

MEDIATION, ARBITRATION AND LITIGATION: DISPUTE RESOLUTION IN THE PEOPLE'S REPUBLIC OF CHINA

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The issue of how to provide for the resolution of disputes in the People's Republic of China ("China") has become one of the most noteworthy topics worldwide since China opened its doors in 1978. The reasons behind this are obvious: ever since the promulgation of the first significant foreign business-related law in China in 1979,¹ many foreign businesspeople and entities have been deeply involved in economic cooperation with their Chinese counterparts in the forms of direct investment, licensing, and trade. With increasing international business, disputes occur more frequently and there is a growing need to resolve them. The way China handles these disputes inevitably attracts the world's attention because it is an important factor in determining whether economic ties between China and the rest of the world will continue to expand. In addition, despite cultural, political, and historical differences, Chinese methods and philosophies of dispute resolution reveal lessons for the rest of the world in seeking improvement in their own dispute resolution models or more appropriate methods for their societies to resolve their problems. As former U.S. Chief Justice Warren Burger noted, the unique Chinese model might be employed to stem the flood of litigation afflicting many court systems in the world.² The characteristics

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1. This first significant foreign business-related legislation is the "Law of the People's Republic of China Using Chinese and Foreign Investment," adopted at the 2nd Session of the Fifth National People's Congress on July 1, 1979 [hereinafter Equity Joint Venture Law].

2. See *U.S. Chief Justice in Shanghai* (BBC Summary of World Broadcasts and Monitoring Reportings, Sept. 10, 1981), available in LEXIS, Nexis Library, BBCSWB File.

and utility of the Chinese dispute resolution mechanism which enables a population of 1.2 billion to live in harmony can hardly be ignored. This Article will describe these dispute resolution devices, and, focusing on recent developments and the uniqueness of each, evaluate the effectiveness and efficiency of such devices. Part I of the Article discusses mediation. Specifically, the discussion covers nonjudicial mediation, mediation during arbitration proceedings, and mediation during litigation proceedings. Part II describes arbitration, analyzing both Chinese domestic and international arbitration mechanisms. Part III discusses litigation, based on the Chinese Civil Procedure Law. Finally, Part IV provides a brief conclusion.

I. MEDIATION

A. NON-JUDICIAL MEDIATION

“Mediating disputes by smoothing away discords” is a traditional way China has always used to solve civil disputes. The traditional preference for dispute resolution by extra-legal means can find its root in Confucianism, a philosophic model dominating Chinese history for more than two thousand years. Under Confucian philosophy, a person should make one’s path by attention to virtue rather than law.³ To put it another way, it is always more desirable to keep a friend than win a victory. Motivated by this philosophy in the past, neighborhood leaders, relatives, friends and elders of the disputing parties, or those who were impartial and enjoyed high prestige in the community, upon request or self-instinct, would put the disputing parties together and talk them into an agreement. This practice played a positive role in settling disputes among people and enabling the members of a community to live in peace.

The foundation of the People’s Republic of China in 1949 and the campaign immediately thereafter to annul all old legal systems, tradition, and authorities did not affect the prevalence of mediation in China. Instead, China codified the informal mediation system in its 1954 Provisional General Rules for the Organization of People’s Mediation Committees.⁴ In 1987, with more than 950,000 mediation committees and six million

3. See Sybille Van Der Sprenkel, *LEGAL INSTITUTIONS IN MANCHU CHINA* 30-31 (1962).

4. Provisional General Rules of China for the Organization of People’s Mediation Committees (1954) (P.R.C.).

mediators spread throughout the nation,⁵ China's mediation system became the largest dispute resolution program in the world.

The promulgation of the new set of rules governing China's mediation committees in 1989⁶ signifies the perfection, in a sense, of this alternative dispute resolution model in China. The 1989 Rules reconfirm the government's support of this extra-legal dispute resolution device. The Rules also impose more structure on the mediation committees, yet allow greater independence from the domination of the Chinese political party. As a result of this revision, a modern mediation system has emerged in China which is more independent, professional, and efficient.

