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## China's Implementation of the UN Sales Convention Through Arbitral Tribunals

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## China's Implementation of the UN Sales Convention Through Arbitral Tribunals\*

MARK R. SHULMAN\*\* AND LACHMI SINGH\*\*\*

*Because of China's enormous and fast-growing economy and its increasing role in shaping global governance, the evolving rule of law system in the People's Republic poses some of the most critical challenges and opportunities for peace and prosperity in our era. This article examines a feature of the private law system which has developed over the past three decades alongside—arguably instead of—a reliable public order for resolution of international commercial disputes. It does so by focusing on the decisions issued by China's pre-eminent arbitral association—the China International Economic and Trade Arbitration Commission (CIETAC) in Beijing. This article examines the role of CIETAC in China's dispute resolution system, discussing its practices, its procedures*

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\* © Mark R. Shulman and Lachmi Singh, 2010. All rights reserved. The authors are grateful to Albert Kritzer for introducing them to each other and for proposing this project. 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 or an international seminar co-sponsored with Pace University School of Law on The Application and Interpretation of the CISG in Member States with Emphasis on Litigation and Arbitration in the People's Republic of China (October 13–14, 2007). In particular, his understanding of private law in China was greatly enhanced by a presentation by and conversations with Huang Jin, then Vice-President of Wuhan University and now President of the China University of Political Science and Law, and with Guo Yujun of Wuhan University. He is also grateful for comments to this work offered by Vikki Rogers of Pace University and Raj Bhala of the University of Kansas.

\*\* Assistant Dean for Graduate Programs / International Affairs, Adjunct Professor of Law, Pace University School of Law; J.D., Columbia University School of Law; Ph.D. (History), University of California, Berkeley; M.St. (Modern History), University of Oxford; B.A., Yale University.

\*\*\* Senior Lecturer at the University of West of England, Bristol (Contract, Comparative Law and Shipping Law); Ph.D. Candidate, University of Birmingham School of Law; LL.B (Honors) 2004, University of Birmingham; B.A. (Political Science) 2001, University of Toronto.

*and some of the problems that have arisen in regards to settling disputes with foreign parties. In particular, it undertakes a close examination of CIETAC decisions interpreting the United Nations Convention on Contracts for the International Sale of Goods which has been in effect in China since January 1, 1988 and provides the default scheme that regulates all eligible international sales of goods transactions among parties. A leading authority on law in China has argued that CIETAC's practices need substantial reform if they are to adhere to the standards of other international arbitral tribunals. Based on the information currently available, however, we tentatively conclude that concerns such as those about pro-Chinese bias or corruption in this system are either not in evidence or are being addressed. We believe that the glass is half full and generally becoming fuller—at least for the peaceful and just resolution of international commercial disputes.*

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*It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit.<sup>1</sup>*

*In death avoid hell; in life avoid the law courts.<sup>2</sup>*

### Chinese Proverbs

## I. CHINA'S LEGAL SYSTEM AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

### A. Introduction

Over the past thirty years, the People's Republic of China (PRC)—with its enormous population,<sup>3</sup> rapidly developing economy and astounding industrial capacity—has transformed the world's economy while simultaneously developing and reforming its own institutions. Even more noticeably since its accession to the World Trade Organization (WTO) on December 11, 2001,<sup>4</sup> China's influence on the global system of trade has been immense. In 2008, China ranked third among the world's nations for the claimed value of merchandise imported and second for the value of merchandise exported.<sup>5</sup> In terms of merchandise trade—consisting of agricultural products, fuels and mining products and manufactured products—

1. Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1201 (1966).

2. ALASDAIR CLAYRE, 1 *THE HEART OF THE DRAGON* 184 (1985).

3. See China Population Development and Research Center, <http://www.cpirc.org.cn/en/eindex.htm> (last visited Feb. 10, 2010) (providing information on the growing population of China).

4. World Trade Organization, Statistics Database, Trade Profile: China, <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=CN> (last visited Feb. 10, 2010).

5. *Id.*

China commands over an eight-percent share of the world's total exports and over a six-percent share of the world's total imports.<sup>6</sup> And with long-standing growth rates reported to be near ten percent,<sup>7</sup> the Chinese economy is a key driver for development around the world.

Such fast growth and high levels of trade have had significant implications for the development of sales law and of a true rule of law system in China. It is evident to any lawyer that with such an enormous number 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 and 2008 when we started the research for this article, one could hardly turn on the television news or open the newspaper without finding yet another case arising from unsafe products manufactured in China. A range of products including melamine, heparin, pet food, tires, toothpaste and toys have all been recalled because dangers to consumers have been discovered.<sup>8</sup> In 2007, the European Union reported some 440 different products from China to be unsafe for consumer use.<sup>9</sup> In 2009, tests carried out by the Bureau of Industry and Commerce in Guangdong province on over 200 products (including beverages, children's clothing and sani-

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6. *Id.*

7. Xu Dashan, *China's Economy to Grow 8% Annually from 2006 to 2010*, CHINA DAILY, Mar. 21, 2005, [http://www2.chinadaily.com.cn/english/doc/2005-03/21/content\\_426718.htm](http://www2.chinadaily.com.cn/english/doc/2005-03/21/content_426718.htm). For more recent data, see CENTRAL INTELLIGENCE AGENCY (C.I.A.), THE WORLD FACTBOOK: CHINA (2009), <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html>.

8. 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. *New York Times*, Times Topics, Consumer Safety and China, [http://topics.nytimes.com/top/reference/timestopics/subjects/c/consumer\\_product\\_safety/china/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/c/consumer_product_safety/china/index.html) (last visited Feb. 10, 2010). See also David Barboza, *China Orders New Oversight of Heparin, With Tainted Batches Tied to U.S. Deaths*, N.Y. TIMES, Mar. 22, 2008, <http://www.nytimes.com/2008/03/22/world/asia/22heparin.html>; David Barboza, *China Begins Inspections of Ingredient Tied to Tainted Pet Food*, N.Y. TIMES, May 5, 2007, <http://query.nytimes.com/gst/fullpage.html?res=9B0CEFD8113EF936A35756C0A9619C8B63>; David Barboza, *China to Revise Rules on Food and Drug Safety*, N.Y. TIMES, June 7, 2007, <http://www.nytimes.com/2007/06/07/business/worldbusiness/07safety.html>; Andrew Martin, *Chinese Tires Are Ordered Recalled*, N.Y. TIMES, June 26, 2007, <http://www.nytimes.com/2007/06/26/business/worldbusiness/26tire.html>; Louise Story & David Barboza, *Mattel Recalls 19 Million Toys Sent From China*, N.Y. TIMES, Aug. 15, 2007, <http://www.nytimes.com/2007/08/15/business/worldbusiness/15imports.html>.

9. Press Release, European Commission, Consumer Affairs, China and Product Safety: Frequently Asked Questions (Jul. 19, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/299>.

tary products) revealed that only forty-nine percent of these complied with quality standards.<sup>10</sup>

The Chinese government has responded to the resulting backlash from foreign importers by declaring a “special battle” against poor product quality.<sup>11</sup> Vice-Premier Wu Yi, head of a Cabinet-level panel on food safety and quality, stated, “This is a special battle to protect the safety and interests of the general public, as well as a war to safeguard the made-in-China label . . . .”<sup>12</sup> The Chinese government has taken a strong stand when it comes to punishing those responsible for producing tainted or unsafe products. In a recent case involving milk powder that was contaminated with melamine, punishment handed down to the executives of the company responsible ranged from two years to life in prison.<sup>13</sup> The two persons directly linked to the contamination were executed for their role in the deaths of six children.<sup>14</sup> While Chinese authorities scramble to implement new safety and product standard regulations, there are still outstanding issues arising from the sale and consumption of tainted goods; some of these are currently pending in courts and arbitral tribunals across China.

The United Nations Convention on Contracts for the International Sale of Goods (CISG or the Convention) has been in effect in China since January 1, 1988, and provides the default scheme that regulates all eligible international sales of goods transactions between parties within Contracting Member States.<sup>15</sup> The Convention’s signi-

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10. Qiu Quanlin, ‘Unsafe’ Products Still on Shelves in Guangdong, CHINA DAILY, June 30, 2009, [http://www.chinadaily.com.cn/china/2009-06/30/content\\_8336609.htm](http://www.chinadaily.com.cn/china/2009-06/30/content_8336609.htm).

11. *China Declares War on Unsafe Products*, ENV’T NEWS SERVICE, Aug. 24, 2007, <http://www.mywire.com/a/EnvironmentNewsService/China-Declares-War-Unsafe-Products/4448439/>. As part of the effort to clamp down on corruption, a Beijing court imposed the death penalty on Zheng Xiaoyu, the former head of the State Food and Drug Administration. He was executed on July 10, 2007. Joseph Kahn, *China Executes Former Drug Regulator*, N.Y. TIMES, July 11, 2007, <http://www.nytimes.com/2007/07/11/business/worldbusiness/11execute-web.html>.

12. *China Declares War on Unsafe Products*, *supra* note 11.

13. Sharon LaFraniere, *2 Executed in China for Selling Tainted Milk*, N.Y. TIMES, Nov. 24, 2009, <http://www.nytimes.com/2009/11/25/world/asia/25china.html>.

14. *Id.*

15. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9 (1984), 1489 U.N.T.S. 3 [hereinafter CISG]. See also Pace Law School Institute of International Commercial Law, CISG Database, <http://www.cisg.law.pace.edu/> (last visited Feb. 2, 2010) (providing a continually growing electronic database of court judgments and arbitral awards interpreting the CISG). Like the U.S., the PRC has made an Article 95 declaration and is therefore not bound by Article 1(1)(b) of the Convention. See Pace Law School Institute of International Commercial Law,

ficance can hardly be overstated given that China's largest trading partners are the United States, the European Union, and the Republic of Korea, each of which is a Contracting State under the CISG.<sup>16</sup>

While much of the scholarly literature on the CISG has focused on the decision-making of national courts,<sup>17</sup> relatively little has been written on the decisions of arbitral panels. This article examines the latter—in particular, decisions of the China International Economic and Trade Arbitration Commission (CIETAC).<sup>18</sup> Many contracting parties prefer arbitration over other methods of dispute resolution because it is relatively speedy and cost-efficient while yielding decisions that are binding and enforceable in domestic courts, pursuant to the terms of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>19</sup> These purported advantages of arbitration over litigation in the courts appear to be particularly desirable in China where domestic courts have long been considered susceptible to the vicissitudes of corruption and political influence.

