mind when assessing risks and opportunities of a given transaction or relationship.

³⁰ A. Tay & C. Leung, (eds.) *Introduction: The Relation between Culture, Commerce and Ethics* in GREATER CHINA: LAW SOCIETY AND TRADE (Law Book Coy) 7 (2005).

³¹ K. WANG, CHINESE COMMERCIAL LAW (2005) 37. And see, Patricia Pattison & Daniel Herron *The Mountains are High and the Emperor is Far Away: Sanctity of Contract in China* 40 AM. BUS. L. J. 459, 460. (“From the Chinese perspective, the ‘final’ contract signifies that a relationship exists and terms-negotiations may now continue. The ‘final’ contract signals the beginning for real contract negotiations.”)

³² K. Bucknall, *Chinese Business Etiquette and Culture*, 116 C&M Online Media, Inc (2002).

³³ *Ibid*, 118

³⁴ J. A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201 (1966).

Non-Chinese parties often struggle under the dual burden of being not only unfamiliar with the substance of Chinese law but also not knowing where to find it. This is most evident in the law governing contracts. In addition to the much-lauded *Contract Law* which came into force in 1999, there are other ‘hidden’ sources of laws governing contracts in the PRC that may not be easily discernable to foreigners.³⁵ Curiously, although contractual issues constitute a relatively small part of the Civil Code, it does bear significant influence in how courts go about interpreting contracts.³⁶ Professor Li argues that these provisions are general in nature and can often be confusing as to their actual meaning, as they rarely serve to define parties’ responsibilities in cases of breach.³⁷ Another ‘hidden’ source of law is the role of precedent in contract law. Precedent lacks a vital role in the PRC, in great part because most decisions are not reported.³⁸ Because these decisions will have to meet the approval of the Ministry of Propaganda before being released, few decisions that are made public are done so in order to satisfy a political rather than a legal agenda.³⁹ Lastly, foreigners have to contend with a multitude of regulations and ordinances handed down by the various levels of administrative bodies.⁴⁰ These laws could affect the outcome of a contractual dispute depending on where the case is heard. In order to determine the proper outcome, a court would need to examine the relevant ordinances at all levels of government.⁴¹ Foreigners would find it exceedingly difficult to access this information, as they are often only published

³⁵ G. Li, *The PRC Contract Law and Its Unique Notion of Subrogation*. 4:1 J. INT’L COMM. L. & TECH. 14 (2009).

³⁶ G. Li, *The PRC Contract Law and Its Unique Notion of Subrogation*. 4:1 J. INT’L COMM. L. & TECH. 14 (2009).

³⁷ G. Li, *The PRC Contract Law and Its Unique Notion of Subrogation*. 4:1 J. INT’L COMM. L. & TECH. 14 (2009). See for example: Clause 113 in the Civil Code which provides “If both parties breach the contract, each party shall bear its respective civil liability.” CIVIL CODE cl. 113 (P.R.C.).

³⁸ G. Li, *The PRC Contract Law and Its Unique Notion of Subrogation*. 4:1 J. INT’L COMM. L. & TECH. 14 (2009).

³⁹ G. Li, *The PRC Contract Law and Its Unique Notion of Subrogation*. 4:1 J. INT’L COMM. L. & TECH. 15 (2009). See also, J. H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT’L L. 329 (2006).

⁴⁰ G. Li, *The PRC Contract Law and Its Unique Notion of Subrogation*. 4:1 J. INT’L COMM. L. & TECH. 16.

⁴¹ G. Li, *The PRC Contract Law and Its Unique Notion of Subrogation*. 4:1 J. INT’L COMM. L. & TECH. 16.

in Chinese.⁴² Even this cursory examination of the challenges posed by China's courts system demonstrates why foreign investors are reluctant to enter into legal proceedings where they can encounter unfair practices, opaque procedures and unfamiliar rules which may result in costly mistakes. Because trade with China is important for becoming and remaining competitive and to avoid the pitfalls of the formal legal system, traders frequently incorporate arbitration clauses into their sales contracts in order to ensure access to the most appealing process possible for resolving commercial disputes. Likewise, Chinese companies themselves often prefer such alternative dispute resolution mechanisms to resolve legal issues, as they too appear to mistrust the reliability and efficiency of resolution through the traditional court systems.⁴³

Over the past thirty years the Chinese government has made progress towards developing a rule of law. While the PRC may not adhere closely to the Western conceptions of the rule of law, it has gone some distance in achieving this goal.⁴⁴ In fact, taking into account the abject lack of truly legal institutions in the PRC before the reforms began, then we can fully appreciate the advancements made in developing its institutions and legal rules in a relatively short space of time.⁴⁵ At the same time, a robust arbitral system has been created to fill gaps and facilitate trade.

⁴² G. Li, *The PRC Contract Law and Its Unique Notion of Subrogation*. 4:1 J. INT'L COMM. L. & TECH. 16.

⁴³ Total number of arbitrations filed in 2005: 48,339 *China An Emerging Maritime Jurisdiction: Recent Trends Pointing to a New Regime*, Peter Murray Ince & Co, Shanghai International Law Firm Available at: http://esvc000873.wic005u.server-web.com/docs/Murray_paper.pdf.

⁴⁴ J. HEAD, CHINA'S LEGAL SOUL: THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT, 147.

⁴⁵ J. HEAD, CHINA'S LEGAL SOUL: THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT, 147.

1.3 Arbitration in China

As noted above, foreign investors generally choose arbitration as the means of resolving any disputes which may arise in their course of dealings.⁴⁶ And while Chinese law is mostly amenable to arbitration because the PRC is a party to the New York Convention, it mandates the use of Chinese arbitration associations or panels for enforcement.⁴⁷ There are 180 arbitral bodies in PRC, several of which have a significant case load of foreign-party disputes. CIETAC is the oldest, largest and most popular such body for foreign entities. CIETAC was established in 1956 as the China Council for the Promotion of International Trade. Subsequently it was then known as the Foreign Trade Arbitration Commission. It assumed the current name in 1988. In 2000 it also adopted the name Arbitration Court of the China Chamber of International Commerce. CIETAC's head offices are located in Beijing with two sub-commissions in Shanghai and Shenzhen.⁴⁸ In 2007 CIETAC dealt with 1,118 arbitration cases making it one of the busiest arbitration bodies in the world. Of these cases, some 429 (38%) included at least one "foreign" party.⁴⁹

CIETAC promotes the use of its arbitral services by claiming that its practices closely adhere to that of non-Chinese international arbitration tribunals. Its services are presented as independent and impartial and as offering a fee structure that is significantly lower than that of other major institutions.⁵⁰ Some commentators disagree with these contentions. Most

⁴⁶ See Fan Yang, *CISG in China and Beyond*, 40 UCC L. J. 3 Art. 5 (Winter 2008) discusses the definition of "foreign" in the context of "foreign-related contracts." Dr. Yang concludes "The fact that the current PRF Contract Law 1999 itself does not contain special provisions governing international sales contracts reinforces the importance of CISG as the most influential source of law on international contracts in China."

⁴⁷ See section 2.3b.

⁴⁸ See D. Wu, *CIETAC's Practice on the CISG*, *NORDIC J. OF COMM. L.* 43. September 2005. Available online: <http://www.njcl.utu.fi/2_2005/article2.htm> Accessed June 22, 2008.