According to the 1989 Rules, each Urban Neighborhood or Village Resident Committee is entitled to establish People's Mediation Committees.⁷ Also, mediation committees are allowed to be established in larger workplaces such as government institutions, businesses, schools, and mines.⁸ Each mediation committee shall be comprised of three to nine members who are elected by the constituents from the committee's jurisdiction.⁹ An adult citizen who is "impartial to people, has a close connection to the masses and possesses basic knowledge of law and policies" can be eligible for the candidacy of a mediator.¹⁰ Mediation can be initiated upon the request of the disputing parties or on the mediator's own initiative. While mediating, committee members must investigate facts, distinguish right from wrong, talk to the disputing parties patiently, bring them around, and finally try to reach an agreement.¹¹ Though the 1989 Rules impose a general obligation on the disputing parties to honor the dispute resolution agreement reached in a mediation, enforcement of the agreement is not mandatory. A party may rescind the agreement at will and take the case to the relevant local government agency or a people's court.¹²

The codified Chinese mediation system has exercised a prominent extra-judicial function. According to Ren Jianxin, the

5. See Ren Jianxin, *Mediation, Conciliation, Arbitration and Litigation in the People's Republic of China*, 15 INT'L BUS. LAW. 395 (1987). Ren Jianxin is the Chief Justice of the Chinese Supreme Court.

6. Organic Rules for People's Mediation Committees [hereinafter 1989 Rules] (June 17, 1989) (P.R.C.).

7. 1989 Rules, art. 2. See also The Organic Law on Urban Committees in China, *id.* at art. 13.

8. See 1989 Rules, art. 15. See also Liu Jinghuai, *People's Mediation is a Legal System with Intensely Chinese Characteristics*, LIAOWANG (OUTLOOK) WEEKLY (Overseas ed.), Oct. 16, 1989, at 7, 7-8.

9. See 1989 Rules, *supra* note 6, art. 3.

10. *Id.* art. 4.

11. *Id.* art. 8.

12. *Id.* art. 9.

Chief Justice of the Chinese Supreme Court, the mediation committees 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 misdemeanor cases.¹³ 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,¹⁴ far surpassing the number of cases brought to Chinese courts.¹⁵

B. MEDIATION DURING ARBITRATION PROCEEDINGS

Recognizing the advantages of mediation as an effective method for resolving disputes, many substantive Chinese laws either mandate or encourage the disputing parties to use the mechanism to solve their problems.¹⁶ Most importantly, China has extended the application of mediation to its arbitration and litigation proceedings. Arbitral organs, both domestically oriented commissions¹⁷ and internationally oriented organizations representing the China International Economic and Trade Arbitration Commission ("CIETAC") and the China Maritime Arbi-

13. Ren, *supra* note 5.

14. *See id.*

15. *See Civil Dispute Mediation Committees* (BBC Summary of World Broadcasts and Monitoring Reports, Oct. 19, 1991), available in LEXIS, Nexis Library, BBCSWB File.

16. Examples include: The Economic Contract Law of the People's Republic of China, art. 42, enacted by the Fifth National People's Congress on December 13, 1981, as amended; the Equity Joint Venture Law, *supra* note 1, art. 14; the Law of China on Economic Contracts Involving Foreign Interest [hereinafter Foreign Economic Contract Law], adopted at the 10th Session of the Standing Committee of the Sixth National People's Congress, promulgated on Mar. 21, 1985.

17. Before 1995, China's domestic arbitration organs were mainly represented by commissions that were set up in the State Administration for Industry and Commerce and local Administrations of Industry and Commerce at different levels in accordance with the enabling Regulations on Arbitration for Economic Contracts of China, promulgated on Aug. 22, 1983 by the State Council. They focused on economic contract dispute resolution. Since Sept. 1, 1995, those arbitration organs have been dissolved, replaced or reorganized, according to the Arbitration Law of China, adopted at the 9th Session of the Standing Committee of the Eighth National People's Congress on Aug. 31, 1994, *reprinted in* CHINA ECONOMIC NEWS, (No. 39) Oct. 10, 1994 at 6 [hereinafter 1995 Arbitration Law]. The new arbitration commissions under the 1995 Arbitration Law are formed by the relevant departments and chambers of commerce under the coordination of the governments. They are no longer set up according to administrative levels. Also, arbitration is not subject to the jurisdiction of administrative departments at any level and region. Most importantly, arbitration commissions are no longer part of government organs and are independent of any of those organs. The commissions have neither a subordinate relationship nor any subordinate relations of their own.

tration Commission ("CMAC"),¹⁸ are required or permitted by their respective rules and regulations to attempt mediation before proceeding to arbitrate. In the domestic realm, for example, the Chinese 1983 Contract Arbitration Regulations expressly provide: "In handling cases the arbitration organ shall first conduct mediation." China's new Arbitration Law again permits a tribunal to mediate a case before passing its award.¹⁹ Under the latter, the disputing parties may also begin mediation on their own initiative. In Chinese international arbitration proceedings, the recently revised Arbitration Rules of CIETAC,²⁰ inheriting the consistent provisions of its old Rules,²¹ again permit an arbitral tribunal to mediate a case under its cognizance in the process of arbitration if both parties have a desire for mediation or one party so desires and the other party does not object when consulted by the tribunal.²² Also, a tribunal may mediate cases in the manner it deems appropriate.²³