CIETAC is one of the largest and most important arbitration institutions in China. While it is often difficult to obtain reliable insights into decision-making in China and particularly from alternative dispute mechanisms, we were fortunate to have access to translations

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CISG Database, CISG: Participating Countries – China (PRC), <http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html> (last visited Feb. 10, 2010).

16. All E.U. members are state parties to the CISG with the notable exceptions of the United Kingdom, Ireland and Portugal. See Pace Law School Institute of International Commercial Law, CISG Database, CISG: Table of Contracting States, <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last visited Feb. 10, 2010).

17. See UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS (2008), available at [http://www.uncitral.org/pdf/English/clout/08-51939\\_Ebook.pdf](http://www.uncitral.org/pdf/English/clout/08-51939_Ebook.pdf). See also Pace Law School Institute of International Commercial Law, CISG Database, UNCITRAL Digest Cases Plus Added Cases, <http://www.cisg.law.pace.edu/cisg/text/digest-cases-toc.html> (last visited Feb. 2, 2010) (providing electronic access to all information in the 2008 UNCITRAL Digest, as well as “[l]inked citations to more recent cases and other cases that cite or interpret each Article of the CISG,” section outlines and footnote web links to cited cases).

18. See generally CIETAC, China International Economic and Trade Arbitration Commission, Introduction, [http://cn.cietac.org/english/introduction/intro\\_1.htm](http://cn.cietac.org/english/introduction/intro_1.htm) (last visited Feb. 10, 2010).

19. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. The New York Convention had been acceded to by 143 countries as of November 25, 2008. The Convention came into force for China as of April 22, 1987. UNCITRAL, Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Feb. 10, 2010).

of reasoned opinions issued as a result of over 300 arbitrated disputes involving the application of the CISG in China. Albert H. Kritzer<sup>20</sup> and his colleagues at the Pace University School of Law's Institute of International Commercial Law collected these decisions directly from CIETAC and had them meticulously translated before posting them on the Institute's website.<sup>21</sup> As of June 2009, of the 345 reported Chinese cases applying the CISG, 290 of these were CIETAC awards.<sup>22</sup> For purposes of this article, we postulate that these decisions are indicative of the state of the rule of law in China.

This article examines the role of CIETAC in China's dispute resolution system, discussing its practices, its procedures and some of the problems that have arisen in regards to settling disputes with foreign parties. This article first addresses criticisms of CIETAC and also tackles questions about Chinese arbitration on the whole. The second section examines decisions reached in the cases dealing with defective and unsafe products and discusses how they might impact decisions in disputes currently pending before the tribunal. It concludes with a more wide-ranging discussion of the broader implications of our findings for the development of the rule of law in China. Compared to conditions thirty years ago when Deng Xiaoping launched the program to "establish a socialist legal system with Chinese characteristics,"<sup>23</sup> we conclude that the glass is half full and generally becoming more full—at least for the peaceful and just resolution of international commercial disputes. Moreover, we believe

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20. Albert H. Kritzer is Executive Secretary of the Institute of International Commercial Law, Pace University School of Law and Co-editor of the CISGW3 Electronic Library on the United Nations Convention on Contracts for the International Sale of Goods and International Contract Law.

21. See Pace Law School Institute of International Commercial Law, CISG Database, <http://www.cisg.law.pace.edu/> (last visited Feb. 10, 2010). 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, Presentation at the 2007 International Seminar on the Application and Interpretation of the CISG in Member States with Emphasis on Litigation and Arbitration in the P.R. of China (Oct. 13–14, 2007), *in* 40UCC L.J. 261 (2007). Kritzer has also conducted a statistical analysis of the first 290 reported cases. See *infra* text accompanying notes 232 to 233.

22. These statistics were an indication of cases accessible and translated on the Pace University School of Law CISG database. See Pace Law School Institute of International Commercial Law, CISG Database, Country Case Schedule: China, <http://www.cisg.law.pace.edu/cisg/text/caselit.html#china> (last visited June 10, 2009). See also Fan Yang, *CISG in China and Beyond*, 40 UCC L.J. 373 (2008).

23. Jerome Alan Cohen, *China's Legal Reform at the Crossroads*, 169 FAR E. ECON. REV. 23, 24 (2006).



that the development of reliable and increasingly fair commercial arbitration is likely to have beneficial effects throughout China.

### B. *Legal System in China*

We begin our examination of the procedures and practices of China's arbitral system with a brief look at the political, legal and economic context in which it developed. Since the end of the Revolution in 1949, China's legal landscape has been dominated by the political branches and the interests they represent. For several decades, no real effort was made to distinguish politics from law, with the former consistently dictating the substance, process and application of the latter. Since the death of Mao Zedong in 1976, however, the PRC has undergone dramatic transformations, including the establishment of a less political and more institutionalized and codified system of law.<sup>24</sup> While this change has been meaningful, the will of the Communist Party of China (CPC or the Party) still continues to pervade China's 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. Each of the tiers operates at its respective level exercising political, legislative, administrative and judicial functions complete with its own institutions.<sup>25</sup> 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. The budgets of each of the local People's courts are subject to the approval of their respective local governments, and this opens the possibility that these judicial bodies could be subject to interference from the government.<sup>26</sup> 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

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24. Human rights lawyer Sharon Hom notes that "[t]here has been significant progress toward rebuilding the legal system in China since the early 1980s, including impressive legislative activity, training of legal personnel (lawyers, judges, law professors) and development of legal and administrative institutions and processes [but there remain] difficult challenges in light of persistent structural and systemic problems including: endemic corruption and influence of *guanxi* (relationships), levels of legal competency, the role of the CPC and the lack of an independent judiciary and bar." Sharon K. Hom, *Foreword: Circling Towards Law*, 2 CHINA RTS. F., Feb.–Apr. 2007, at 19, 19, available at [http://www.hrchina.org/public/PDFs/CRF.2.2007/CRF-2007-2\\_Circling.pdf](http://www.hrchina.org/public/PDFs/CRF.2.2007/CRF-2007-2_Circling.pdf).

25. KUI HUA WANG, CHINESE COMMERCIAL LAW 13–14 (2000).

26. *Id.* at 26.

Congress, making the lines of judicial impartiality difficult to distinguish.<sup>27</sup>

Article 126 of the Constitution of the PRC states that “[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.”<sup>28</sup> However, in practice this is not always the case.<sup>29</sup> 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.<sup>30</sup> Typically such interference involves members of the judiciary and the government working together to protect their individual or institutional interests.<sup>31</sup>

More recently, China’s leaders have gone further and promulgated the “Three Supremes”—a hierarchy of interests that judges should account for in their decision-making.<sup>32</sup> The Communist Party of China is the first “Supreme.” Next come the people. The Constitution and the law constitute the third “Supreme.” In addition to (but not unrelated to) the indeterminate impact of this directive, some unknown number of “sensitive” cases are decided by the “adjudication

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27. *Id.* at 27–29.

28. XIAN FA art. 126 (1982) (P.R.C.).

29. *See* Hom, *supra* note 24, at 19. Professor John Head of the University of Kansas School of Law also offers an enlightening discussion of the meaning of the rule of law in China, starting with the provocative question: “should the nearly absolute authority of the CPC over China’s system of law and governance, coupled with the absence of a genuinely representative legislature reflecting direct influence by society at large, lead us to conclude that China is *not* in fact a ‘rule of law country’ as its Constitution proclaims?” JOHN W. HEAD, CHINA’S LEGAL SOUL: THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT 127 (2009). He concludes that a “‘thin’ rule of law . . . *does* exist in today’s China, although only barely.” *Id.* at 148.

30. *See* KUI HUA WANG, *supra* note 25, at 16.

31. *Id.* at 27–28.

32. In December 2007, President and Party General Secretary Hu Jintao announced the Three Supremes. The new Supreme Court President Wang Shengjun has subsequently promulgated them. *See* Jerome Cohen, *Body Blow for the Judiciary*, S. CHINA MORNING POST, Oct. 18, 2008, available at [http://www.cfr.org/publication/17565/body\\_blow\\_for\\_the\\_judiciary.html](http://www.cfr.org/publication/17565/body_blow_for_the_judiciary.html) (describing the high-level support for the “Three Supremes” and explaining how they represent a step backwards in the development of China’s rule of law system). On the other hand, one of the authors (Shulman) recently met with a variety of lawyers and law professors in Beijing and Shanghai and came away with the impression that many people view the Three Supremes as something of a bad joke, an obstacle in the inexorable development of respect for the law.

committees” of courts—panels which may not even have heard the cases.<sup>33</sup>

In the face of this kind of direction from the leadership, the professionalization of the judiciary—increasing its capacity, integrity and political independence—is proceeding unevenly. Chapter III of the Organic Law of the People’s Courts of the PRC sets out the eligibility criteria for judicial personnel of the People’s courts.<sup>34</sup> Specifically, Article 34 states,

[c]itizens who have the right to vote and to stand for election and have reached the 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.<sup>35</sup>

This article was amended in 1983 to add a requirement for office that “[j]udicial personnel of people’s courts must have an adequate knowledge of the law.”<sup>36</sup> 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 factors as service in the People’s Liberation Army.<sup>37</sup> As recently as twenty years ago, a mere ten percent of judges had enjoyed higher education in the law.<sup>38</sup> More recent statistics offer signs that the situation is improving, but of the approximately 200,000

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33. This phenomenon is widely known in China, as attested to by many lawyers interviewed during the course of Shulman’s December 2009 visit.

34. Zhonghua Renmin Gongheguo fayuan zuzhifa [Organic Law of the People’s Courts] (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1979, effective Jan. 1, 1980) (amended Sept. 2, 1983), arts. 34–41, *translated in* China Internet Information Center, <http://www.china.org.cn/english/government/207253.htm> (last visited Feb. 10, 2010) (P.R.C.) (“The authorized government portal site to China, www.china.org.cn is published under the auspices of the [PRC’s] State Council Information Office and the China International Publishing Group in Beijing.” China Internet Information Center, About Us, <http://www.china.org.cn/e-logo/about.htm> (last visited Feb. 10, 2010).).

35. *Id.* art. 34.

36. *Id.*

37. Hairong Zhou, *The Re-establishment of the Chinese Legal System: Achievements and Disappointments*, 10 CIV. JUST. Q. 44, 54 (1991).