⁴⁹ Ashby Jones & Andrew Batson, *Concerns About China Arbitration Rise*, *WALL ST. J.* (May 9, 2008) B1 (citing figures of 684 in 2002, 709 in 2003, 850 in 2004, 979 in 2005, 981 in 2006 and 1,118 for 2007). L. Zhang, *The Enforcement of CIETAC Arbitration Awards* *HONG KONG LAWYER*. February 2, 2002. , available at: <<http://www.hk-lawyer.com/2002-2/Default.htm>> Accessed July 14, 2008

⁵⁰ China International Economic and Trade Arbitration Commission., available at: <http://www.cietac.org.cn/english/introduction/intro_1.htm> Accessed April 3, 2008.

notably, New York University School of Law's Professor Jerome Cohen, a distinguished China watcher, argues that CIETAC's practices need substantial reform if they are to adhere to the standards of other international arbitral tribunals.⁵¹ Professor Cohen served as an arbitrator in a case involving an alleged breach of a contract to build a power plant, describing his experience "I saw some of the most blatant contract violations I'd ever seen, but it was like the [other arbitrators] had been watching a different case."⁵² This article mainly addresses criticisms such as those levelled by Professor Cohen against CIETAC and also tackles questions about Chinese arbitration on the whole. Criticisms and areas for potential reform are identified as the following:

- the respect for validity of arbitration clauses;
- the effective and efficient enforcement of CIETAC arbitration awards;
- CIETAC's practice of mandating use of its own personnel as arbitrators does not allow for fair proceedings;
- decision making and record keeping needs to be more transparent in order to ensure the integrity of the process; and that
- CIETAC administrative fees are actually higher than that of comparable institutions.

Each of these concerns is substantiated and important. However, our analysis of the published arbitral decisions and the secondary literature suggests that they are neither as pervasive nor as damning as might appear at first glance.

⁵¹ J. Cohen, *Time to Fix China's Arbitration*, FAR EASTERN ECO. REV. 32 January 2005. See also an article written by Washington-based practitioners Michael J. Lyle & David A. Hickerson noting that "CIETAC has disadvantages for a U.S. company, including the fact that proceedings are in Chinese unless the parties agree otherwise, the quality of arbitrators is uneven; and the evidentiary procedures and filing deadlines are sometimes ignored. *Nonetheless, while arbitrating in China poses obstacles, the enforceability of an award increases the changes for recovery.*" Lyle & Hickerson, *Products Liability: Chinese-Made Goods* NAT'L L. J. (February 18, 2008) 15 (emphasis added).

⁵² Ashby Jones & Andrew Batson, *Concerns about China Arbitration Rise* WALL ST. J. (May 9, 2008) B1.

a) Validity of Arbitration Clauses

Because jurisdiction of arbitration is based on mutual agreement of the parties and enforcement further requires state action, the validity of an arbitration clause is itself the subject of considerable litigation. When addressing the validity of arbitration clauses in the PRC, first and foremost it is recommended that business people – and their lawyers – expressly state arbitration as their preferred method of dispute resolution and that this stipulation be included in their contract. The reason for this is that it is nearly impossible for parties to agree on arbitration after a dispute has arisen. When a dispute arises between a foreign entity and a Chinese company, parties are not under a requirement to select the arbitral tribunals in the PRC to preside over the dispute. Rather they can choose from arbitral tribunals from anywhere. In fact they do not even have to choose Chinese law to govern the dispute as this is not necessary in contracts between Chinese and foreign entities.⁵³ Parties should be aware however that Article 16 of the PRC Arbitration Law states that the chosen arbitration clause must clearly state a specific name of an arbitration tribunal (*zhongcai weiyuanhui*). Failure to name a specific body that leaves any ambiguity in the intention expressed of the clause will likely result in unintended consequences. Article 18 of the PRC Arbitration Law states that the failure to name a specific arbitration commission should result in invalidation of the clause, thus negating the intention to arbitrate and leaving the parties with the only of the courts for pursuit of their claims. An example of this can be seen in one case which concerned a dispute over the party's right to elect the Paris-based International Chamber of Commerce (the "ICC") rules to govern its dispute.⁵⁴ In this particular case the arbitration clause stated that all disputes would be settled under the rules of arbitration of the ICC, however the clause failed to specify the arbitral *institution* that should hear the dispute.

⁵³ D. Livdahl, *International Arbitration in the PRC*. Paul, Hastings, Janofsky & Walker, LLP (2006). Except in cases involving Sino-foreign venture agreements and certain PRC mining and oil exploration contracts.

⁵⁴ For the rules, see <http://www.iccwbo.org/court/arbitration/id4199/index.html>.

As a result of this oversight the Haikou Municipal Intermediate People's Court held the clause to be invalid, reasoning that willingness to use the ICC rules was not the same as choosing the ICC arbitral commission because these rules could be applied by other arbitral bodies.⁵⁵ To prevent this unintended result from reoccurring the ICC has now amended its arbitration clause from its original wording to address those disputes which will be heard in China, it now reads:

All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.⁵⁶

It is worth noting however that the PRC's position on the validity of these arbitration clauses was widely criticised. In the case of *Guanghope v Mirant* the Chinese Supreme People's Court found that an arbitration clause was invalid because the parties had not expressly named an arbitral commission.⁵⁷ As a result of these criticisms, the Supreme People's Court drafted a set of rules to deal with the problems presented. The draft was referred to as the Several Provisions on People's Courts' Dealing with Cases of Foreign-related Arbitration and Foreign Arbitration ("Several Provisions"). They stated that, "[w]here the parties only provide that the arbitration rules of a certain arbitration institution shall be applicable and fail to provide that the arbitration shall be conducted by that arbitration institution, the people's courts shall determine that the arbitration institution whose arbitration rules are referred to has jurisdiction over the case."⁵⁸ Despite the fact that

⁵⁷ D. Livdahl & X. QIN, *ICC Arbitration Administered in China*. Paul, Hastings, Janofsky & Walker LLP (2006).

⁵⁶ International Chamber of Commerce., available at: <http://www.iccwbo.org/court/english/news_archives/2005/china.asp> Accessed April 3, 2008.

⁵⁷ 'International Arbitration as a Means for Dispute Resolution With Chinese Exporters' <http://www.hklaw.com/id24660/PublicationId2341/ReturnId31/contentid50261/>

⁵⁸ D. Livdahl & X. Qin, *ICC Arbitration Administered in China*. Paul, Hastings, Janofsky & Walker LLP (2006). SEE ALSO: <http://news.xinhuanet.com/legal/2003-12/31/content_1255462.htm>

this draft has yet to take legal effect in the PRC, courts have already used it to guide their decisions. A court in Xiamen found valid a provision that required use of the ICC rules of arbitration and stating that the place of arbitration shall be in Beijing but failing to name a specific body.⁵⁹

b) The Enforcement of CIETAC and Foreign Arbitration Awards

The prospect of state enforcement is a lynchpin of arbitration. In a 2008 article, Washington-based practitioners Michael Lyle and David Hickerson note “CIETAC has disadvantages for a U.S. company, including the fact that proceedings are in Chinese unless the parties agree otherwise; the quality of arbitrators is uneven; and the evidentiary procedures and filing deadlines are sometimes ignored. *Nonetheless, while arbitrating in China poses obstacles, the enforceability of an award increases the chances for recovery.*”⁶⁰ Likewise, Fiona D’Souza has concluded a study of enforcement, noting that the Supreme People’s Court has recently “issued three Interpretations and Directives notable for their contribution towards improving the recognition process.”⁶¹ Nevertheless there is still the outstanding issue that some arbitral awards are not being enforced by the courts, despite the fact that the PRC is party to the New York Convention. First, we will examine the enforcement of awards made by foreign-related arbitration body which has been recognized by the PRC. In the event of non-compliance by a party to such an award the other party can apply to the intermediate people’s court for an enforcement ruling pursuant to Article 259 of the PRC Civil Procedure Law (the “CPL”). Additionally Article 217 CPL makes provisions

⁵⁹ D. Livdahl & X. Qin, *ICC Arbitration Administered in China*. Paul, Hastings, Janofsky & Walker LLP (2006). See Ruling No. Xia Min Ren Zi 81

⁶⁰ Lyle & Hickerson, *Products Liability: Chinese-Made Goods* NAT’L L.J. (February 18, 2008) 15 (emphasis added)

⁶¹ Fiona D’Souza, *LLM Perspective: The Recognition and Enforcement of Commercial Arbitral Awards in The People’s Republic of China* 30 FORDHAM INT’L L. J. 1318 (April, 2007) (arguing that efforts over the past ten years have addressed factors that have given rise to a situation in which “China’s reputation for enforcement of arbitration awards leaves much to be desired”) 1318, 1331 ff.