In addition, China has taken the lead in inventing new mediation methods such as "joint mediation" in international arbitration proceedings. Under the "joint mediation" device, a Chinese party may apply to CIETAC and the foreign party to a corresponding arbitral organ in his/her own country for joint arbitration. Upon such application, the arbitral organs each appoint

18. China's international arbitration organs were first set up in 1954 and 1958 in accordance with the "Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade [hereinafter "CCPIT"]," adopted by the former Government Administration Council (now State Council) of the Central People's Government on May 6, 1954; and the "Decision of the State Council of the People's Republic of China Concerning the Establishment of a Maritime Arbitration Commission within CCPIT," adopted by the State Council on Nov. 21, 1958. These organs were called "Foreign Trade Arbitration Commission" and "Maritime Arbitration Commission." Later the former was renamed as "Foreign Economic and Trade Arbitration Commission" and now "China International Economic and Trade Arbitration Commission [hereinafter "CIETAC"]; and the latter was renamed as "China Maritime Arbitration Commission [hereinafter "CMAC"]." The adoption of the 1995 Arbitration Law does not affect the legal status of these organs because the Arbitration Law, by setting forth a special chapter dealing with these organs, reaffirms their independent position in China's dispute resolution system.

19. See 1995 Arbitration Law, *supra* note 17.

20. Arbitration Rules of CIETAC (1995), revised and adopted by China International Chamber of Commerce ("CCPIT") on Sept. 4, 1995, effective as from October 1, 1995 [hereinafter 1995 CIETAC Arbitration Rules].

21. For example, Arbitration Rules of CIETAC (1994), revised and adopted on Mar. 17, 1994 at the 1st Session of the Standing Committee of the Second National Congress of the CCPIT, effective as from June 1, 1994 [hereinafter 1994 CIETAC Arbitration Rules], art. 51, and CIETAC Arbitration Rules (1988), art. 37, adopted on Sept. 12, 1988 at the 3rd Session of the First National Congress of the CCPIT.

22. 1995 CIETAC Arbitration Rules, *supra* note 20, art. 46.

23. See *id.* art. 47.

one or more mediators on an equal basis to mediate the case jointly. Since the mediators consist of nationals from the disputants' own countries and normally gain the trust of the disputants, the mediation efforts made during such international arbitration proceedings have been highly productive.

Because of the traditional preference, the promotion by laws, rules and regulations, and the obvious benefits to the parties and the government, Chinese arbitration organs have attached great importance to mediation. They have endeavored to bring the disputing parties into mediation whenever possible. In the three years from 1984-86, about 88% of the domestic disputes brought before domestic arbitration commissions all over China were solved by mediation.²⁴ Currently about 30% of the international arbitration cases accepted by CIETAC were solved by mediation.²⁵ The practice of combining arbitration and mediation has been recognized as a distinctive feature of the Chinese arbitration proceedings.²⁶

C. MEDIATION DURING LITIGATION PROCEEDINGS

Mediation has also had a place in Chinese litigation proceedings. The Civil Procedure Law of China devotes a whole Chapter to dealing with this alternative dispute resolution model.²⁷ According to the Civil Procedure Law, a judge or a collegial panel assigned to try the civil case shall conduct mediation first if the parties concerned so require or do not object.²⁸ In order to foster an amicable environment and help the parties reach an agreement, the hearing process used during an in-court mediation proceeding is not as strict as that used in a formal trial. The presiding judge or panel, for efficiency purposes, is authorized to use simplified methods to notify the concerned parties and witnesses to appear in court.²⁹ Once an agreement is reached, the court is required to draw up a mediation statement which will be legally binding upon its receipt by the parties. In certain family cases such as reconciled divorce cases, adoption cases, and cases that could be performed immediately, a media-

24. See Ren, *supra* note 5, at 396.

25. See Wang Shengchang, *A Comparative Survey of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce and the Arbitration Rules of the China International Economic and Trade Arbitration Commission*, J. INT'L ARB., Dec. 1992, at 93, 115.

26. See Tang Houzi, *CONCILIATION IN CHINA, WORLD PEACE THROUGH LAW CENTER* (1990).

27. See Code of Civil Procedure of China, [Bus. Reg. 1] China Laws for Foreign Bus. (CCH) 9, 19-201 (1991).

28. *Id.* arts. 85, 86.

