

# Amicable dispute resolution in the People's Republic of China and its implications for foreign-related construction disputes

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A combined mediation/arbitration process is unique to the People's Republic of China (PRC). This paper looks at how this amicable, out-of-court dispute resolution system works if the dispute is foreign-related, as defined under the Foreign Economic Contract Law. First, it outlines Chinese culture and its relation to the PRC legal framework and also to the amicable dispute resolution system discussed. Second, the system is appraised in the context of the uncertainty of the local judicial system. Third, distinctive features of domestic and foreign-related dispute resolution mechanisms are discussed by comparison with international practice. Finally, the amicable dispute resolution system for resolving construction disputes and its enforcement mechanisms are analysed, with statistical data to explain their implications for foreign investors in the construction industry of the PRC.

*Keywords:* ADR, arbitration, award enforcement, China, construction dispute, enforcement, mediation, foreign economic contract law, People's Republic of China, PRC

## Introduction

In the People's Republic of China (PRC), the term 'amicable dispute resolution mechanism' includes 'friendly' negotiation, conciliation and mediation, both before and during arbitration proceedings, but stops short of the full hearing in an arbitration.

The Chinese preference for an internal model of law (*li*) rather than the rules of law (*fa*) in maintaining social order traditionally has encouraged people to settle disputes through amicable mechanisms (Li, 1970). This encouragement, and sometimes mandatory provisions, are built into the PRC legal system. The attitude of Chinese peasants towards litigation can be summed up in an old Chinese saying: avoid a law court while alive and never go to hell after death. This obsession is due to a combination of factors: an inadequate judicial system, the enormous costs incurred in litigation, social pressure and the parties' ignorance.

Since the PRC adopted the 'Open Door' policy in the 1980s, opportunities for foreign trading and property development have attracted many foreign investors. Those accustomed to assertion of rights through legal means have reason to be apprehensive of the legal system in dealing with disputes in the PRC. Flexible out-of-court dispute resolution mechanisms are the preferred options for locals and foreigners wishing to bypass the uncertainties associated with the PRC judicial system. Even in countries like the UK and the USA, with their well-tried and familiar judicial systems, parties to a dispute may be dissatisfied with litigation and the 'judicialized' arbitration process (Brooker and Lavers, 1994).

Although PRC law allows the parties to agree to arbitrate disputes outside the country, most Chinese business partners will insist on arbitration in the PRC. The China International and Economic Trade Arbitration Commission (CIETAC) has the exclusive right to deal with foreign-related disputes as defined

under the 1985 Foreign Economic Contract Law (FECL), discussed in detail below. Among the foreign-related cases submitted to CIETAC, 90% are disputes between a Chinese and a foreign entity (Cheng, 1994). Because of the nature of the construction business and the location of properties, most construction disputes have to be resolved under the PRC domestic dispute resolution system; they cannot be referred to CIETAC. Despite there having been so much foreign-involved construction activity and real estate transactions in the PRC in recent years, nearly half the cases submitted to CIETAC were concerned with sales contracts; the remainder covered a broad range of contracts, and construction and real estate contracts are only a small part of it (Cheng, 1994).

A summary of the institutional legal framework in the PRC sets the scene for understanding its unique amicable dispute resolution mechanism. A study of the system in comparison with international practice highlights the characteristics of the PRC mediation mechanism. Its claimed merit is re-assessed through analyses of limited statistical data published by the CIETAC Secretariat, and backed up with specific enquiries to the Secretary General of CIETAC and interviews with local practitioners.

Published materials about law and the construction industry in the PRC are not widely available in English; some of the references in this paper are based on reputable Chinese texts.

## Cultural background

### Classic tradition

Chinese culture is deeply influenced by Confucian and Taoist philosophies. The Confucian teaching of *li* concerns self-cultivation, human dignity and respect. Individuals are expected to fulfil obligations appropriate to their social position and to respect the social hierarchy. Harmony is built on loyalty, family identity and preservation of the clan. Leadership comes from a morally superior individual who does righteous acts. All these features ask for the submergence of individualism in favour of harmony in a community. Taoism, flourishing in parallel with Confucianism, also places a high esteem on individual integrity and social harmony. It opposes the use of force and punishment and treasures a natural way of living. It is therefore not a surprise to see Low (1996) drawing many examples of teaching from the Taoist book *Tao Te Ching* and correlating their application to mediation or conciliation.