where a party does not adhere to a domestic award. However both of these articles stipulate that the commission would have to be established according to PRC law, which of course would exclude an ICC award as this arbitral body would not be established in accordance with PRC law, thus excluding enforcement of these awards.⁶² While it may be argued that CPL Article 269 should provide some protection for the enforcement of a foreign award via the New York Convention, in practice this would also be limited as the Notice of the Supreme People's Court on the Implementation of the New York Convention restricts its application to awards made in other contracting states and not those which have been made in the PRC.⁶³

In 2001 Randall Peerenboom conducted a study of 72 foreign and CIETAC arbitral award cases decided from 1991-1999.⁶⁴ He found that 52% of all foreign awards and 47% of all CIETAC awards were enforced.⁶⁵ In fact the situation is improved once it is taken into account that of the 37 cases that were not enforced by the courts, almost half of these were due to lack of assets on the part of the respondent.⁶⁶ Professor Peereboom's study of awards offers meaningful indications that the situation on enforcement of foreign awards a decade ago was not be as bleak as some had speculated. For those who argue that local protectionism affects the enforceability of awards, the study found that whilst 60% of parties thought this to be the case, in fact there was little difference in the enforceability rate where protectionism was absent and those cases where present.⁶⁷ However it is argued while local

⁶² D. Livdahl & X. Qin, *ICC Arbitration Administered in China*. Paul, Hastings, Janofsky & Walker LLP (2006).

⁶³ D. Livdahl & X. Qin, *ICC Arbitration Administered in China*. Paul, Hastings, Janofsky & Walker LLP (2006).

⁶⁴ R. Peerenboom, *Seek the Truth from Facts: An Empirical Study of Enforcement of Arbitral Award in the PRC* 49 AM. J. COMP. L. 249, 252.

⁶⁵ For purposes of his study, "enforced" meant that some amount was recovered, even if were a mere one percent of award amount. R. Peerenboom. *Seek the Truth from Facts: An Empirical Study of Enforcement of Arbitral Award in the PRC* 49 AM. J. COMP. L. 249, 263.

⁶⁶ R. Peerenboom, *Seek the Truth from Facts: An Empirical Study of Enforcement of Arbitral Award in the PRC* 49 AM. J. COMP. L. 249, 266.

⁶⁷ Absence of protectionism (61%) Presence of local protectionism (54%) see R. Peerenboom, *Seek the Truth from Facts: An Empirical Study of Enforcement of Arbitral Award in the PRC* 49 AM. J. COMP. L. 249, 276.

protectionism may not affect enforcement *per se*, it may have the effect of causing delays or difficulties for the parties involved.⁶⁸ The study also identified various other factors that may or may not influence the enforcement of awards; these included the role of the Party, the lack of authority of the courts as well as the competence of the judiciary.⁶⁹ It is difficult to draw specific conclusions as to the reasons why some awards are not enforced, however the study does demonstrate that the problem of enforcement cannot be looked at in isolation. Thus, it cannot be institutional policies alone which shape the role of contract law in the years to come, it will also depend on the public's attitude and perception of these laws.

c) CIETAC should not use its own Personnel as Arbitrators

One of Professor Cohen's principal criticisms of CIETAC's practices is that the association frequently allows its own full-time personnel to serve as arbitrators. In some cases they are even chosen as presiding arbitrator. This is a worrying fact especially for foreign parties using CIETAC's services as this could create potential conflicts of interest. CIETAC defends this claim by stating that although it does use its own personnel as arbitrators, such personnel are highly skilled law graduates. In addition to this they do not use these personnel unless parties fail to make an appointment of their own and in any case these personnel are only used in disputes involving relatively small claims.⁷⁰

Professor Cohen also argues that the presiding arbitrator in a foreign-related case should be from a third country unless the parties agree to allow otherwise. CIETAC's new rules do allow for an arbitrator not listed on the panel to serve, however this must be done with the

⁶⁸ R. Peerenboom, *Seek the Truth from Facts: An Empirical Study of Enforcement of Arbitral Award in the PRC* 49 AM. J. COMP. L. 249, 277.

⁶⁹ R. Peerenboom, *Seek the Truth from Facts: An Empirical Study of Enforcement of Arbitral Award in the PRC* 49 AM. J. COMP. L. 249, 285, 294, 298.

⁷⁰ L. Cao, *CIETAC as a Forum for Resolving Business Disputes* The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, available at: <http://www.fljs.org/uploads/documents/Cao%231%23.pdf>.

permission of the Chairman of CIETAC.⁷¹ Arbitrators chosen from within China must satisfy one of the criteria set out in Article 13 of the Arbitration law which states an arbitrator must either: be engaged in arbitration work for at least eight years, worked as a lawyer for at least eight years, served as a judge for at least eight years, have been engaged in legal research or legal education, possessing a senior professional title; or have acquired the knowledge of law, engaged in the professional work in the field of economy and trade.⁷² In contrast if an arbitrator is chosen from outside China Article 67 merely states that, ‘A foreign-related arbitration commission may appoint arbitrators from among foreigners with special knowledge in the fields of law, economy and trade, science and technology.’⁷³ When parties cannot agree on a Chair, the current procedure is for a Chair to be chosen from the official list, more often than not this will be a Chinese arbitrator.⁷⁴

Professor Cohen’s concerns are important. Airing them may have the intended effect of facilitating their redress. Meanwhile, CIETAC’s defender Cao⁷⁵ recognizes their merits and argues that the association is working to cabin their potentially corrupting effects. Room clearly remains for additional reforms.

d) Decision making and record keeping needs to be more transparent

Another criticism put forth is that CIETAC has no definitive procedures for allowing access to its records of arbitration proceedings. In addition to this CIETAC arbitrators allow staff members to draft arbitral awards, a practice which is most worrisome as it erodes the confidence and level of expertise that CIETAC hopes to inspire.⁷⁶ CIETAC’s defender, Cao

⁷¹ J. Cohen, *CIETAC’s Integrity*, Letter to FAR EASTERN ECO. REV, July 1, 2005. See Article 21.2 CIETAC Rules.

⁷² <http://www.jus.uio.no/lm/china.arbitration.law.1994/13.html>.

⁷³ See, <http://www.jus.uio.no/lm/china.arbitration.law.1994/67.html>.

⁷⁴ D. Livdahl, *International Arbitration in the PRC*, Paul, Hastings, Janofsky & Walker, LLP (2006).

⁷⁵ Until recently, Mr. Cao was an arbitrator and senior Staff Member of CIETAC.

⁷⁶ J. Cohen, *CIETAC’s Integrity*, Letter to FAR EASTERN ECO. REV, July 1, 2005.

Lijun, argues that the role of staff members in drafting awards is used in extremely limited situations, for example drafting procedural rulings and procedural correspondence under the guidance of the arbitrators.⁷⁷ However, they do concede that up until 2000 and sometime thereafter, staff members were allowed to draft awards.

The need for arbitral awards to be published has also been expressed in order to provide greater transparency, however CIETAC rules do not expressly address this issue.⁷⁸ CIETAC does allow for some awards to be published on what appears to be an *ad hoc* basis. The criteria for selecting which decisions to send to Professor Kritzer have not been publicly articulated. For example, the Pace database reports 288 CIETAC arbitration awards, the majority of which are pre-2002, and yet it offers no information about how these decisions were selected for reporting.⁷⁹ Although this situation is not ideal for the purposes of scrutinizing CIETAC awards, it does seem better than that of other major tribunals. For example, the Arbitration Institute of the Stockholm Chamber of Commerce and Paris-based ICC have each reported only a handful of cases. Based on this sort of comparison, Professor Kritzer concludes that CIETAC is on the forefront of transparency.⁸⁰

e) CIETAC Administrative Fees are higher than that of other Institutions

CIETAC's website boasts in its preamble, '[a]s a leading arbitration institution, the CIETAC arbitration fees are relatively lower than other major international arbitration

⁷⁷ L. Cao, *CIETAC as a Forum for Resolving Business Disputes* The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, available at: <http://www.fljs.org/uploads/documents/Cao%231%23.pdf>.