29. See *id.* art. 86.

tion statement can even be omitted.³⁰ Nevertheless, the Civil Procedure Law expressly prohibits compulsive settlement.³¹ If no agreement is reached through mediation or if either party backs out of the settlement agreement before the mediation statement is served, the court will proceed to trial without delay.³² To exhaust the possibility of using the alternative dispute resolution model, however, the Civil Procedure rules allow the judges to make a final effort at mediation prior to the rendering of a judgment.³³

In-court mediation has achieved considerable success in China. As early as 1986, the Chinese courts solved about one million civil and economic cases through mediation, amounting to 61.5% of the total number of cases handled in that year.³⁴

From an objective perspective, mediation is beneficial to both the disputants and the government. On the disputants' side, the parties could arrive at an agreement to a dispute on a voluntary basis and in an amicable environment, without being bound by the strict procedural rules and without giving up their reasonable expectations. On the government's side, intervention by mediators has the effect of avoiding certain crimes, reducing litigation, saving judicial resource, and enhancing social stability. China has been at the forefront of developing precedents of mediation as well as maximizing the benefits derived from it. As a result, mediation has been a hallmark of the Chinese dispute resolution system. China's experience is noteworthy for those countries in the world seeking optimization of dispute resolution alternatives.

II. ARBITRATION

Since opening up to the outside world in the late 1970s, China's economy has witnessed dramatic growth. Meanwhile, existing arbitration forums, rules, and regulations dealing with international business transactions have further developed;³⁵ new arbitration forums, rules, and regulations dealing with domestic economic transactions and other affairs have also emerged³⁶ and received positive acceptance. This development can, of course, be attributed to economic necessity. However, a more important motivation behind this development can also find its root in the teachings of Confucianism. Today, arbitration is an important

30. See *id.* art. 90.

31. See *id.* art. 88.

32. See *id.* art. 91.

33. *Id.* art. 128.

34. See Ren, *supra* note 5, at 396.

35. See 1995 CIETAC Arbitration Rules, *supra* note 20.

36. See *supra* note 17.

and frequently-used method for settling disputes in China, as evidenced by the prevalence of arbitration as a primary dispute resolution device in China's business-related legislation³⁷ and the busy dockets of the arbitral organizations.³⁸

A. DOMESTIC ARBITRATION

China's arbitration can be divided into two types, namely domestic arbitration and international arbitration. Each type has its own law, or rules and regulations. Before the enforcement of the 1995 Arbitration Law, domestic arbitration was mainly related to economic contract disputes³⁹ handled by Economic Contracts Arbitration Commissions, a nationwide network under the control of the State Administration of Industry and Commerce and its local offices. Since these domestic arbitral bodies were the product of the rigid framework of the centralized planned economy, they were by nature no more than administrative organs. In reality, a substantial amount of domestic economic contract disputes were put to arbitration at the direction of the Administration and its local offices through their regulative and contract approval authority. Nevertheless, those organs have been exercising their dispute-solving function for more than a decade in Chinese domestic arbitration history. Their achievements in maintaining China's social and economic order and facilitating the development of its economy cannot be underestimated.

Since September 1995, a unified and independent domestic arbitration system has been established in China according to the 1995 Arbitration Law. Under the Law, the jurisdiction of arbitration organs is substantially enlarged. Except for a few family-related cases expressly excluded by the Law such as cases arising from marriage, adoption, guardianship, child support, inheritance, and cases that have been stipulated by law to be settled by administrative organs,⁴⁰ most of the domestic disputes are arbitrable. In addition, for the first time in Chinese domestic arbitration history the Law prescribes a higher qualifications standard for arbitrators.⁴¹ Most importantly, the Law brings China's gen-

37. See, e.g., Foreign Economic Contract Law, *supra* note 16 art. 37; *id.* art. 42; Equity Joint Venture Law, *supra* note 1, art. 14.

38. According to Michael J. Moser, *China's New International Arbitration Rules*, 11 J. INT'L ARB., Sept. 1994, at 5, 6, China has become one of the leaders in the world arbitration business. In 1993, China ranked first in terms of the number of new submissions (503 new cases).

39. Some other special arbitration systems include those dealing with labor disputes, copyright, technology contracts, and security disputes.

40. See 1995 Arbitration Law, *supra* note 17, art. 3.

41. *Id.* art. 13.

eral proceedings of domestic arbitration in line with prevailing world practices.

