One Country, Two—International Commercial Arbitration—Systems

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VII. INTRODUCTION

Three things prompted us to write this article. First, in the last 15 years of the twentieth century, both China and Hong Kong rose prominently on the international arbitration scene. As a result, there is wider interest in attempting to understand just what has been accomplished by both and what still lies ahead of them. Second, the return of Hong Kong to the People’s Republic of China (PRC) on 1 July 1997, as the Hong Kong Special Administrative Region (HKSAR), has created concern over Hong Kong’s status as an international arbitration venue. This concern represents one of the many tests the HKSAR has faced in its first three years of existence. Third, although the beginning of a new century perhaps always provides a convenient excuse to write something, we do believe that now is indeed a good time to attempt an informative assessment of the international commercial arbitration systems in the PRC and the HKSAR, as China and Hong Kong have already taken major steps not only to modernize and internationalize their respective international arbitration systems, but also to solve the most vexing arbitration issues left over by the reunification.

Aware that the subject-matter could easily occupy an entire book, we have limited our discussion to the major similarities and differences between the international commercial arbitration systems in the PRC and HKSAR, and the question of how they have adapted to the change of sovereignty and co-existed since July 1997. This study is not a detailed account of legal particularities and recent developments in the two systems. Nor is it an updated practical guide for international lawyers and practitioners. Instead, it provides an analysis of major characteristics and future trends. The intention here is to test how well the concept of “one country, two legal systems” has been put into practice so far in this particular area of law and how successfully the concern over Hong Kong’s status as an international commercial arbitration centre has been addressed.

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As there is no generally accepted definition of what is an “international” arbitration, the term “international commercial arbitration system” used here needs to be defined with reference to the legal terminology of the PRC and the HKSAR. In China, the term “international” is seldom used in legislation. Instead, it is “foreign-related”, or “foreign elements”, that is the favoured term. Chapter 7 of the PRC Arbitration Law is titled “Special Provisions Concerning Foreign Related Arbitration”. Article 65 of that chapter states that “Provisions in this chapter are applicable to the arbitration of economic, trade, transport, and maritime disputes involving foreign-related elements.” Similar terms can also be found in, for example, the PRC’s Civil Procedure Law and its General Principles of Civil Law, among others. However, none of these laws provides explicit definition.

The Supreme People’s Court has, however, issued an opinion as to the definition of “foreign related civil litigation” as follows:

“Civil cases in which either or both parties are a person of foreign nationality or a stateless person, or a company or organization domiciled in a foreign country, or in which the legal facts that establish, change or terminate the civil legal relationships between the parties take place in a foreign country; or in which the subject matter of the dispute is situated in a foreign country, shall be civil cases involving foreign-related parties.”

Based on this opinion, it is established that an arbitration in China shall be foreign-related, or international, if it involves a dispute between:

(4) a Chinese party and a foreign party;
(5) two foreign parties; or
(6) two Chinese parties, but the legal relationship between them or the subject matter of dispute takes place or is situated in a foreign country.

In Hong Kong, the 1982 Arbitration Ordinance began to establish a distinction between domestic arbitrations and international arbitrations. This earlier distinction was later replaced by the more liberal definition in the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL Model Law or Model Law) adopted by the Arbitration

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5 Under the 1982 Arbitration Ordinance, an arbitration would be treated as “international” only if it involved at least one party whose residence, place of incorporation, or place of central management and control was located outside Hong Kong. See Arbitration Ordinance, 1982, ch. 341 (H.K.), reprinted in [Commercial Arbitration Law in Asia and the Pacific] Int'l Com. Arb. (Oceana Publications) No. 4, H.K.1 (September 1987), § 234B(8); W. Laurence Craig, et al., *Hong Kong Law in International Chamber of Commerce Arbitration* Int'l Com. Arb. (Oceana Publications) No. 5, § 34.01, at 395 (January 1990).
(Amendment) (No. 2) Ordinance 1989. Under Article 1(3) of the UNCITRAL Model Law, an arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

In addition, if a party has more than one place of business, its place of business for the purpose of a particular arbitration will be that which has the closest relationship to the arbitration agreement (Article 1(4)(a)). In cases where a party does not have a place of business, reference is made to the party’s habitual residence (Article 1(4)(b)).

Clearly, both Hong Kong’s and China’s definitions of international arbitration are similar in that they are both based on a mixture of the subject-matter of the legal relationship and the locality of the parties. Such a definition is broad enough to cover disputes between two domestic parties if a substantial part of the underlying obligation is to be performed outside China or Hong Kong. However, the two definitions differ in two special ways. First, Article 1(3)(c) of the Model Law provides parties with greater autonomy by allowing them to expressly agree that the subject-matter of the arbitration agreement relates to more than one country, and thus categorize their arbitration as “international” in nature. No such rule exists in China. Second, parties from Hong Kong, Macau, and Taiwan are treated on an equal footing with foreign parties in the PRC. Even though Hong Kong and Macau have now returned to China, an arbitration continues to be deemed foreign-related or international if it

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7 The Hong Kong High Court held in Fung Sang Trading Ltd. v Kai Sun Sea Peds. & Food Co. that, while both parties had their places of business in Hong Kong, the arbitration was within the scope of the UNCITRAL Model Law because a substantial part of the underlying contract obligation was to be performed outside Hong Kong; the fact that the goods had to be delivered in China. See Fung Sang Trading Ltd. v Kai Sun Sea Peds. & Food Co., 1992 (1) Hong Kong L. Rep. 40, 40-41. An excerpt of the opinion is reprinted in Hong Kong, 17 Y.B. Com. Arb. 289 (1992). For a discussion of a similar criterion to establish foreign elements in China, see Wang Shou-Chang, Resolving Disputes in the PRC: A Practical Guide to Arbitration and Conciliation in China, note 4 above, at 21-22.

involves a party from or in connection with Hong Kong and Macau. No similar treatment for mainland, Macanese and Taiwanese parties exists in Hong Kong.

Having a clearly defined distinction between international and domestic arbitrations is important because in many countries the term “international” determines not only whether a particular tribunal has jurisdiction over a dispute but also which arbitration rules apply. In China, before the 1994 Arbitration Law, international arbitrations were exclusively dealt with by the China International Economic and Trade Arbitration Commission (CIETAC) and the China Maritime Arbitration Commission (CMAC)\(^9\) and governed by the CIETAC and CMAC arbitration rules. However, this is not, and has not been, the case in Hong Kong. Although the Arbitration (Amendment) (No. 2) Ordinance 1989 provides that domestic arbitrations in Hong Kong apply the UNCITRAL Model Law under Part II\(^{10}\) and international arbitrations there apply provisions under Part IIA, parties are granted freedom to choose either Part II or Part IIA to be applied to their arbitration no matter whether their disputes are international or domestic in nature.\(^{11}\)

Having a clearly defined distinction between international and domestic arbitrations is also important because it is indispensable for collecting reliable statistics. For example, according to Article 2 of the 1998 CIETAC Rules,\(^{12}\) CIETAC has the power to resolve the following types of disputes:

(i) international or foreign-related disputes;
(ii) disputes related to Hong Kong, Macau, or Taiwan;
(iii) disputes between enterprises with foreign investment, and disputes between an enterprise with foreign investment and another Chinese legal person, physical person, and/or economic organization;
(iv) disputes arising from project financing, invitations to tender, bidding, construction and other activities conducted by Chinese legal persons, physical persons, and/or other economic organizations through the use of the capital, technology or services from foreign countries, international organizations, or from Hong Kong, Macau and Taiwan; or
(v) disputes that may be taken cognizance of by the Arbitration Commission in accordance with special provisions of, or upon special authorization from, China’s laws or administration regulations.

Among these five types of disputes, only the first two categories of cases may be counted as CIETAC “international” arbitration cases.

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\(^9\) The two institutions are specifically called “foreign-related arbitration commissions.” See, e.g., Article 66 of the 1994 Arbitration Law and Article 260 of the 1991 Civil Procedure Law. For a detailed discussion of the two institutions, see Part III Institutional Development, below.

\(^{10}\) This part of the 1989 Ordinance was largely based on English legislation, which provides wide-ranging judicial oversight of challenges to arbitrators and their awards; e.g., §§ 3 (revocation of arbitrator’s authority), and 23 (appeal against award on a point of law).

\(^{11}\) For more details of the opt-in or opt-out clauses, see Part IVA, Hong Kong Special Administrative Region Arbitration Ordinance (Chapter 34), below.

In addition, our use here of the term “international arbitration system” is particularly for the purpose of narrowing the scope of this study and excluding the domestic arbitration systems in China and Hong Kong. However, we are fully aware that in both China and Hong Kong an absolute separation of the international and domestic commercial arbitration systems is unrealistic in terms of both institutional and legal frameworks. In China, since the enactment of the 1994 Arbitration Law, the strict division of jurisdictions between China’s domestic and foreign-related, or international, arbitration commissions has been relaxed. On the one hand, CIETAC can now handle, and in fact has expanded its jurisdiction over, some special kinds of domestic arbitration cases and, on the other hand, the domestic arbitration commissions are also allowed to handle international arbitration cases. According to a notice of the State Council of 1996, if parties to a foreign-related dispute were to voluntarily submit a dispute to a newly-established domestic arbitration commission for arbitration, that institution could accept it. In Hong Kong, not only does the Hong Kong International Arbitration Centre (HKIAC) handle both domestic and international arbitration cases, but also, as pointed out above, parties have the autonomy to choose which part of the Arbitration Ordinance and what arbitration rules apply to their arbitration. Moreover, although domestic and international arbitrations continue to apply different laws in China and Hong Kong, the disparity between the two sets of laws has been reduced since the passage of the 1994 Arbitration Law in China and the Arbitration (Amendment) Ordinance 1996 in Hong Kong.

The term “commercial” has two aspects of significance. First, it relates to the issue of arbitrability, or the domain of arbitration, which determines which types of disputes may be resolved by arbitration and which belong to the domain of the courts. Thus, for example, if national legislation requires that an international dispute that is arbitrable should be commercial in nature, then the term determines that an international arbitration tribunal has jurisdiction only over a dispute of a commercial nature. Second, the “commercial” nature of a dispute is also of particular importance in recognizing and enforcing an arbitral award pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York

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13 See Article 2(3)-(5) of the 1998 CIETAC Rules. As an example of the special authorization under Article 2(5), on 26 August 1994, the China Securities Regulatory Commission (CSRC) officially designated CIETAC as the sole arbitration institution in China for handling all securities disputes where the parties have entered into an arbitration agreement. See Cheng Dejun, Michael J. Moser and Wang Shengchang, *International Arbitration in the People’s Republic of China: Commentary, Cases and Materials* (Butterworths Asia, Hong Kong, 1995), at 28.


15 For a detailed discussion of HKIAC, see Part III, *Institutional Development*, below.

16 The Arbitration (Amendment) Ordinance 1996 was passed by the HKSAR Legislative Council (LegCo) on 18 December 1996, and took effect on 27 June 1997. For a summary see 12 Mealey’s Int’l Arb. Rep. (September 1997), at B-1.


18 The qualification of “commercial” is generally used in civil law countries. See id., at 18.
Convention), because many States have made "commercial" reservations under the Convention to the effect that an arbitral award can be enforced under the Convention only when the subject-matter that is arbitrated is of a commercial nature.

In both aspects, the term is only relevant in China, not in Hong Kong. When Hong Kong adopted the UNCITRAL Model Law in 1989, it completely eliminated the definition of "commercial" arbitration. Hong Kong also made no commercial reservations under the New York Convention. The complete absence of any commercial dispute requirement in Hong Kong's international arbitration has not been changed after the handover of the former British colony back to the PRC. In China, although both the 1994 Arbitration Law and the 1998 CIEAC Arbitration Rules have instituted no commercial dispute requirement, the term that is used, "economic and trade transactions", has been interpreted to include most kinds of "commercial" disputes. The PRC, moreover, made the commercial arbitration reservation when ratifying the New York Convention in 1986. To assist People's Courts at lower levels to implement the Convention, the Supreme People's Court provided guidance in the form of a judicial interpretation, which states that commercial legal relations are those "concerning economic rights and obligations arising out of contract, tort or relevant provisions of law, including disputes concerning the sale and purchase of goods, lease of property, contracting for project work, processing arrangements, technology transfer, equity joint ventures, cooperative joint ventures, exploration and exploitation of natural resources, insurance, financing, labor, agency, consultancy services and transportation by sea, air, railway or road, as well as product liability, environmental pollution, accidents at sea and ownership, but not including disputes between foreign investors and government bodies."

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19 For more discussion of the New York Convention, see Part IV The Legal Framework, below.
20 §34(2) of the 2000 Arbitration Ordinance states that "Article 1(1) of the UNCITRAL Model Law shall not have the effect of limiting the application of the UNCITRAL Model Law to international commercial arbitration." The 2000 Arbitration Ordinance is available at <http://www.justice.gov.hk/Home.htm>. For the underlying reasons for this section, see the Law Reform Commission of Hong Kong, Report on the Adoption of the UNCITRAL Model Law of Arbitration [1987], ¶¶ 4.11-4.16. The fact that there is no commercial requirement does not mean every dispute is arbitrable in Hong Kong. The following are not subject to arbitration: (1) Fraud (see §26.2 of the 2000 Hong Kong Arbitration Ordinance), (2) disputes involving the validity or infringement of intellectual property, (3) disputes relating to marriage, divorce, and relations between parents and children, (4) disputes reserved to particular courts or tribunals for resolution, such as bankruptcy, company liquidation and winding up, liability to taxation and questions of personal status, such as nationality or residence, and (5) disputes in which the contract underlying the arbitration is void ab initio, whether by statute or at common law. See Neil Kaplan and Robert Morgan, Hong Kong, in International Council for Commercial Arbitration, International Handbook on Commercial Arbitration (Ian Paulson, general editor, with the assistance of International Bureau of the Permanent Court of Arbitration, The Hague, Boston: Kluwer Law International), Supp. 29 (December 1999), at 21.
21 When the UK extended the Convention to Hong Kong, 23 April 1977, it also extended its reservation: "The United Kingdom will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State. This declaration is also made on behalf of Gabon, Hong Kong, and the Isle of Man to which the Convention has been extended." See <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/parl//chapterXXII//treaty1.asp>.
22 See the discussion in Part II.B. New Constitutional Order—One Country, Two Systems, below.
23 See Cheng Dejun et al., note 13, above, at 27.
To a large extent, this guideline is similar to the definition provided in a footnote to Article 1(1) of the UNCITRAL Model Law. And, as "the term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not", so should the judicial interpretation of the Supreme People's Court. In other words, neither the footnote nor the Supreme People's Court's notice is intended to be an exhaustive list. On the other hand, CIETAC's jurisdiction may not be extended to all of the commercial disputes enumerated by the Supreme People's Court because the 1994 Arbitration Law provides other limits to the domain of arbitration.

VIII. THE HISTORICAL, CONSTITUTIONAL, ECONOMIC AND CULTURAL BACKGROUND

A. HISTORICAL ORIGINS AND PRE-1997 REFORMS

Although Hong Kong and China share a long history and common culture and traditions, their current legal systems differ profoundly. In addition to the obvious differences resulting from the disparate influences of the common law (in Hong Kong) and civil law (in China) traditions, as well as from contrasting ideological principles, HKSAR and PRC international arbitration law and practice have also been marked by the distinct styles of the West and the East.

Hong Kong's arbitration system naturally owes much to that of its former colonial ruler, Britain. England is known as a country with a rich tradition of arbitration. Today, the London Court of International Arbitration (LCIA), founded in 1892, the world's oldest existing arbitral institution, is among the leading international arbitration institutions in the world. However, the British colonial government failed to introduce formal arbitration legislation to Hong Kong until the

26 The footnote states that "... relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road."

27 See id.


29 Under Article 3 of the 1994 Arbitration Law, (1) marital, adoption, guardianship, support and succession disputes and (2) administrative disputes are not subject to arbitration. As the 1994 Arbitration Law does not exclude disputes over intellectual property rights, disputes concerning bankruptcy, and disputes relating to antitrust from the scope of arbitrability, they should now be subject to arbitration despite earlier laws and regulations of the PRC that require such disputes to be resolved by relevant governmental authorities or by the competent People's Courts. See Tang Houzhi and Wang Shengchang, The People's Republic of China, in International Council for Commercial Arbitration, International Handbook on Commercial Arbitration, note 20, above at 17. It has already been reported that disputes over intellectual property have been among CIETAC's cases. See Cheng Dejun, Working Report of the 11th Committee of CIETAC, China Int'l Commercial Arb. Y.B. 87 (1997-1998), at 87.

30 England has for many centuries been one of the world's major centres of international commerce, and consequently the law and practice of international commercial arbitration there has ancient origins. For a short history of English arbitration, see Neil Kaplan, Jill Spruce and Michael J. Moser, Hong Kong and China Arbitration: Cases and Materials (Hong Kong: Butterworths; Salem, N.H.: Butterworth Legal Publishers, 1994), at xiii-lxiv.

1960s. As Neil Kaplan has pointed out, although arbitration practice emerged in Hong Kong as early as in 1843, Hong Kong did not have any formal arbitration law until the enactment of its first Arbitration Ordinance (Chapter 341) in 1963. Moreover, the 1963 Arbitration Ordinance basically mirrored the English Arbitration Act 1950, as it was traditional for English laws simply to be transposed onto the colonial Hong Kong statute books without being tailored to the particular needs of Hong Kong. The 1963 Arbitration Ordinance provided a unitary arbitration system that applies to both domestic and international arbitrations. The British style of arbitration law and practice in Hong Kong was first modified in 1982 by the passage of the 1982 Arbitration Ordinance. As the Law Reform Commission of Hong Kong formed in 1979 recommended, the new Arbitration Ordinance adopted not only new features of the English Arbitration Act 1979, but also other reforms that represented the beginning of Hong Kong’s departure from its previously strict English model.

Many reforms provided in the 1982 Arbitration Ordinance, such as permitting foreign counsel to handle international arbitrations in Hong Kong on behalf of their clients (§ 20) and a conciliator to continue to serve as an arbitrator if the conciliation fails (§ 2A), were aimed at making Hong Kong a more attractive venue for international arbitration. In the early 1980s, few international arbitrations were conducted in Hong Kong. Although the Hong Kong branch of the Chartered Institute of Arbitrators, established in 1972, had grown to more than 200 members, the “branch was fairly inactive”. It was reported that the members of the Hong Kong branch conducted only about five arbitrations annually between 1978 and 1980. In about the same period (1976–80), the arbitration committee of the Hong Kong General Chamber of Commerce conducted only about four arbitrations yearly as the agent in Hong Kong of the International Chamber of Commerce (ICC). The total estimated figure of arbitrations for this period was only around 14 a year.