⁷⁸ Article 33 CIETAC Rules

⁷⁹ See <http://cisgw3.law.pace.edu/cisg/text/CIETAC-awards.html>. There are hundreds of cases heard by CIETAC each year involving the CISG, even allowing for the three-year rule of non-publication in the case of appeals this is not the whole picture.

⁸⁰ Albert H Kritzer, *Application and Interpretation of the CISG in the PR of China — Progress in the Rule of Law in China*, a presentation at Wuhan Conference on the "Application and Interpretation of the CISG in Member States With Emphasis on Litigation and Arbitration in the PR China" October 13-14, 2007 in Wuhan, China, published in 40 U.C.C. L. J. (2007/2) 261-268.

institutions.⁸¹ However, many have argued that in cases where the amount exceeds \$100 million, the fees paid to CIETAC are exorbitant when compared to other arbitral institutions.⁸² For example a claim in the amount of \$500 million would result in an administration fee to CIETAC of \$2.5 million. This fee compares unfavourably with a ICC fee of \$88,800 for arbitrating a claim of the approximately same amount. One could conclude this is another reason for business people to avoid arbitration in China.⁸³ These figures are even more disconcerting when upon examination it is apparent that CIETAC's arbitrators are amongst the lowest paid in the arbitral community.⁸⁴ Much like other arbitral bodies such as the ICC or the Hong Kong International Arbitration Commission, CIETAC calculates arbitrators fees based on the claim amount. However the fees that CIETAC paid to its arbitrators are apparently calculated at a significantly lower rate than these other organizations, raising the issue of whether the best foreign arbitrators would agree to serve on the CIETAC panel.⁸⁵ CIETAC has responded to these criticisms stating that these matters are not within their control, as of 2002 a government regulation requires all arbitral bodies to submit revenues and expenditures to the Ministry of Finance for approval.⁸⁶ Therefore, in order to compensate foreign arbitrators for the low pay, a special fee is levied to the party who appoints this arbitrator, which is intended to cover fees and expenses. This solution however has not proven to be satisfactory as it has led to Chinese arbitrators claiming that it is unfair for foreign arbitrators to be paid more for doing the same amount of work.

⁸¹ http://www.cietac.org.cn/english/introduction/intro_1.htm

⁸² However it is worth noting that cases for which the disputed amount is less than US \$1 million CIETAC's fees are comparable with that of its competitors. D. Livdahl, *International Arbitration in the PRC*. Paul, Hastings, Janofsky & Walker, LLP

⁸³ D. Livdahl, *International Arbitration in the PRC*, Paul, Hastings, Janofsky & Walker, LLP (2006). All dollar figures are US.

⁸⁴ L. Cao, *CIETAC as a Forum for Resolving Business Disputes* The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, available at: <http://www.fljs.org/uploads/documents/Cao%231%23.pdf>.

⁸⁵ L. Cao, *CIETAC as a Forum for Resolving Business Disputes* The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, available at: <http://www.fljs.org/uploads/documents/Cao%231%23.pdf>.

⁸⁶ L. Cao, *CIETAC as a Forum for Resolving Business Disputes* The Foundation for Law, Justice and Society in collaboration with The Centre for Socio-Legal Studies, University of Oxford, available at: <http://www.fljs.org/uploads/documents/Cao%231%23.pdf>.

Moreover, business people may be dissuaded from using CIETAC once they find out that they would have to bear the costs of the special fees. It is also worth questioning how can the proceedings be fair and impartial if a party who requests a foreign arbitrator has to pay for this service. Furthermore it has been argued that because Chinese arbitrators are paid less than their foreign counterparts they may not be as diligent in their approach to arbitration, however CIETAC vociferously refutes this claim. In sum, CIETAC's opaque financial arrangements detract from the desirability of employing its services, even if they generally result in lower bills.

PART TWO: China and the CISG: Review of Existing Decisions dealing with Non-Conforming Goods

2.1 Contract Law in China

Chinese contract law provides the basic and default rules of commercial transactions, and therefore the context in which disputes must be addressed. Ten years ago, the PRC enacted a unified contract code known as the *Contract Law of the PRC*. Among other things, the new Contract Law replaced the previous Foreign Economic Contract Law. The new law made no distinction between Chinese and foreign companies, in the effort to ensure equal and fair treatment of both parties.⁸⁷ If the contract contains a foreign element, *inter alia* the contracting parties are foreign nationals or the subject matter is in a foreign country, then the parties decide which jurisdiction's law will govern their contract.⁸⁸ This decision generally

⁸⁷ Agence France Presse, *China's Contract Law to take effect from October 1*, INT'L NEWS, (March 22, 1999)

⁸⁸ Article 126 *Contract Law*: "Parties to a foreign related contract may select the applicable law for resolution of a contractual dispute, except otherwise provided by law. Where parties to the foreign related contract failed to select the applicable law, the contract shall be governed by the law of the country with the closest connection thereto."

also includes a choice about whether to submit disputes to a Chinese or foreign arbitral institution.⁸⁹

2.2 The Applicability of the CISG in China and the relevance of Chinese

Contract law

As noted above, the CISG has been in force in China since 1988 (some eleven years before enactment of the *Contract Law*). Under the terms of China's ascension to the Convention, where both parties have their place of business in member states, the CISG will apply unless it is excluded. The CISG will also apply if the contract expressly requires it. However if the foreign contracting party is not a signatory to the Convention, and in absence of the parties choosing a governing law, then the contract will be governed by the *Contract Law*. Even though it is argued that in the event of a conflict between the CISG and the *Contract Law* the CISG will prevail, parties would be best advised to make specific provisions in their contracts as to the law governing disputes. The use of the CISG as the governing law for contractual disputes offers several advantages to the parties. First, it provides a nominally level playing field whereby both parties should be afforded the same familiarity with the Convention. The other advantage is that the CISG has had more years to develop than the Chinese contract code, arguably allowing for more certainty in decision making than that of the Chinese laws. While this article will not proceed with an in-depth examination of the *Contract Law*, it is worth noting a few relevant points for businesspeople and their legal advisors to take into consideration. For example, the *Contract Law* was

⁸⁹ Article 128 *Contract Law*: "The parties may resolve a contractual dispute through settlement or mediation. Where the parties do not wish to, or are unable to, resolve such dispute through settlement or mediation, the dispute may be submitted to the relevant arbitration institution for arbitration in accordance with the arbitration agreement between the parties. Parties to a foreign related contract may apply to a Chinese arbitration institution or another arbitration institution for arbitration. Where the parties did not conclude an arbitration agreement, or the arbitration agreement is invalid, either party may bring a suit to the People's Court. The parties shall perform any judgment, arbitral award or mediation agreement which has taken legal effect; if a party refuses to perform, the other party may apply to the People's Court for enforcement."

intended to unify and supersede all previous legislation dealing with contractual issues. During this drafting process other contractual legal instruments, both foreign and international were given due consideration. In particular, the CISG and the UNIDROIT Principles were sought out as guidelines.⁹⁰ As a consequence of this ambitious effort, the *Contract Law* offers a wider scope than some CISG provisions, for example it covers more than one type of contract, not merely contracts for the sale of goods. In addition it relaxes the requirement of the written contractual form, under the Convention China declared itself not bound by Article 11 of CISG⁹¹ which deals with this issue.⁹² The *Contract Law* also provides clear rules on offer and acceptance which closely mirror that of the CISG provisions. Finally the *Contract Law* makes provisions for specific performance as an express remedy under the contract,⁹³ whereas its CISG counterpart Article 28 places some restrictions on this remedy.⁹⁴ Some commentators question whether the *Contract Law* poses a threat to the employment of the CISG in the PRC, but we believe that the two instruments have may be complementary.⁹⁵ The fact that the *Contract Law* provisions draw so closely from the CISG it could only serve to help with interpreting and drawing a deeper understanding of the Convention among those people working with both bodies of law. We see no reason why one interpretation of a provision in say the *Contract Law* should cloud interpretation of the uniform international sales law. Even though they may have similar or even identical terms, lawyers understand that they may be read differently – depending the on the jurisprudence of the particular body of law. To the extent this has not been the case, and tribunals or courts have been using the

⁹⁰ Legal Affairs Committee of NPC (ed.), “Comparison of Provisions between the Contract law of China and Other Related International and Internal Contract Legislation,” Beijing: Law Press, April 1999

⁹¹ A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

⁹² Article 10 *Contract Law* (P.R.C.).