According to the Law, an arbitral tribunal will not have jurisdiction unless the parties have reached a qualified arbitration agreement prior to the application for arbitration.⁴² Preservative measures may be applied for with the tribunal and a decision on the application will be made by a court in the place where the other party resides. The parties may engage legal counsel in the arbitration proceedings. Unlike the provisions in the Civil Procedure Law,⁴³ the 1995 Arbitration Law does not confine the foreign parties in a domestic arbitration to representation by Chinese lawyers only; foreign lawyers may therefore appear before a Chinese domestic arbitral tribunal.

To guarantee the impartiality of the arbitrators and their awards, the 1995 Arbitration Law adopted an arbitrator challenge system⁴⁴ and provided for an adversarial hearing.⁴⁵ Furthermore, disputants may apply for the abrogation of an award from the intermediate court in the place where the arbitration commission resides if the Arbitration Law was violated by the tribunal or the parties in reaching the award or the court deems that the award violated public policy.⁴⁶ The parties are required by the Law to execute the award once it becomes binding. If the losing party refuses to execute the award, the winning party may go to the court of the former's residence for an enforcement of the award.

The adoption of the 1995 Arbitration Law, which essentially meets the international standard, counters the compulsion and influence from the Chinese government and ensures the impartiality of Chinese domestic arbitration. It is expected that the stronger the market mechanism becomes in China, the weaker the administrative involvement in business activities, and the role of the arbitration system will become ever more important.

B. INTERNATIONAL ARBITRATION

Since there is no international court for the resolution of business disputes in the world, and there is an understandable

42. Ch. 3 of the 1995 Arbitration Law sets forth the requirements an arbitration agreement must meet. In summary, an arbitration agreement must clearly specify the expression of application for arbitration, matters for arbitration and the arbitration commission chosen. The subject matter must be arbitrable. Any agreement executed by legally incompetent persons or that was the product of coercion will be deemed invalid.

43. See Code of Civil Procedure of the P.R.C., *supra* note 27, art. 241.

44. 1995 Arbitration Law, *supra* note 17, ch. 1, art. 8, at 7.

45. *Id.* at 6.

46. *Id.* art. 58.

reluctance for international businesspeople to agree to resolve disputes in the courts of the other party,⁴⁷ international arbitration has become the recognized process by which international business disputes are resolved.⁴⁸ In China, international arbitrations are almost exclusively handled by CIETAC and CMAC. Often, when the parties to business transactions decide the venue of arbitration will be in China, CIETAC or CMAC is the mechanism of choice. Because the arbitration rules and practices of CMAC are substantially the same as that of CIETAC, and because CIETAC's economic and trade arbitration represents the mainstream of Chinese international arbitration, the following discussion focuses on CIETAC's rules and practices.

Since the promulgation of the 1988 CIETAC Arbitration Rules, the number of cases submitted to arbitration before CIETAC has dramatically increased.⁴⁹ The disputes submitted to CIETAC arbitration in recent years tend to be more complex and involve increasingly larger claims.⁵⁰ These should be attributed to the substantial improvement of the CIETAC arbitration rules and the enforceability of its awards in China⁵¹ and over one hundred 1958 New York Convention countries. As of March 12, 1994, and September 4, 1995, CIETAC made a series of major

47. Major factors leading to such reluctance include: uncertainty about the process in foreign courts, concern about the possibility of local bias, questions about enforceability, and lack of confidentiality of the court process.

48. The reasons behind this recognition may include: (1) similarity in the international arbitration rules of most arbitral organs substantially mitigates the uncertainty about the process; (2) local bias is dealt with by appointing neutral arbitrators, and a neutral place for the arbitration can also be chosen; (3) enforceability of a foreign arbitration award in another country can be greatly enhanced through its joining of the international conventions; and (4) nearly all arbitration rules provide for confidentiality of the process.

49. Moser, *supra* note 38.

50. See Cheng Dejun, *Report on the Draft Amendment to the Arbitration Rules of the China International Economic and Trade Commission*, reprinted in Kaplan, Spruce and Moser, *Hong Kong and China Arbitration: Cases and Materials* 803 (1994).

51. Code of Civil Procedure of the P.R.C., *supra* note 27, art. 259 provides that the party winning the arbitration may apply for enforcement to the intermediate people's court of the place where the domicile of the person against whom an application is made is located or where the property is located. The Civil Procedure Law only sets forth in art. 260 the limited circumstances under which a Chinese court will refuse to enforce an international arbitration award, which include: (1) the parties had no arbitration agreement; (2) the service of process was not properly made to the party against whom the application for enforcement was made; (3) the composition of the arbitration tribunal or the procedure for arbitration was not in conformity with the rules of arbitration; (4) the matters dealt with by the award fall outside the scope of the arbitration agreement or are not matters which the arbitration organ was empowered to arbitrate; and (5) social and public policy prevent enforcement.

changes to its arbitration rules,⁵² bringing them more in line with recognized international standards.