38. *Id.*

judges currently serving in the PRC only half have earned a university degree of any kind.<sup>39</sup>

The government has recognized that the lack of formal judicial training has had a harmful impact on the nation's international business dealings.<sup>40</sup> It has been argued that without a proper legal education, well-intentioned judges often struggle to cope with decisions involving complex legal issues such as intellectual property rights.<sup>41</sup> To address these problems, starting in 2002 new judicial candidates have been required to pass the State Judicial Exam (SJE) which tests their knowledge of legal theory, economic law and public and private international law. When the SJE was first issued, only seven percent of the 360,000 people who took part passed.<sup>42</sup>

As a result of growing recognition of the depressive economic impact of this situation, the PRC is implementing new initiatives, including one that offers judges the chance to complete an LL.M. at City University in Hong Kong. This program offers a significant improvement to the judges' international law expertise.<sup>43</sup> In addition to these initiatives to provide legal training for judges by institutions and collaborations outside of the PRC, domestic mechanisms have also been instituted. These include two training institutes for judges, the National Judges College and the Spare-time University.<sup>44</sup> Both of these institutions are run and financed by the Supreme People's Court.<sup>45</sup> There are also various Chinese universities and training centers which provide on-the-job training to those already employed in the judiciary.<sup>46</sup>

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39. Benjamin L. Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 620, 625–26 (2007).

40. Liying Zhang, *Hong Kong Launches Masters Program for Mainland Judges*, ALB NEWS, Jan. 23, 2009, <http://asia.legalbusinessonline.com/news/breaking-news/32198/details.aspx>.

41. Jianqiang Nie, *The Enforcement of Intellectual Property Rights in China: Institutional Challenges 9*, Seminar Presentation at the University of Melbourne Law School (Sept. 7, 2009), <http://www.ipria.org/events/seminar/Enforcement%20of%20IP%20in%20China.ppt>.

42. VINCENT CHENG YANG, *JUDICIAL AND LEGAL TRAINING IN CHINA: CURRENT STATUS OF PROFESSIONAL DEVELOPMENT AND TOPICS OF HUMAN RIGHTS 20* (2002), available at [http://www.icclr.law.ubc.ca/Publications/Reports/Beijing\\_August\\_2002.pdf](http://www.icclr.law.ubc.ca/Publications/Reports/Beijing_August_2002.pdf).

43. See Liying Zhang, *supra* note 40.

44. YANG, *supra* note 42, at 8–9.

45. *Id.*

46. *Id.* at 5. See also *Chinese Judges Observe American Law in Action*, COLUM. L. SCH. MAG., Dec. 22, 2009, available at <http://www.law.columbia.edu/magazine/153242/chinese-judges-observe-american-law-in-action>.

The demand for greater levels of expertise certainly exists. In joining the WTO, China has had to reform many of its own laws to conform to WTO standards, and this has meant that the judges have also had to enhance their levels of expertise to cope with the ever-increasing caseloads. Therefore, when comparing the position of the judiciary today with that of a few years ago, we can see that meaningful steps are being taken to improve the quality of training for judges.<sup>47</sup> The results of these various initiatives will require time to take effect, particularly in light of the large number of judges to be trained and the costs involved.

In addition to the problems associated with the competency of the judiciary, careful observers have also noted that many of the legal proceedings that take place in the courts frequently lack some measure of transparency. Courts sometimes refuse even to disclose what rules they are applying.<sup>48</sup> 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.

As Alice Tay and Conita Leung explain, Chinese “[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 important.”<sup>49</sup> The difference between the Western formalistic approach to the rule of law and the Chinese approach is further illustrated in the ways that contracts are perceived. For example, a Chinese negotiator may see a contract not as a legally binding document with predictable legal consequences, but as an expression of one’s willingness to cooperate and to enter into a friendly relationship.<sup>50</sup> This perception contrasts starkly to the standard Western view, in which the wording of the contract controls interpre-

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47. See, for example, the program offered by Columbia Law School as part of the LL.M. at the City University of Hong Kong. Columbia Law School, Chinese Judges to Study American Legal System at Columbia Law School (June 5, 2009), [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2009/june2009/ChineseJudges](http://www.law.columbia.edu/media_inquiries/news_events/2009/june2009/ChineseJudges).

48. David Livdahl, *International Arbitration in PRC*, 13 NIHON KOKUSAI KEIZAIHO NENPO [Y.B. OF INT’L ECON. L.] 103, 105 (2004).

49. Alice Tay & Conita Leung, *Introduction: The Relation Between Culture, Commerce and Ethics*, in GREATER CHINA: LAW, SOCIETY, AND TRADE 1, 7 (Alice Tay & Conita Leung eds., 2005).

50. See KUI HUA WANG, *supra* note 25, at 37. See also 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 (2003) (“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.”).

tation and both parties are generally obliged by the terms, as far as is practicable (i.e. *pacta sunt servanda*).<sup>51</sup>

Chinese businesspeople tend to shy away from detailed clauses within the contract, especially when this would weaken their position.<sup>52</sup> Instead the negotiation process is given greater influence. It has been argued that, as a result of this climate, negotiating parties should keep detailed notes of all negotiations, however informal the exchange.<sup>53</sup> Furthermore, subsequent amendments to the contract and cancellations of the contract after granting final approval are not unheard-of in Chinese business practice.<sup>54</sup> Westerners are advised not to 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.<sup>55</sup> This difference in attitude can be summed up in the Chinese proverb: “It is better to keep a friend than to win a victory.”<sup>56</sup> Notwithstanding this difference of approach to the deal, the Chinese still manage to conduct enormous volumes of international business.

Foreign parties often struggle with the dual burden of not only being 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,<sup>57</sup> which came into force in 1999, there are other “hidden” sources of law governing contracts in the PRC that may not be easily discernable to foreigners.<sup>58</sup> Although contractual issues constitute a relatively small part of the Civil Code, they bear significant influence on how courts go about interpreting contracts.<sup>59</sup> Grace Li argues that these provisions are general in nature and can often be confusing as to their ac-

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51. See E. Allan Farnsworth, *An International Restatement: The UNIDROIT Principles of International Commercial Contracts*, 26 U. BALT. L. REV. 1, 4 (1997) (noting that the UNIDROIT Principles provide that if “performance becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations.”); E. ALLAN FARNSWORTH, *CONTRACTS* 37–40 (3d ed. 1999).

52. KEVIN BUCKNALL, *CHINESE BUSINESS ETIQUETTE AND CULTURE* 115 (2002).

53. *Id.* at 115–16.

54. *Id.* at 117.

55. *Id.* at 118.

56. Robert F. Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383, 384 (1987).

57. *Zhonghua Renmin Gongheguo Hetongfa* [Contract Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 1999, effective Oct. 1, 1999) *LAWINFOCHINA* (last visited Feb. 10, 2010) (P.R.C.).

58. Grace Li, *The PRC Contract Law and Its Unique Notion of Subrogation*, 4 J. INT’L COM. L. & TECH. 12, 14, 16 (2009), <http://www.jiclt.com/index.php/jiclt/article/view/67/66>.

59. *Id.* at 14.

tual meaning, as they rarely serve to define parties' responsibilities in cases of breach.<sup>60</sup>

The role of precedent in contract law offers another example of a "hidden" source of law. Precedent does not play a significant role in the PRC, in great part because most decisions are not reported.<sup>61</sup> Because the Ministry of Propaganda's consent is required before a court can release the text of a decision, the few decisions that are made public are released in order to satisfy a political rather than a legal agenda.<sup>62</sup>

Lastly, foreigners must contend with a multitude of regulations and ordinances handed down by the various levels of administrative bodies.<sup>63</sup> Depending on where the case is heard, these laws could affect the outcome of a contractual dispute. In order to determine the proper outcome, a court would need to examine the relevant ordinances at all levels of government.<sup>64</sup> Foreigners may find it exceedingly difficult to access this information, as it is often published only in Chinese.<sup>65</sup>

Even this brief examination of the challenges imposed by China's court system demonstrates why foreign investors are often reluctant to enter into Chinese legal proceedings in which they may encounter unfair practices, opaque procedures and unfamiliar rules. Thus, traders frequently turn to alternative dispute resolution, incorporating arbitration clauses into their sales contracts. Chinese companies themselves often prefer such alternative dispute resolution mechanisms to resolve their legal issues, as they too appear to mistrust the traditional court system.<sup>66</sup>

While the PRC may not adhere closely to the Western conceptions of the rule of law, China's government has made progress

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60. *Id.* (citing Zhonghua Renmin Gongheguo minfa tongze [General Principles of the Civil Law] (adopted by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 113, LAWINFOCHINA (last visited Feb. 10, 2010) (P.R.C.) ("If both parties breach the contract, each party shall bear its respective civil liability.")).

61. *Id.*; see also J. H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L L. 329, 376-77 (2006).

62. Li, *supra* note 58, at 15.

63. *Id.* at 16.

64. *Id.*

65. *Id.*

66. See Peter Murray, *China, An Emerging Maritime Jurisdiction: Recent Trends Pointing to a New Regime*, at 3 (2006), available at [http://esvc000873.wic005u.server-web.com/docs/Murray\\_paper.pdf](http://esvc000873.wic005u.server-web.com/docs/Murray_paper.pdf) (noting that the total number of arbitrations filed in China in 2005 was 48,339).

towards developing a rule of law over the past thirty years.<sup>67</sup> By taking into account the utter lack of independent legal institutions in the PRC prior to Deng's reforms, we can start to appreciate the advances made in developing its legal institutions and rules in a relatively short amount of time.<sup>68</sup> At the same time, the PRC has created a parallel system that facilitates trade by enabling traders to resolve commercial disputes through arbitration with relative efficiency, reliability and fairness.

### C. *Arbitration in China*

As noted above, foreign investors generally choose arbitration as the means of resolving disputes in their course of dealings.<sup>69</sup> 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.<sup>70</sup> There are 180 arbitral bodies in the PRC, several of which have a significant caseload of foreign-party disputes. CIETAC is the oldest and largest such body. CIETAC was established in 1956 as the China Council for the Promotion of International Trade.<sup>71</sup> It assumed its current name in 1988.<sup>72</sup> In 2000, it also adopted the additional name of the Arbitration Court of the China Chamber of International Commerce.<sup>73</sup> CIETAC's head office is located in Beijing, and it has established sub-commissions in Shanghai, in Shenzhen and most recently in Tianjin.<sup>74</sup> The Central Government oversees CIETAC and appoints its Secretary-General. In 2007, CIETAC dealt with 1,118 arbitration cases, making it one of the busiest arbitration bodies in the

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67. HEAD, *supra* note 29, at 147.