⁹³ Article 107 *Contract Law* (P.R.C.).

⁹⁴ If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

⁹⁵ See D. Ding, *China and CISG* in MICHAEL R. WILL (ed.) *CISG AND CHINA: THEORY AND PRACTICE*. Faculté de droit, Université de Genève (1999) 25-37.

jurisprudence on one body of law to fill in gaps (or even to “correct” mistakes) in the other, it seems to be a one-way street: Chinese courts are using CISG jurisprudence to interpret the *Contract Law*. Either way, we do not see any evidence that the harmonized interpretation of the CISG has been undermined.

2.3 Overview of history and scope of CISG

Prior to commencing an examination of the CISG and how it has been applied by CIETAC in the cases of defective products, we pause briefly to review its history, scope, as well as its purpose, albeit briefly. The purpose of this excursion is to examine the events leading up to the existence of the Convention, it is important to understand why such an instrument was implemented and the manner of contracts to which it applies.

In 1966, the General Assembly of the United Nations established the United Nations Commission on International Trade Law (“UNCITRAL”). This working group reviewed previous international sales instruments in order to create a new convention, and the results of their efforts were completed in 1978.⁹⁶ The CISG was signed in Vienna in 1980, and came into force in 1988 upon gaining the required number of ratifications.⁹⁷ As of this writing, some 75 States have adopted the CISG.⁹⁸ Over three-quarters of all international sales transactions are conducted between parties in a Contracting Member State.⁹⁹

⁹⁶ Previous sales law Uniform Law for the International Sale of Goods (“ULIS”), and Uniform Law on the Formation of Contracts for the International Sale of Goods (“ULF”).

⁹⁷ *Pace University CISG Database* [online]. [Accessed June 2008], available at: <<http://www.cisg.law.pace.edu/cisg/cisgintro.html>>

⁹⁸ *Pace University CISG Database* [online]. [Accessed June 2009], available at: <<http://cisg.law.pace.edu/cisg/countries/cntries.html>>

¹⁰⁴ However it is important to note that this does not mean over three-quarters of all international sales contracts are governed by the CISG, for example those that are excluded based on Articles 2, 3, 4, 5. However the CISG can also be applied through Article 1(1)(b) where the parties *do not* have their places of business in different Contracting States, but the rules of private international law of the forum lead to the application of the CISG. Thus, the number of contracts governed by the Convention is greater than just those covered under Article 1(1)(a) but again subject to the exclusions listed above. NB Article 1(1)(b) does not apply to China.

Once ratified by a Contracting State, the CISG takes precedence over domestic law and choice of law rules in regards to contracts for the international sale of goods.¹⁰⁵ The CISG has 101 articles and is divided into four principal parts. Part I details the Convention's scope and contains general provisions applicable to the rest of the Convention. Part II is concerned with rules for the formation of contracts of sale, and Part III with the rules governing the seller's and buyer's substantive obligations. Part IV contains the final provisions on adherence to and ratification of the Convention by Contracting States including the reservations that may be made at one of several stages to the Convention's applicability to a Contracting State.¹⁰⁰

According to Article 1(1)(a), the Convention applies to contracts of sale of goods between parties whose places of business are in different States. The CISG will also apply where when the rules of private international law lead to the application of the law of a Contracting State.¹⁰¹ It is important to note that the CISG is a set of rules for business not consumer transactions.¹⁰² In addition to this, certain types of sales contracts are specifically excluded under the Convention.¹⁰³ Questions involving the validity of the contract are also outside the Convention, as is the effect which the contract may have on property in the goods sold,¹⁰⁴ and any liability of the seller for defective goods causing death or personal injury to

¹⁰⁵ M. BRIDGE, *THE INTERNATIONAL SALE OF GOODS: LAW AND PRACTICE* 37

¹⁰⁰ Pace University CISG Database [online]. [Accessed June 2008], available at: <http://cisgw3.law.pace.edu/cisg/text/treaty.html>.

¹⁰¹ Article 1(1)(b) Not applicable to PRC.

¹⁰² M. BRIDGE, *THE INTERNATIONAL SALE OF GOODS: LAW AND PRACTICE* 46

¹⁰³ Article 2 of the CISG states that contracts involving the sale of securities, ships, vessels, hovercraft or aircraft, and electricity are not governed by the Convention.

¹⁰⁴ Art 4 CISG This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;
(b) the effect which the contract may have on the property in the goods sold.

any person.¹⁰⁵ One of the notable features of the Convention is that it allows contracting parties the ability to derogate from¹⁰⁶ or exclude its provisions altogether.¹⁰⁷

2.4 CISG and Non-Conformity of Goods

As this article deals with unsafe products produced by Chinese manufactures it is important to establish the issues of non-conformity which can be covered by the CISG.

Article 35 CISG deals with the rules relating to conformity it states:

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

¹⁰⁵ Art 5 CISG.

¹⁰⁶ Under Art 6 of CISG, derogation under the Convention is permitted, with the one exception of Art 12 CISG,

¹⁰⁷ This can be done expressly, it is somewhat contentious amongst some scholars if an exclusion can be implied therefore the exclusion can be implied but must be sufficiently clear, parties are advised to make their intentions clear to avoid unwanted results. See also, M. BRIDGE, THE INTERNATIONAL SALE OF GOODS: LAW AND PRACTICE 65. Bridge argues that some States may require an explicit written exclusion. Unlike its predecessor, the ULIS, the CISG did not specifically say implied exclusions were permissible, thus there is doubt on the issue. See also: Yearbook I (1968-1970), 168, No 70. See also: P. SCHLECTRIEM & I. SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (2nd ed. 2005) 86 para. 8.

The first part of the provision, Article 35(1) gives authority to the terms of the contract and the stipulations of the parties. If there is no express agreement, then general provisions of the Convention may be used to ascertain the intentions of the parties. These provisions include articles 8 and 9 governing the parties' intention and trade usages respectively.¹⁰⁸ As regards which statements are capable of becoming terms of the contract, it is argued by some commentators that the CISG does not distinguish between different types of statements as may be the case in certain legal systems.¹⁰⁹ The second part of the provision Article 35(2) deals with the meaning of conformity under the CISG. Unless the parties have disclaimed liability as to the fitness and quality of the goods, this part of the provision will apply.¹¹⁰ According to Article 35(2)(a) goods must be fit for their ordinary use; therefore defects in the goods which affect their use would render them non-conforming. Standards of conformity are judged according to the standards established in the seller's country unless the buyer has made known to the seller of any specifications which must be adhered to in order for the goods to be saleable. The final part of Article 35 relieves the seller of any liability if the buyer knew or could not have been aware of the non-conformities listed in Article 35(2)(a-d). Examples of this include if the seller had in the past sold to the buyer poor quality goods without complaints from the buyer; or if the price corresponds to the price generally paid for poor quality goods.¹¹¹

¹⁰⁸ Parties' intention and trade usages respectively.

¹⁰⁹ See for example the U.S. law distinction between representations and promises. Discussion on terms and phases in Article 35, available at : <http://cisgw3.law.pace.edu/cisg/biblio/enderlein-art35.html#art35-1a>

¹¹⁰ Some legal systems do not allow for disclaimers of this kind see for example English law Sale of Goods Act 1979 section 13-14 dealing with description and quality of the goods cannot be contracted out if the one party is a consumer if the parties are two business then the disclaimer must satisfy the reasonableness test under the Unfair Contract Terms Act 1977. However the CISG does not deal with validity of clauses (Article 4) therefore this matter would have to be settled within domestic laws.