One of the most important changes introduced by the 1994 and 1995 CIETAC Arbitration Rules relates to the scope of CIETAC's jurisdiction. Under the Rules, CIETAC's jurisdiction will be extended to "disputes concerning international or foreign economic relations and trade bounded or not bounded by contracts as arising between foreign legal persons and/or natural persons and Chinese legal persons and/or natural persons, among foreign legal persons and/or natural persons or among Chinese legal persons and/or natural persons."⁵³ Disputes arising between Chinese parties and/or parties from Hong Kong, Macao or Taiwan, or between Chinese-foreign joint ventures and Chinese parties, are now clearly within CIETAC's subject matter jurisdiction. CIETAC's authority is no longer limited to contract disputes alone. Clearly, under the new provision, a party who has no contact with his/her counterpart may still lodge a claim before CIETAC as long as the dispute relates to foreign economic relations and/or trade.

Other major breakthroughs of the recent CIETAC Arbitration Rules which appeal to foreign parties include: (1) The Rules expressly permit foreign arbitrators to be included in the Panel of Arbitrators.⁵⁴ As a result of this breakthrough, among those arbitrators on the Panel, about one-third are distinguished foreign (including Hong Kong) lawyers appointed as CIETAC arbitrators.⁵⁵ Foreign parties thus have the power to nominate one of the foreign panelists as an arbitrator, assuring at least one on a three-person panel. The foreign arbitrator may serve as a check on the arbitration process to assure that it is fairly and impartially conducted. (2) Arbitration can be carried out in English or other foreign languages as agreed upon by the parties involved. Chinese is no longer the only official language for Chinese international arbitration.⁵⁶ (3) Foreign parties can use their own non-Chinese attorneys in the proceedings.⁵⁷ (4) The Rule sets forth a nine-month time limit for a tribunal to conduct a hearing and render its award. With the permission of the Arbitration Commission, an extension of this time limit may be granted in a case

52. For example, of the eighty-one articles contained in the 1994 CIETAC Arbitration Rules, 38 are entirely new. Of the forty-three articles found in the 1988 CIETAC Arbitration Rules, more than one-third have been amended to a greater or lesser extent.

53. Arbitration Rules of CIETAC, *supra* note 20, art. 2.

54. *Id.* art. 10.

55. See "CIETAC Arbitrators," a list of arbitrators issued by CIETAC.

56. Arbitration Rules of CIETAC, *supra* note 20, art. 75.

57. *Id.* art. 22.

where the delay is "indeed necessary" and the reasons for the postponement are "really justified."⁵⁸ (5) The arbitral award made by CIETAC is final and binding upon both disputing parties. Neither party may bring a suit before a court or make a request to any other organization for altering the arbitration award.⁵⁹ (6) In line with current trends in international arbitration, the Rule provides for simplified proceedings for handling certain types of disputes to ensure the speedy handling of arbitration.⁶⁰ Under this "fast-track" device, a claim worth less than RMB500,000 *yuan* (\$60,000) or a dispute involving more than RMB500,000 *yuan*, in which both parties agree to going through the "fast track" arbitration, will be handled by a single arbitrator appointed by the Chairman of CIETAC. Oral hearings need not take place. The panel must render an award within ninety days from the appointment of the arbitrator or within thirty days from the conclusion of an oral hearing, if one was conducted.

The 1995 CIETAC Arbitration Rules reflect China's years of efforts to bring its international arbitration practice and procedures into line with international practice, even though certain deficiencies still exist and some work remains to be done. With CIETAC's more devoted efforts, it is not too ambitious to expect that CIETAC will in the near future achieve a higher status in the international community, not only in terms of the quantity of the cases it handles, but also the quality of the cases it decides.

III. LITIGATION

Civil litigation was traditionally discouraged in China. An old proverb expresses the ancient Chinese view of a lawsuit: "It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit."⁶¹ This explains why in more than two thousand years of Chinese legal history, China had no formal civil procedure law until 1910, when Shen Jiaben drafted the Provisional Da Qing Civil Procedure Law.⁶² However, with the development of the society in China, civil litigation could not be totally avoided, despite traditional taboos. A modern form of civil procedure, in which litigation is a means of dispute resolution, has been developing slowly in China. The enactment of the 1990 Procedural Law of Administrative Litiga-

58. *Id.* art. 52.