32 For a description of some earlier Hong Kong laws that applied to arbitration in Hong Kong, see Robert Morgan, The Arbitration Ordinance of Hong Kong: A Commentary (Butterworths Asia, Hong Kong, 1997), at 2–3.
35 See Robert Morgan, note 32 above, at 3.
37 For a description of these departures, see Neil Kaplan, The History and Development of Arbitration in Hong Kong, Y.B. 1st Fin. & Econ. L. 1996, note 33, above, at 206–207.
38 The figure is quoted from Law Reform Commission of Hong Kong, Report on Commercial Arbitration (Topic 1), 11 December 1981, at 3.
39 See Neil Kaplan, note 33, above, at 221.
The Law Reform Commission believed that the basic reason why comparatively few arbitrations were taking place in Hong Kong was the lack of convenient arbitration facilities and suggested that "ready arbitration facilities should be provided through private institutions". In response to this need, Hong Kong set up its international commercial arbitration institution, the HKIAC, in 1985, with the clear aim to become a leading international commercial arbitration centre in Asia. During the same year, the UNCITRAL Model Law was adopted by the United Nations. Even though the United Kingdom itself initially rejected the Model Law, the Law Reform Commission recommended in 1987 that it be adopted in Hong Kong with only minor changes. This was done by the passage of the Arbitration (Amendment) Ordinance 1989, a major achievement in Hong Kong’s history of arbitration legislation, which created a dual arbitration system in Hong Kong.

Three years later, as the debate on the Model Law in the United Kingdom engendered a change in attitude in favour of absorbing the Model Law into a new Arbitration Act, another important arbitration law reform followed in Hong Kong. In 1992, an Arbitration Law Committee was formed by the HKIAC to consider further reform of the Arbitration Ordinance, particularly in light of arbitration law reform proposals in England and Wales, the Netherlands Arbitration Act 1986, and Singapore’s International Arbitration Act. The Committee’s efforts were finalized by the passage of the Arbitration (Amendment) Ordinance 1996 on 18 December 1996. The 1996 Ordinance enacted the proposals of the Arbitration Law Committee to harmonize Hong Kong’s domestic and international arbitration laws by introducing provisions of common application to both domestic and international arbitrations and applying certain provisions of the UNCITRAL Model Law to domestic arbitrations.

In the same year, still a year before the British handover of Hong Kong to the PRC, the Hong Kong Institute of Arbitrators (HKIarb), the first truly local arbitration institute, was established. All these developments showed that, although Hong Kong’s international commercial arbitration law originated from the English common law

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41 See id., at 4–5, and 31.
42 The Model Law was rejected by the Departmental Advisory Committee on Arbitration Law formed in 1986. See Robert Morgan, note 32, above, at 6. 9.
45 See Robert Morgan, note 32, above, at 9.
tradition, its modern version significantly departed from the English model.\textsuperscript{51} Hong Kong has, in fact, adopted many features of contemporary international arbitration law and practice through the 1982, 1989 and 1996 and other Arbitration (Amendment) Ordinances, as well as through the establishment of new arbitration institutions.

China's international arbitration law and practice were originally modelled on that of the Foreign Trade Arbitration Commission (FTAC) of the Soviet All-Union Chamber of Commerce.\textsuperscript{52} Like its Soviet counterpart, China established its FTAC in 1956 within and under the auspices of the PRC's trade promotion body, the China Council for the Promotion of International Trade (CCPIT).\textsuperscript{53} Under Article 2 of the FTAC rules, FTAC was vested with the exclusive authority to administer arbitrations in connection with foreign trade disputes arising between foreign firms, companies, or other economic organizations on the one hand and Chinese firms, companies, or other economic organizations on the other.\textsuperscript{54} Until the PRC embarked upon its reform and open-door policy in the late 1970s, FTAC remained basically an international-trade disputes arbitration institution.

China's international arbitration law and institutional reforms took quite different paths. In Hong Kong, the arbitration law reform came first and the institution building followed, whereas in China, the strengthening of existing institutions came first and the arbitration law reform followed. The economic reform and the new openness to the world quickly expanded China's international commercial relations. The expansion of the PRC's international economic activities first eliminated the limitation of FTAC's jurisdiction to simple "trade" disputes. On 26 February 1980, the State Council changed FTAC's name to the Foreign Economic and Trade Arbitration Commission (FETAC) and expanded its jurisdiction to include, in addition to foreign trade disputes, disputes "arising from various kinds of China's economic cooperation with foreign countries".\textsuperscript{55}


\textsuperscript{52} The FTAC was formed in Moscow in 1932 to resolve disputes in foreign trade. Also attached to the Soviet All-Union Chamber of Commerce was another arbitration body, the Maritime Arbitration Commission (MAC), formed in December 1930. See Kaj Hobøl, Arbitration in Moscow, 3 Arb. Inst'l 119 (1987), at 122.

\textsuperscript{53} It has been asserted that one difference between them was that the FTAC of the CCPIT was non-governmental in nature while the FTAC of the Soviet All-Union Chamber of Commerce was not. See Legislative Affairs Commission of the Standing Committee of the National People's Congress of the PRC, ed., Arbitration Laws of China (Hong Kong: Sweet & Maxwell Asia, 1997), at 106, n. 14.

\textsuperscript{54} See Cheng Dejun et al., note 13 above, at 7-8.

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The first major effort to strengthen China's international arbitration institutions came in 1988. On 21 June 1988, FETAC was formally renamed to its current name CIETAC.\textsuperscript{56} On 12 September 1988, new arbitration rules for CIETAC were adopted to expand its jurisdiction further and allow foreign nationals to be appointed to CIETAC's Panel of Arbitrators, among many other reforms. The new rules (the 1988 CIETAC Rules) took effect on 1 January 1989.\textsuperscript{57} The second major effort to enhance CIETAC's role came in 1994. Based on the work of a drafting group formed by CIETAC in early 1992,\textsuperscript{58} CCPII formally adopted the revised CIETAC Arbitration Rules (the 1994 CIETAC Rules) on 17 March 1994,\textsuperscript{59} which were again amended on 4 September 1995 (the 1995 CIETAC Rules)\textsuperscript{60} in accordance with the PRC's 1994 Arbitration Law. These reform efforts have truly modernized and internationalized China's international arbitration system.\textsuperscript{61}

After China's international arbitration institutions were strengthened, and with the rapid development of domestic economic reform, which demanded reform of China's domestic arbitration system, there emerged a need for enacting a comprehensive and uniform arbitration law governing both domestic and international arbitrations in China. To meet this need, the PRC enacted its first formal Arbitration Law on 31 August 1994, which became effective on 1 September 1995. While the new arbitration law brought fundamental changes to China's domestic arbitration system, it largely conformed to and then strengthened international arbitration institutions and practices that already existed.

It is clear today that, from 1980 to Hong Kong's return to China in 1997, international arbitration systems in both China and Hong Kong experienced major reform and progressive change. Although they have different historical origins and reform paths, both have significantly departed from their historical origins and come more closely in line with modern international practice. As a result, as will be shown below, they have both—in the context of international commercial arbitration—developed from "lightweight" to "heavyweight" status.

B. NEW CONSTITUTIONAL ORDER—ONE COUNTRY, TWO SYSTEMS

Hong Kong's post-1997 constitutional order was provided in its mini-constitution, the Basic Law of the Hong Kong Special Administrative Region (Basic Law).\textsuperscript{62} The Basic Law implements in detail the statements of principles set out in the


\textsuperscript{57} The text of the 1988 CIETAC Rules is reprinted in Cheng Dejun et al., note 13 above, at 333.

\textsuperscript{58} See Michael J. Moser, China's New International Arbitration Rules, 11 J. Int. Arb. 3 (September 1994), at 6.

\textsuperscript{59} The text of the 1994 CIETAC Rules is reprinted in Cheng Dejun et al., note 13 above, at 353.

\textsuperscript{60} The text of the 1995 CIETAC Rules is reprinted in Wang Shengchang, note 4, above, at 226.

\textsuperscript{61} For a more detailed account of these reforms, see Part III A. PRC International Arbitration Institutions, below.

Sino-British Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China (Joint Declaration). Under the Joint Declaration and the Basic Law, the HKSAR enjoys a high degree of autonomy and China and the HKSAR maintain separate legal and judicial systems.

Article 8 of the Basic Law provides that the laws previously in force in Hong Kong—i.e., the common law, rules of equity, ordinances, subordinate legislation, and customary law—shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the legislature of the HKSAR. Even provisions of UK Acts of Parliament formerly applied to Hong Kong may remain in force if being re-enacted as Ordinances through the localization process. Under Article 18 of the Basic Law, the laws in force in the HKSAR shall be the Basic Law, the laws previously in force in Hong Kong as provided for in Article 8, and the laws enacted by the Legislative Council (LegCo). The PRC’s laws do not apply to Hong Kong, except those that are listed in Annex III of the Basic Law, according to the procedure under Article 18 of the Basic Law.44

The Basic Law has, however, made important structural changes to Hong Kong’s judicial system. The new judiciary received a tremendous boost from the establishment of a Court of Final Appeal based in Hong Kong to replace the Privy Council as the court of last recourse. In addition, the former Supreme Court (comprising the Court of Appeal and the High Court) was replaced with a High Court comprising a Court of Appeal and a Court of First Instance. Despite these structural changes, the pre-handover judicial system has been kept basically intact and hence continues to function as a foundation of stability. Today, the new judiciary is to a large extent applying the same laws as were applied in the past. Foreign judges continue to be appointed to, and apply common law precedents in, Hong Kong courts (not only in the lower courts, but also in the Court of Final Appeal), and English continues to be the dominant court language.

Although the Joint Declaration and the Basic Law do not mention Hong Kong’s arbitration system, by granting a high degree of autonomy to the HKSAR and by

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44 The current list includes the following PRC laws: (1) Resolution on the Capital, Calendar, National Anthem and National Flag of the People’s Republic of China; (2) Resolution on the National Day of the PRC; (3) Declaration of the Government of the PRC on the Territorial Sea; (4) Nationality Law of the PRC; (5) Regulations of the PRC Concerning Diplomatic Privileges and Immunities; (6) Law of the PRC on the National Flag; (7) Regulations of the PRC Concerning Consular Privileges and Immunities; (8) Law of the PRC on the National Emblem; (9) Law of the PRC on the Territorial Sea and the Continental Shelf; (10) Law of the PRC on the Garrisoning of the Hong Kong Special Administrative Region; and (11) Law of the PRC on the Exclusive Economic Zone and the Continental Shelf. See Annex III to the Basic Law and the two decisions of the Standing Committee of the National People’s Congress on the addition to or deletion from the list of national laws in Annex III to the Basic Law, adopted respectively on 1 July 1997 and 4 November 1998, available online at <http://www.info.gov.hk/basic_law/english/f02.htm>.
45 Basic Law, Article 81.
46 Basic Law, Article 92.
47 Basic Law, Article 82. See also Hong Kong Court of Final Appeal Ordinance (Ordinance No. 79 of 1995), available online at <http://www.justice.gov.hk/Home.htm>.
solemnly undertaking to maintain Hong Kong’s legal system unchanged until the middle of the next century, they have, in fact, obligated China to guarantee that the rapid development of Hong Kong’s international arbitration system undertaken during the transition period and continued after 1997 will not be affected by the change in Hong Kong’s status.

It is only natural, albeit accidental, that Hong Kong’s modern international arbitration law and institutions were to a large extent formed—and made an integral part of the legal system—after the Joint Declaration was concluded, given “the substantial development of autonomous features in implementing the Joint Declaration during the transition period.” Since 1997, both China and the HKSAR have continued to take separate steps to improve their respective international arbitration systems. For example, the LegCo passed the Arbitration (Amendment) Bill 1999 on 5 January 2000 to implement the Memorandum of Understanding (MOU) on the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR, as well as the Arbitration (Amendment) Bill 2000 on 14 June 2000 to facilitate the enforcement in Hong Kong of awards made in countries or territories that are not parties to the New York Convention. In China, the 1995 CIETAC Arbitration Rules were further amended in 1998 to bring them even closer in line with international practice. And on 24 January 2000, the Supreme People’s Court issued an announcement publishing, in the form of a judicial interpretation, the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR in the Mainland China, which took effect on 1 February 2000.

Moreover, to fulfill its obligations under the Joint Declaration, and in accordance with the spirit of the Basic Law, China has taken steps to ensure that the Hong Kong international arbitration system remains intact. In June 1997, the PRC government formally notified the UN Secretary-General that the New York Convention would continue to apply to the HKSAR as it had been applied in the

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68 According to Article 4 of the Joint Declaration, the transition period was “between the date of the entry into force of the Joint Declaration and 30 June 1997.”

69 As Robert Morgan has pointed out, “[i]n effect the transition of sovereignty over the territory has coincided with major reform of its arbitration law.” See Robert Morgan, note 50, above, at 18.

70 See Xiaohong Xu and George D. Wilson, The Hong Kong Special Administrative Region as a Member of Regional External Autonomy, 32 Case W. Res. J. Int’l L. 1 (Winter 2000), at 35.

71 The Act is available online at <http://www.legco.gov.hk/lpr25-97/97-98/english/bills/c.177_e.htm>. The story is available online at <http://www.info.gov.hk/gia/general/200006/14/0614234.htm>. The text of the Act was published in the Government of the HKSAR Gazette, 26 May 2000, no. 21, Legal Suppl. 3. It is also available online through the official Hong Kong government website <http://www.info.gov.hk/>. While the Arbitration (Amendment) Ordinance (No. 2 of 2000) facilitates the enforcement of mainland awards, the Arbitration (Amendment) (No. 2) Ordinance (No. 38 of 2000), effective 23 June 2000, will facilitate the enforcement of Macau and Taiwanese awards in Hong Kong. However, the enforcement of the former is based on the New York Convention, while the enforcement of the latter is based on the same terms as domestic awards.

72 For a detailed discussion, see Part III A PRC International Arbitration Institutions, below.

and this has ensured that there will continue to be no commercial arbitration requirement in enforcing a foreign arbitral award in Hong Kong. Most importantly, after hesitation and delay, which led to a legal vacuum for more than two years after the handover, in June 1999 the PRC signed the MOU with the HKSAR government to ensure mutual enforcement of Hong Kong arbitral awards in China and PRC arbitral awards in Hong Kong, essentially in accordance with the New York Convention.

Not only do the two international arbitration systems remain separate and continue to develop separately, but they also continue to be supported by their respective, albeit different, judicial systems. While, in general, both judicial systems are supportive of international arbitration, it is China, not Hong Kong, that has often been criticized for having problems in enforcing arbitral awards. Compared to the PRC's judiciary, for instance, the HKSAR's judiciary enjoys far better legal training, is not burdened by corruption and local protectionism, and has clearly been equipped with well-established precedents and more sophisticated procedures to handle setting aside or enforcing arbitral awards. Without the many problems that have often been seen as the underlying cause for the failure of enforcement of arbitral awards in mainland China—and hence have subjected the PRC's judiciary to heightened scrutiny abroad—Hong Kong's judiciary has provided strong support to international

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78 On 6 June 1997, the Government of China notified the Secretary-General of the following: “In accordance with the Declaration of the Government of the People's Republic of China and the United Kingdom of Great Britain and Northern Ireland on the question of Hong Kong signed on 19 December 1984, the People's Republic of China will resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997. Hong Kong will, with effect from that date, become a Special Administrative Region of the People's Republic of China and will enjoy a high degree of autonomy, except in foreign and defense affairs, which are the responsibility of the Central People's Government of the People's Republic of China. The Convention will apply to Hong Kong Special Administrative Region only to the recognition and enforcement of awards made in the territory of another Contracting State. The Government of the People's Republic of China will assume responsibility for the international rights and obligations arising from the application of the Convention to Hong Kong Special Administrative Region.” Subsequently, on 10 June 1997, the Government of the United Kingdom of Great Britain and Northern Ireland notified the Secretary-General of the following: “In accordance with the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong signed on 19 December 1984, the Government of the United Kingdom will resume Hong Kong to the People's Republic of China with effect from 1 July 1997. The Government of the United Kingdom will continue to have international responsibility for Hong Kong until that date. Therefore, from that date the Government of the United Kingdom will cease to be responsible for the international rights and obligations arising from the application of the said Convention to Hong Kong.” See <http://untreaty.un.org/ENGLISH/bible/englishtreatytext/bible/partI/chapterXXII/trwry1.asp>.

79 Compared to the difficulties faced by the Berlin Court of Arbitration (formerly the Court of Arbitration attached to the Chamber of Foreign Trade of the former German Democratic Republic) after the reunification of the West and East Germany in 1990, the hesitation and delay in reaching the agreement between China and Hong Kong has been much less problematic. See Jörg Kirchner and Arthur L. Marriott, International Arbitration in the Aftermath of Socialism: The Example of the Berlin Court of Arbitration, 10 J. Int'’l Arb. 1 (Mar. 1993), at 5.

77 For a more detailed discussion, see Part V Mutual Enforcement of Arbitral Awards, below.

76 It is beyond the scope of this article to provide a detailed assessment of the enforcement of arbitral awards by the judiciaries in China and Hong Kong. However, a limited discussion of the enforcement issue of “convention awards” is offered in Part IV C: Role of the UNCITRAL Model Law and the New York Convention, below.

arbitration in Hong Kong. While China is striving to improve its enforcement mechanism in regard to the enforcement of arbitral awards, it can only be expected that—particularly with the passage of the Arbitration (Amendment) Bill 2000—Hong Kong’s new judiciary will play an even more supportive role in the future.

C. ECONOMIC DEVELOPMENT AS THE DRIVING FORCE FOR ARBITRATION

An important factor that has helped push China and Hong Kong into their current prominent status in the international arbitration landscape is the rapid economic development in Asia. In other words, the rapid development of new arbitration laws and practices in China and Hong Kong can be attributed to economic necessity. Arbitration is essentially a service industry. On the one hand, international arbitration services follow international trade and commerce. Economic development demands arbitration services. On the other hand, international arbitration services in turn help to promote the economic development, for they provide a degree of legal certainty to the international business community. It is almost self-evident that international commercial arbitration has been well-developed in almost all advanced industrial countries and regions in the world. As was pointed out nearly 10 years ago, “there is a growing feeling in Asia that, as the balance of trade power shifts from West to East, so should the arbitral facilities”.

When considering Hong Kong’s arbitration law reform proposals in the early 1980s as part of the territory’s ongoing legal reform, the Law Reform Commission noted that there was a strong and widespread belief that Hong Kong had the potential to develop into the leading international arbitration centre in the region, and that the driving forces behind such a belief were several interrelated economic factors.

According to the Law Reform Commission, Hong Kong by then had already developed into a leading financial and commercial centre in Asia, and in such a centre, international arbitration facilities were arguably among the services that should have been readily available. Moreover, the vitality and increased size of the economy of Hong Kong itself—evidenced by its position as the world’s third-busiest container port, the size of the shipping fleets owned there, the number and scope of building and engineering contracts, the international trade financially serviced by local and international institutions based in Hong Kong, and the size and sophistication of the financial and commercial sectors—all pointed to a potential market arising within Hong Kong for arbitration services.