68. *Id.*

69. See Yang, *supra* note 22, at 377 (discussing the definition of "foreign" in the context of "foreign-related contracts"). Professor Yang concludes that "[t]he fact that the current 1999 PRC Contract Law itself does not contain special provisions governing international sales contracts reinforces the importance of the CISG as the most influential source of law on international contracts in China." *Id.* at 384.

70. See New York Convention, *supra* note 19, art. 2(3).

71. CIETAC, Introduction, *supra* note 18.

72. *Id.*

73. *Id.*

74. See Dong Wu, *CIETAC's Practice on the CISG*, NORDIC J. OF COM. L., Issue 2005 No. 2, at 3, [http://www.njcl.utu.fi/2\\_2005/article2.pdf](http://www.njcl.utu.fi/2_2005/article2.pdf); CIETAC Tianjin International Economic and Financial Arbitration Center, Introduction, <http://www.cietac-tj.org/English/Aboutus/Aboutus.htm> (last visited Feb. 10, 2010).



world.<sup>75</sup> Of these cases, some 429 (thirty-eight percent) included at least one foreign party.<sup>76</sup>

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.<sup>77</sup> Some commentators dispute these claims. Jerome Cohen, a leading authority on law in China, argues that CIETAC's practices need substantial reform if they are to adhere to the standards of other international arbitral tribunals.<sup>78</sup> Cohen served as an arbitrator in a case involving an alleged breach of a contract to build a power plant. In describing his experiences he said, "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."<sup>79</sup> We have identified and will proceed to examine the following criticisms and areas for potential reforms:

- 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, which does not allow for fair proceedings;
- decision-making and record-keeping, which need to be more transparent in order to ensure the integrity of the process; and that
- CIETAC administrative fees, which 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 they might appear at first glance and in most cases steps are being taken towards improving the existing regime.

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75. Li Zhang, *The Enforcement of CIETAC Arbitration Awards*, HONG KONG LAW., Feb. 2002, available at [http://www.hk-lawyer.com/InnerPages\\_features/0/804/2002/2](http://www.hk-lawyer.com/InnerPages_features/0/804/2002/2).

76. Ashby Jones & Andrew Batson, *Concerns About China Arbitration Rise*, WALL ST. J., May 9, 2008, at B1 (indicating that CIETAC received 684 cases in 2002, 709 cases in 2003, 850 cases in 2004, 979 cases in 2005, 981 cases in 2006 and 1,118 cases in 2007).

77. CIETAC, Introduction, *supra* note 18.

78. Jerome Cohen, *Time to Fix China's Arbitration*, 168 FAR E. ECON. REV. 31, 32 (Jan. 2005); see also Michael J. Lyle & David A. Hickerson, *Products Liability: Chinese-Made Goods*, NAT'L L. J., Feb. 18, 2008, at 15, col.1.

79. Jones & Batson, *supra* note 76.

## 1. Validity of Arbitration Clauses

As jurisdiction of arbitration is based on mutual agreement of the parties and enforcement may require 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 contracts. This is because 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 an arbitral tribunal based in the PRC. Rather, they can choose an arbitral tribunal from anywhere. In fact, they do not even have to choose Chinese law to govern the dispute.<sup>80</sup> 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*).<sup>81</sup> Failing to name a specific body or leaving any ambiguity in the intention expressed in 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 could result in invalidation of the clause, thus negating the intention to arbitrate and leaving the parties with only the courts for pursuit of their claims.<sup>82</sup>

An example of this problem can be seen in one case concerning a dispute over the parties' right to elect the rules of the Paris-based International Chamber of Commerce (ICC) to govern its dis-

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80. It is not necessary to choose Chinese law to govern disputes arising from contracts between Chinese and foreign entities, except in Sino-foreign venture agreements and certain PRC mining and oil exploration contracts. Report by David Livdahl, Partner, Corporate Department, Paul Hastings, Janofsky & Walker LLP, *International Arbitration in the PRC* (2006) (on file with author) [hereinafter Livdahl 2006].

81. *Zhonghua Renmin Gongheguo zhongcai fa* [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective September 1, 1995), art. 16, *translated in* 34 I.L.M. 1650 (1995) (P.R.C.) ("An arbitration agreement shall include arbitration clauses concluded in a contract, and agreements on arbitration petition that are reached in writing before or after a dispute. An arbitration agreement shall contain the following particulars: (1) an indication of the intention to apply for arbitration; (2) the arbitrable matters; and (3) the selected arbitration commission.").

82. *Id.* art. 18 ("Where an arbitration agreement contains no or unclear provisions, the parties may reach a supplementary agreement. Where no such supplementary agreement can be reached, the arbitration agreement shall be void.").

pute.<sup>83</sup> In this 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. 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.<sup>84</sup> Likewise, in the case of *Guanghope v. Mirant*, the Supreme People's Court found that an arbitration clause was invalid because the parties had not expressly named an arbitral commission.<sup>85</sup> To prevent this unintended result from reoccurring, the ICC has now amended its arbitration clause from its original wording to address those disputes that 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.<sup>86</sup>

It is worth noting, however, that the PRC's position on the validity of these arbitration clauses was widely criticized.<sup>87</sup>

In the wake 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 Court Dealing with Cases of Foreign-related Arbitration and Foreign Arbitration (Several Provisions).<sup>88</sup> They stated that where "the parties only provide that the arbitration rules of a certain arbitration institution shall

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83. See generally Int'l Chamber of Commerce, *Rules of Arbitration*, ICC 01/2009, Jan. 1, 2008, available at [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_arb\\_english.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf).

84. David Livdahl & Xiaodan Qin, *ICC Arbitration Administered in China*, 2006 ASIAN DISP. REV. 49, 50, available at <http://hkmc.hk/HKIAC/pdf/Further%20Readings/ADR%20April%202006.pdf>.

85. Alfred B. Adams, III et al., *International Arbitration as a Means for Dispute Resolution with Chinese Exporters*, CHINA NEWSL. (Holland and Knight LLP, Tampa, Fla.), Jan. 23, 2008, <http://www.hklaw.com/id24660/PublicationId2341/ReturnId31/contented50261/>.

86. Int'l Chamber of Commerce, ICC Standard and Suggested Clauses for Dispute Resolution Services, Arbitration in Mainland China, <http://www.iccwbo.org/court/arbitration/id4114/index.html> (last visited Feb. 10, 2010).

87. Livdahl & Qin, *supra* note 84, at 49.

88. *Id.* at 50.

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."<sup>89</sup> Despite the fact that this draft has yet to be made legally binding in the PRC, courts have already begun using it to guide their decisions. A court in Xiamen ruled valid a provision that required use of the ICC rules of arbitration and stated that the place of arbitration shall be in Beijing, but failed to name a specific body.<sup>90</sup> This ambiguity in intent might normally have resulted in the invalidation of the clause. However, in this case it was upheld.<sup>91</sup>

## 2. 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.<sup>92</sup>

Likewise, Fiona D'Souza concluded her own 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."<sup>93</sup>

Nevertheless, there is still the outstanding issue that some arbitral awards are not being enforced by the courts, despite the fact that China is party to the New York Convention. Here we will ex-

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89. *Id.*

90. *Id.*; see also Livdahl 2006, *supra* note 80, at 11–12 (citing Xiamen Xiang Yu Group Corp. v. Mechel Trading AG (Xiamen Interm. People's Ct., Dec. 14, 2004), translated in <http://cisgw3.law.pace.edu/cases/041214c1.html>).

91. Livdahl & Qin, *supra* note 84, at 50; Livdahl 2006, *supra* note 80, at 11–12.

92. Lyle & Hickerson, *supra* note 78, at 15 (emphasis added).

93. Fiona D'Souza, LL.M. Perspective, *The Recognition and Enforcement of Commercial Arbitral Awards in The People's Republic of China*, 30 *FORDHAM INT'L L.J.* 1318, 1331 (2007). D'Souza argues 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." *Id.* at 1318.

amine the enforcement of awards made by foreign-related arbitration bodies that have been recognized by the PRC. In the event of non-compliance by a party with a foreign arbitration award, the other aggrieved party can apply to the Intermediate People's Court for an enforcement ruling pursuant to Article 259 of the PRC Civil Procedure Law (CPL).<sup>94</sup> Additionally, Article 217 of the CPL makes provisions for when a party does not adhere to a domestic award.<sup>95</sup> 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.<sup>96</sup> While it may be argued that Article 269 of the CPL should also provide some protection for the enforcement of domestic awards via the New York Convention,<sup>97</sup> in practice 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 does not apply to those made in the PRC.<sup>98</sup>

In 2001, Randall Peerenboom calculated enforcement rates based on a study of seventy-two foreign and CIETAC arbitral award cases decided from 1991 to 1999.<sup>99</sup> He found that fifty-two percent of all foreign awards and forty-seven percent of all CIETAC awards were enforced.<sup>100</sup> In fact these findings improve once we take into account that, of the thirty-seven cases that were not enforced, almost half were due to lack of assets on the part of the respondent.<sup>101</sup> Peerenboom's study of awards clearly indicates that the enforcement of foreign awards during this period was not as bleak as some had speculated. For those who speculate that local protectionism (*guanxi*) affects the enforceability of awards, the study found that while sixty percent of parties thought this to be the case, in fact there was little difference in the enforceability rate of cases where protectionism was absent with those cases where protectionism was present.<sup>102</sup> Howev-

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94. Zhonghua Renmin Gongheguo minshi susong fa [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991), art. 259, LAWINFOCHINA (last visited Feb. 10, 2010) (P.R.C.).

95. *Id.* art. 217.

96. See Livdahl & Qin, *supra* note 84, at 50–51.

97. Civil Procedure Law, *supra* note 94, art. 269.

98. Livdahl & Qin, *supra* note 84, at 50–51.

99. Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Award in the PRC*, 49 AM. J. COMP. L. 249, 252 (2001).

100. *Id.* at 263. For purposes of his study, “enforced” meant that some amount was recovered, even if that amount was a mere one percent of the award amount. *Id.* at 267.

101. *Id.* at 266–67.