59. *Id.* art. 60.

60. *Id.* ch. III.

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

62. See Cai Faband, A COURSE IN CIVIL PROCEDURE LAW 37 (1984). Da Qing is the last dynasty in Chinese history (1644-1911).

tion of China⁶³ and the 1991 Civil Procedure Law signify great accomplishments in China where virtue traditionally prevails over law. The laws also reflect the development of dispute resolution mechanisms in China. These moves are directly related to China's ongoing process of modern economic reform and development of an open door policy, which have generated numerous civil disputes. From an objective perspective, traditional dispute resolution mechanisms such as mediation and arbitration, while possessing their own outstanding merits, cannot totally replace the function of litigation, where definite decisions can be pursued, secured, and strictly enforced.

Though the civil procedure law has less than one century of history in China, the most recent Civil Procedure Law possesses some important features. Under the device outlined in the Civil Procedure Law, a court of the first instance (basic level court) has general jurisdiction over most civil cases. It consists of specially-formed collegiate benches for accepted individual cases. Each collegiate bench is composed of an odd number of judges and sometimes a people's assessor will be seated, functioning as a judge.⁶⁴ In simple civil cases, a single judge presides.⁶⁵ There is no jury system in China; judges decide both facts and law in any cases before the court. A court of the second instance (intermediate court) has limited jurisdiction. While devoting most of its time hearing requests for retrial and appeals from the court of the first instance, it does occasionally act as a court of the first instance and try important cases involving large amounts of money or having significant social impact.

To commence a civil action in China, a plaintiff is required to file a written complaint which sets forth the claims of the suit, the facts and legal grounds on which the suit is based, and the evidence and its source as well as information regarding the witnesses. Upon examination by the court's case acceptance division, the case is accepted and assigned to a subsequently formed collegiate bench or a single judge if the complaint conforms to the provisions of the Civil Procedure Law. Under the Civil Procedure Law, service of process is conducted by the court. Direct service is required. However, if direct service raises difficulties, the court may serve process by mail. If these methods fail, the court may authorize notice by public announcement.⁶⁶ Qualified Chinese attorneys are allowed to represent litigants and their

63. The Procedural Law of Administrative Litigation of China, adopted at the 2d Sess. of the Seventh People's Congress on Apr. 4, 1989, promulgated by Order No. 16 of the Chinese President, and effective as of Oct. 1, 1990.

64. See Code of Civil Procedure of the P.R.C., *supra* note 27, art. 40.

65. *Id.*

66. *Id.* ch. VII, sec. 2.

rights to investigate and collect evidence are guaranteed.⁶⁷ A foreign litigant must retain a Chinese attorney if he/she chooses to have counsel.⁶⁸

The Civil Procedure Law specifies the types of permissible evidence that litigants may present to the court.⁶⁹ The court will scrutinize the evidence for verification before allowing it to be used as a basis for determining facts. Upon its own initiative, the court has the right to obtain evidence itself.⁷⁰ Qualified Chinese attorneys are able to collect evidence as well as review and investigate evidence provided by the other parties to the court. However, no discovery mechanisms or procedures are provided by the civil procedure or the lawyer's regulations. Security remedies, such as attachment, sequestration, freezing or posting security, may be available upon application of a party or on the court's own motion. The Civil Procedure Law also empowers the courts to order prejudgment payment for a claim for alimony, maintenance, child support, death or disability compensation, remuneration for labor, and other claims.⁷¹

A full trial is almost always warranted in China once the court has accepted the case. There are no dispositive devices such as motions to dismiss, judgment on the pleadings, or summary judgment provided in the Civil Procedure Law. As mentioned above, the court shall first conduct mediation if the litigants so require or do not object. If mediation fails, a trial shall promptly follow. The trial will focus on court investigation. During trial, new evidence may be presented by the parties and cross-examination is allowed.⁷² After the parties and the court introduce evidence, the plaintiff and his/her attorneys are allowed to make statements, followed by the response from the defendant and his/her attorneys as well as debate by and between the parties. The plaintiff and the defendant are also allowed to make closing arguments.⁷³ A judgment will be issued by the bench upon conclusion of the trial, in which true facts are stipulated and legal grounds for the decision are discussed. Notwithstanding the procedures outlined above, the Civil Procedure Law

67. *Id.* ch. V, sec. 2.