80 As has been pointed out, Hong Kong’s “judiciary is supportive of arbitration and ... parties will find a judiciary well attuned to the needs of the international commercial community”. See Neil Kaplan et al., note 6 above, at 239.
82 See Neil Kaplan, et al., note 6 above, at 238.
Added to Hong Kong’s economic development is the fact that China’s reform and opening to the world since the late 1970s has rapidly increased its foreign trade and other co-operative economic activities, such as joint ventures. Parties thereto generally prefer arbitration as a means of resolving disputes that may arise rather than court proceedings. Thus, China’s sizeable economic development created a huge potential for increased arbitration services. Although China had set up its own international commercial arbitration institutions, such as CIETAC, arbitration in China had not always been acceptable to foreign contracting parties, who preferred—for reasons of convenience, cost, perceived neutrality, etc.—venues outside China, such as Stockholm, London, Zurich, and Geneva, Paris and New York. However, these venues abroad were, and are still, usually not preferred by Chinese parties for similar reasons. Therefore, both foreign and Chinese parties’ quests for a convenient neutral venue have provided Hong Kong, traditionally a bridge between the East and the West, with an opportunity to become an attractive, alternative choice for international arbitration services.

Also added to Hong Kong and China’s economic development is the fact of rapid economic development throughout Asia. Such development has produced large, supra-national contracting parties, who also need, and prefer, international arbitration to resolve disputes. Nevertheless, the increased demand for international arbitration in the region has not been met by existing international arbitration centres there. For instance, the Regional Centre for Arbitration in Kuala Lumpur (KLICA), established in 1978 by the Asia-African Legal Consultative Committee, had its first international arbitration case only in 1986. Compared to Kuala Lumpur, Hong Kong can be

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85 This potential has been proved, at least partially, by the caseload statistics of CIETAC between 1984 and 1989: see Table 1. By way of historical comparison, it is interesting to note that, according to Wang Shengchang, CIETAC handled a total of 177 cases between 1956 and 1986. See Wang Shengchang, note 4 above, at 68. If one subtracts the total number of 132 cases between 1984 and 1986, CIETAC handled only 45 arbitration cases during 1956 and 1983.
86 Indeed, as has been pointed out, “Hong Kong has become a major international arbitration centre within the South East Asia region over the past ten years, in relation particularly to commercial contracts involving parties from the People’s Republic of China.” See Robert Morgan, note 32, above, at 1.
87 See The Centre’s Statistics—Year Ending 1999, The Regional Center for Arbitration in Kuala Lumpur Arb. News (May 2000), at 2. For recent figures, see Table 4, below.
viewed, and has seen itself, as having many advantages to meet the increasing demand in the region.\textsuperscript{88}

In the PRC, economic considerations are also the major reason for government promotion of international arbitration as the favoured means for dispute resolution. While commenting on the fact that the formulation of the PRC Arbitration Law demonstrates that China's arbitration system has come into line with predominant arbitration systems worldwide, the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the PRC has asserted that the Arbitration Law will play an important role in promoting China's commerce with other countries, its participation in competition in the world market, and economic growth and trade internationally.\textsuperscript{89} It also seems obvious why China's international arbitration system provides legal and/or natural persons from Hong Kong, Macau, and Taiwan with the same treatment as legal and/or natural persons from foreign countries. As Hong Kong, Macau and Taiwan are all on the top-ten list of major sources of "foreign" investment in the PRC, bestowing equal treatment upon them encourages a continued inflow of that substantial investment.\textsuperscript{90}

As the US Supreme Court said in \textit{Scherk v. Alberto-Culver Co.}, 417 US 506, 507 (1974), the right of parties to agree to arbitrate a broad range of disputes is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction". Clearly, as arbitration is the preferred way to solve disputes by the international business community, Hong Kong and China, like many other countries in the Pacific Rim, have viewed the development of their own arbitration laws and institutions as a means to help the continued and smooth growth of their foreign trade and economic relations.

\textsuperscript{88} It is perhaps for similar reasons that there has been a rapid increase in the number of international arbitration institutions throughout the Pacific region. Australia established the Australian Centre for International Commercial Arbitration (ACICA) in 1985 on the initiative of the Institute of Arbitrators of Australia. Singapore set up its own Singapore International Arbitration Centre (SIAC) in May 1990. See David Weber, \textit{International Arbitration Is Gaining Acceptance Among Pacific Rim Traders}, 7 Cal. Law. (Mar. 1987), at 29.


\textsuperscript{90} According to figures provided by China's Ministry of Foreign Economic and Trade Cooperation, as of the end of May 2000, the top ten sources of foreign investments in China are Hong Kong, the United States, Japan, Taiwan, Singapore, the Virgin Islands, Korea, the UK, Germany and Macau. See \textit{Actual Foreign Investment in China Tops ¥120 Billion}, People's Daily (Overseas Edition), 19 June 2000, at 1.
The mutually beneficial relationship between economic development and arbitration services also includes the direct economic benefits that a busily functioning service industry of international arbitration can bring to a local economy through achieving the arbitration institutions' economic self-sustainance as well as other benefits. Arbitration in the HKIAC is such a case in point. As one commentator has pointed out, as a result of the rapid development of international arbitration in Hong Kong, a considerable amount of international arbitration activity takes place there, contributing to the territory's "invisible" earnings. Indeed, HKIAC initially relied on private donations and government funds. Now it is self-supporting.

D. The Common Heritage Favouring Mediation within Arbitration

Although China, including Hong Kong, has a relatively short history of international arbitration, it has a long tradition of using mediation and conciliation (tiaojie) as the favoured means of dispute resolution. Chinese and foreign scholars studying China's dispute resolution practices are in universal agreement that the Chinese practice is to prefer dispute settlement by mediation or conciliation between disagreeing parties. Mediation/conciliation has not only played a prominent role in settling disputes among people and enabling the members of a
community to live in peace in both traditional and contemporary China, but it has also been employed to deal with international commercial disputes arising from Chinese-foreign economic relations. In practice, not only does ad hoc and institutional mediation continue to be used for settlement of international commercial disputes, but also, more importantly, mediation is employed innovatively in combination with arbitration. Although China and Hong Kong have joined other nations in internationalizing their arbitration systems in recent years, their common heritage of a culture that favours mediation has enabled them to lead the way in the world in using the technique of “mediation within arbitration”.

The use of mediation in combination with, or “within”, arbitration is a distinctive feature of China’s international arbitration system. Although FTAC applied this technique from the beginning of its work, its Provisional Rules of Procedure (1956) did not include such a feature. The practice was first provided in Article 19 of the Provisional Rules of Procedure of the Maritime Arbitration Commission (MAC) of the CCPIT, adopted on 1 August 1959. Only after many years of experimenting and practising this technique did the 1988 CIETAC Rules for the first time stipulate in Article 37 that both CIETAC and the arbitral tribunal may conciliate cases under their cognizance. Then the 1994 CIETAC Rules made some important changes and set forth more detailed rules. Under the new rules, only the arbitral tribunal, not CIETAC, may conciliate the case under its cognizance.

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100 Stories of mediation appeared as part of the oldest Chinese folklore in China’s earliest historical record. Many real-life mediation cases were also recorded in the authoritative history books of each dynasty. During the Ming Dynasty (1368–1644), each village was to build a Shennong Ting (Public Notice Pavilion), where the local elders or officials listened to the disputes of the people as judges and interceded for them to arrive at peaceful solutions. See Cao Pei, The Origins of Mediation in Traditional China, 54 Dispute Resolution J. 32 (May 1999).

101 According to Ren Jianxin, Chief Justice of the Supreme People’s Court, the people’s mediation committees in the PRC have settled cases covering a wide array of topics such as divorce, inheritance, parental and child support, alimony, debts, real property, production, and torts, as well as other civil and economic disputes and criminal misdemeanour cases. They have also played an important role in preventing crime, reducing litigation in the courts, enhancing the people’s unity, and promoting social stability. Over seven million disputes are satisfactorily resolved through the use of mediation each year in China, far surpassing the number of cases brought in Chinese courts. See Ren Jianxin, Mediation, Consultation, Arbitration and Litigation in the People’s Republic of China, 15 Int’l Bus. Law. 395 (Oct. 1987).

102 For a brief discussion of ad hoc and institutional mediation in international commercial dispute resolution in China, see Wang Shengzhong, note 4 above, at 34–47.

103 Although China is the strongest advocate of this technique, similar practices have also been developed and promoted in other countries, such as Japan. For example, in as early as September 1962, Section 24 of the Rules of the Maritime Arbitration of Japan Shipping Exchange Inc. (Ordinary Rules) provided that “[a]t any stage of the arbitration proceeding the Arbitrators may, with the consent of the parties, settle the whole or part of the dispute by mediation”. However, this practice has yet to be formally enacted into Japan’s Code of Civil Procedure, which has long supported mediation in court as well as mediation prior to litigation since it was adopted in 1891. According to the latest available statistics, out of all the applications the Tokyo Maritime Arbitration Commission (TOMAC) accepted from April 1985 to December 1995, 44.9 percent were settled by mediation initiated either by the parties or arbitrators during arbitral proceedings. See Takao Tateishi, Mediation as a Pre-Stage to Arbitration—Is it the Way Ahead for ADR in Japan? 41 Bulletin of the Japan Shipping Exchange, Inc. 17 (September 2000), at 20.

104 Article 19 states: “The Maritime Arbitration Commission may endeavour to settle by conciliation any dispute of which it has taken cognizance.” The text of the MAC Provisional Rules is reprinted in Cheng Dewei et al., note 13 above, at 440–448.


106 See Articles 46–51 of the 1994 CIETAC Rules.
in the process of arbitration if both parties have a desire for conciliation, or if one party so desires and the other party agrees to it (Articles 45 and 47). There is no fixed procedure for this technique. The arbitration tribunal may conciliate cases in any manner it deems appropriate (Article 46). The arbitration tribunal may help the parties reach a voluntarily amicable agreement and then end the case by making an arbitral award in accordance with the contents of such agreement—unless otherwise agreed by the parties (Article 49). Should conciliation fail, the arbitration procedure resumes (Articles 47 and 51), and

"any statement, opinion, view or proposal which has been made ... accepted or rejected by either party or by the arbitration tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense and/or counterclaim in the subsequent arbitration, proceedings, judicial proceedings or any other proceedings." (Article 50).

Finally, Articles 51 and 52 of the 1994 Arbitration Law provides unambiguous legislative support to this practice. Under Article 51, both written conciliation statements and arbitral awards based on settlement agreements reached by the parties through the arbitrators' conciliation during arbitration proceedings are judicially enforceable.

Based on China's own experience, Chinese scholars strongly believe that the combination of the two procedures has more advantages than does keeping them apart. First, separate procedures can be avoided and substantial time and money can be saved; second, the Chinese experience shows that more of the successful conciliation cases are conducted by arbitrators during arbitration proceedings than by conciliators in the process of stand-alone conciliation; third the combination of arbitration with conciliation can make good use of the advantages of both. An arbitral award based on a settlement agreement may not only satisfy both parties'

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105 For an empirical account of CIETAC practice, see Huang Yunning, Mediation in the Settlement of Business Disputes: Two Typical Examples of Cases Settled by Mediation at the CIETAC's Shenzhen Commission, 8 J Int Arb. 4 (1991), at 23.
106 As written conciliation statements and arbitration awards based on settlement agreements have equal legal effect in China, it is not necessary to obtain the latter for performance or enforcement purposes in China. However, if a settlement agreement reached by the parties through the arbitrators' conciliation needs to be performed or enforced abroad, an arbitral award shall be made. See Legislative Affairs Commission of the Standing Committee of the National People's Congress of the PRC (ed.), Arbitration Laws of China, note 53, above, at 79-80. Thus Article 49 of the 1998 CIETAC Rules stipulates that "the arbitration tribunal shall end the case by making an arbitration award in accordance with the contents of the settlement agreement unless otherwise agreed by the parties".
109 Indeed, as one commentator has pointed out "[t]he best time to settle an international business dispute can be after the international arbitration proceeding has been commenced, just like in court litigation, parties may be ready to settle only after the adjudicatory process has begun and even has progressed." See Harold I. Abramson, id., at 1.
needs and thus transform antagonists into friends but may also be enforced in court.\(^{110}\)

Hong Kong was among the first to formally adopt this Chinese-style practice. The 1982 Arbitration Ordinance took the initial step of allowing a conciliator to continue to serve as arbitrator if the parties made no objection (Section 2A). However, the 1982 Ordinance only allowed conciliation as an independent proceeding prior to arbitration, and the conciliator-turned-arbitrator served only as a means for making an easy transition from conciliation to arbitration. It was the Arbitration (Amendment) (No. 2) Ordinance 1989 that formally adopted the Chinese practice of combining arbitration and conciliation proceedings on a voluntary basis.\(^{111}\) Under Section 2B of the 1989 Ordinance, an arbitrator can act as a conciliator in an effort to reach a settlement of the dispute during the course of, i.e., within, an arbitration.\(^{112}\) Section 2C provides that "the settlement agreement shall, for the purpose of its enforcement, be treated as an award on an arbitration agreement and may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect." So far, the experience of the combination of mediation and arbitration in Hong Kong has also been viewed as favourable.\(^{113}\) It has been rather proudly proclaimed that "Hong Kong is uniquely placed to provide dispute resolution services. Its sympathy with the Asian traditions of mediation and its skill at blending the best of east and west have created the prime centre in Asia for the resolution of disputes."\(^{114}\)

The success of this approach as used in China, Hong Kong and some other countries has received increased attention but mixed reactions from international arbitration circles.\(^{115}\) To its critics, who, in the words of the general counsel of the

\(^{110}\) As one Australian commentator has pointed out, the combined use of conciliation and arbitration can on the one hand "help breathe new life into arbitration", which is often seen as being out of touch with the real issues and unable to satisfy the parties' needs, and on the other hand "add backbone to conciliation", which on its own lacks binding force. The practice "can deliver not only justice but also practical and sensible awards. In particular, the model allows the arbitrator to get to the very heart of the dispute and reach proper conclusions on the law and merits." See Russell Thirgood, *A Critique of Foreign Arbitration in China*, 17 J. Int'l Arb. 4 (June 2000), at 95-97, 101.


\(^{112}\) This is quoted from HKIAC's web page at <http://www.hkiac.org/hongkong.htm>.

American Arbitration Association, believe the "conventional wisdom that arbitration and mediation operate best when employed as separate processes, since each has its own purpose and ultimate morality",116 the practice is risky because it raises the due process and natural justice concern that the private caucus meetings, or "shuttle diplomacy", conducted by the arbitrator-turned-conciliator in the conciliation process, violate the right to know and be able to answer an opponent’s case if the information provided during private caucus remains confidential in the following arbitration proceedings after attempts at conciliation fail;117 that the impartiality of the conciliator-arbitrator in the remaining arbitration process is in doubt as he may prejudge the case during conciliation efforts;118 and that a conciliator-arbitrator may confuse his dual role.119 But to its proponents, who think that the conventional wisdom is unnecessarily cautious and conservative and "symptomatic of a Western view that completely distinguishes conciliation from arbitration rather than seeing the two modes as part of a larger dispute resolution system",120 not only does the practice offer many benefits, but also the concerns and critics can be addressed if conciliation is conducted on a fully informed121 and voluntary122 basis.123

Despite this seemingly persistent controversy, it seems that the practice has gradually expanded to other parts of the world and found more and more supporters in international ADR circles. As one commentator has pointed out, "if there is an open door, one can use it both ways".124 In response to this development, the International Arbitration Conference held in Seoul on 10–12 October 1996, sponsored by the

119 See Leon L. Fuller, Collective Bargaining and the Arbitrator, 1962 Proc. of the 15th Ann. Mtg of the Nat'l Acad. of Arb. 8 (1962), at 29–30, 33, (arguing that a mediator-arbitrator may confuse the two distinctive roles of mediator and arbitrator, each of which calls for different purposes and moralities—with mediation focused on settlement and arbitration focused on decisions according to the law). For specific concerns regarding CIETAC practice, see Stanley Lubman and Gregory Wigneros, International Commercial Dispute Resolution in China: A Practical Assessment, 4 Amer. Rev. Int'l Arb. 107 (1993), at 127 (suggesting that the arbitrators may be more likely to base their decision on equity rather than strict application of the law when mediating a case, and thus unduly benefit the disputant with the weaker legal argument); Lunming Chen, Some Reflections on International Commercial Arbitration in China, 13 J Int Arb 2 (1996), at 121, 152 (reporting that once the arbitrators have indicated their views, the parties may feel pressured to settle even if they think they are entitled to a more favorable award under the law, for fear of angering the arbitrators).
120 See, e.g., Thirgood, note 110 above, at 95–96.
121 See David C. Elliott, Med-Arb: Wrong with Danger or Right with Opportunity? 62 Arbitration 175 (August 1996) at 176-177. In China, in spite of the fact that both the 1994 Arbitration Law and the 1998 CIETAC Rules do not require the arbitral tribunal to disclose information obtained during a caucus, the actual practice of conciliation is said to be conducted on a fully informed basis. See Tang Houzhi, Is There an Expanding Culture that Favors Combining Arbitration with Conciliation or Other ADR Procedures?, in International Dispute Resolution: Towards an International Arbitration Culture, note 94, above, at 112.
122 See the opinion of Neil Kaplan, quoted in Tang Houzhi, note 94, above, at 113.
123 For suggestions of more detailed protocols that a conciliator-arbitrator should accept when conducting conciliation, see Harold I. Abramson, note 108, above, at 7–17.
124 See Johannes Trappe, note 97, above, at 188.
International Council for Commercial Arbitration, devoted one of its four topics to the question: "Is there an expanding culture that favours combining arbitration, conciliation or other dispute resolution procedure?" According to two major speakers at that conference, combinations of arbitration with conciliation have indeed become more acceptable and possibly been used more frequently. In addition to China and Hong Kong, a number of countries, such as Australia, Canada, Singapore, India and Germany have adopted similar mechanisms to combine arbitration and mediation/conciliation in their arbitration laws, and a number of international arbitration bodies in Japan, Switzerland and other countries have done the same in their arbitration rules.

IX. INSTITUTIONAL DEVELOPMENT

This part of the article will provide a general overview of all of the PRC's and HKSAR's arbitration organizations. However, the primary focus will be on CIETAC and HKIAC, the two administrative arbitration institutions in China and Hong Kong.

A. PRC INTERNATIONAL ARBITRATION INSTITUTIONS

These institutions consist of CIETAC (1956), CMAC (1959) and the China Arbitration Association (CAA).

3. CIETAC (1956)

The China International Economic and Trade Arbitration Commission (CIETAC) is the best-known international commercial arbitration institution in China. Originally, it was set up in April 1956 as an arbitration body within the China...
Council for the Promotion of International Trade (CCPIT) or China Chamber of International Commerce (CCOIC) to resolve China’s foreign trade disputes. Now its jurisdiction has been expanded to resolving international or foreign-related, contractual or non-contractual, economic and trade disputes (Article 1, CIETAC Rules).