102. The enforceability rate in the absence of local protectionism was sixty-one percent,

er, while local protectionism may not affect enforcement per se, it may have the effect of causing delays or difficulties for the parties involved.<sup>103</sup>

In a survey of 488 respondents carried out by Veron Hung, forty-six percent said they would petition their local government if they felt that their claims were rejected without a valid reason.<sup>104</sup> However it was pointed out that they would proceed with legal action once they were sure that their own connections with higher government agencies could protect them,<sup>105</sup> thereby contributing to the prevalence of local protectionism. This attitude is reflected in what is described by Hung as the “three nots” (*san bu*): those who do not bring suit because they are fearful of government backlash, those who do not sue because of cost and those who do not bring suit because they lack knowledge of legal matters.<sup>106</sup>

Peerenboom also identified factors that may affect the enforcement of awards: the role of the Party, the lack of authority of the courts and the competence of the judiciary.<sup>107</sup> Some have argued that interference by the Party has been one of the largest stumbling blocks to the independence of the judiciary.<sup>108</sup> Li Yayun conducted research in this area and concluded that Party interference ranged from controlling the nomination process for judges to influencing the outcomes of decisions.<sup>109</sup> She argued that it is not unheard of for a judge to be removed if she or he does not provide a desired outcome in a case and to be replaced with someone who will.<sup>110</sup> More recently, the Party claims to have introduced measures for reform and to promote judicial fairness (*sifa gongzheng*) and the rule of law in China. In particular, it points to Shanghai as an example of a city

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while the enforceability rate in the presence of local protectionism was fifty-four percent. *Id.* at 276.

103. *Id.* at 277.

104. Veron Mei-Ying Hung, *Judicial Reform in China: Lessons from Shanghai* at 5 (Carnegie Endowment for Int'l Peace, Carnegie Paper No. 58, 2005), available at <http://www.carnegieendowment.org/files/CP58.Hung.FINAL.pdf>.

105. *Id.*

106. Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77, 85–90 (2004).

107. Peerenboom, *supra* note 99, at 284–87, 294–301.

108. Mei Ying Gechlik (Veron Hung), *Carnegie Endowment for International Peace, The Chinese Communist Party's Leadership and Judicial Independence* (Oct. 29, 2003), <http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=650>.

109. *Id.*

110. *Id.*

achieving “outstanding . . . judicial work, court reform, and contingent building.”<sup>111</sup>

Hung argues that there are several reasons why issues such as *guanxi* and *san bu* may not appear to have had as significant an impact on judicial matters in Shanghai as in the rest of the country.<sup>112</sup> She notes that, in 1998, less than one percent of the 20,000 cases examined were found to be linked to *guanxi*.<sup>113</sup> First, Shanghai has received more than half of the national budget allocated by the Party to provide legal aid services; in addition to this, residents of the city are overall more affluent and more knowledgeable about their legal rights.<sup>114</sup> Without the relevant data, it is difficult to draw specific conclusions as to the reasons why some awards are not enforced and whether or not factors such as government interference and local protectionism can affect enforcement. However, the study does demonstrate that the problem of enforcement cannot be looked at in isolation. Thus, it cannot be institutional policies alone that will shape the role of contract law in the years to come; this will also depend on the public's attitude and perception of these laws.

### 3. CIETAC Should Not Use Its Own Personnel as Arbitrators

One of Jerome Cohen's principal criticisms of CIETAC's practices is that the association frequently allows its own full-time personnel to serve as arbitrators.<sup>115</sup> In some cases they are even chosen as a presiding arbitrator.<sup>116</sup> This practice is troubling, especially for foreign parties using CIETAC's services, as it may create potential conflicts of interest.<sup>117</sup> CIETAC defends itself by stating that although it does use its own personnel as arbitrators, such personnel are highly skilled law graduates.<sup>118</sup> In addition, CIETAC asserts that it generally does not use these personnel unless parties fail to make an

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111. Veron Mei-Ying Hung, *supra* note 104, at 3 (citing *People's Courts Completed Most Reform Tasks – China's Chief Justice*, BBC MONITORING INTERNATIONAL REPORTS (March 12, 2003)).

112. *Id.* at 9–10.

113. *Id.* at 9.

114. *Id.* at 5–7.

115. Cohen, *supra* note 78, at 32.

116. *Id.*

117. *Id.*

118. LIUN CAO, CIETAC AS A FORUM FOR RESOLVING BUSINESS DISPUTES 5 (2008), available at <http://www.fljs.org/uploads/documents/Cao%231%23.pdf>.

appointment of their own and, in any case, that these personnel are only used in disputes involving relatively small claims.<sup>119</sup>

Cohen also argues that the presiding arbitrator in cases involving foreign entities should be from a third country unless the parties agree to allow otherwise.<sup>120</sup> CIETAC's new rules do allow for an arbitrator not listed on the panel to serve, but this must be done with the permission of the Chairman of CIETAC.<sup>121</sup> Arbitrators chosen from within China must satisfy one of the criteria set out in Article 13 of the Arbitration Law:

- (1) to have been engaged in arbitration work for at least eight years;
- (2) to have worked as a lawyer for at least eight years;
- (3) to have served as a judge for at least eight years;
- (4) to have been engaged in legal research or legal education, possessing a senior professional title; or
- (5) to have acquired the knowledge of law, engaged in the professional work in the field of economy and trade, etc., possessing a senior professional title or having an equivalent professional level.<sup>122</sup>

In contrast, if an arbitrator is chosen from outside China, Article 67 merely states, "A foreign-related arbitration commission may appoint its arbitrators from among foreign nationals with expertise in the fields of law, economic relations and trade, science and technology, etc."<sup>123</sup> 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.<sup>124</sup> In order to promote impartial-

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119. *Id.*

120. Cohen, *supra* note 78, at 33.

121. Jerome Cohen, Letter to the Editor, *CIETAC's Integrity*, 168 FAR E. ECON. REV. 4-5 (2005); see Zhongguo Guoji Jingji Maoyi Zhongcai Weiyuanhui Zhongcai Guize (2005) [Arbitration Rules of the China Int'l Econ. & Trade Arbitration Comm'n (2005 version)] (revised and adopted by the China Chamber for International Commerce, Jan. 11, 2005, effective May 1, 2005), art. 21(2), available at <http://cn.cietac.org/rules/rules.pdf> (P.R.C.) [hereinafter CIETAC Arbitration Rules] ("Where the parties have agreed to appoint arbitrators from outside of the CIETAC's Panel of Arbitrators, the arbitrators so appointed by the parties or nominated according to the agreement of the parties may act as co-arbitrator, presiding arbitrator or sole arbitrator after the appointment has been confirmed by the Chairman of the CIETAC in accordance with the law.").

122. Arbitration Law, *supra* note 81, art. 13.

123. *Id.* art. 67.

124. Livdahl, *supra* note 48, at 106.



ity—and the comforting appearance of impartiality—we urge the appointment of Chairs only from third countries.

Cohen's concerns remain important. We hope that examination of these concerns may have the intended effect of furthering discussion and ideally lead to improvements on the current regime. Meanwhile, CIETAC's defender, Lijun Cao,<sup>125</sup> acknowledges the merits of these concerns and argues that CIETAC is working to limit their potentially corrupting effects.<sup>126</sup> Room clearly remains for additional reforms.

#### 4. Decision-Making and Record-Keeping Needs to Be More Transparent

Another criticism is that CIETAC has no definitive procedures for allowing access to its records of arbitration proceedings.<sup>127</sup> This, however, is generally true for arbitral tribunals in which neither briefs nor institutional decisions are routinely made public.<sup>128</sup> Less typical is CIETAC's practice of permitting arbitrators to allow staff members to draft arbitral awards,<sup>129</sup> a practice which is most worrisome as it erodes the level of confidence that CIETAC hopes to inspire. Cao responds to this criticism by arguing that the role of staff members in drafting awards is limited to drafting procedural rulings and correspondence under the guidance of the arbitrators.<sup>130</sup> However, CIETAC concedes that until 2000 and sometime thereafter, staff members were allowed to draft arbitral awards.<sup>131</sup>

The need for arbitral awards to be published in order to provide greater transparency has also been expressed, yet CIETAC rules do not expressly address this issue.<sup>132</sup> Still, CIETAC does allow for some awards to be published on an ad hoc basis, such as decisions contained in the CISG Database at Pace University School of Law's

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125. Until recently, Lijun Cao was an arbitrator and a senior Staff Member of CIETAC.

126. LIJUN CAO, *supra* note 118, at 5, 8.

127. See Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 128 (2003). See also Paul Mitchard, *Is CIETAC Leading Arbitration in Asia into a New Era of Transparency?*, in THE ASIA-PACIFIC ARBITRATION REVIEW 2009: A GLOBAL ARBITRATION REVIEW SPECIAL REPORT 29, 29–30 (2009).

128. Mitchard, *supra* note 127, at 29–30.

129. Cohen, *supra* note 78, at 36–37.

130. LIJUN CAO, *supra* note 118, at 6.

131. *Id.*

132. Mitchard, *supra* note 127, at 29–30; CIETAC Arbitration Rules, *supra* note 121, art. 33.

Institute of International Law.<sup>133</sup> CIETAC has not publicly articulated the criteria it used for selecting which decisions to send to Pace. As of March 2009, the CISG Database reported 288 CIETAC arbitration awards, most issued before 2002.<sup>134</sup> However, CIETAC has offered no information about how these decisions were selected for reporting.<sup>135</sup> Although this ambiguity is not ideal for the purposes of scrutinizing the body of CIETAC awards, it does offer more transparency than is available to those seeking to assess the work of other major tribunals. For example, the Arbitration Institute of the Stockholm Chamber of Commerce only had three reported awards on the CISG Database and even the Paris-based ICC had only reported seventy-one awards.<sup>136</sup> Based on this sort of comparison, Kritzer concludes that CIETAC is on the forefront of transparency.<sup>137</sup>

#### 5. CIETAC Administrative Fees Are Higher than Those of Other Institutions

CIETAC's website boasts: "As an international arbitration institution, the CIETAC arbitration fees are relatively lower than other major international arbitration institutions."<sup>138</sup> Despite this claim 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.<sup>139</sup> For example, a claim in the amount of \$500 million would result in an administrative fee to

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133. Pace Law School Institute of International Commercial Law, CISG Database, <http://www.cisg.law.pace.edu/> (last visited Feb. 10, 2010).

134. Pace Law School Institute of International Commercial Law, CISG Database, CIETAC Arbitration Awards, Mar. 5, 2009, <http://cisgw3.law.pace.edu/cisg/text/CIETAC-awards.html>. Although additional awards were released in December 2009, they have not been incorporated into the analysis here. See Pace Law School Institute of International Commercial Law, CISG Database, CIETAC Arbitration Awards, Dec. 4, 2009, <http://cisgw3.law.pace.edu/cisg/text/CIETAC-awards.html>.