¹¹¹ Discussion on terms and phases in Article 35, available at : <http://cisgw3.law.pace.edu/cisg/biblio/enderlein-art35.html#art35-1a>

The CISG is not concerned with whether the goods met with safety standards of the buyer's country as long as they otherwise remain fit for their purpose,¹¹² these are matters to be settled within public law and thus outside the realm of conformity for the purposes of the Convention. An example of this can be seen in the *New Zealand Mussels* case from 1995¹¹³ in which the German Supreme Court held that even though the molluscs contained a cadmium concentration exceeding the limit recommended by the German health authority, the Swiss seller in this case was not in breach of contract. The court concluded based on the reasoning that the mussels were still edible and that Article 35(2) CISG¹¹⁴ (dealing with conformity of the goods) did not place an obligation on the seller to supply goods that conform to *all* statutory or other public provisions in force in the buyer's country – unless the same provisions exist in the seller's country as well. Only if the buyer had informed the seller about such provisions and relied on the seller's expert knowledge or the seller had knowledge of the provisions due to special circumstances would the seller would have been liable for breach of contract.¹¹⁵

The *New Zealand Mussels* decision raised many questions within the CISG community as to the effect and impact of its notably narrow interpretation of non-conformity. It is important to bear in mind that framework conventions such as the CISG are designed so that by its very nature not every issue will be expressly settled within its wording. Rather we look to decisions and underlying principles of the Convention to settle these internal gaps

¹¹² However see exception at *fn* 119.

¹¹³ Germany March 8, 1995 Supreme Court Available at: <http://www.cisg.law.pace.edu/cases/950308g3.html>

¹¹⁴ Article 35(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

- (a) are fit for the purposes for which goods of the same description would ordinarily be used;
- (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
- (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
- (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

¹¹⁵ Germany March 8, 1995 Supreme Court Available at: <http://www.cisg.law.pace.edu/cases/950308g3.html>
See also Article 35(2)(b)

(*praeter legem gaps*), and in fact the Convention itself directs us to do so.¹¹⁶ The issue of whose place of business (*i.e.* that of the buyer or the seller) should determine what public law regulations apply is not a matter that is readily resolved based on the plain language of the Convention. The German Supreme Court decided in favor of the seller's place of business. The main reason for this decision is that the seller cannot be expected to know the public law regulations of a country not his own unless the same laws apply to the seller's country or alternatively the buyer informs him of these regulations.¹¹⁷ A third exception would be if due to "special circumstances" such as the existence of a seller's branch office in the buyer's country, the seller knew or should have known about the regulations.¹¹⁸ This cramped view of non-conformity contrasts starkly with that of *Medical Marketing v. Internazionale Medico Scientifica*¹¹⁹ which involved a U.S. buyer and an Italian seller in a dispute over the burden of complying with U.S. governmental safety standards.¹²⁰ The case was first decided by an arbitral tribunal which held that the defendant had delivered units that failed to comply with U.S. safety standards and therefore was "non-conforming." The seller appealed on the grounds that the arbitrators misapplied the CISG by refusing to follow the German decision in the *Mussels* case. On appeal the court noted that the arbitrators had carefully considered the German case and had concluded that the situation before them fit within an exception recognized by the German Supreme Court. Confirming the arbitral award, the

¹¹⁶ Article 7(2) explains "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. As opposed to *Intra Legem* gaps which under Article 7(2) of the CISG, are filled in by domestic law applicable by virtue of the conflict of laws rules of the forum State."

¹¹⁷ P. SCHLECHTRIEM, 50 YEARS OF THE *BUNDESGERICHTSHOF* : A CELEBRATION ANTHOLOGY FROM THE ACADEMIC COMMUNITY [Accessed July 2008], available at: <<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html#iv>>

¹¹⁸ P. Schlectriem, *Case Commentary Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.r.l. U.S. District Court, Eastern District of Louisiana, 17 May 1999: Conformity of the goods and standards established by public law treatment of foreign court decision as precedent' in Praxis des Internationalen Privat- und Verfahrensrechts*, Germany pp. 388-390 [Accessed July 2008], available at: <<http://cisgw3.law.pace.edu/cases/990517u1.html>>

¹¹⁹ United States 17 May 1999 Federal District Court [LA], available at: <<http://cisgw3.law.pace.edu/cases/990517u1.html>>

¹²⁰ United States 17 May 1999 Federal District Court [LA], available at: <<http://cisgw3.law.pace.edu/cases/990517u1.html>>

court held that the arbitrators had not exceeded their authority. In the court's opinion it was noted that the seller was or should have been aware of the public law regulations before entering into the contract.¹²¹ This decision and its rationale was significant for the development of CISG jurisprudence because it recognised that courts in different jurisdictions are under an obligation to treat decisions from other higher courts with some degree of authority and precedential value. Although the Convention itself does not stipulate a *stare decisis* value to decisions generated under it, Article 7 CISG does require when interpreting the Convention regard is to be had to promoting uniformity in decision making.¹²²

When dealing with issues that arise on non-conformity for reasons of public law regulations it is important to remember that domestic regulations often stem from prohibitions and other curtailments which are unique and possibly idiosyncratic to the importing country. Therefore it would be an unfair burden on the seller to have knowledge of all these regulations unless one of the exceptions listed was applicable or alternatively the provisions of Article 35(2)(b) applied. To avoid these problems, contracting parties should allocate these risks expressly.

2.5 CIETAC Cases on Non-Conformity of the Goods

To date CIETAC has reported 54 international cases dealing with non-conformity of the goods to the contract.¹²³ The Secretary General of CIETAC (or his designates) selected the cases released to Professor Kritzer for translation and publication. We have no way of knowing the proportion of the total number of CISG cases handled by CIETAC. Nor can we

¹²¹ See opinion of Judge Stanwood R. Duval, Jr. , available at: <<http://cisgw3.law.pace.edu/cases/990517u1.html>>

¹²² See DIETER BLUMENWITZ, EINFÜHRUNG IN DAS ANGLO-AMERIKANISCHE RECHT [INTRODUCTION TO ANGLO-AMERICAN LAW], (6th ed. 1998), p. 31 *et seq.*

¹²³ <http://cisgw3.law.pace.edu/cisg/text/PRC-35.html>. Accessed May 15, 2009.

assume that these cases are representative of all CIETAC offices; we are still awaiting cases handled by the CIETAC-Shanghai office.¹²⁴ Nevertheless, based on the available decisions, we offer some tentative observations regarding non-conformity of the goods and go on to assess the value of the tribunals' reasoning.¹²⁵

a) General Conformity Issues

In a 1996 case involving a Canadian seller and a Chinese buyer, for the sale of broadcasting equipment, the buyer alleged that the seller did not supply goods in conformity with the contract, as the equipment did not adhere to the technical specifications set out in the contract in accordance with Article 35 (1) CISG.¹²⁶ After examining the evidence and documents, the CIETAC arbitral tribunal found that the contract did not contain stipulations on function, quality, and technical requirements on the goods. However in a contract attachment signed by both parties the equipment supplied was found to be recommended by the seller for the purpose of launching broadcast services. In addition to this, three sets of tests were carried out on the equipment, and in the third test the equipment was still found to be defective. The tribunal found in the case found that the seller had committed a fundamental breach of contract, as set out in CISG Article 25 by failing to provide conforming goods. In this case the tribunal correctly applied the CISG's provisions to the facts of the case, since the technical documentation were not actually contained in the contract itself the tribunal took account of subsequent events and surrounding circumstances of the case. This practice follows CSIG Article 8 which allows for the parties intentions to be taken into account; intention can be discerned from negotiations, any practices which the

¹²⁴ Email dated October __ 2008 from Albert Kritzer to Lachmi Singh.

¹²⁵ A. Vincze, *Conformity of the Goods under the UN Convention on Contracts for the International Sale of Goods (CISG) – Overview of CIETAC's Practice in Sharing International Commercial Law across National Boundaries*, Festschrift for Albert H. Kritzer on the occasion of his 80th birthday (C. Andersen & W. Schroeter) 552-581.