As a non-governmental organization, CIETAC is a full-fledged international arbitration institution and perhaps one of the largest in terms of size in the world. At its highest level, CIETAC is composed of one Chairman, several Vice-Chairmen and a number of other members. The main functions of the Commission are to set important policies for its work, adopt annual work reports, and draft reorganization plans and amendments to its arbitration rules in accordance with Article 4 of the Articles of Association of CIETAC, as well as perform specific powers vested in it by the CIETAC Arbitration Rules in arbitration proceedings. The Commission also has one Honorary Chairman and several advisers (Article 8, CIETAC Rules). Its day-to-day work is managed by its Secretariat. Relatively new to its structure is an Expert Consultants Committee set up in August 1994 (Article 9, CIETAC Rules) and an Arbitration Institute set up in July 1994 under its Secretariat. According to Article 7 of the 1993 Articles of Association of CIETAC, the Arbitration Institute is responsible for conducting research on arbitration issues, sponsoring publications such as its yearbook and case reports, and organizing conferences.

CIETAC has its headquarters in Beijing, a Shenzhen Sub-Commission in Shenzhen Special Economic Zone, and a Shanghai Sub-Commission in Shanghai. The Shenzhen and Shanghai Sub-Commissions were established, respectively, in 1984 and 1990 in view of the expansion of arbitration activities in those locales. Prior to 1994, the Shenzhen and Shanghai Sub-Commissions each maintained their own Panels of Arbitrators, Arbitration Commissions and Secretariats. Today, although CIETAC’s Sub-Commissions continue to have their own Arbitration Commissions and Secretariats to handle their day-to-day work under the leadership of their respective Secretaries-General, they no longer have their own Panel lists. The 1994 CIETAC Rules clearly provide that CIETAC Headquarters and its Shenzhen and Shanghai Sub-Commissions constitute a single institution; they not only apply the same Arbitration Rules but also maintain the same Panel of Arbitrators (Article 11, CIETAC Rules). On 1 June 1999, CCPIT/CCOIC approved CIETAC’s decision to establish five liaison offices in Dalian, Fuzhou, Changsha, Chengdu and Chongqi. These liaison offices...
offices are responsible only for promoting and assisting CIETAC's arbitration work, and are not authorized to conduct arbitration themselves. Their operation is directly under CIETAC's supervision.\footnote{132}

In many ways, CIETAC is a typical “success story” of modern PRC economic and legal reform since the late 1970s. It has led the way to the development of China's international arbitration law and practices and its experience was largely written into the 1994 Arbitration Law. If CIETAC was, arguably, stagnant in its first 20 years or more, it has since then experienced a “sea change” from China’s opening its door to the world. Taking CIETAC’s arbitration rules as an example, the Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the CCPIT, formulated by the CCPIT on 31 March 1956 (1956 Provisional Rules)\footnote{133}, i.e. the PRC's first formal, international arbitration procedural rules—had been in service for more than 30 years (1956–87) without change, but were then changed four times within the next 10 years (between 1988 and 1998).

The 1988 CIETAC Rules, effective on 1 January 1989,\footnote{134} were the first attempt to internationalize and modernize the CIETAC Rules. Some of their notable improvements over the 1956 Provisional Rules include: (i) foreign nationals can be appointed to the Panel of Arbitrators (Article 4); (ii) arbitrators who have personal interests in the case shall withdraw themselves or be challenged by the parties (Article 18); (iii) all hearings shall be held in private unless the parties agree otherwise (Article 25); and (iv) formal provision for CIETAC's long-standing practice of combining arbitration with conciliation (Article 37).

The 1994 CIETAC Rules, effective on 1 June 1994,\footnote{135} were the second attempt to bring the CIETAC Rules more fully in line with international practice, especially the UNCITRAL Model Law. Their major improvements over the 1988 CIETAC Rules include: (i) both contractual and non-contractual disputes are clearly covered (Article 2);\footnote{136} (ii) an arbitration clause is one that is separated from other clauses of the contract or is an arbitration agreement attached to a contract separate from other parts of the contract (Article 5); (iii) waiver of the right to object is provided for (Article 45); (iv) a new summary arbitration procedure is added in Chapter III (Articles 64–74); (v) any language agreed upon by the parties other than Chinese—the official language of CIETAC—may be used in an arbitration (Article 75); and (vi) five more rules

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\footnote{133} The 1956 Provisional Rules are reprinted in Cheng Dejun et al., note 13 above, at 323–330.
\footnote{134} The Rules were adopted 12 Sept. 1988 at the Third Session of the First National Congress of the CCPIT. For the text of the 1988 CIETAC Rules, see id., at 333–345.
\footnote{135} The Rules were adopted 17 March 1994 at the First Session of the Standing Committee of the Second National Congress of the CCPIT. For the text of the 1994 CIETAC Rules, see id., at 383–404.
\footnote{136} In the 1998 case of China National Technical Import \\& Export Corp. v. Industrial Recorders Corp. (S.R.C.) of Switzerland, the Shanghai Intermediate Municipal People's Court held that a claim involving fraud was based in tort, not contract, and thus fell outside the scope of CIETAC's jurisdiction. See Michael J. Moser, note 58 above, at 8.
concerning the tradition of conducting conciliation in the course of arbitration are added to improve that special practice (Articles 47–51).  

The main purpose of the 1995 CIETAC Rules, effective on 1 October 1995, was to conform the 1994 CIETAC Rules with the PRC's 1994 Arbitration Law. The major changes included: (i) the chairman of CIETAC no longer has the power to appoint the presiding arbitrator except when the parties fail to do so; (ii) CIETAC continues to have power to decide on the existence and validity of arbitration agreements and the scope of its arbitral jurisdiction, but the final decision shall be made by the People's Court; (iii) CIETAC shall transmit the parties' application for taking interim measures of protection of evidence to the intermediate People's Court in the place where the evidence is located; and (iv) an award shall be scrutinized on issues related to its form by CIETAC before it is signed.  

The 1998 CIETAC Rules, effective 10 May 1998, made three further significant changes to the PRC's international arbitration system. First, they represented the latest expansion of CIETAC's jurisdiction to include disputes involving enterprises with foreign investment such as wholly foreign-owned enterprises and Chinese-foreign joint ventures and thus solved a problem that had long troubled foreign investors and lawyers. Under the previous CIETAC rules, only disputes arising from contracts with "foreign elements" could be submitted to CIETAC arbitration. However, it was unclear whether disputes arising from a contract between enterprises with foreign investment or between such enterprises and local Chinese companies could be arbitrated through CIETAC as foreign-related cases. Foreign investors in China generally wanted CIETAC to take their disputes of this nature. CIETAC once took the view that these disputes were foreign-related and thus under its jurisdiction. The People's Court, however, took a different view in China.

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138 The Rules were adopted on 4 September 1995 by the CCPI. For the Chinese and English texts of the Rules, see Chris Hunter, ed., note 97, above, Appendix 2A.  
140 See Articles 31 and 32 of the 1994 Arbitration Law and Article 24 of the 1995 CIETAC Rules.  
141 See Article 20 of the 1994 Arbitration Law and Article 4 of the 1995 CIETAC Rules.  
143 See Article 54 of the 1994 Arbitration Law and Article 56 of the 1995 CIETAC Rules. Article 55 of the 1995 CIETAC Rules provides the detailed requirements for the form of an award. An arbitral award has to state the claims, the facts of the dispute, the reasons on which the arbitral award is based, the result of the arbitral award, the allocation of the arbitration costs, and the date on which and the place at which the arbitral award is made.  
146 Foreign-invested enterprises established in mainland China are considered Chinese legal persons. Economic and trade contracts they enter into between themselves or with other Chinese legal persons are considered to be domestic contracts, not foreign-related contracts. As a result, when disputes arise and arbitration is sought, there may be disputes over whether the Arbitration Commission has the authority to take cognizance of the cases.
International Engineering Consultancy Company v. Lido Hotel, Beijing, where the Beijing Intermediate People's Court held on 23 December 1992 that the dispute between the two parties had no foreign-related element—despite the argument that Lido's being a Sino-foreign joint venture itself implied a foreign-related element—and the dispute was thereby ruled beyond the arbitral authority of CIETAC.\footnote{147} The revised Article 2 does not challenge the People's Court's interpretation. In fact, it reaffirms that interpretation by treating these types of disputes as domestic disputes.\footnote{148} The change represents part of CIETAC's effort to expand its jurisdiction over some particular kinds of domestic disputes as it faces increasing competition from domestic arbitration commissions over foreign-related cases.

Second, the revised Article 7 provides greater autonomy to parties in regard to their choice of arbitration rules. The previous Article 7 stipulated that “once the parties agree to submit their dispute to the Arbitration Commission for arbitration, it shall be deemed that they have agreed to have the arbitration conducted under these rules”. As a result, CIETAC was only rendering administrative services for arbitration under its own arbitration rules. The new version has added that “[i]n the case where the parties have agreed otherwise, which is also agreed to by the Arbitration Commission, the parties' agreement shall prevail”. This means that CIETAC may administer arbitrations under other arbitration rules chosen by the parties to a dispute, such as the UNCITRAL Model rules, or under the CIETAC Rules modified by the parties. Although this particular new rule still requires the consent of the Arbitration Commission for the stipulation of arbitration rules, it has substantially liberalized one important aspect of China's international arbitration system. However, it remains to be seen what practical effect this new rule will have on CIETAC arbitration. According to one commentator, the new rule remains on paper today precisely because it conflicts with the P.R.C.'s 1994 Arbitration Law, which does not provide the parties with the autonomy to deviate from statutory procedure or arbitration rules of the Chinese arbitration commissions.\footnote{149} However, if the rule is indeed implemented in CIETAC arbitration, CIETAC will once again lead the way in reforming international arbitration practice in China.

Third, Article 35 of the 1995 CIETAC Rules stipulated that “[c]ases taken cognizance of by the Arbitration Commission shall be heard in Beijing, Shanghai, and Shenzhen, and may only be heard in other places with the approval of the Secretary-General of the Arbitration Commission or of its sub-commissions”. In the new version, the parties can choose the place of arbitration, other than Beijing, Shanghai, and Shenzhen, without first obtaining the approval of the Secretary-General of the

\footnote{147} As a result, the CIETAC award against Lido was denied enforcement. For a summary of the case, see Song Huang, \textit{Several Problems in Need of Resolution in China by Legislation on Foreign Affairs Arbitration}, 19 J.Int.Arb. 3 (Sept. 1993), at 98–99.

\footnote{148} For example, CIETAC is currently considering adopting separate arbitration rules for these domestic disputes and setting up a panel of arbitrators exclusively composed of Chinese nationals to handle these cases. See Wang Shengchun, note 145 above, at 106.

Arbitration Commission or its sub-commissions. Due to China’s geographic size, the issue of the location of the arbitration is important—whereas it has almost no significance in Hong Kong.

Despite these efforts to make CIETAC’s arbitration practices more consistent with international practices, CIETAC continues to be unique among major international arbitration bodies in several aspects. For example, the parties and the Chairman of CIETAC are bound to select arbitrators from among those who are listed in the CIETAC’s Panel of Arbitrators. CIETAC’s limitation to the parties’ complete autonomy in selecting arbitrators of their choice departs not only from general international practice but also, arguably, from the PRC’s 1994 Arbitration Law. Articles 11 and 13 of the 1994 Arbitration Law provide that “arbitration commissions shall appoint arbitrators but there is no requirement that an arbitration tribunal be formed only from an arbitration commission’s list of arbitrators.” Thus, this is an area where the 1994 Arbitration Law is silent and currently self-regulated by arbitration commissions. Although all arbitration commissions require that parties choose arbitrators only from their lists of arbitrators, arguably, the 1994 Arbitration Law does not foreclose the possibility of future reform if arbitration commissions wish to change their rigid appointment practice. At the same time, to address the criticism that its practice limits the autonomy of the parties, CIETAC has gradually internationalized its institutional composition by appointing a growing number of foreign nationals to its Panel of Arbitrators. It now lists 124 foreign nationals from 25 countries, and 29 arbitrators from Hong Kong, four from Taiwan, and one from Macau, among its nearly 500 arbitrators eligible to hear disputes. CIETAC’s list of potential arbitrators also includes many younger Chinese legal professionals, who have substantial exposure to foreign legal systems. Nevertheless, to a number of observers, this particular CIETAC practice remains an unsatisfactory one.

Moreover, CIETAC maintains a continuing and decisive involvement in many of the critical aspects of the arbitral process. Many of CIETAC’s powers are normally vested in the arbitral tribunal, as in the practice of other international arbitration

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150 See Articles 16, 24–27, and 31 of the 1998 CIETAC Rules.
151 Article 31 of the 1994 Arbitration Law states: “If the parties agree that the arbitration tribunal shall be composed of three arbitrators, they shall each appoint, or entrust the chairman of the arbitration commission to appoint, one arbitrator. The parties shall jointly select, or jointly entrust the chairman of the arbitration commission to appoint, the third arbitrator, who shall be the presiding arbitrator. If the parties agree that the arbitration tribunal shall be composed of one arbitrator, they shall jointly appoint, or jointly entrust the chairman of the arbitration commission to appoint, such arbitrator.”
153 See CIETAC Panel of Arbitrators (2000 edition), on file with the authors.
154 According to the present authors’ review, they are a substantial, and ever-increasing, minority of all Chinese arbitrators hired by CIETAC.
bodies. For example, under Article 4 of the 1998 CIETAC Rules, it is the Arbitration Commission, not the arbitral tribunal, that "has the power to decide on the existence and validity of an arbitration agreement and the jurisdiction over an arbitration case". Under Article 23, a request for interim measures of protection made by a party must be submitted to the Arbitration Commission, rather than to the arbitral tribunal, which will then pass them to the relevant People's Court. And under Article 81, the power to interpret the CIETAC arbitration rules is vested in the Arbitration Commission, not the arbitral tribunal. As to what is the proper role for the Arbitration Commission, there are apparently different opinions among Chinese and foreign arbitration authorities.\textsuperscript{156}

It should also be emphasized that CIETAC is perhaps the only major international arbitration body that is operating in a national legal system that is in transition. There exist several problematic aspects in regard to China's international arbitration system in general, and CIETAC in particular—such as in the areas of enforcement of arbitral awards and detailed evidence rules—which can be attributed to deficiencies in other areas of the Chinese legal system and need to be addressed there. Until these areas are improved, the continued negative coverage of these problems abroad by the news media\textsuperscript{157} and legal literature may impose a hidden cost on CIETAC in the sense of preventing it from being able to fully realize its potential, even though what it has achieved so far is arguably quite impressive.

4. CMAC (1959)

The China Maritime Arbitration Commission (CMAC)\textsuperscript{158} is a sister arbitration institution to CIETAC established within CCPIT/CCHOC. In accordance with the decision made by the State Council on 21 November 1958,\textsuperscript{159} CMAC was set up on 22 January 1959 and originally named the Maritime Arbitration Commission (MAC). In 1988, it was renamed CMAC.\textsuperscript{160} It is very much like a downsized CIETAC. Compared to CIETAC, it has a smaller structure with no sub-commissions,\textsuperscript{161} handles substantially fewer cases, which typically involve smaller

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\textsuperscript{157} For a recent story, see David Evans, "Arbitration Concerns Remain," S. China Morning Post, 21 Feb. 2000, Business Post, at 1.

\textsuperscript{158} The official website of the CMAC is at <http://www.ccpit.org/engVersion/indexEn.html>.

\textsuperscript{159} The Decision is reprinted in Cheng Dejun et al., note 13 above, at 436.


\end{footnotesize}
claims,\textsuperscript{162} and is thus lesser known\textsuperscript{163} due to its specialized jurisdiction over arbitration cases involving only contractual and non-contractual maritime disputes arising from, or in the process of, transportation, production and navigation by or at sea, in coastal waters and other waters connected with the sea.\textsuperscript{164}

The organization and procedural rules\textsuperscript{165} of CIETAC and CMAC mirror each other to a large extent. Like CIETAC, CMAC is composed of one Chairman, several Vice-Chairmen and a number of Commission members. The Commission members are experts, scholars, and noted personages selected and appointed by CCPI/CCOIC from among the Chinese legislature, judicial organs, and shipping, insurance, and other departments and companies. CMAC also has an Honorary Chairman and several consultants attached to it by CCPI/CCOIC invitation. CMAC’s secretariat, directed by the secretary general, handles the day-to-day work.

CMAC maintains a different and much shorter list as its Panel of Arbitrators. Like CIETAC, the CMAC Arbitration Rules allow not only Chinese citizens but also foreign citizens to be appointed, but parties must choose their arbitrators only from the Panel list. Currently, CMAC has a list of 117 arbitrators (16 of whom are from ten different foreign countries, and three from Hong Kong) while CIETAC’s list includes nearly 500 arbitrators (124 of whom are from 25 different foreign countries, 29 from Hong Kong, four from Taiwan, and one from Macau).\textsuperscript{166} The arbitrators of CMAC are selected and appointed by CCPI/CCOIC from among individuals with special knowledge and practical experience in shipping, insurance, law and other relevant fields. Besides legal knowledge, the special knowledge of the arbitrators covers carriage of goods by sea, maritime insurance, chartering and purchasing of vessels, ship repair and shipbuilding, ship inspection, agency, navigational skills, engineering, harbour superintendence, harbour administration, pilotage, environmental protection at sea, marine collision (including salvage and towing of vessels), raising wrecks, and averaging adjustments, among other particularized areas.

Although CMAC handles far fewer cases each year than CIETAC, it is still one of the major maritime institutions in Asia. The following table shows the caseload of HKIAC, CMAC, and TOMAC\textsuperscript{167} in the 1990s:

\textsuperscript{162} See id., at 12. In fact, compared to the rapid development of CIETAC, CMAC’s caseload has been largely static and has become a major issue in CMAC’s continued development. It has been pointed out that “the low caseloads imply that CMAC has been financially relying on CIETAC’s subsidy” to maintain an independent operation, because the two institutions share the same facilities in Beijing. See John Shujian Ma, Non-judicial Means of Dispute Settlement, in Wang Guogao and John Ma, China Law (Kluwer Law International, The Hague, 1999), at 759.


\textsuperscript{164} For these and other reasons, the discussion here of CMAC is limited to a brief introduction.

\textsuperscript{165} The Provisional Rules of Procedure of the Maritime Arbitration Commission were adopted on 8 January 1959 and are reprinted in Cheng Dejun et al., note 13 above, at 440. The Provisional Rules were later revised in 1988 and 1995. For the 1995 CMAC Arbitration Rules, see Wang Shengchun, note 4 above, at 267. Note that CMAC did not revise its rules in 1994 and 1998 as CIETAC did.

\textsuperscript{166} See CMAC Panel of Arbitrators (2000 edition), on file with the authors.