135. See *id.* 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 complete picture.

136. See Pace Law School Institute of International Commercial Law, CISG Database, Country Case Schedule, <http://www.cisg.law.pace.edu/cisg/text/casecit.html> (last visited Feb. 10, 2010).

137. Kritzer, *supra* note 21, at 263.

138. CIETAC, Introduction, *supra* note 18.

139. It is worth noting, however, that CIETAC's fees are comparable with those of its competitors in cases where the disputed amount is less than U.S. \$3 million. Livdahl 2006, *supra* note 80, at 8. All dollar figures are U.S. dollars.

CIETAC of approximately \$2.5 million.<sup>140</sup> Arbitrating the same claim at the ICC would result in an administrative fee of \$88,800.<sup>141</sup> One could conclude that this disparity in costs is another reason for business people to avoid arbitration in China.<sup>142</sup> Moreover, despite its relatively high fees, CIETAC's arbitrators are among the lowest paid in the arbitral community.<sup>143</sup> 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 calculated at a significantly lower rate than these other organizations,<sup>144</sup> which raises the issue of whether the best foreign arbitrators would agree to serve on a CIETAC panel.

CIETAC has responded to these criticisms by stating that these matters are not within its control because, as of 2002, a government regulation requires all arbitral bodies to submit revenues and expenditures to the Ministry of Finance for approval.<sup>145</sup> 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.<sup>146</sup> This solution 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. 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 the proceedings can be fair and impartial if a party who requests a foreign arbitrator has to pay more for this service. Furthermore, it has been argued that because Chinese arbitrators are paid less than their foreign counterparts that they may not be as diligent in their approach to arbitration; CIETAC vociferously refutes this claim.<sup>147</sup> In sum, CIETAC's opaque financial arrangements detract from the desirability of employing its services, even if they generally result in lower bills.

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140. *Id.* at 14.

141. *Id.*

142. The chances of CIETAC handling a case where the disputed amount is more than U.S. \$100 million may be rare but not unheard of; it is also worth noting that we do not have the case figures available to determine if CIETAC has handled cases for this amount. *Id.*

143. LIJUN CAO, *supra* note 118, at 4.

144. *Id.*

145. *Id.*

146. *Id.*

147. Jones & Batson, *supra* note 76.

## II. CHINA AND THE CISG: REVIEW OF EXISTING DECISIONS DEALING WITH NON-CONFORMING GOODS

### A. *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 replaced the existing Foreign Economic Contract Law<sup>148</sup> with a unified contract code known as the Contract Law of the PRC.<sup>149</sup> The new law made no distinction between Chinese and foreign companies in an effort to ensure equal and fair treatment of both parties.<sup>150</sup> If the contract contains a foreign element, i.e., the contracting parties are foreign nationals or the subject matter is in a foreign country, then the parties can decide which jurisdiction's law will govern their contract.<sup>151</sup> This decision generally also includes a choice about whether disputes will be submitted to a Chinese or foreign arbitral institution.<sup>152</sup>

### B. *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 prior to enactment of the Contract Law).

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148. Zhonghua Remin Gongheguo Shewai Jingji Hetongfa [Foreign Economic Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 21, 1985, effective July 1, 1985), *translated in* 24 I.L.M. 799 (1985) (P.R.C.).

149. Contract Law, *supra* note 57.

150. *China's Contract Law to Take Effect from October 1*, AGENCE FR. PRESSE, Mar. 22, 1999.

151. Contract Law, *supra* note 57, art. 126 ("Parties to a foreign-related contract may select the applicable law for resolution of a contractual dispute, except as otherwise provided by law. Where parties to the foreign-related contract fail to select the applicable law, the contract shall be governed by the law of the country with the closest connection thereto.").

152. *Id.* art. 128 ("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 the judgments, arbitration awards or mediation agreements which have taken legal effect; if a party refuses to perform, the other party may request the People's Court for enforcement.").

Under the terms of China's ratification of the Convention, in cases where both parties have their place of business in member states, the CISG will apply unless it is excluded. The CISG also applies if the contract expressly requires it. However, if the foreign contracting party is not from a signatory to the CISG, and in absence of the parties choosing a governing law, the contract will be governed by the Contract Law. Even though it is argued that the CISG will prevail in the event of a conflict between the CISG and the Contract Law, parties are 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 can be advantageous to the parties. First, it provides a nominally level playing field, as both parties have equal access to information contained in 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. First, the Contract Law was intended to unify and supersede all previous legislation dealing with contractual issues.<sup>153</sup> 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 used as guidelines.<sup>154</sup> 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.<sup>155</sup> In addition, it relaxes the requirement of the written contractual form;<sup>156</sup> under the Convention, China declared itself not bound by Article 11 of the CISG which deals with this issue.<sup>157</sup> Finally, the Contract Law provides for specific performance as an express remedy under the

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153. See Ding Ding, *China and CISG*, in *CISG AND CHINA: THEORY AND PRACTICE* 25 (Michael R. Will ed., 1999).

154. *Id.* at 33.

155. *Id.* at 33–34.

156. Contract Law, *supra* note 57, art. 10.

157. CISG, *supra* note 15, art. 11 (“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.”); Pace Law School Institute of International Commercial Law, CISG Database, CISG: Participating Countries – China (PRC), <http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html> (last visited Feb. 10, 2010).

contract,<sup>158</sup> whereas its CISG counterpart, Article 28, restricts availability of this remedy.<sup>159</sup>

Although some commentators question whether the Contract Law poses a threat to the employment of the CISG in the PRC, we believe that the two instruments may be complementary.<sup>160</sup> The fact that the Contract Law provisions are similar to the CISG aids in interpreting and drawing a deeper understanding of the Convention among those people working with both bodies of law. For example, we see no reason why one interpretation of a provision in 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 on the jurisprudence of the particular body of law. To the extent that this has not been the case, and tribunals or courts have been using the jurisprudence of 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.

### C. *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 and purpose. 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; the results of these efforts were completed in 1978.<sup>161</sup> The CISG was signed in Vienna in 1980 and entered into force in 1988 upon being ratified by the required number

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158. Contract Law, *supra* note 57, art. 107.

159. CISG, *supra* note 15, art. 28 (“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 judgment 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.”).

160. See Ding Ding, *supra* note 153, at 36–37.

161. The previous sales laws were the Uniform Law for the International Sale of Goods (ULIS) and Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). See Pace Law School Institute of International Commercial Law, CISG Database, Antecedents to the CISG, <http://www.cisg.law.pace.edu/cisg/text/antecedents.html> (last visited Feb. 10, 2010).

of parties.<sup>162</sup> As of this writing, some seventy-four States had adopted the CISG.<sup>163</sup> Over three-quarters of all international sales transactions are conducted between parties based in a Contracting State.<sup>164</sup>

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.<sup>165</sup> 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.<sup>166</sup> Part II is concerned with rules for the formation of contracts of sale.<sup>167</sup> Part III deals with the rules governing the substantive obligations of the buyers and sellers.<sup>168</sup> Part IV contains the final provisions on adherence to and ratification of the Convention by Contracting States, including any reservations made in regard to the Convention's applicability to a Contracting State.<sup>169</sup>

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."<sup>170</sup> The CISG also applies "when the rules of private international law lead to the application of the law of a Contracting State."<sup>171</sup> It is important to note that the CISG is a set of rules for

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162. See UNCITRAL, Status: 1980 – United Nations Convention on Contracts for the International Sale of Goods, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last visited Feb. 10, 2010).

163. *Id.*

164. It is important to note that this does not mean that over three-quarters of all international sales contracts are governed by the CISG. Those that are excluded are based on application of Articles 2, 3, 4 and 5. However, the CISG can be applied through Article 1(1)(b) where the parties *do not* have their places of business in different Contracting States and the rules of private international law of the forum can also 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. Note, though, that Article 1(1)(b) does not apply to the PRC. See Pace Law School Institute of International Commercial Law, CISG Database, CISG: Participating Countries – China (PRC), <http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html> (last visited Feb. 10, 2010).

165. JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG IN THE USA 11–13 (2d ed. 2004).

166. See CISG, *supra* note 15, arts. 1–13.

167. *Id.* arts. 14–24.

168. *Id.* arts. 25–88.

169. *Id.* arts. 89–101.

170. *Id.* art. 1(1)(a).

171. *Id.* art. 1(1)(b). Note that this provision is not applicable to the PRC. See Pace Law School Institute of International Commercial Law, CISG Database, CISG: Participating Countries – China (P.R.C.), <http://www.cisg.law.pace.edu/cisg/countries/cntries-China.html> (last visited Feb. 10, 2010).

business, not consumer transactions.<sup>172</sup> In addition to this, certain types of sales contracts are specifically excluded under the Convention.<sup>173</sup> Questions involving the validity of the contract are also outside the scope of the Convention, as is the effect which the contract may have on property rights in the goods sold,<sup>174</sup> and any liability of the seller for defective goods causing death or personal injury to any person.<sup>175</sup> One of the notable features of the Convention is that it allows contracting parties the ability to derogate from<sup>176</sup> or exclude its provisions altogether.<sup>177</sup>

#### D. *CISG and Non-Conformity of Goods*

As this article deals with unsafe products produced by Chinese manufacturers, it is important to establish the issues of nonconformity which can be covered by the CISG. Article 35 of the CISG, relating to conformity, 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;

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172. CISG, *supra* note 15, art. 2(a); LOOKOFSKY, *supra* note 165, at 17.

173. For example, contracts involving the sale of securities, ships, vessels, hovercraft or aircraft, and electricity are not governed by the Convention. CISG, *supra* note 15, art. 2.

174. *Id.* art. 4 (“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.”).

175. *Id.* art. 5 (“This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.”).

176. *Id.* art. 6 (permitting derogation under the Convention, with the one exception of art. 12).

177. *Id.* Unlike its predecessor, the ULIS, the CISG did not specifically indicate that implied exclusions were permissible, thus there is doubt on the issue. See [1968–1970] Y.B. U.N. Comm’n on Int’l Trade Law 168, U.N. Doc A/CN.9/SER.A/1970; COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 86 (Peter Schlechtriem & Ingeborg Schwenzer eds., Oxford Univ. Press 2d ed. 2005). Parties are advised to make their intentions clear to avoid unwanted results.