¹²⁶ China May 22, 1996 CIETAC Arbitration proceeding (*Broadcasting equipment case*) Available at: <http://cisgw3.law.pace.edu/cases/960522c1.html>

parties have established between themselves, usages and any subsequent conduct of the parties. In other words, the panel applied the terms of the Convention as Western lawyers would expect – not in any idiosyncratic or “Chinese” way. This decision shows that the tribunal used the provisions of the CISG to determine whether the facts of the case amounted to a fundamental breach for non-conformity of the contract. The Convention’s provisions were not narrowly construed; instead, all applicable circumstances were considered and set out in the rationale of the decision.

b) Issues relating to the discovery of the non-conformity

In a case involving a US buyer and a Chinese seller for the sale of flanges also raised the issue of determining non-conformity in relation to goods was raised.¹²⁷ Each contract contained terms on quality and examination of the goods and set out an obligation for the seller to provide Mill Test Reports (“MTRs”) describing the chemical and heat data of the flanges. The goods were subsequently sold on to the buyer’s customers where they were found to be non-conforming. This case is important because it calls into question those defects which are not visibly apparent; the defects were of a latent nature which was only discovered a few years after the goods were delivered. The tribunal found that based on independent expert tests the flanges were defective and not in conformity with the specifications set out in the contract. The tribunal considered the seller liable under Article 36(2) CISG, as the defective flanges constituted a breach of a guarantee that the goods would remain fit for their ordinary purpose. However the tribunal also found that the guarantee period was not indefinite and would not extend past the two-year period set forth in Article 39(2) CISG. The tribunal reached the decision that some of the defects in this case were defects of which the seller “could not have been unaware” nevertheless the tribunal held that

¹²⁷ China March 30, 1999 CIETAC Arbitration proceeding (*Flanges case*), available at: <http://cisgw3.law.pace.edu/cases/990330c2.html>. See also the companion case China March 29, 1999 CIETAC Arbitration proceeding (*Flanges case*) Available at: <http://cisgw3.law.pace.edu/cases/990329c1.html>.

Article 40 CISG¹²⁸ did not take precedence over the provisions of Article 39(2) CISG.¹²⁹ The tribunal ruled that the language of CISG Article 39(2) bars an indemnity claim beyond the stated two-year period and that the buyer was at fault for not discovering the defect sooner due to the fact that the buyer had overstocked and therefore had not used the goods before the two year period expired. This ruling in favour of the Chinese seller might have set precedent that generally benefitted sellers, and given China's status as a major producer and seller of goods, it could have been seen as establishing a pro-China rule – or merely a ruling that favoured a particular Chinese seller.

The controversy of this case was ignited by a subsequent case heard by the Stockholm Chamber of Commerce. Under similar factual circumstances, the Swedish tribunal decided that the buyer was not barred from relying on a non-conforming part for a machine when the defect was discovered three years after the machine was delivered.¹³⁰ The buyer could still rely on the defect to show non-conformity despite the two year limitation set out in Article 39(2) because the seller knew that the part required for the machine was important to the buyer. The tribunal reasoned that “Article 40 is an expression of the principles of fair trading that underlie also many other provisions of CISG, and it is by its very nature a codification of a general principle.”¹³¹ In contrast the CIETAC tribunal found that “the longest time limit to notify of lack of conformity of the goods with the contract is “within a period two years from the date on which the goods were actually handed over to the buyer.” This is so because the

¹²⁸ The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

¹²⁹ In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

¹³⁰ Stockholm Chamber of Commerce Arbitration Award of June 5, 1998, available at: <http://cisgw3.law.pace.edu/cases/980605s5.html>. See C. Andersen, *Applying Article 40 to 39(2) as well as 39(1) -- Stockholm vs. Flanges* March 14, 2006 Available at: <http://cisgw3.law.pace.edu/cases/990330c2.html>.

¹³¹ See C. Andersen, *Applying Article 40 to 39(2) as well as 39(1) -- Stockholm vs. Flanges* March 14, 2006 Available at: <http://cisgw3.law.pace.edu/cases/990330c2.html>.

restricting words “in any event” are used in Article 39(2).”¹³² It is argued given the discrepancy in the reasoning of these two arbitral bodies more rationale should be given to support CIETAC’s decision which was based on overstocking by the buyer, specifically if the seller was aware of the defect should he be relieved of liability even if the defect had been discovered past the two year period?¹³³ This decision should have involved explicitly weighing the need for sound business practice and fair dealing not to mention the relevance of good faith against the need to establish a cut off period in bringing liability of transactions to an end and giving businesses the ability to look forward without unnecessary encumbrances. CISG Article 40 does not mention limiting its application to that of Article 39(1); instead it should be read to include all of Article 39.¹³⁴ This is not to say that the Stockholm tribunal is correct and CIETAC is wrong; however if the CIETAC tribunal reached its conclusion based on the fact that the seller was deemed not to have acted fraudulently, then the rationale should have included this reasoning and created a distinction more explicitly. Instead the result is two differing points of view about this nexus. They pose a significant threat to the uniformity principle that underlies the successful implementation of the Convention on a global scale. In light of the recent cases dealing with defective products which may encounter the same issues such failure to give notice within the stipulated time period, it is imperative that the tribunals employ rationales based directly on the express provisions of the CISG in order to justify their decisions. So the 1996 *Flanges Case* offers crucial evidence to those who argue that CEITAC is either corrupt, less skilled

¹³² The tribunal interpreted the wording in its strictest sense. <http://cisgw3.law.pace.edu/cases/990330c2.html>.

¹³³ See C. Andersen, *Applying Article 40 to 39(2) as well as 39(1) -- Stockholm vs. Flanges* March 14, 2006 Available at: <http://cisgw3.law.pace.edu/cases/990330c2.html>.

¹³⁴ See Article 44 CISG as an example of the former. See V. Curran, *Cross-References and Editorial Analysis Article 40* available at: <http://www.cisg.law.pace.edu/cisg/text/cross/cross-40.html> Article 40 CISG and is ULIS counterpart are essentially similar in wording, the Tunc commentary on ULIS states that: ‘In determining that the seller may not rely on the barring of rights provided for in Articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware of and did not disclose, Article 40 does no more than sanction a rule of good faith’ Therefore where Article 40 is applicable, the buyer will not lose remedies provided for under the CISG for failure to comply with Article 39. In this situation Article 39’s notice requirements will not apply.

than Western tribunals or biased in favour of either Chinese parties in or sellers in general. This concern, however, seems overblown – or at least premature – because it relies on a starkly contrasting Stockholm case to evince one of these flaws. In the absence of the Stockholm opinion for comparison, the *Flanges Case* might not itself seem to indicate any bias or flaw.

c) International and Industry Standards

In a case involving a Dutch seller and a Chinese buyer for the sale of European old boxboard corrugated carton, the technical specifications appended to the contract stipulated with considerable precision the minimum content levels that the goods were to contain.¹³⁵ Upon arrival of the goods the buyer alleged that the content level of the goods was not in conformity with the contractual stipulations and that the goods could not be used for their purpose of producing brown paper. The tribunal found that there was no uniform international standard of quality for old corrugated carton and that as a consequence the express stipulations of the parties had to be relied upon to prove non-conformity of the goods. While the decision of the tribunal is correct in its application, (*i.e.* that regard should indeed be given to the parties express stipulations) the reasoning is somewhat troubling. The tribunal stated that no "uniform international standard of quality" existed within this particular industry yet if there was a standard to be found which differed from the contractual stipulations, that this would this supersede the parties express stipulation? This decision would require more explanation as the meaning of what defines a 'uniform' standard, a term

¹³⁵ China 8 March 1996 CIETAC Arbitration proceeding (*Old boxboard corrugated cartons case*) Available from World Wide Web: <http://cisgw3.law.pace.edu/cases/960308c1.html>

that is ambiguous and presumably it would also depend on the facts and circumstances of the particular case.¹³⁶

In another case involving a Czech buyer and a Chinese seller for the sale of down jackets and winter coats, the contract stipulated the goods were to be “European style.”¹³⁷ The buyer alleged non-conformity of the coats due arguing that they were not European style and that the down content of the coats were only 20% instead of the 30% they should have been. The second CIETAC tribunal found that no standard existed that determined the meaning of “European style” and therefore the buyer could not rely on this claim to prove non-conformity. More controversially the tribunal decided that the fact that the coats only had 20% of down instead of 30% was reflected in the low contract price and therefore the coats were deemed to be conforming in this respect by reason of the lower price. In contrast to this decision in the 2000 case involving the sale of steel cylinders, the Chinese seller argued that the contract price was below the quoted price for brand new steel cylinders and as a result the buyer should have expected to receive old cylinders.¹³⁸ The tribunal found that the price of goods could not indicate whether parties intended sell brand new goods or not, therefore price should not be indicative of quality of the goods.