\textsuperscript{167} For more information on TOMAC, organized in the Japan Shipping Exchange, Inc. (JSE), see JSE’s official website at <http://www.jseinc.org/index_e.htm>.
Table 2: CMAC, HKIAC and TOMAC Annual Maritime Arbitration Caseload, 1990–1999

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(Source: HKIAC, CMAC, TOMAC)

5. China Arbitration Association (CAA)

The China Arbitration Association (CAA) was introduced in the PRC’s 1994 Arbitration Law to be established as a new national arbitration institution. As part of the reform and reorganization of China’s arbitration system, CAA was deemed necessary to provide nationwide supervision to and regulation of newly reformed domestic arbitration commissions. CAA is said to be a non-governmental, self-regulating organization, consisting of all of China’s arbitration commissions (either domestic or foreign-related). According to the Notice of the Office of the State Council on Reorganization of Arbitration Institutions and Preparation for the Establishment of China Arbitration Association, issued on 13 November 1994, the Office of Legislative Affairs of the State Council is responsible for organizing and co-ordinating the preparatory work for the establishment of the CAA. However, no specific timetable has been set in the Notice for this purpose. Today, although more than five years have passed since the 1994 Arbitration Law entered into force on 1 September 1995, and although some 150 domestic arbitration commissions have so far been established, CAA has yet to be formally created.

Pursuant to Article 15 of the Arbitration Law of the PRC, the principal aims of CAA will be to supervise arbitration commissions and their members and arbitrators as

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168 The figures are quoted from a breakdown in numbers of different kinds of cases in HKIAC’s overall caseload.


170 A list of newly established domestic arbitration commissions was attached to the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR, published 28 January 2000, in the People’s Court Daily, available online at [http://www.mfyb.com.cn/html/2000/01/28/00120000128021.htm].

171 Article 15 of the 1994 Arbitration Law of the PRC provides: “The China Arbitration Association is a social organization with the status of a legal person. Arbitration commissions are members of the China Arbitration Association. The charter of the China Arbitration Association shall be formulated by its national congress of members. The China Arbitration Association is a self-regulated organization of arbitration commissions. It shall, in accordance with its charter, supervise arbitration commissions and their members and arbitrators as to whether or not they breach discipline. The China Arbitration Association shall formulate rules of arbitration in accordance with this law and the relevant provisions of the Civil Procedure Law.”
to breaches of discipline. In addition to this supervisory function, CAA will have the authority to formulate arbitration rules for domestic arbitration commissions in accordance with the 1994 Arbitration Law and the relevant provisions of the PRC’s Civil Procedure Law. CAA will affect China’s international commercial arbitration in performing its dual functions, and it can be expected that CIETAC’s practice will have a strong influence on CAA’s initial work in this regard.

It is not clear whether CAA will establish uniform ethical rules for all arbitration commissions in China, including CIETAC and CMAC, or leave CIETAC/CMAC alone—as they have already formulated their own, joint Code of Ethics. Either way, the CIETAC/CMAC Code of Ethics will remain influential, as CIETAC and CMAC are, in fact, pioneers in the PRC in prescribing ethical rules for their arbitrators, and these ethical rules have already been used as authoritative guidance by many domestic arbitration commissions in drafting their own rules.

Although CAA has no authority to formulate arbitration rules for CIETAC and CMAC, since domestic arbitration commissions are authorized to accept foreign-related arbitration cases, CAA will affect foreign-related arbitration directly by adopting arbitration rules for domestic arbitration commissions. Pending the adoption of permanent rules of arbitration by CAA, Article 75 of the 1994 Arbitration Law allows the domestic arbitration commissions to formulate provisional rules in light of practical needs. For this purpose, the State Council promulgated the Model Provisional Arbitration Rules, according to the 1994 Arbitration Law, on 28 July 1995, to be adopted as provisional arbitration rules by domestic arbitration commissions. The model rules are similar, but not identical, to CIETAC’s rules. Although the model rules do not provide special rules for arbitration involving foreign elements, the Beijing Arbitration Commission (BAC) has adopted special rules in Chapter 6 of its Arbitration Rules titled “Special Provisions for Procedure of Arbitration Involving Foreign Elements”. These “special” rules are almost identical to the relevant CIETAC rules.

B. HKSAR ARBITRATION INSTITUTIONS

These institutions consist of HKIAC (1985), the Hong Kong branch of the Chartered Institute of Arbitrators (1972) and HKIARB (1996).

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174 Article 75 of the 1994 Arbitration Law provides that “[foreign-related arbitration rules may be formulated by the China Chamber of International Commerce in accordance with this law and the relevant provisions of the Civil Procedure Law.”

175 The Model Rules are reprinted in Wang Shengchang, note 4 above, at 312.

1. **HKIAC (1985)**

The Hong Kong International Arbitration Centre (HKIAC)\(^{177}\) is among the newest of the major international arbitration centres. Opening its doors just 15 years ago in September 1985, it was founded by a group of the leading business and professional people in Hong Kong, with assistance from the Hong Kong government to promote Hong Kong as a venue for international arbitration. As an independent and non-profit organization limited by guarantee\(^{178}\) with charitable status, it has received generous funding from the business community and the Hong Kong government, but it is independent of both and is now financially self-sufficient. Thus, HKIAC is distinct from CIETAC and CMAC, which are “independent” only in the sense of being autonomous parts of CCPIT/CCOIC.

HKIAC has an effective management. It operates under a Council composed of business and professional people of many different nationalities and with a wide diversity of skills and experience. The Council has delegated management to a Management Committee made up of arbitration experts. The day-to-day administration of HKIAC arbitration activities is conducted by a Secretary-General, who is its chief executive and registrar and answerable to the Management Committee. With a small organization, HKIAC nevertheless effectively performs the functions of both CIETAC and CMAC, as it co-operates actively with the Hong Kong Shipowners Association to promote maritime arbitration in Hong Kong.\(^{179}\) To assist disputants in resolving their disputes by arbitration and by other means of dispute resolution, HKIAC provides premises and administrative support to arbitration and mediation hearings held in Hong Kong, as well as information services.

Compared to CIETAC, HKIAC was internationalized from the beginning. The original members (including US lawyers) of the Steering Committee formed to consider the possibility of establishing an arbitration centre in Hong Kong eventually all became members of the Council of the Centre. Major trading nations (including China) are represented on HKIAC’s panel of arbitrators, and this panel has been periodically updated to ensure both quality and wide country representation.\(^{180}\) But most importantly, HKIAC operates in an internationalized and very liberal international arbitration system.

An important function of HKIAC is to appoint or assist parties in the appointment of arbitrators and mediators. In addition to serving as an appointing authority according to the parties’ agreement, HKIAC also has statutory appointment duties. As a result of an amendment to the Arbitration Ordinance brought about by the Arbitration (Amendment) Ordinance 1996, which came into effect on 27 June 1997, HKIAC is authorized to carry out two significant functions: (1) by replacing “the court

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\(^{177}\) The official website of HKIAC is at <http://www.hkiac.org/>.

\(^{178}\) The term “limited by guarantee” means limited exposure.

\(^{179}\) For a description of maritime arbitration in Hong Kong, see Peter S. Caldwell, *Maritime Arbitration in Hong Kong*, 22 Mar. Law. 155 (Winter 1997).

\(^{180}\) See Neil Kaplan, *et al.*, note 6 above, at 238.
or a judge” it may appoint arbitrators or umpires where the parties have failed to agree, or have not designated an appointing authority, or the designated appointing authority fails to carry out its function (§§12 and 34C(3), Arbitration Ordinance); and (2) it may determine whether a tribunal of one or three arbitrators should consider a dispute under the international (UNCITRAL Model Law) regime (§34C(5), Arbitration Ordinance).

When exercising its appointment duties—unlike CIETAC’s appointment practice, which requires arbitrators to be appointed only from CETAC’s Panel of Arbitrators—HKIAC has adopted a more liberal method. The Hong Kong Arbitration Order is based on the principle that “the parties to a dispute should be free to agree how the dispute should be resolved” (§2AA(2)(a)). Under Article 11 of the UNCITRAL Model Law, no person shall be precluded by reason of his nationality and the parties are free to agree on a procedure of appointing the arbitrator(s). Although HKIAC maintains a Panel list of about 130 arbitrators from all over the world, it is free to appoint anyone else outside the list in accordance with the Arbitration (Appointment of Arbitrators and Umpires) Rules.

As the only local arbitration centre in Hong Kong, HKIAC administers both domestic and international arbitration proceedings and its procedural rules of arbitration are bifurcated. For domestic arbitration, HKIAC has formulated its own domestic arbitration rules: the latest version is the HKIAC Domestic Arbitration Rules (1993). For international arbitration, it has adopted the Procedures for Arbitration (including the UNCITRAL Rules (1976)), which include additional rules to the UNCITRAL Rules and will apply to international arbitrations administered by HKIAC unless the parties choose other procedural rules.

In addition to HKIAC’s arbitration rules, Hong Kong’s international arbitration system provides the parties with full autonomy to choose any other arbitration rules to conduct their arbitration. Under Article 19(1) of the UNCITRAL Model Law, the parties have the freedom to agree on the arbitral procedure to be followed by the arbitral tribunal. They may adopt an established set of international arbitration rules, such as the UNCITRAL Arbitration Rules, and are free to change them, or even make their own rules. Moreover, in the absence of agreement between the parties, Article 19(2) of the

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182 Under Part III of the Arbitration (Appointment of Arbitrators and Umpires) Rules, HKIAC shall appoint a suitable person by considering: (a) the nature of the dispute; (b) the availability of arbitrators or umpires, as the case may be; (c) the identity of the parties; (d) the independence and impartiality of the arbitrator or umpire; (e) any stipulation in the relevant arbitration agreement; and (f) any suggestions made by the parties themselves.” The Arbitration (Appointment of Arbitrators and Umpires) Rules were made by HKIAC under Sections 12 and 34C of the Arbitration Ordinance (Cap.34) with the approval of the Chief Justice. They are reprinted in: HKIAC, A Guide to Applying for the Appointment of an Arbitrator or for a Decision as to the Number of Arbitrators, at 8.

183 None of these HKIAC rules is publicly available. They have to be purchased through HKIAC—a practice unique among major international arbitration centres. In response to the authors’ inquiry, the Secretary-General of the HKIAC has stated that the HKIAC intends to make these rules available online soon.
UNCITRAL Model Law confers on the arbitral tribunal the power to determine what procedure is appropriate to conduct the arbitration, including the power to determine the admissibility, relevance, materiality and weight of any evidence. Clearly, the autonomy enjoyed by parties and the powers vested in the arbitral tribunal in Hong Kong in choosing procedural rules are greater than those in China.

2. The Hong Kong Branch of the Chartered Institute of Arbitrators (1972)

The Chartered Institute of Arbitrators (CIA) is a well-established international organization of arbitrators. It was founded in London in 1915 with the aim of promoting arbitration as an alternative method of dispute resolution to litigation. Now it has developed into a professional body with more than 9,000 members from 84 countries around the world, and it is perhaps the largest organization of its kind in the world.\(^{(184)}\) It has a multidisciplinary membership, including practitioners in law, construction, shipping, finance, insurance, commodities, agriculture, accounting and medicine, among other fields. In achieving its principal object of promoting and facilitating the determination of disputes by arbitration and other ADR other than through litigation in court, it provides services such as maintenance of a register of arbitrators, appointment of qualified persons to act as arbitrators, and training programmes for potential and practising arbitrators. The Institute has examinations that members have to pass to become associates and fellows.\(^{(185)}\)

The CIA’s Hong Kong branch was established in 1972, and is one of the CIA’s oldest overseas branches. It was the first arbitration institution in Hong Kong. Since its foundation, its rapid growth has made it the largest among the overseas branches of the Institute today. In 1977, its members numbered 64, of whom half were Fellows. In July 1985, that number increased to 482, including 36 Fellows.\(^{(186)}\) Today, members of the branch total 1,421, including 261 Fellows.\(^{(187)}\) In June 1999, the branch was renamed the Chartered Institute of Arbitrators (East Asia Branch) and started to serve members not only from Hong Kong, but also from other East Asian locales. The branch is managed by an elected committee, under the leadership of the branch chairman, and its contact point is through HKIAC.

As a local branch, it has played an important role in promoting Hong Kong’s arbitration and other ADR methods. It was represented on: the Commercial Arbitration Sub-Committee of the Law Reform Commission of Hong Kong, which led to the passage of the Arbitration (Amendment) Ordinance 1982; the Steering Committee, which resulted in the establishment of HKIAC in 1985; and, again, the Law Reform Commission Sub-Committee, which led to the adoption of the

\(^{(184)}\) As of 1 June 2000, there were 9,533 members, among them 2,342 "Fellows", 2,852 "Associates", 3,771 "Members", and 568 "Retired". This was further broken down into: 5,518 UK members and 3,715 overseas members. The figures were provided by CIA, and are on file with the authors.

\(^{(185)}\) For more information on CIA, see its official website at <http://www.arbitrators.org/>.

\(^{(186)}\) See Neil Kaplan, et al., note 6 above, at 241.

\(^{(187)}\) The figure was provided by HKIAC, and is on file with the authors.
UNCITRAL Model Law in Hong Kong in 1989. It has also been represented on HKIAC’s Management Committee. In addition to its own training programmes, it also assists the City University of Hong Kong in that institution’s master’s degree programme in arbitration and dispute resolution.

As a regional branch, its functions are similar to its parent, such as providing training programmes and organizing seminars. The new East Asia branch is actively organizing many activities both in Hong Kong and throughout the region. At the time of writing this article, it was planning to hold a joint forum in Singapore with the Singapore Institute of Arbitrators on 11 November 2000, and a joint seminar with CIETAC in Beijing in early 2001. Also scheduled was an Entry Course to be held in Hong Kong by the end of 2000. The branch will continue to serve as a CIA examination centre. Like its parent, it maintains a panel of arbitrators and has a standing committee that, upon request, will make nominations of arbitrators for consideration by parties to a dispute.

3. HKIarb (1996)

The Hong Kong Institute of Arbitrators Limited (HKIarb) is the newest member of Hong Kong’s arbitration institutions. It was established in 1996 by a group of Hong Kong professionals in the field of arbitration. As a non-profit organization limited by guarantee, it is run by a Council elected annually by its members. The Council has a number of committees covering such areas as membership, finance, corporate affairs, education, and training programmes. It has two grades of multidisciplinary membership: associates and fellows. Since its establishment, its membership has grown rapidly. As of August 1999, it had 124 associates and 140 fellows. It does not itself, however, provide administrative services for arbitration. It maintains no panel of arbitrators and does not serve as an appointing authority. Its contact point is also through HKIAC.

HKIarb’s principal objectives are to promote arbitration and other ADR practice in Hong Kong. In many aspects, HKIarb’s aims and activities are similar to those of the CIA’s Hong Kong branch. For example, it will offer courses based on its own course materials for the education and training of arbitrators and mediators as well as other professional bodies in Hong Kong. As a local institute, it has a close relationship with the HKSAR government and will organize courses for the HKSAR government. It has been involved in setting appropriate standards of conduct for arbitrators and mediators in Hong Kong. Most importantly, with the approval of the Secretary for Justice, it has established a Committee on Hong Kong Arbitration Law in co-operation

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188 See Neil Kaplan, et al., note 6 above, at 241.
189 See id., at 299.
190 This information was provided to the authors by Terence Wong, Secretary for the Chartered Institute of Arbitrators (East Asia Branch), via e-mail dated 2 August 2000.
191 According to Christopher To, Secretary-General of the HKIAC, the original number of members of the HKIarb in 1996 was 100 (20 fellows and 80 associates). The figure, as of August 1999, is available at <http://www.wtc.com/hk/main/5/sparbic.html>. 

with HKIAC, with the object of making further recommendations to the HKSAR government on reform of Hong Kong arbitration law.

HKIarb has also aimed at fostering co-operation with regional and international arbitration organizations. It has signed co-operation agreements with a number of arbitration institutions in Asia, such as the Japan Commercial Arbitration Association (JCAA) on 10 May 1999, and the Korea Commercial Arbitration Board (KCAB) on 9 January 2000. It has also established co-operative relations with CIA's Hong Kong branch and maintained strong links with arbitration institutions in mainland China and Taiwan.

C. INSTITUTIONAL RELATIONSHIPS

From its beginnings, Hong Kong has received support from China's trade and arbitration organizations in its efforts to establish a widely-utilized and effective international arbitration forum. It was reported that, in May 1985, a Hong Kong delegation returned from Beijing with the news that CCPIT had pledged full support for the arbitration project and offered the services of its experienced arbitrators to sit on the arbitration panels of Hong Kong's new centre. In March 1987, 12 members of the CIETAC panel of arbitrators were listed on the HKIAC's panel of arbitrators. This made HKIAC the first arbitration centre outside mainland China to have on its panel arbitrators from the PRC.

Since then, the co-operation between CIETAC and HKIAC has been strong. In 1989, 13 foreign nationals were named as members of the CIETAC's panel of arbitrators. Of these, eight were Hong Kong Chinese. Currently, CIETAC has 29 arbitrators from the HKSAR and HKIAC has around 10 arbitrators from the PRC.

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192 The Co-operation Agreement was signed on the occasion of the visit by Norihiko Maeda, President of JCAA, to HKIarb. The agreement seeks co-operation in the promotion of arbitration and other alternative means of dispute resolution in the Asia-Pacific and wider regions, providing that JCAA and HKIarb shall work together in the selection, education, and training of potential and practicing arbitrators, in the setting up and running of conferences and seminars on arbitration and other ADR, and in exchanging information on and recommendations of persons suitable to act as arbitrators, mediators, or conciliators. See New Japanese-Hong Kong Cooperation Agreement Signed, available at <http://www.jcra.or.jp/e/arbitration-e/gyuppan-e/news5.html>.

193 This is reported at KCAB's website at <http://www.kcab.or.kr/e/note4.html>.

194 As has been reported, in 1985, officials in Hong Kong estimated that the HKIAC should have sufficient funding, due in large part to private contributions from the Chinese business community, including, significantly, from the Bank of China and other mainland enterprises. See Anne Judith Farina, “Tackling Disputes into Harmony,” China’s Approaches to International Commercial Arbitration, 4 Ann. U. J. Int’l L. & Pol'y 137 (1989), at 166.

195 Id.

196 See Seth Faison, Hong Kong Arbitration Face Battle to Prove their Worth, S. China Morning Post, 22 Sept. 1987, at 2.

197 See Michael J. Moser, note 58 above, at 9.

198 See China International Economic and Trade Arbitration Commission Arbitrators (1 Mar. 2000), on file with the authors.