(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 judgment;

(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.<sup>178</sup>

The first part of the provision, Article 35(1), gives authority to the terms of the contract and the stipulations of the parties.<sup>179</sup> 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' intentions and trade usages, respectively.<sup>180</sup> Regarding which statements are capable of becoming terms of the contract, some commentators argue that the CISG does not distinguish between different types of statements, as may be the case in certain legal systems.<sup>181</sup> The second part of the provision, Article 35(2), deals with the meaning of conformity under the CISG.<sup>182</sup> Unless the parties have disclaimed liability or have agreed to their own standards as to the fitness and quality of the goods, this part of the provision will apply.<sup>183</sup> Article 35(2)(a)

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178. CISG, *supra* note 15, art. 35.

179. *Id.* art. 35(1).

180. *Id.* arts. 8–9 (discussing treatment of the parties' intentions and trade usages, respectively).

181. CISG, *supra* note 15, art. 35. See for example the U.S. law distinction between representations and promises. FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 140 (1992), available at <http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html>.

182. CISG, *supra* note 15, art. 35(2).

183. Some legal systems do not allow for disclaimers of this kind. See, e.g., Sale of Goods Act, 1979, c. 54, §§ 13–14 (Eng.) (Description and quality of the goods cannot be contracted out if one party is a consumer; if the parties are two businesses, then the disclaimer must satisfy the reasonableness test under the Unfair Contract Terms Act, 1977,

states that goods must be fit for their ordinary use.<sup>184</sup> Accordingly, defects that affect the everyday use of such goods 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 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 have been aware of the non-conformities listed in Article 35(2)(a)–(d).<sup>185</sup> An example of this is where the seller had in the past sold goods of poor quality to the buyer without complaints, or if the price corresponds to the price generally paid for poor quality goods.<sup>186</sup>

The Convention is not concerned with whether the goods meet the safety standards of the buyer's country as long as they otherwise remain fit for their purpose.<sup>187</sup> Safety standards are matters to be settled within public law and are 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 1995, in which the German Supreme Court held that even though the mollusks in question 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.<sup>188</sup> The court based its conclusion on the reasoning that the mussels were still edible and that Article 35(2) (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.<sup>189</sup> Only if the buyer had informed the seller about such provisions or relied on the seller's expert knowledge, or the seller had knowledge of the provisions due to special circumstances, would the seller have been liable for breach of contract.<sup>190</sup>

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c. 50, § 6 (Eng.)). However, the CISG does not deal with validity of clauses, so this matter would have to be settled within domestic laws. *See* CISG, *supra* note 15, art. 4.

184. CISG, *supra* note 15, art. 35.

185. *Id.*

186. *See id.* (discussing terms and phrases).

187. *But see* ENDERLEIN & MASKOW, *supra* note 181, at 143 (arguing that while the fitness of the goods is generally determined by the seller's country, safety considerations must only be considered if the buyer informs the seller in advance).

188. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 8, 1995, 129 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 75 (F.R.G.), *translated in* <http://www.cisg.law.pace.edu/cases/950308g3.html> [hereinafter *New Zealand Mussels Case*].

189. *Id.*; *see also* CISG, *supra* note 15, art. 35(2)(b).

190. *New Zealand Mussels Case*, *supra* note 188.

The *New Zealand Mussels* decision raised many questions within the CISG community as to the 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 their 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 (*praeter legem*), and in fact the Convention directs us to do so under Article 7.<sup>191</sup> The issue of which party's place of business 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 the court's 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 in the seller's country, the buyer informs the seller of these regulations,<sup>192</sup> or if due to "special circumstances," such as the existence of a branch office of the seller in the buyer's country, the seller knew or should have known about the regulations.<sup>193</sup>

This view of non-conformity by the German courts can be compared with that of the court in *Medical Marketing v. Internazionale Medico Scientifica*, which involved a dispute between a U.S. buyer and an Italian seller over the burden of complying with U.S. governmental safety standards.<sup>194</sup> The dispute was first heard before an arbitral tribunal which held that the defendant had delivered units that failed to comply with U.S. safety standards and the goods were

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191. See CISG, *supra* note 15, art. 7(2) ("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."). This is 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." Lucia Carvalhal Sica, *Gap-filling in the CISG: May the UNIDROIT Principles Supplement the Gaps in the Convention?*, NORDIC J. COM. L., Issue 2006 No. 1, at 3, [http://www.njcl.utu.fi/1\\_2006/article2.pdf](http://www.njcl.utu.fi/1_2006/article2.pdf).

192. Peter Schlechtriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof* (Todd J. Fox trans., 2001), <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html>.

193. Peter Schlechtriem, *Commentary, Conformity of the Goods and Standards Established by Public Law; Treatment of Foreign Court Decision as Precedent: Medical Marketing International, Inc. v. Internazionale Medico Scientifica, S.r.l., U.S. District Court, Eastern District of Louisiana, 17 May 1999* (André Corterier trans., 1999), <http://cisgw3.law.pace.edu/cases/990517u1.html>.

194. *Med. Mktg. Int'l v. Internazionale Medico Scientifica, S.R.L., No. Civ. A. 99-0380, 1999 WL 311945, at \*1* (E.D. La. May 17, 1999).

therefore “non-conforming.”<sup>195</sup> The seller appealed on the grounds that the arbitrators misapplied the CISG by refusing to follow the German decision in the *Mussels* case.<sup>196</sup> 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.<sup>197</sup> Confirming the arbitral award, the court held that the arbitrators had not exceeded their authority in not following the German decision.<sup>198</sup> 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.<sup>199</sup> This decision and its rationale were significant for the development of CISG jurisprudence because they recognized that courts in different jurisdictions are under a duty to consider decisions from other higher courts and assess the merits of cases with similar facts. Although the Convention itself does not stipulate a stare decisis value to decisions generated under it, Article 7 of the CISG does require that when interpreting the Convention, regard be given to promoting uniformity in decision-making.<sup>200</sup>

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

#### E. *CIETAC Cases on Non-Conformity of the Goods*

As of May 2009, CIETAC had reported fifty-four international cases dealing with non-conformity of the goods to the contract.<sup>201</sup>

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195. *Id.*

196. *Id.* at \*2.

197. *Id.*

198. *Id.*

199. *Id.*

200. CISG, *supra* note 15, art. 7. See Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J.L. & COM. 245 (1999).

201. Pace Law School Institute of International Commercial Law, CISG Database, Cases on the CISG by Courts and Arbitral Tribunals of the People’s Republic of China: Article 35, Conformity of Goods to Contract, <http://cisgw3.law.pace.edu/cisg/text/PRC->

The Secretary General of CIETAC (or his designates) selected the cases released to Pace 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 assume that these cases are representative of all CIETAC offices, as the Pace Institute of International Commercial Law has yet to receive any cases handled by the CIETAC-Shanghai office.<sup>202</sup> Nevertheless, based on the available decisions, we offer some tentative observations regarding nonconformity of the goods and go on to assess the value of the tribunals' reasoning.

### 1. General Conformity Issues

In the *Broadcasting Equipment* case involving a Canadian seller and a Chinese buyer, 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 CISG Article 35(1).<sup>203</sup> After examining the documents, the CIETAC arbitral tribunal found that the contract did not contain stipulations on function, quality and technical requirements on the goods. However, there was an attachment to the contract signed by both parties that stated that the equipment supplied was 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; after the third test the equipment was still found to be defective. The tribunal found in this case 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 was not actually contained in the contract itself, but rather in the attachment, the tribunal took into account the relevance of this documentation in determining the parties' intentions. This practice follows CISG Article 8, which states that intention can be discerned from

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35.html (last visited May 15, 2009).

202. E-mail from Albert Kritzer, Executive Secretary of the Institute of International Commercial Law, Pace University School of Law, to Mark R. Shulman, Assistant Dean for Graduate Programs / International Affairs, Adjunct Professor of Law, Pace University School of Law (Oct. 26, 2008, 09:14 EST) (on file with author).

203. CIETAC Arbitration Award of May 22, 1996, (*Broadcasting Equipment Case*), 1996 Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] 1260, translated in <http://cisgw3.law.pace.edu/cases/960522c1.html> (P.R.C.).

“negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”<sup>204</sup> 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.

## 2. Issues Relating to the Discovery of the Non-Conformity

A case involving a U.S. buyer and a Chinese seller for the sale of steel flanges also raised the issue of determining nonconformity in relation to goods.<sup>205</sup> Each of the several sales contracts contained terms on quality and examination of the goods and set out an obligation for the seller to provide Mill Test Reports describing the chemical and heat data of the flanges.<sup>206</sup> The goods were subsequently re-sold to the buyer’s customers at which point they were found to be non-conforming.<sup>207</sup> This case is important because it calls into question those defects which are not visibly apparent; the defects were of a latent nature only discovered a few years after the goods were delivered.

Based on independent expert tests, the tribunal found that the flanges were defective and not in conformity with the specifications established in the contract.<sup>208</sup> The tribunal considered the seller liable under CISG Article 36(2), as the defective flanges constituted a breach of a guarantee that the goods would remain fit for their ordinary purpose.<sup>209</sup> However, the tribunal also found that the guarantee period was not indefinite and would not extend past the two-year pe-

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204. CISG, *supra* note 15, art. 8(2).

205. CIETAC Arbitration Award of Mar. 30, 1999 (*Flanges Case*), 1999 Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] 1703, *translated in* <http://cisgw3.law.pace.edu/cases/990330c2.html> (P.R.C.); *see also* the companion case CIETAC Arbitration Award of Mar. 29, 1999, 1999 Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] 1652, *translated in* <http://cisgw3.law.pace.edu/cases/990329c1.html> (P.R.C.).

206. *Flanges Case*, *supra* note 205.

207. *Id.*

208. *Id.*

209. *Id.*

riod set forth in Article 39(2).<sup>210</sup> The tribunal concluded that some of the defects in this case were defects of which the seller “could not have been unaware.”<sup>211</sup> This point notwithstanding, the tribunal held that Article 40<sup>212</sup> did not take precedence over the provisions of Article 39(2).<sup>213</sup> The tribunal ruled that the language of 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.<sup>214</sup> This ruling in favor of the Chinese seller on the relationship between Article 40 and Article 39(2) might have set a trend that generally benefited sellers.