68. *Id.* art. 241. Of course, a foreign litigant can always choose to represent him/herself without engaging local counsel. If that is the case, however, he/she may not be able to investigate or collect evidence that local counsel would be able to under the attorney rights guaranteed by Chinese law.

69. *Id.* ch. VI. In general, they include: (1) documentary evidence; (2) material evidence; (3) audio-visual material; (4) testimony of witnesses; (5) statements of the parties; (6) expert conclusions; and (7) records of inspection.

70. *Id.* art. 65.

71. *Id.* arts. 94, 97.

72. *Id.* art. 125.

73. *Id.* art. 127.

offers a simplified device for small civil actions. They can be adjudicated in a simplified proceeding and must be concluded within three months from the date of acceptance of the case by the court. This process consists of a verbal complaint and response and a decision by a single judge. The court employs simplified procedures for summons and examination of evidence.⁷⁴

Parties objecting to a judgment or ruling of a court of the first instance have the right to appeal to a court at the next higher level.⁷⁵ The appellate court is free to thoroughly review the lower courts' decisions regarding the facts and the law by means of a collegiate panel. If the reviewing panel, upon pre-trial investigation of the facts and evidence and questioning of the parties, considers that no material errors regarding facts were made by the trial court, it can make its order without conducting a trial, either affirming the original judgment or amending the original judgment if the application of law by the lower court was incorrect. The order is final; a post trial motion to set aside the order and allow for a new trial conducted by the original trial court or the court at the next higher level is available but rarely allowed.⁷⁶

If the appellate reviewing panel finds that the facts found by the lower court could be incorrect or were not clearly ascertained and the evidence was insufficient, it may either conduct a trial and make a final judgment or remand the case to the original trial court for retrial. A lower court's decision will also be set aside and the case retried if the original trial court did not follow the procedure in making its decision if that failure may have affected correct adjudication.

Once a judgment is binding, the original court of the first instance has the responsibility to enforce the judgment.⁷⁷ A compulsory execution mechanism is available upon timely application by one party.

One of the important features of the Civil Procedure Law is that it devotes an independent Part to regulating civil procedure of cases involving foreign elements.⁷⁸ This Part supersedes the other provisions of the Law unless it fails to speak to a question, in which case the other provisions apply. The foremost principle outlined in this Part is that a foreign party has the same rights and obligations in Chinese courts as a Chinese party unless the foreign party's country does not follow the international rule of reciprocity. The Civil Procedure Law also specifies particular

74. *Id.* ch. XIII.

75. *Id.* art. 147.

76. *Id.* ch. XVI.

77. *Id.* art. 207.

78. *Id.* pt. IV.

principles relating to jurisdiction, service of process, provisional security remedies, and judicial assistance.⁷⁹

It is true that China's singular simplicity of civil litigation differs from many foreign countries' dual system of federal and state court procedures; however, the Chinese procedure has its own merits. It eliminates the complex body of laws which is usually seen in dual system countries in the areas of federal-state judicial relations, jurisdiction, conflict of laws, and enforcement of judgments. Admittedly, some provisions in the Civil Procedure Law relating to judicial independence, judges and lawyers' qualifications and roles, rules of evidence, and appellate court review need further fine-tuning; some provisions such as dispositive methods and discovery procedures should be considered for inclusion. Notwithstanding these drawbacks, the Civil Procedure Law is a major improvement of China's system of dispute resolution. Its adoption and implementation indicate that China is quickly becoming a law-oriented country.

IV. CONCLUSION

Extra-judicial dispute resolution in the form of mediation is the norm in China. It is firmly rooted in ancient Chinese philosophy. Dispute resolvers will not relinquish the opportunity to mediate a case and urge the parties to reach a settlement agreement. As a major dispute resolution mechanism in China, mediation has been both effective and efficient and serves a significant social function in saving judicial resources and maintaining social harmony. With the enforcement of the recently promulgated Arbitration Law and the new arbitration rules of CIETAC, China's restructured domestic arbitration organs as well as international arbitration organs will continue to lead the world in terms of the quantity of the disputes they administer. As a result of the tireless efforts of the Chinese arbitration organs, we can expect China will soon lead the world in arbitration in terms of quality as well. The promulgation of China's Civil Procedure Law signifies that a complete dispute resolution regime has been formed in China. The Procedure, though not flawless, has unique and important features. Although Chinese people will still emphasize settling disputes through mediation or arbitration, they seem increasingly inclined to litigate. It is therefore certain that in the near future in China the Civil Procedure Law and the dispute resolution mechanism designed with it will play more and more significant roles in solving international and domestic disputes.

79. *Id.* chs. XXV-XXIX.