199 As the HKIAC's panel is not published, this number is based on an estimate of the HKIAC's Secretary-General.
On 15 June 1991, CIETAC and HKIAC entered into a formal co-operation agreement.\textsuperscript{200} According to the agreement, they have undertaken to provide each other with assistance in: (i) the selection of persons of suitable experience and integrity to be included on their respective panels of mediators, conciliators and arbitrators; (ii) the appointment of experts or assessors; (iii) the appointment of mediators, conciliators and arbitrators; (iv) the provision of facilities and support services, such as hearing rooms, administrative services, translation and transcription; (v) obtaining information, publications and advice; and (vi) any other matter relating to dispute resolution. Currently, both sides foster such co-operation on a half-year basis, including mutual visits and exchanges of experience. Officials of CIETAC regularly visit Hong Kong and enjoy good working relationships with all those concerned about arbitration in Hong Kong.\textsuperscript{201}

In addition to arbitration personnel and financial support from the Chinese institutions, there are also signs that China has encouraged Chinese companies to choose Hong Kong as a venue for arbitration. For example, according to the Memorandum of Regulatory Understanding of 19 June 1993 between the Hong Kong Securities and Futures Commission and the China Securities Regulatory Commission—in relation to the listing on the Hong Kong Stock Exchange of a number of mainland companies—China has agreed that shareholders' disputes with mainland management can be arbitrated in Hong Kong at HKIAC under the Securities Arbitration Rules of the HKIAC.\textsuperscript{202}

Both sides have also promised to co-operate in organizing seminars, conferences and educational programmes. Examples of such co-operation include: (i) in February 1993, HKIAC, CIETAC and the City Polytechnic University of Hong Kong jointly sponsored a major conference in Hong Kong to discuss the issue of cross-strait disputes settlement;\textsuperscript{203} and (ii) on 11–13 November 1998, HKIAC, CIETAC, CIA (East Asia branch), CMAC, HK1Arb, the City University of Hong Kong, the International Chamber of Commerce—Asia, and the Inter-Pacific Bar Association co-organized the 1998 International Dispute Resolution Conference in Hong Kong, which drew a total of 120 participants.\textsuperscript{204}

\section*{D. Major Venues for International Commercial Arbitration}

Although both Hong Kong and China are latecomers to formal, international arbitration, from their early days of copying the British and Russian models they have

\textsuperscript{200} For the text of the Co-operation Agreement, see Cheng Dejun et al., note 13 above, at 371.
\textsuperscript{201} Id., Introduction.
\textsuperscript{202} For this purpose, the Security Arbitration Rules of the HKIAC were adopted to take effect from 1 July 1993. For the English and Chinese texts, see id., at 813–835.
\textsuperscript{203} See Neil Kaplan, et al., note 6 above, at 361.
\textsuperscript{204} The information was provided by Shirley Cho of HKIAC via email, dated 20 September 2000.
progressed to the point of—in many ways—out-performing their teachers, becoming two of the most prominent arbitration venues in the world.

CIETAC’s importance as an international arbitration forum has expanded with China’s development as an economic power and the rapid modernization and internationalization of its arbitration system. In 1985, CIETAC handled only 37 cases. Ten years later, that number had grown to over 900. Since then, its annual caseload has steadily declined to 609 in 1999. However, indisputably CIETAC is still one of the major international commercial arbitration institutions in the world. In terms of the annual number of cases, it has ranked first in the world since 1993. While CIETAC’s caseload is declining, the total amount of funds disputed in its arbitration cases reached a historic level of nearly RMB6.89 billion (USD 840 million) in 1999. Parties from more than 40 countries and regions other than China have been involved in CIETAC arbitration cases. The awards made by CIETAC have already been recognized and enforced in more than 20 countries or territories, including Japan, New Zealand, Germany, France, the United States, Canada and the HKSAR. All these achievements have naturally earned CIETAC a reputation worldwide.

HKIAC’s story is equally, if not more, telling. Since its establishment in September 1985, HKIAC has quickly achieved its goal of becoming a major arbitration centre in Asia. Table 3, showing HKIAC’s caseload since 1985, is clear and convincing evidence:

<table>
<thead>
<tr>
<th>Year</th>
<th>85</th>
<th>86</th>
<th>87</th>
<th>88</th>
<th>89</th>
<th>90</th>
<th>91</th>
<th>92</th>
<th>93</th>
<th>94</th>
<th>95</th>
<th>96</th>
<th>97</th>
<th>98</th>
<th>99</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases</td>
<td>9</td>
<td>20</td>
<td>43</td>
<td>24</td>
<td>45</td>
<td>54</td>
<td>94</td>
<td>185</td>
<td>139</td>
<td>150</td>
<td>184</td>
<td>197</td>
<td>218</td>
<td>240</td>
<td>257</td>
</tr>
</tbody>
</table>

(Source: HKIAC)

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205 It should be noted that Russia has also made substantial improvements in the area of international arbitration. For a study of recent Russian reforms, see Burke McDavid, *Arbitration Alternatives With a Russian Party*, 12 Int’l Law 119 (Spring 1988).

206 The decline of CIETAC’s caseload in recent years can be attributed partly to the competition of China’s domestic arbitration commissions. It has been reported that because of its lower fees, compressed resolution period, and desire to conform to international practice, the Beijing Arbitration Commission (BAC)—one of the most active domestic arbitration commissions in China—is becoming an attractive alternative to CIETAC and overseas arbitration. As of 25 May 1999, the BAC had accepted a total of 683 cases since its establishment in 1995, and among them more than 20 cases have involved either a foreign party or a Chinese enterprise with foreign investment. See Donald C. Clarke and Angela H. Davis, *Dispute Resolution in China: The Arbitration Option*, in Asia Law and Practice (ed.), *China 2000: Emerging Investment, Funding and Advisory Opportunities for a New China* (Hong Kong: Euromoney Publications (Jersey) Limited, 1999), at 151-162, available online at <http://www.asialaw.com/bookstore/china2000/chapter12.htm>. It has also been reported that CIETAC has assisted in the conduct of arbitrations in Beijing by the International Chamber of Commerce International Court of Arbitration. See Wang Shengchang, note 132 above, at 8. If foreign arbitration institutions are allowed to conduct arbitrations in China, CIETAC may face competition from them as well.

207 See Wang Shengchang, note 132 above, at 6.

208 See Michael J. Moser, note 135 above, at 35.

209 See Li Hu, note 149 above, at 6.
Amazingly, if accounting only by caseload, the HKSAR should also rank among the most important international commercial arbitration centres in the world today—as Table 4, an international arbitration caseload comparison chart of major regional and international arbitration institutions in the 1990s, indicates.

**Table 4: Annual Caseload of Major International and Regional Arbitration Institutions, 1990-99**

<table>
<thead>
<tr>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>CIETAC</td>
<td>238</td>
<td>274</td>
<td>267</td>
<td>486</td>
<td>829</td>
<td>902</td>
<td>778</td>
<td>723</td>
<td>645</td>
<td>609</td>
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<tr>
<td>ICC</td>
<td>365</td>
<td>333</td>
<td>337</td>
<td>352</td>
<td>384</td>
<td>427</td>
<td>433</td>
<td>452</td>
<td>466</td>
<td>529</td>
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<tr>
<td>AAA</td>
<td>205</td>
<td>262</td>
<td>252</td>
<td>207</td>
<td>187</td>
<td>180</td>
<td>226</td>
<td>320</td>
<td>430</td>
<td>453</td>
</tr>
<tr>
<td>HKIAC</td>
<td>54</td>
<td>94</td>
<td>185</td>
<td>139</td>
<td>150</td>
<td>184</td>
<td>197</td>
<td>218</td>
<td>240</td>
<td>257</td>
</tr>
<tr>
<td>SCC</td>
<td>35</td>
<td>63</td>
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<td>78</td>
<td>74</td>
<td>70</td>
<td>75</td>
<td>82</td>
<td>92</td>
<td>104</td>
</tr>
<tr>
<td>LCIA</td>
<td>28</td>
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<td>28</td>
<td>29</td>
<td>29</td>
<td>40</td>
<td>37</td>
<td>52</td>
<td>70</td>
<td>60</td>
</tr>
<tr>
<td>SIAC</td>
<td>N/A</td>
<td>2</td>
<td>7</td>
<td>15</td>
<td>22</td>
<td>37</td>
<td>25</td>
<td>43</td>
<td>67</td>
<td>67</td>
</tr>
<tr>
<td>KCAB</td>
<td>19</td>
<td>17</td>
<td>30</td>
<td>28</td>
<td>33</td>
<td>18</td>
<td>36</td>
<td>51</td>
<td>59</td>
<td>40</td>
</tr>
<tr>
<td>KLRCA</td>
<td>8</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>8</td>
<td>11</td>
<td>6</td>
<td>8</td>
<td>15</td>
<td>19</td>
</tr>
<tr>
<td>JCAA</td>
<td>N/A</td>
<td>6</td>
<td>5</td>
<td>3</td>
<td>4</td>
<td>7</td>
<td>8</td>
<td>13</td>
<td>14</td>
<td>12</td>
</tr>
</tbody>
</table>

(Source: various)

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210 The figures are from CIETAC, and are on file with the authors.
211 The figures are quoted from the Statistical Reports published in the International Chamber of Commerce International Court of Arbitration Bulletin from 1990 to 1999, provided by ICC and on file with the authors.
212 The figures were provided by the American Arbitration Association, and are on file with the authors.
213 The figures were provided by the Hong Kong International Arbitration Center, and are on file with the authors.
214 The figures are available online at the Arbitration Institute of the Stockholm Chamber of Commerce website: <http://www.chamber.se/arbitration/english/>.
215 The figures were provided by the London Court of International Arbitration, and are on file with the authors.
216 The figures were provided by the Singapore International Arbitration Center, and are on file with the authors. Note that SIAC was founded in May 1990.
217 The figures for 1995–99 are available online at the Korea Commercial Arbitration Board’s official website: <http://www.kcab.or.kr/e/index_e.html>. The figures for 1990–94 were provided by Jong-Hee Kim, President of KCAB, via e-mail to the author dated 7 August 2000.
218 See note 87, above.
Moreover, compared to other venues for arbitration in the region, the HKSAR claims that it probably handles the largest number of cases in which neither party is local. 220 Indeed, Hong Kong enjoys unique conditions that enable it to compete most effectively with other economic powers in offering international arbitration services. Obviously, Hong Kong itself has a robust economy. Geographically convenient, superbly well-equipped in communications, transport, and accommodations, Hong Kong has for some time been the de facto international financial and commercial capital of East Asia. Moreover, by virtue of being a leading commercial centre in Asia, Hong Kong has strong expertise in finance, law, shipping, and construction, and many other areas—with an enormous pool of experienced professionals available in support of dispute resolution. Along with accountants, architects, bankers, engineers, insurance experts and lawyers, there are thousands of other specialists who may be called on to assist in particular disputes. In addition to lawyers qualified to advise on Hong Kong law, there are many experienced lawyers resident in the HKSAR hailing from most major international trading nations, who are qualified to advise on the laws of their respective jurisdictions. When necessary to supplement its own arbitral experience, Hong Kong can draw on this remarkable international reservoir of specialist knowledge. It is also important to emphasize that arbitration in Hong Kong is fully supported by its judiciary, as well as by its truly internationalized and very liberal international arbitration system.

Busy international arbitration venues that they are, there are still many things to be desired before both CIETAC and HKIAC can be considered truly major international arbitration centres. The PRC still has a long way to go in general to achieve legal sophistication. It cannot simply rely on the hard work and rate of progress of CIETAC and CMAC to date. 221 China also awaits the formal establishment of a professional organization of arbitrators to provide the education and training programmes that are indispensable for existing and prospective arbitrators, as well as for information exchange. 222 Meanwhile, in Hong Kong, the effort to harmonize domestic and international arbitration laws has yet to be fully accomplished to form a truly advanced arbitration system. The HKIAC has yet to make its panel, rules and other aspects of its operation available to the public.

In addition, there is also a need for greater research and information efforts. Although authoritative books have been published in regard to the international arbitration systems in China and Hong Kong, there is still an urgent need, in light of the fast pace of their development, to upgrade the websites of both CIETAC and

220 See HKIAC’s website at <http://www.hkiac.org/.
221 As has been pointed out, “CIETAC is widely credited by the foreign business community as a relatively inexpensive, expedient, and fair forum for resolving disputes with Chinese parties.” However, the hard-won respect for CIETAC is seemingly being squandered by China’s judicial system. See Matthew D. Bersano, The Enforcement of Arbitration Awards in China, 10 J. Int. Arb. 2 (June 1993), at 47.
222 One commentator has suggested that the CAA is the best body to assume this function in the future “in view of the CAA’s central supervisory role and the legislative intention to unify and upgrade the system of PRC arbitration”. See Katherine L. Lynch, Chinese Law: The New Arbitration Law, 26 Hong Kong L.J. 304 (1996), at 107-108.
HKIAC to make more recent, detailed, and analytical information accessible to a wider group of readers. Like other major international arbitration venues around the world that provide high-quality publications, it would also be very desirable for these leading arbitration venues in East Asia to consider jointly launching an arbitration periodical in English to report not only on their own significant developments in international arbitration but also on those of the entire Asian region.

X. THE LEGAL FRAMEWORK

A. HONG KONG SPECIAL ADMINISTRATIVE REGION ARBITRATION ORDINANCE (CHAPTER 341)

Hong Kong’s formal arbitration laws came into being with the adoption of the Hong Kong Arbitration Ordinance (Chapter 341 of the Laws of Hong Kong) in 1963. Since then, the Hong Kong arbitration system has undergone numerous statutory modifications, especially in 1982, 1989, 1996 and 1999.223 Following the common-law tradition of having only a single statute to regulate arbitration,224 the ordinance remains the major source of arbitration law in Hong Kong and provides the foundational legislative support underlying arbitration and mediation in Hong Kong.

The Ordinance, as amended in 2000, has seven parts and four Schedules225 and may be summarized as follows:

- Part I—Preliminary. This states basic definitions in, and objectives and principles of, the Ordinance. See §§1–2AC.
- Part I A—Application. This provides rules applicable to both domestic and international arbitration, such as the power of the arbitrator to act as conciliator (§2B), powers of arbitration tribunals (§2Gb(f)) and courts (§2Gc(1)(c)) to grant interim injunctions or direct other interim measures to be taken, etc. See §§2AD–2GN.
- Part II—Domestic Arbitration. This, the oldest and largest part of the Ordinance, remains very much under the influence of the English Arbitration Act (1950–1996). See §§2L–34 and Schedule 4.
- Part II A—International Arbitration. This part applies the UNCITRAL Model Law to international arbitrations conducted in Hong Kong. See §§34A–34C. The Model Law is set out in Schedule 5 and, to assist the interpretation of the Model Law by arbitral tribunals and by the courts, three related documents such as the Analytical Commentary on Draft Text of a Model Law on International

223 For an account of modifications made before the handover, see Robert Morgan, note 32, above.
Commercial Arbitration by the Secretary-General on 25 March 1985 (UN Doc. A/CN.9/264) are set out in Schedule 6.

- Part IIIA—Enforcement of Mainland Awards. This new part applies the MOU to enforce arbitral awards made by mainland arbitration institutions in the HKSAR. See §§40A–40G.276

- Part IV—Enforcement of Convention Awards. This applies the New York Convention to enforce foreign arbitral awards made under that Convention set out in Schedule 3. See §§41–46.

- Part V—General. This last part provides miscellaneous rules. See §§47–48.

The Ordinance’s more notable features are summarized below.

First, the development of the Ordinance has experienced an interesting U-turn. The Arbitration (Amendment) (No. 2) Ordinance 1989 broke up Hong Kong’s unitary arbitration system and created a dual one. Recently, however, there has been a movement towards gradual unification of the dual system for domestic arbitration and international arbitration in Hong Kong. Based partly on certain provisions of the English Arbitration Act 1996, and partly on the UNCITRAL Model Law, the 1996 Amendment started a process of harmonizing Hong Kong’s domestic and international arbitration regimes with the aim of formulating a single, unified system for domestic and international arbitrations.277

Second, even the Ordinance’s separation of domestic and international arbitration regimes is not absolute. When the Arbitration (Amendment) (No. 2) Ordinance 1989 introduced the Model Law for international arbitration in Hong Kong, it also provided rules that allow parties to domestic arbitrations to opt out of Part II and into Part IIA, so that the Model Law will apply (§2L), or parties to international arbitration to opt out of Part IIA and into Part II, so that the rules governing domestic arbitration will apply (§2M).278

Third, the Ordinance, Hong Kong is among the first few countries and regions in the world, and the first in Asia, to adopt the UNCITRAL Model Law.279 Hong Kong (on 6 April 1990) was the ninth jurisdiction to enact the Model Law in its own

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276 Part III Enforcement of Certain Foreign Awards (§§35–40) and the 1st and 2nd Schedules were completely repealed by the passage of the Arbitration (Amendment) Ordinance 1999. “Certain foreign awards” are awards made under the Geneva Protocol on Arbitration Clauses (1923) set out in the 1st Schedule and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927) set out in the 2nd Schedule. The two treaties were superseded by the New York Convention and are for practical purposes moribund today. Moreover, the PRC has not signed the two Geneva treaties, so they ceased to apply to Hong Kong from 1 July 1997.

277 For a detailed discussion on Hong Kong’s movement towards a unified arbitration system, see generally Robert Morgan, note 50, above.

278 See also related rules §§34A–34B in Part IIA.

279 As of 8 June 2000, legislation based on the UNCITRAL Model Law had been enacted in Australia, Bahrain, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Germany, Guatemala, Hong Kong Special Administrative Region of China, Hungary, India, Iran, Ireland, Kenya, Lithuania, Macau Special Administrative Region of China, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, the Russian Federation, Singapore, Sri Lanka, Tanzania, Ukraine, within the UK: Scotland; within the United States: California, Connecticut, Oregon, and Texas; and Zimbabwe. The status of enactments of the Model Law is available at <http://www.uncitral.org/english/status/>”, issued by the International Trade Law Branch, United Nations Office of Legal Affairs, servicing the United Nations Commission on International Trade Law (UNCITRAL).
legislation, after only Canada (10 August 1986), Cyprus (29 May 1987), the state of California in the United States (4 March 1988), Nigeria (14 March 1988), Bulgaria (5 August 1988), Australia (12 June 1989), the state of Texas in the United States (1 September 1989), and the state of Connecticut in the United States (1 October 1989).230

Fourth, under the Ordinance, not only was Hong Kong among the first to enact the Model Law, but it was also among the earliest to adopt the Model Law almost in its entirety. Hong Kong can be called a true “Model Law territory”.231 The major changes were adding the Chinese practice of combining mediation within arbitration and dropping the requirement of “commercial”, which enabled Hong Kong to apply the Model Law to its furthest possible scope.232

In addition to the Ordinance and subsidiary legislation, there are also “judge-made” arbitration laws in Hong Kong. As the HKSAR continues to be a common-law jurisdiction under the “one country, two systems” formula, case law (precedent) continues to be part of the Hong Kong laws. Not only are HKSAR’s lower courts bound by the cases decided by higher courts, especially the Court of Final Appeal, but also the cases decided in the UK and other common-law jurisdictions continue to be persuasive, even if not binding, precedents.233 Moreover, Order 73 (Arbitration Proceedings) of the Rules of the High Court (Chapter 4A) governs the procedural requirements for applications of the arbitration—related matters (such as interim measures of protection determination of a preliminary point of law, and appeal against or setting aside or enforcement of awards) to the High Court under the Arbitration Ordinance.234 Order 73 is further supplemented by the Practice Directions issued by the Chief Justice.235

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230 All dates are the effective dates of the domestic legislation that enacted the Model Law. The information on these effective dates is provided by UNCITRAL, and on file with the authors.