The decision in the *Flanges* case is troubling when compared to an earlier case heard by the Stockholm Chamber of Commerce. Facing 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 four years after the machine was delivered, thereby outside the two-year limitation period set in Article 39(2).<sup>215</sup> The Stockholm Chamber held that the buyer could still rely on the defect to show non-conformity despite the two-year limitation because the seller knew that the part required for the machine was important to the buyer and did not inform the buyer that he had substituted this part for another. The tribunal reasoned that “Article 40 is an expression of the principles of fair trading that underlie also [sic] many other provisions of the CISG, and it is by its very nature a codification of a general principle.”<sup>216</sup>

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210. *Id.*; U.N. Comm’n on Int’l Trade Law, *Case Abstract No. 770: Flanges Case, A/CN.9/SER.C/ABSTRACTS/74* (Apr. 18, 2008) (prepared by Damon Schwartz), available at <http://cisgw3.law.pace.edu/cases/990330c2.html#uab> (last visited Feb. 10, 2010).

211. *Flanges Case*, *supra* note 205.

212. CISG, *supra* note 15, art. 40 (“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.”).

213. CISG, *supra* note 15, art. 39(2) (“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.”).

214. *Flanges Case*, *supra* note 205.

215. *Beijing Light Auto. Co. v. Connell Ltd. P’ship*, Separate Award of June 5, 1998 (Arbitration Inst. of the Stockholm Chamber of Commerce), available at <http://cisgw3.law.pace.edu/cases/980605s5.html>; see Camilla Baasch Andersen, *Applying Article 40 to 39(2) as well as 39(1)—Stockholm vs. Flanges* (Mar. 14, 2006), <http://cisgw3.law.pace.edu/cases/980605s5.html>

216. See Andersen, *supra* note 215.

In contrast, the CIETAC *Flanges* 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 restricting words ‘in any event’ are used in Article 39(2).”<sup>217</sup> It is argued, given the discrepancy in the reasoning of these two arbitral bodies, that more explicit rationale should be provided 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?<sup>218</sup>

The CIETAC decision should have weighed the need for sound business practice and fair dealing, not to mention the role of good faith, against the need to establish a cut-off period for bringing liability of transactions to an end and giving businesses the ability to look forward without unnecessary encumbrances. 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.<sup>219</sup> 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 specific issue.

The fact that these tribunals offer differing interpretations of the relationship between Article 40 and Article 39(2) poses a non-trivial threat to the principle of uniform application that underlies the

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217. *Id.* (citing *Flanges Case*, *supra* note 205). The tribunal here is interpreting the wording in its strictest sense.

218. *See id.*

219. *See* CISG, *supra* note 15, art. 44 (an example of the former); *see also* Vivian Grosswald Curran, Cross-References and Editorial Analysis: Article 40 (June 1997), <http://www.cisg.law.pace.edu/cisg/text/cross/cross-40.html>. CISG Article 40 and its 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.” *Id.* (citing André Tunc, *Commentary on the Hague Conventions of 1 July 1964 on International Sale of Goods and the Formation of the Contract of Sale*, in 1 DIPLOMATIC CONFERENCE ON THE UNIFICATION OF LAW GOVERNING THE INTERNATIONAL SALE OF GOODS: RECORDS AND DOCUMENTS OF THE CONFERENCE 355, 376 (1966)). 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.



successful implementation of the Convention on a global scale. In light of the recent cases dealing with defective products in the PRC (in which one may encounter the same issues as failure to give notice within the stipulated time period), it is of the essence that the tribunals employ rationales based directly on the provisions of the CISG in order to justify their decisions. Thus, the ten-year-old *Flanges* case offers evidence for those who argue that CIETAC is either corrupt, less skilled than Western tribunals or biased in favor of either Chinese parties or sellers in general. At this point, however, their concern seems overblown—or at least premature—because it rests 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. On the other hand, even without the Stockholm case as a basis for comparison, it is arguable that CIETAC failed to interpret the provisions of Article 40 correctly, as the wording of this provision is stated to apply to the whole of Article 39.

### 3. International and Industry Standards

The next case involved a Dutch seller and a Chinese buyer for the sale of 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.<sup>220</sup> 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.<sup>221</sup>

While the decision of the tribunal is correct in its application (i.e., that regard should indeed be given to the express stipulations of the parties), the reasoning is somewhat troubling. The tribunal stated that no “uniform international standard of quality” existed within this particular industry,<sup>222</sup> yet if there were a standard to be found which

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220. CIETAC Arbitration Award of Mar. 8, 1996 (*Old Boxboard Corrugated Cartons Case*), 1996 Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] 951, translated in <http://cisgw3.law.pace.edu/cases/960308c1.html> (P.R.C.).

221. *Id.*

222. *Id.*

differed from the contractual stipulations, would this supersede the parties' express stipulation? This decision requires more explanation as to the meaning of what defines a "uniform" standard, a term that is ambiguous.<sup>223</sup> In addition, we argue that, first and foremost, it is the express contractual stipulations of the parties which *should* be given consideration; after all this would be the standard on which the agreement was formed. Gap-filling is only appropriate where legitimate gaps exist.

In a case involving a Czech buyer and a Chinese seller for the sale of down jackets and winter coats, the contract stipulated that the goods were to be "European style."<sup>224</sup> The buyer alleged that the coats did not conform to the terms of the contract, arguing that they were not "European style" and that the down content of the coats were only twenty percent instead of the thirty percent they had expected.<sup>225</sup> The CIETAC tribunal found that no standard existed that determined the meaning of "European style," and therefore the buyer could not rely on this non-existent standard to prove non-conformity.<sup>226</sup> Furthermore, the tribunal decided that the fact that the coats only had twenty percent of down instead of thirty percent was reflected in the low contract price.<sup>227</sup> Thus, the coats were deemed to be conforming in this respect by reason of the lower price.<sup>228</sup> In contrast to this decision, in an earlier 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.<sup>229</sup> The tribunal found that the price of goods could not indicate whether parties in-

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223. Andrea Vincze, *Conformity of the Goods in 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 552, 563 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008).

224. CIETAC Arbitration Award of Mar. 21, 1995 (*Down Jacket and Winter Coat Case*), 1995 Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] 1329, translated in <http://cisgw3.law.pace.edu/cases/950322c1.html> (P.R.C.).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. CIETAC Arbitration Award of Jan. 19, 2000 (*Steel Cylinders Case*), 2000 Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] 1222, translated in <http://cisgw3.law.pace.edu/cases/000119c1.html> (P.R.C.).

tended to sell brand new goods or not.<sup>230</sup> Therefore, the question of whether a lower price should be indicative of the quality of the goods received would depend on the circumstances of the case, namely the purpose for which the goods are bought.

These two opinions are good examples illustrating the need for uniform decisions under the Convention and for the parties themselves. In addressing the issue of uniformity, CIETAC has been described as being on the forefront of the interpretation of the CISG.<sup>231</sup> It follows that CIETAC has to be able to provide decisions that correctly interpret the Convention and provide a clear rationale for cases with similar facts. In addition, parties, in particular buyers as they are the most affected, need to apply the caveat emptor principle when entering into contracts. Specifically, they need to be aware of the various factors that may bar their claim to seeking a remedy for non-conforming goods. The guiding principle should be to draft contracts with clear specifications for the goods, as spending more on contractual negotiation could help to reduce litigation costs later on. We are encouraged by the notion that the publication of decisions will foster greater uniformity of interpretation in the Convention. 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.

#### F. *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 on the part of the CIETAC panels. A statistical analysis is telling. Out of 290 cases, the claimants were awarded damages ninety percent of the time; on average the claimant recovered about sixty-five percent of the disputed amount.<sup>232</sup> Chinese claimants in these cases were successful ninety percent of the time, whereas when a Chinese party acted as respondent, they were only successful eight percent of the time.<sup>233</sup>

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230. *Id.*

231. This conclusion is based on the fact that CIETAC has delivered to Pace for publication the greatest number CISG decisions of any arbitral body or indeed country. See Pace Law School Institute of International Commercial Law, CISG Database, Country Case Schedule, <http://www.cisg.law.pace.edu/cisg/text/casecit.html> (last visited Feb. 10, 2010).

232. E-mail from Albert Kritzer, *supra* note 202.

233. *Id.*

Moreover, the 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,

we 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.<sup>234</sup>

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 endeavored to present a balance of the criticisms facing CIETAC and its response to these criticisms. Is CIETAC biased against foreigners? The decisions to which we have had access 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." In practice this would be quite difficult and costly to achieve, as the party involved would have to bribe the 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?

The reality of the arbitration market in the region is that other tribunals, such as the Beijing Arbitration Commission (BAC), pose significant competition for CIETAC. In fact, many foreign arbitrators have commended BAC's rules on arbitration as being more straightforward than those of CIETAC.<sup>235</sup> And yet, CIETAC remains the most commonly used tribunal for international arbitration.<sup>236</sup> Based therefore on the available evidence and a logical interpretation of the incentives to compete on quality, price and fairness, we con-

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234. CIETAC Arbitration Award of Sept. 6, 1996 (*Engines Case*), 1996 Zhong Guo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Hui Cai Jue Shu Hui Bian [Compilation of CIETAC Arbitration Awards] 1791, *translated in* <http://cisgw3.law.pace.edu/cases/960906c1.html> (P.R.C.).

235. Thomas Klitgaard, *Made in China and Beyond*, Presentation at Mealey's Product Recall Conference (Dec. 10–11, 2007).

236. Li Zhang, *supra* note 75.

clude that CIETAC's problems are not so pervasive as to make it uncompetitive.

### III. 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, along the way developing myriad and sophisticated political, legal and economic institutions. The cumulative costs of this rapid development are enormous in terms of lives, 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 the Chinese people have enjoyed because of their ability to depend on an 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 recourse when they believe they have suffered from a violation of an obligation, they can price the risk of transactions more accurately and in lower amounts. Likewise, both parties are 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. Sellers will 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 traders' reliance upon arbitration has displaced

the impulse to develop the rule of law more generally. Nevertheless, the fact that arbitration occurs 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 a practice of law that is faithful to international standards for objectivity, integrity and professionalism. This exposure is, in turn, training Chinese lawyers to litigate and settle disputes—skills which readily transfer to their other work. Likewise, judges have their horizons expanded and their expectations raised. And we conclude that the people of China's expectations regarding the due process rights they should demand have been raised as well.

Finally, at the risk of appearing too 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 economies, such as Vietnam.<sup>237</sup> Second, by cabining commercial conflicts through peaceful resolution, it ensures that mere trader disputes do not escalate into wider and more dangerous disputes—or increase distrust between the people of China and other nations. 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. Development comes at great cost, but it brings with it unprecedented levels of widespread prosperity.

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237. See generally MARK SIDEL, LAW AND SOCIETY IN VIETNAM: THE TRANSITION FROM SOCIALISM IN COMPARATIVE PERSPECTIVE 1 (2008) (“[T]his 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.”).