These two opinions are good examples for the need for uniformity of decisions under the Convention and for the parties themselves. In addressing the first concern as to uniformity, CIETAC being the forum on the forefront of the interpretation of the CISG¹³⁹ has to be able to provide decisions that correctly interpret the Convention as well as provide a

¹³⁶ A. Vincze, *Conformity of the Goods under the UN Convention on Contracts for the International Sale of Goods (CISG) – Overview of CIETAC’s Practice in Sharing International Commercial Law across National Boundaries*, FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS 80TH BIRTHDAY (C. Andersen & W. Schroeter) 552-581.

¹³⁷ China March 21, 1995 CIETAC Arbitration proceeding (*Down jacket and winter coat case*) Available from World Wide Web: <http://cisgw3.law.pace.edu/cases/950322c1.html>

¹³⁸ China January 19, 2000 CIETAC Arbitration proceeding (*Steel cylinders case*) Available from World Wide Web: <http://cisgw3.law.pace.edu/cases/000119c1.html>

¹³⁹ Taking into account it has the highest number of publicised CISG decisions.

clear rationale for case which have similar facts. In addition to this, parties, in particular buyers as they are the most affected need to apply the *caveat emptor* principle when entering into contracts and be aware of the various factors which may bar their claim to seeking a remedy for non-conforming goods. The guiding principle should be to draft contracts with clear specifications of the goods; spending more on contractual negotiation could help to reduce litigation costs later on. We are encouraged by the notion that the fact of publication will foster greater uniformity of interpretation. Indeed, we would even speculate that CIETAC is releasing these decisions for publication in order to create circumstances in which its panels can – and do – issue more uniform decisions.

2.6 Conclusions on Case Analysis

After an examination of the entire body of cases made available by CIETAC and despite some of the problems raised by the most notable cases which we discuss above, we tentatively conclude that there is no overt evidence of a pro-China bias corruption on the part of the CIETAC panels. A statistical analysis is telling. Out of 290 cases, the claimants were awarded damages 90% of the time; on average the claimant recovered about 65% of the disputed amount. In disputes which involved a Chinese party acting as claimant these cases were successful 90% of the time, whereas when a Chinese party acted as respondent they were successful 8% of the time. Moreover, only reference made to corruption was in a case involving a Chinese claimant and a U.S. respondent for the sale of engines. The U.S. seller alleged that, “[w]e have reason to believe that the [Buyer] intentionally avoided using the inspection agency stipulated in the contract, bent the law for its own benefit, and practiced fraud by colluding with the CCIB Gansu. That an agency authorized by the Chinese government could issue such an irresponsible certificate is truly astonishing; much more as it

is an incompetent agency to issue the Inspection Certificate.”¹⁴⁰ The arbitrator appointed to the case found that the certificate was not issued in accordance with the law and therefore had no effect.

The question of whether or not there is corruption in the practices of CIETAC itself is difficult to answer. In this article we have endeavoured to present a balance of the criticisms facing CIETAC and its response to these criticisms. Is CIETAC biased against foreigners? The decisions we have had access to indicate that this is not the case. Setting aside the issue of whether or not we have the complete picture, is it in CIETAC’s best interest as an arbitral body dealing with foreign related disputes to be perceived as being biased against non-Chinese parties? The answer is a resounding “No.” The reality of arbitration in the region is that there are other competitive tribunals such as the Beijing Arbitration Commission (the “BAC”) which pose a significant threat to CIETAC’s dominance in the market of foreign dispute resolution. In fact many foreign arbitrators have commended BAC’s rules on arbitration as being more straightforward than that of CIETAC.¹⁴¹ Is there evidence of bribery and corruption of the panels? Again, in practice this would be quite difficult and costly to achieve, the party involved would have to bribe their appointed arbitrator, in addition to the Chairperson and the secretary who assists in writing the draft decision for approval. Given the relatively small amounts involved in these cases would it be worth the hassle?

PART THREE: Public policy implications

Over the past thirty years, the world’s most populous country has made enormous strides. Its burgeoning economy has moved hundreds of millions of people out of poverty,

¹⁴⁰ China September 6, 1996 CIETAC Arbitration proceeding (*Engines case*)
<http://cisgw3.law.pace.edu/cases/960906c1.html>

¹⁴¹ T. Klitgaard, presentation at Mealey’s Product Recall Conference: Made in China and Beyond December 10-11, 2007 Washington D.C.

along the way developing myriad and sophisticated political, legal and economic institutions. The cumulative costs of this rapid development are also enormous, in terms of lives and health, environmental degradation, and the loss of cultural heritage and respect for human dignity. Even the establishment of legal systems – generally viewed as a positive development – brings significant costs. Moreover, some critics claim that the arbitral system upon which China’s economy relies so heavily, has been developed to the detriment of the formal legal system. Where traders can rely on private justice, pressure to develop and reform is taken off the formal legal system, or so goes the argument. And indeed, the argument may be correct, but evidence for it is very difficult to assemble. On the other hand, the robust system of commercial arbitration can also be seen as promoting peaceful and just development in the People’s Republic of China.

It seems almost too obvious to point out the economic benefits that China has enjoyed more fully because of its capacity to rely on a arbitral system for resolution of commercial disputes. Relatively comfortable in the ability to rely on impartial and speedy resolution of disputes, foreign traders will be encouraged to increase trade with China (and not with countries where disputes are less likely to be resolved fairly). And because traders have a meaningful recourse when they believe they have suffered from a violation of an obligation, they can price the risk of transactions more accurately and lower. Likewise, both parties are more fully incentivized to look for continuing and improving relationships with one another. They are encouraged to increase the value of the goods traded by providing timely, effective and meaningful feedback about quality (fitness for purpose generally). Sellers will quickly reap advantages by improving their products. In short, arbitral systems encourage the growth of trade by facilitating the increase of quality and lowering transaction costs.

In addition to these direct economic consequences, the fact that China has a robust arbitral system may be encouraging the overall development of the rule of law. As noted above, there may be some extent to which the ability of traders to rely on arbitration has displaced the impulse to develop the rule of law system more generally, but the opposite is almost certainly true as well. The fact that arbitration goes on regularly in China and that courts are required to give decisions effect means that there are at least some additional opportunities to provide norm setting lessons. Business people, lawyers, and judges are exposed to the practice of law that is faithful to international standards for objectivity, integrity and professionalism. This exposure is, in turn training Chinese lawyers how to litigate and settle disputes – skills and expectations which readily transfer to their other work. Likewise, judges have their horizons expanded and their expectations raised. And it appears safe to conclude that the people of China have generally increased their own expectations about the due process rights they should enjoy.

Finally and at the risk of appearing to grandiose in our claims for the benefits of this system, we would add that it has global benefits. First, it serves as a model for improving other developing and post-command economics such as Vietnam and Cambodia.¹⁴² Second, by cabining commercial conflicts through peaceful resolution, it ensures that mere trader disputes do not escalate into more general and dangerous disputes – or result in a widening distrust between the people of China and other nations. And third, by fostering the growth and efficiencies mentioned in the first paragraph of this section, the arbitral system is helping to create value and ever-greater levels of globalization. Yes, this growth comes with great costs, but it brings with it as well unprecedented levels of widespread prosperity.

¹⁴² See for instance, MARK SIDEL, *LAW AND SOCIETY IN VIETNAM* (2008) (“this volume makes explicit comparisons to developments in China, a country closely watched in Vietnam and whose own reform efforts have sometimes paralleled (or presaged) some of Vietnam’s struggles and policies” 1.