231 For a study of national enactment of the Model Law, see, e.g., Porter Sanders, Unity and Diversity in the Adoption of the Model Law, 11 Arb. Intl’l 11 (1995).

232 For all the changes made to the Model Law, see Law Reform Commission of Hong Kong, Report on the Adoption of the UNCITRAL Model Law of Arbitration (Topic 17), September 1987, at 28–29, ¶¶4.11–4.16. Note that there have been other changes to the Model Law made by later amendments to the Arbitration Ordinance. For example, the Arbitration (Amendment) Ordinance 1996 gives HKIAC the power to decide whether a tribunal of one or three arbitrators should decide international cases, where the parties have not provided for the number of arbitrators and cannot agree [34C(5) of the Arbitration Ordinance], while under Article 10(2) of the Model Law one is deemed to intend a tribunal of three arbitrators.

233 See Neil Kaplan and Robert Morgan, note 20, above, at 6.

234 The text of Order 73 is available in Neil Kaplan and Robert Morgan, id., Annex II. It is also available online at <http://www.justice.gov.hk/Home.htm>.

B. Arbitration Laws of the People's Republic of China

Whereas in Hong Kong the single statute of the Hong Kong Arbitration Ordinance regulates the arbitration system, the arbitration laws in China were fragmented from the start. It has been reported that from 1949 to the end of 1993, there existed 14 laws, 82 administrative regulations and nearly 200 local regulations in which provisions concerning arbitrations were incorporated.236

Today, this situation continues in China, albeit to a lesser extent. As a civil-law jurisdiction, one important source of arbitration law in China is its Civil Procedure Law, formally adopted by the Fourth Session of the Seventh National People's Congress on 9 April 1991.237 However, departing from the civil-law tradition to enact arbitration law in one comprehensive code of civil procedure,238 China adopted a piecemeal approach when enacting arbitration provisions in its Civil Procedure Law. Although Chapters 21 (Application for and Referral of Enforcement), 28 (Arbitration), and 29 (Judicial Assistance) of that Law provide important provisions concerning arbitration agreements, provisional measures of protection, stays of court proceedings, and the setting aside and enforcement of arbitral awards, other matters—such as jurisdiction, arbitration procedure and the making of awards—are left untouched. Then, the PRC turned to a common law-style approach to adopt a comprehensive arbitration law, which has since become the most important source of arbitration law in China.

The 1994 Arbitration Law was adopted by the 9th Standing Committee Session of the 8th National People's Congress on 31 August 1994 and took effect on 1 September 1995.239 It represents a major effort to unify and reform the fragmented arbitration laws in China. It consists of eight chapters, 80 articles, and one annex, and may be summarized as follows:

- Chapter 1 General Provisions. This concerns arbitrability and basic principles of arbitration. See Articles 1–9.

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236 See Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China (ed.), Arbitration Laws of China, note 53, above, at 27.
237 The Law took effect on the same day it was adopted. Note that the Law was first enacted for Trial Implementation in 1982. The text of the Law is reprinted in Cheng Dejun et al., note 13 above, at 498–583.
Chapter 3 Arbitration Agreement. This describes the form and validity of arbitration agreements. See Articles 16–20.

Chapter 4 Arbitration Proceedings. This deals with applications, acceptances, formation of arbitration tribunals, hearings, and awards. See Articles 21–57.

Chapter 5 Application for Setting Aside Arbitration Award. This provides the grounds for the setting aside of arbitral awards, as well as remedy measures. See Articles 58–61.

Chapter 6 Enforcement. This concerns enforcement and refusal of both domestic and international arbitral awards. See Articles 62–64.

Chapter 7 Special Provisions for Arbitration Involving Foreign Elements. This sets up special, favourable rules for international arbitration. See Articles 64–73.

Chapter 8 Supplementary Provisions. This deals with miscellaneous rules. See Articles 74–80.

The 1994 Arbitration Law has been called “a major milestone in the development of China’s legal system”. Among its notable features are the following.

First, while the 1994 Law has substantially changed China’s domestic arbitration system and brought it closer to standard international practice, China’s foreign-related arbitration system as a whole has remained largely as it was. In other words, contrary to the fundamental reforms done to domestic arbitration institutions and practices, the 1994 Law by and large simply writes into law existing international arbitration institutions and practices and further strengthens them. For example, Article 66 states that “foreign-related arbitration commissions may be organized and established by the China Chamber of International Commerce”. This basically confirms and guarantees the continued operation of CIETAC and CMAC, which were formerly “organized and established by the China Chamber of International Commerce”.

Second, under the 1994 Law, China’s international arbitration continues to enjoy favourable treatment in spite of the fact that domestic arbitration is now more closely in line with international standards. For example, there is no limit on the number of members of foreign-related arbitration commissions under Article 66, while the maximum number of members for domestic arbitration commissions is 16 under Article 12. The competent court for deciding arbitral

209 The 1994 Arbitration Law provides even less leeway to the People’s Courts to intervene in arbitration than the New York Convention allows. Under Article 5 of the 1994 Arbitration Law, the People’s Courts cannot intervene “unless the arbitration agreement (clause) is void”, while under Article II of the Convention, a court shall “refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed”.
210 The major reforms include: (i) domestic arbitration commissions are all reorganized and no longer subordinate to the governmental authorities; (ii) domestic arbitration awards, which formerly were not final, are now final; (iii) not only contractual, but also non-contractual, disputes are now arbitrable; and (iv) an arbitration agreement is now required.
jurisdiction, taking interim protection measures in support of foreign-related arbitration, reviewing an application for setting aside a foreign-related award, or reviewing an application for enforcement of a foreign-related award, is a People’s Court at the intermediate level, while in domestic arbitration, the competent People’s Court is at the lowest level—except in the case of the setting aside of domestic awards. Moreover, according to Articles 58 (setting aside of domestic awards) and 63 (enforcement of domestic awards) of the Arbitration Law and Article 217 (enforcement of domestic awards) of the Civil Procedure Law annexed to the 1994 Arbitration Law, competent People’s Courts can review the merits of an award rendered by a domestic arbitration commission; but under Articles 70 (setting aside of foreign-related awards) and 71 (enforcement of foreign-related awards) of the Arbitration Law and Article 260(1) (enforcement of an award rendered by a foreign-related arbitration commission) of the Civil Procedure Law annexed to the 1994 Arbitration Law, competent People’s Courts are able to review only the procedural matters in connection with foreign-related awards and/or an award rendered by a foreign-related arbitration commission—on a restricted list of grounds that are geared to international standards.

Third, in spite of its overall significant legislative reform achievements, Chapter 7 of the 1994 Law does not completely replace all the arbitration provisions of previous laws and regulations. The 1994 Arbitration Law has to be read together with the 1991 Civil Procedure Law. Indeed, Articles 217 and 260 of the 1991 Civil Procedure Law are annexed to the 1994 Arbitration Law. There are also other laws and regulations

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244 There is no such differential treatment in Hong Kong. All applications of arbitration-related matters—such as interim measures of protection, determinations of a preliminary point of law, and appeals against or the setting aside or enforcement of awards (but excepting stays of proceedings)—to the Hong Kong judiciary are to be dealt with by the Court of First Instance (formerly the High Court) according to Order 73 Arbitration Proceedings of the Rules of the High Court (Chapter 4A).


246 Reading the 1994 Arbitration Law and the 1991 Civil Procedure Law together does not always produce clear-cut understanding, however. For example, it has been argued that there is an inconsistency between Articles 70 and 71 of the 1994 Arbitration Law on the one hand and Article 260 of the 1991 Civil Procedure Law on the other, and that there is also a dilemma in determining which provision of the 1991 Civil Procedure Law applies to a domestic arbitration award made by CIETAC—a foreign-related arbitration commission—as Article 217 applies to a domestic arbitral award and Article 260 to an award made by a foreign-related arbitration commission. See John Mo, note 91, above, at 34-36. However, in our view, there can be a very different reading. Judging from its wording, the 1991 Civil Procedure Law distinguishes only arbitral awards made by foreign-related arbitration commissions from domestic awards made by domestic arbitration institutions, and sets up different enforcement regimes for each category. In reality, it appears that when the 1991 Civil Procedure Law was adopted, all awards made by foreign-related arbitration commissions were foreign-related awards and all awards made by domestic arbitration commissions were domestic awards. Then, the 1994 Arbitration Law opened the door for two new categories. One is, as interpreted by the State Council in its 1996 Notice, foreign-related awards made by domestic arbitration commissions; the other concern, as decided by CCPIT in adopting the 1995 and 1998 CIETAC Rules, special kinds of domestic awards made by CIETAC. Reading together the two laws, there should be no difficulty covering the latter category under Article 260 of the Civil Procedure Law, which regulates any "arbitration award made by a foreign-related arbitration institution". Similarly, there is no issue of inconsistency in using the same standard set forth in Article 260 of the 1991 Civil Procedure Law for the setting aside or enforcement of the former category, which neither existed nor needed to be regulated before.
that have relevant arbitration provisions.\textsuperscript{247} Where the 1994 Arbitration law is silent, these previous laws and regulations continue to apply. And, when there is a conflict between the provisions of the 1994 Arbitration Law and the previous laws and regulations concerning international arbitration, the former are to prevail (Article 78).\textsuperscript{248}

Moreover, the 1994 Arbitration Law should also be read together with the Supreme People’s Court’s judicial interpretations relevant to international arbitration. Although China has no case law tradition of judicial precedents, the Supreme People’s Court’s judicial interpretations are generally viewed as having the same force of law as legislation.\textsuperscript{249} The following are several important Supreme People’s Court’s judicial interpretations involving international arbitration: (1) the Notice of the Supreme People’s Court on the Implementation of China’s Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 April 1987);\textsuperscript{250} (2) Some Opinions on Several Questions Concerning Implementation of the Civil Procedure Law (14 July 1992);\textsuperscript{251} (3) the Notice of the Supreme People’s Court Concerning Handling of Certain Issues of Foreign Related Arbitration and Foreign Arbitration (28 August 1995);\textsuperscript{252} (4) the Notice of the Supreme People’s Court Regarding the Issues on the Setting Aside of the Foreign-Related Arbitration Awards by the People's Court (23 April 1998);\textsuperscript{253} (5) the Regulation of the Supreme People’s Court Concerning the Charges and the Time Limits for Review of Recognition and Enforcement of Foreign Arbitral Award (21 November 1998);\textsuperscript{254} and (6) the


\textsuperscript{248} However, the 1991 Civil Procedure Law should be an exception. The 1991 Civil Procedure Law is a basic law and, under the Chinese legislative hierarchy, a higher law than the 1994 Arbitration Law. A basic law needs to be passed by the general session of the National People’s Congress, while other laws can be passed by the NPC’s Standing Committee. See the PRC Constitution, Arts 62 and 67.

\textsuperscript{249} See Cheng Dejun et al., note 13 above, at 10. In one of its judicial interpretations, the SPC has stated that its regulations are legally binding, provided that they do not contravene national regulations. See Certain Provisions on Judicial Interpretation, issued by the SPC 23 June 1997.

\textsuperscript{250} Translated and reprinted in Cheng Dejun et al., note 13 above, at 754–757.

\textsuperscript{251} See note 3, above.


\textsuperscript{254} For the text of the Regulation, see 1 Gazette of the Supreme People’s Court of the People’s Republic of China 1993, at 22.
Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR in the Mainland China (18 June 1999).255

Today, the legal sources of arbitration laws in the HKSAR and in the PRC continue to diverge, and a clear reflection of this difference is the way the PRC and the HKSAR chose to implement the MOU on Arrangement for Mutual Enforcement of Arbitral Awards of June 1999. The HKSAR enacted the Arbitration (Amendment) Ordinance 1999 to amend its Arbitration Ordinance for this purpose, while in the PRC it was up to the Supreme People’s Court to issue a circular, in the form of a judicial interpretation, rather than for China’s legislature to amend the Arbitration Law. Further, in addition to the difference in sources of arbitration laws, the substance of arbitration laws in the HKSAR and the PRC continues to differ in many aspects.

For example, arbitral tribunals formed in Hong Kong and China have different powers in regard to interim measures of protection. Under Article 17 of the UNCITRAL Model Law, “unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.”256 Under Articles 28 and 46 of the 1994 Arbitration Law, only the People’s Court has the

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255 The Arrangement was published on 28 January 2000 in the People’s Court Daily, available online at <http://www.rmfby.com.cn/html/2000/01/28/00120000128001.htm>. The English version of the Arrangement is available online at <http://www.info.gov.hk/gia/general/199906/15/0615151.htm>. There are also several judicial interpretations issued by the Supreme People’s Court concerning the People’s Courts’ enforcement work in general. They include: Regulations of the Supreme People’s Court Concerning Several Issues Related to the Unified Administration of Enforcement Work by the High People’s Courts (adopted by the Judicial Committee of the SPC, 30 December 1999, which was issued and took effect on 14 January 2000), reprinted in People’s Court Daily, 25 January 2000, available online at <http://www.rmfby.com.cn/html/2000/01/25/00120000125001.htm>; and Certain Regulations for Strengthening and Improving Enforcement Work (adopted by the Judicial Committee of the SPC, 24 February 2000, which was issued and took effect on 11 March 2000), reprinted in People’s Court Daily, 11 March 2000, available online at <http://www.rmfby.com.cn/html/2000/03/11/01020003110003.htm>. The latter regulation attempts to address the problem of lack of enforcement by a local court asked to enforce a judgment or order of another PRC court against a local company. It also clarifies jurisdictional issues and how enforcement cases are to be handled when a party has assets in more than one jurisdiction.

256 See also Article 26 of the UNCITRAL Rules, which states: 1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods. 2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures. 3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.
power to grant interim measures of protection in relation to property and evidence.  

Again, under Article 43 of the 1994 Arbitration Law, “the arbitration tribunal may of its own motion collect evidence as it considers necessary”. This arbitral tribunal activism is consistent with China’s civil-law tradition and common to China’s judicial system as well. Nevertheless, when exercising this discretion, the arbitral tribunal shall, in a timely manner, instruct the parties to be present on the spot if it deems it necessary (Article 38 of the 1995 CIETAC Rules). Such activism is absent in the Hong Kong Arbitration Ordinance. Under Article 24 of the UNCITRAL Arbitration Rules, the arbitral tribunal has extensive power to request the parties to produce evidence, but lacks power to take evidence through its own investigation.

Yet, again, while Article 28 of the UNCITRAL Model Law states that “the arbitral tribunal shall decide ex aequo et bono or as amiable compositur only if the parties have expressly authorized it to do so”, Article 7 of the 1994 Arbitration Law provides that arbitrators in China shall resolve disputes not only “in compliance with the law” but also “in an equitable and reasonable manner”, that is, decide as amiable compositur without the parties’ authorization.

A further difference is that China has only institutional arbitration, while Article 2 of the UNCITRAL Model Law clearly allows both ad hoc and institutional arbitration. No provision for ad hoc arbitration is laid down in the 1994 Arbitration Law. Article 16 of the 1994 Arbitration Law requires that an arbitration agreement shall designate an arbitration commission. Article 18 states that “if an arbitration agreement contains no, or unclear, provisions concerning the matters for arbitration or selection of the arbitration commission, the parties may reach a supplementary agreement. If no such

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257 Article 28 states: “A party may apply for interim measures of protection of property if it may become impossible or difficult to implement the award due to an act of the other party or other causes. If a party applies for interim measures of protection of property, the arbitration commission shall submit the party’s application to the People’s Court in accordance with the relevant provisions of the Civil Procedure Law. If the application is granted, the party who applies for interim measures shall compensate for the losses suffered by the party against whom the interim measures have been taken.” Article 46 states: “Under circumstances where evidence may be destroyed or lost or be difficult to obtain at a later time, a party may apply for interim measures of protection of evidence if the evidence may be destroyed or lost or be difficult to obtain at a later time.” Article 18 of the 1995 CIETAC Rules, which states that “When a party applies for preservation of the evidence, the arbitration commission shall submit the request to the People’s Court in the place where the evidence is located.”

258 See also Article 23 of the 1995 CIETAC Rules, which states that “When a party applies for the preservation of evidence, the arbitration commission shall submit the request to the People’s Court in the place where the evidence is located.”

259 Article 24 of the UNCITRAL Rules provides: 1. Each party shall be relieved of the burden of proving the facts relied on to support his claim or defence. 2. The arbitral tribunal may, if it considers it appropriate, require a party to produce documents, exhibits or other evidence which that party intends to produce in support of the facts in issue. 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time...
supplementary agreement can be reached, the arbitration agreement shall be void." The effect of this institutional arbitration requirement has led to another difference between the 1994 Arbitration Law and the Model Law. Although the 1994 Arbitration Law does not require arbitrators to be selected only from arbitration commissions' panels of arbitrators, it requires a designated arbitration commission—and all arbitration commissions in China require parties to choose arbitrators from their panels.260

C. ROLE OF THE UNCITRAL MODEL LAW AND THE NEW YORK CONVENTION

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), together with the UNCITRAL Arbitration Rules (1976) and the UNCITRAL Model Law (1985),261 are the major achievements in the United Nations' effort to establish a unified international legal framework for the fair and efficient settlement of disputes arising in international commercial relations. The Convention creates a uniform structure through which national enforcement of foreign arbitral awards should follow. The two UNCITRAL models are set (1) for nations to adopt in their arbitration legislation, and (2) for the world's arbitration bodies and parties to choose in their arbitration.

The UNCITRAL Model Law is the most important international standard that Hong Kong and China262 have faced in their efforts to modernize and internationalize their international arbitration systems. The Model Law has been an integral part of Hong Kong arbitration law for 10 years now. Although China has not adopted the UNCITRAL Model Law, it was used as a guide in the course of drafting the 1994 Arbitration Law and, in substance, the fundamental principles of the Model Law have been written into the law in the PRC.263 There is no doubt that the Model Law has been an essential factor in modernizing international arbitration laws in both Hong Kong and China. To say the least, despite the continued differences between the international arbitration laws in China and Hong Kong, the goal of the Model Law to minimize the differences among international arbitration laws is, to a large extent, realized in these two jurisdictions under the principle of "one country, two systems".264

The same can be said for the goals of the New York Convention. The New York Convention is also an important source of arbitration law in both China and Hong

261 Note that sometimes the UNCITRAL Model Law is confused with the UNCITRAL Arbitration Rules. See, e.g., John Ma, note 91, above, at 13.
Kong. The British government extended the application of the New York Convention to Hong Kong on 23 April 1977. China became a party to the New York Convention 10 years later on 22 April 1987. Another 10 years later, on 1 July 1997, when Hong Kong returned to China, the New York Convention continued to apply to Hong Kong on the same terms—while both reciprocity and commercial reservations were made by China, only the reciprocity reservation was made on behalf of Hong Kong by the UK government in 1977 and restated by the Chinese government in 1997.

The New York Convention brings to China and Hong Kong the benefit that their arbitral awards can be recognized and enforced around the world in more than 120 countries, but on the other hand it obligates them to recognize and enforce foreign arbitral awards according to the terms of the Convention. This is the area in which China's system of international arbitration has caused the greatest concern abroad. According to China's own investigation, conducted in August–September 1997 by the Arbitration Research Institute (ARI), from 1990 to the end of August 1997, out of a total of 14 foreign awards filed to the People's Courts for enforcement, one was still pending at the time and three were refused (one for the non-existence of the party subject to enforcement, one for lack of assets available for enforcement, and one for another difficulty). Although this record is not perfect, it may still be interpreted as indicating that—while problems exist—there has been general enforcement of foreign awards in China. Such a "positive" record, however, was turned completely upside down by the notorious case Repower Ltd. v. Shanghai Far East Aerial Technology Import and Export Corporation (the Repower case) which underlined the major issues identified generally with the reluctance of China's judiciary to enforce foreign-related as well as foreign arbitral awards. These issues include local

265 China has made the following reservations: 1. The People's Republic of China will apply the Convention, only on the basis of reciprocity, to the recognition and enforcement of arbitral awards made in the territory of another Contracting State; 2. The People's Republic of China will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the People's Republic of China. The reservations are reported at <http://untreaty.un.org/ENGLISH/bible/englishinternetbibble/part1/chapterXXII/treaty1.asp>.

266 As of 7 June 2000, the 42nd anniversary of its entry into force, 123 countries had become parties to the New York Convention. The figure is available online at <http://untreaty.un.org/ENGLISH/bible/englishinternetbibble/part1/chapterXXII/treaty1.asp>.

267 China has also entered into a number of bilateral judicial assistance agreements with other countries, which apply to the enforcement of arbitral awards. See, e.g., Convention between the Kingdom of Belgium and the People's Republic of China for Mutual Judicial Assistance in Civil Matters, translated and reprinted in Cheng Dejun et al., note 13 above, at 806. China is also a party to the Washington Convention, which applies to the recognition and enforcement of arbitral awards rendered by tribunals established within the World Bank's International Center for the Settlement of Investment Disputes (ICSID).

268 ARI was set up in July 1993 by CCOIC.


protectionism, poor judicial personnel training, and lack of procedural rules for enforcement—all of which can cause undue delay, as evidenced in *Rexpower*.\footnote{Li Hu, note 149 above, at 23-24, 32-33.}

In *Rexpower*, the Shanghai Intermediate People’s Court refused to recognize and enforce a foreign arbitral award made by a tribunal in the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) against a Shanghai factory in 1993. The Court accepted a separate lawsuit filed by the factory on the same subject-matter after the date of the final hearing of the arbitration was set. The Court did so on the ground that the arbitral clause contained in the agreement was ambiguous and incapable of being performed because the arbitration clause: (1) only stated that arbitration should take place in Stockholm but failed to refer specifically to the SCC institute (recall that PRC law requires that the arbitration agreement should designate a specific arbitration commission), and (2) did not specify the law applicable to the arbitration agreement. However, Article V(1)(a) of the New York Convention\footnote{Article V(1)(a) states: “1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”} clearly pointed to the Swedish law as the law applicable to the arbitration agreement. Therefore, the Court should not have applied Chinese law to determine the validity of the arbitration agreement and disregarded the arbitral tribunal’s interlocutory award holding that the SCC had jurisdiction over the dispute. The Court also used certain delaying tactics and did not correct its mistake until after the Supreme People’s Court exerted pressure and the Shanghai factory was declared bankrupt in 1996. The Court’s mishandling and intentional delay in enforcing the foreign award dealt a serious blow to the PRC’s commitment to its international obligations.

To address this concern, the Supreme People’s Court adopted new rules against unlawfully setting aside, or refusing to enforce, foreign arbitral awards. According to the regulation of the Supreme People’s Court Concerning the Charges and the Time Limits for Review of Recognition and Enforcement of Foreign Arbitral Award, issued on 21 November 1998,\footnote{See note 254, above.} if the People’s Court before which the enforcement was sought decides to enforce the arbitral award, the ruling shall be issued within two months after the acceptance of the application for enforcement, and if no special circumstances exist, the enforcement should be completed within six months after the issuance of the above ruling.

But if refusal of enforcement is intended, according to the Notice of the Supreme People’s Court on the People’s Court’s Handling of the Issues in Relation to Foreign-Related Arbitration and Foreign Arbitration issued on 28 August 1995,\footnote{See note 252, above.} an Intermediate People’s Court should first report its tentative ruling of refusal to the High People’s Court of the province for approval. Should the High Court agree on
the lower court’s refusal, a further report must be made to the Supreme People’s Court. A refusal to enforce may not actually be rendered by a lower court in the PRC until the Supreme People’s Court approves it. This reporting system has effectively put any refusal to enforce a foreign arbitral award under heightened scrutiny by the highest court of the PRC. It was reported that since the adoption of the pre-reporting mechanism, about 80 percent of cases where both the intermediate People’s Court and the Higher People’s Court contemplated refusing enforcement were eventually overturned by the Supreme People’s Court in favour of enforcement or recognition and enforcement.

Another overseas concern is that China’s courts may abuse the “public policy” grounds provided for in the New York Convention to set aside or refuse to enforce foreign awards. This concern, however, has not been substantiated so far in regard to foreign awards. It was reported that both the Guangzhou Maritime Court in Guangzhou Ocean Shipping Company v. Marships of Connecticut Company Limited (US) and the Dalian Maritime Court in Dalian Ocean Transportation Company (China) v. Tekso Pte. (Singapore) have enforced foreign arbitral awards rendered by two ad hoc and two-arbitrator tribunals. It is clear that ad hoc arbitration and the even-arbitrator tribunal are contrary to China’s long-standing policy favouring institutional arbitration and the even-arbitrator tribunal. In PRC arbitration law and practice, ad hoc arbitration and the even-arbitrator tribunal have never been allowed. Nevertheless, the Chinese courts did not invoke public policy reasons to denounce these domestically unfavoured, but internationally accepted, practices.

It is generally recognized that Hong Kong has had a good record of enforcing foreign awards under the New York Convention. Hong Kong’s judiciary has given

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275 See Point 2 of the Notice, quoted in Li Hu, note 149 above, at 10. A similar system was established in regard to the setting aside of the foreign-related arbitration award. See Notice of the Supreme People’s Court Regarding the Setting Aside of the Foreign-Related Arbitration Awards by the People’s Court (23 Apr. 1998), note 253, above.

276 However, one major loophole in the mechanism is that it fails to provide a time-limit within which the People’s Courts must decide whether to enforce or refuse to enforce an arbitral award. Thus, the courts can still delay enforcement by not making timely decisions on whether to enforce or not. See Wang Sheng Chang, note 269, above, at 503. See also Randall Peerenboom, note 79, above.

277 See Wang Sheng Chang, note 269 above, at 475–476.

278 Article V(2)(b) states: “2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country.” (emphasis added).


280 However, according to the same investigation conducted by the ARI concerning the enforcement of CIETAC awards in China for the same period, two refusals made by the Intermediate People’s Courts were based on the grounds that enforcement would be contrary to social and public interest. See Wang Sheng Chang, note 269 above, at 480–481.


282 For a summary of this case, see Wang Sheng Chang, note 269 above, at 501.

283 See Li Hu, note 149 above, at 31.

284 For a similar conclusion, see Randall Peerenboom, note 79, above.
broad and favourable interpretation to the Convention. It favours enforcement by discouraging challenges to enforcement based on minor procedural shortcomings. Only a real risk of injustice, such as a denial of an opportunity to cross-examine tribunal-appointed experts or to respond to a tribunal investigation result which was kept secret, could lead to a refusal of enforcement. A further deterrent is that the High Court (now the Court of First Instance) has power to order the party challenging the enforcement to give security for the sum awarded as a precondition to allowing the challenge. The High Court has also set stringent standards for the application of the concept of “public policy” contained in the Convention. The High Court has shown no hesitation in rebuking or reprimanding parties who act in bad faith. It should be emphasized that, as case law continues to be part of Hong Kong law, these well-established precedents will largely guarantee that the future judiciary in Hong Kong will continue to support the enforcement of foreign awards.

XI. MUTUAL ENFORCEMENT OF ARBITRAL AWARDS

The issue of mutual enforcement of arbitral awards between the PRC and the HKSAR was a by-product of Hong Kong’s return to China. Before the reunification, the New York Convention provided guidance for mutual enforcement of arbitral awards made in China and Hong Kong. But with the July 1997 handover, the New York Convention was no longer applicable to the relationship between China and the HKSAR, and “mainland awards” and “HKSAR awards” could no longer be enforced as Convention awards. Nor could they be treated as either domestic or foreign awards under the principle of “one country, two legal systems”. Clearly, a need had arisen to structure the arbitration laws on both sides to provide a new basis to enforce such awards.

Unfortunately, such action was a long time coming. Until the MOU on the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR (MOU) was signed on 21 June 1999, almost two years after the handover, there was, in effect, a legal vacuum. The impact of this vacuum was felt widely and caused great concern in Hong Kong’s legal and business community. It was reported that Hong Kong was potentially losing millions of dollars in business due to slow progress by the PRC and HKSAR governments in finalizing the MOU. Law firms substituted other Asian jurisdictions, including Singapore and Tokyo, and traditional arbitration centres such as London and New York, for Hong Kong as the

\[260\] For a study of Hong Kong’s experience in enforcing the Convention awards, see Stephen D. Ma, Hong Kong’s Experience with the New York Convention: An Introduction, 9 Transnat’l Law. 393 (Fall 1996).

\[261\] The MOU was signed by Secretary for Justice Elsie Leung Oi-sie for the HKSAR and the Vice President of the Supreme People’s Court, Shen Deyong, for the PRC, in Shenzhen, 21 June 1999, and gazetted 28 Jul. 2000. For a detailed discussion of the MOU, see Xian Chu Zhang, The Agreement between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects, 29 Hong Kong L. J. 463 (1999).

\[262\] See Christine Chan, Mainland Moves to Resolve Arbitral Status of Territory, S. China Morning Post, 26 Sept. 1994, at 1.
arbitration venue of choice when drawing up business contracts. Industry practitioners also warned of the consequences of failing to resolve the issue. Arthur Bowring, director of the Hong Kong Shipowners Association, stated: "The word that I'm getting back is that lawyers find it difficult to recommend Hong Kong as a venue for arbitrations when dealing with mainland clients." Indeed, HKIAC recorded only 13 maritime disputes referred to arbitration in 1999, its lowest since 1992.

The problem was highlighted by the refusal of the courts on both sides to enforce each other's awards. In Hong Kong, companies which won arbitration awards from CIETAC could not turn to the Hong Kong courts to get them enforced. In China, it was reported that on 31 January 1998 the Taiyuan Intermediate People's Court indefinitely suspended enforcement of a Hong Kong arbitral award on the ground of lack of a clear legal basis. Subsequently, People's Courts in Beijing, Anhui, Shandong and Guangdong all followed suit in more than 10 proceedings to enforce Hong Kong awards.

Although the governments on both sides were criticized for not settling this unfortunate legal uncertainty sooner, when the MOU, based on the principles of the New York Convention, was finally signed, the conclusion of the drama was hailed as helping Hong Kong to restore its reputation as an international arbitration centre. And after the Hong Kong Arbitration (Amendment) Ordinance 1999 was passed, there were reportedly some initial positive effects of the MOU. According to Christopher To, HKIAC Secretary-General, at least two commercial contracts were moved from Singapore to Hong Kong soon after the MOU entered into effect.

The MOU applies to arbitral awards made in mainland China and the HKSAR. If a party fails to perform an arbitral award made in the PRC or the HKSAR, the other party may apply to the relevant courts in the place where the domicile of the party against whom the application is filed is located, or where the property of that party is located, for enforcement. The relevant courts are, for the mainland, the Intermediate People's Court of the place where the domicile of the party against whom the application is filed is located, or where the property of that party is located, and, for the HKSAR, the High Court of HKSAR.

289 Karen Cooper and Jane Moir, Millions "Lost" as Settlements Go to Singapore; Slow Progress on Awards Agreements Forces Business Overseas, S. China Morning Post, 30 Nov. 1998, at 3.
290 See Ng Fung Hong Ltd v ABC, [1998] 1 HKC 213, and Hebei Import-Export Corp v Polytek Engineering Co Ltd. (No. 2), [1998] 1 HKC 192.
292 See Zhang Xian Chu, note 286, above, at 465.
293 See, e.g., Christopher Ridd, Enforcement of International Arbitration Awards in Hong Kong, 41 Bulletin of the Japan Shipping Exchange, Inc. 26 (September 2000), at 32; David Evans, Ruling to Close up Post-97 Leophore, S. China Morning Post, 29 January 2000, at 2.
294 May Sun-Mei Hon, Mediation Law Boosts SAR, S. China Morning Post, 9 February 2000, at 3.
295 Article 2 of the MOU.
The MOU has two significant characteristics. First, it maintains the spirit of the New York Convention. Article 7 of the MOU virtually repeats Article V of the New York Convention word for word, except for a few minor deviations. It articulates seven grounds on which a court can set aside an arbitral award:

1. A party to the arbitration agreement was of some incapacity under the law applicable to him, or the arbitration agreement was invalid under the governing law that was agreed upon by the parties in their agreement, or the arbitration agreement was invalid under the law of the place of the arbitration due to the absence of any indication of the governing law.

2. The party subject to enforcement did not receive any appropriate notice of the arbitrator appointment, or was unable to present his case for other reasons.

3. The subject-matter in the dispute dealt with by the arbitral award was not contemplated by the parties’ submission, or was not covered by the arbitration agreement, or the award includes rulings over the subject-matter outside the scope of arbitration agreed by the parties. (Nevertheless, an award over the submitted subject-matter may be enforced partially if the matters disposed of by the award are severable from the ultra vires part.)

4. The composition of the arbitration tribunal or its procedure violates the arbitration agreement, or fails to comply with the law of the place of the arbitration if the parties did not indicate any agreement in these matters.

5. The arbitral award in question has not become binding on the parties, or it has been set aside or its enforcement has been suspended by the court in the place of the arbitration or in accordance with the law of the place of the arbitration.

6. The relevant court believes that the subject-matter dealt with by the award is not arbitrable in accordance with the law where the enforcement is sought.

7. The award violates social public interest of the mainland or public policy of the HKSAR.

Second, the MOU respects the differences between the two legal systems of the HKSAR and PRC. During its negotiation, some mainland scholars suggested that the appeal procedures in proceedings to enforce mainland awards in Hong Kong be abolished. This would have required substantial revision of the Hong Kong Arbitration Ordinance. The MOU simply does not take this approach, however. In addition, the PRC term “social public interest” and the common-law term “public policy” are used to label the two similar, but not identical, policy doctrines of the


297 The term is not defined in Chinese legislation and is widely viewed as vague. According to one study, the term is used to refer to harm to State sovereignty, destruction of China’s natural resources, heavy pollution of the environment, injury to people’s health and safety, deterioration and corruption of Chinese moral values, etc. See Wang Chengguang and Zhang Xianchu, Introduction to Chinese Law (Sweet & Maxwell Asia, 1997), at 257.
mainland and Hong Kong, respectively, for setting aside arbitral awards (Article 7(7)). Moreover, local procedures and statutes of limitations continue to be applied in enforcement proceedings. The requirement of Chinese translation and the restriction on arbitrability in the mainland are also recognized by the MOU.

Finally, the importance of the MOU goes beyond the mutual enforcement of arbitral awards made in China and Hong Kong. As the second “fruit” in the area of mutual legal assistance between the two jurisdictions, it is the latest example of successful implementation of the “one country, two systems” principle in Hong Kong and underscores the legal aspect of the remarkable autonomy that HKSAR enjoys. It also demonstrates one of the unique, Chinese dimensions of the HKSAR’s external autonomy, i.e., it treats China–Hong Kong relations, in the areas where the HKSAR is authorized by the Basic Law and Joint Declaration to possess external autonomy, like China’s foreign relations, and then makes arrangements to apply similar rules (here, those of the New York Convention).

XII. CONCLUDING REMARKS

Hong Kong and China have long shared an ancient, Chinese tradition of ADR, but their modern, international commercial arbitration systems—like their modern legal systems—possess disparate origins. Now, however, after some 15 years of progressive legal reform, the two systems have come to share many features of standard international arbitration practice, as well as the traditional Chinese practice of mediation within arbitration. In addition, due to their outstanding overall economic performance and zealous promotion efforts, both the HKSAR and the PRC have rapidly developed from relative “unknowns” in the international arbitration community into two of the most prominent international arbitration centres in the world.

Nevertheless, although they have come together in many ways—particularly with Hong Kong’s transformation from British colony to become once again a formal part of China—the special “one country, two systems” constitutional design has guaranteed the continuation of differences between the HKSAR and the PRC, including separate international arbitration laws and institutions that are supported by distinct judicial systems. This separation means that both the Hong Kong and mainland systems will retain their own features and respond to their own needs, adjusting and developing in the future in their own manner and at their own pace.

Today, the international arbitration systems in Hong Kong and China are undeniably robust and impressive. This can be said with confidence, despite the fact

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298 The first “fruit” was the Arrangement for Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts, signed in January 1999. For the English version of the Arrangement, see the Law Society of Hong Kong, Circular 99/73 (PA), available online at <http://www.hklaw.soc.org.hk/members/index.shtml>.
299 See Zhang Xian Chu, note 286, above, at 485.
300 For a more detailed discussion, see Xiaobing Xu and George D. Wilson, note 70, above, at 18–19.
that certain areas of international arbitration practice in the PRC—such as the enforcement of awards, the formation of the tribunals, the combination of mediation and arbitration, the role of arbitration commissions in arbitration proceedings, and evidence rules—continue to cause concern abroad. In general, there is still a long road ahead before China achieves overall legal sophistication, and in particular much work remains to be done before "CIETAC is ultimately to realize its ambition to become a truly international arbitration centre,"\(^{301}\) it is also highly likely that it will retain its unique arbitration practices—such as mediation within arbitration and a greater role for the arbitration commission in arbitration proceedings.\(^{302}\)

As long as Hong Kong and China continue to be strong economic forces in Asia and to improve their international arbitration systems, it seems safe to conclude that both are likely to further enhance and consolidate their current status in the world arbitration landscape with the passage of time. There are few, if any, signs indicating that the progress of international commercial arbitration in the HKSAR and the PRC has lost any of its impetus. Although CIETAC apparently reached its peak in 1995 in terms of caseload, as China continues with its inexorable integration into the world economy, and as its accession to the World Trade Organization membership appears imminent, there are plenty of reasons to be optimistic about the future of international commercial arbitration, whether on the mainland or in Hong Kong.

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\(^{301}\) See, e.g., Michael J. Moser, note 155 above, at 35.

\(^{302}\) For example, on 18 January 2000, the Joint Chairmen's Meeting of CIETAC and CMAC adopted the Procedure for Jurisdictional Decisions. See Wang Shengchang, note 132, above, at 8.