Both Confucian and Taoist teaching are said to have conditioned Chinese individuals to a social norm of

submission to their clan and to dispute resolution through amicable means. Open confrontation or litigation in a law court is the last alternative.

### Socialist morality in the PRC

Chinese communist ideology does not diverge dramatically from classic Chinese culture: 'Socialist morality' replaces 'Confucian morality'. However, commitment to society and emphasis on collective ways of living require more self-policing and community action. Disputes are resolved by members of a community, for example, by a mediation committee.

In addition to using ideological education to avoid and resolve disputes, the regime realizes the importance of a legal system. It emphasizes that the masses must be able to understand and utilize the law fully. Hence it favours a simple and flexible legal system (Li, 1970). Practice guidelines and systems are established for resolving disputes by amicable means.

Like many other countries, the PRC adopts bifurcation between domestic and foreign dispute resolution mechanisms.

### An informal and flexible legal system

The PRC legal system is marked by its informality and flexibility, which imply low expectations on the part of officials concerning any particular legal rule (Li, 1970). Based on underlying principles pronounced in substantive legislation, particularly in the 1987 General Principles of Civil Law, informal negotiation for a required solution may be possible for a civil case. Likewise, informality can be seen in Art.9 of the 1991 Civil Procedural Law (CPL) which, in domestic cases, requires the court to explore mediation to resolve disputes before judgment. With such a legal system, foreigners have to learn non-confrontation and less visible ways to resolve disputes.

### The development of a dispute resolution mechanism

#### Before the PRC era

In the mid-19th century, Western powers entering China for large scale trade insisted on using their commercial law in extra-territorial courts. After the establishment of the Republic of China, the Nationalist government attempted to create a Western style legal system to avoid resolving foreign-related disputes in extra-territorial courts. Power struggles and civil wars did not give the plan a chance to materialize.

### The PRC era

Since the PRC government came into power, its attitude towards law has been different from that of the capitalist Western powers. In 1954, building upon the work of revolutionary mediation committees, rules for the People's Mediation Committees were promulgated to resolve domestic disputes (Feinerman, 1995). These rules were not for formal court procedures, and most civil disputes were resolved under the informal system, involving settlement by compromise rather than by judicial decision.

Although the 1954 Constitution of the PRC had provisions for court administration in principle, the Organic Law of the People's Court (Organic Law of PC) was adopted in 1979; the Civil Procedure Law (Provisional) was not enacted until 1982. With the growing importance of foreign trade and market economy, pursuant to the 'Open Door' policy in the 1980s, a legal framework for resolving foreign-related disputes was established gradually. The basic approach was to retain the informal system widely used for resolving domestic disputes and to apply the same principles to foreign-related disputes, although the latter were governed by a structured institutional and legal framework more in line with international practice.

### Bifurcation between domestic and foreign-related disputes resolution

The PRC keeps domestic and foreign-related matters carefully differentiated and controlled by separate legislative and administrative measures. To govern economic contracts in the PRC, there are the 1983 Economic Contract Law (ECL) for domestic contracts and the 1985 Foreign Economic Contract Law (FECL) for foreign-related contracts.

Domestic economic contracts are governed exclusively by PRC law and may not be arbitrated outside the PRC. Until the domestic arbitration commission is set up under the new 1995 Arbitration Law, domestic disputes can be mediated by a local Mediation Committee under the supervision of basic People's Courts.

Art.2 of the 1985 FECL has laid down strict requirements for an economic contract to be considered as foreign-related. Art.304 of the 1992 Opinions of the People's Supreme Court on Civil Procedure Law (Opinion on CPL) explains that civil cases involving foreign parties are those 'civil cases in which one party or both parties are foreigners, stateless persons, foreign enterprises or foreign organizations; or in which the legal fact for establishment, modification or termination of the civil legal relationship occurred in a foreign country, or in which the object of the action is located

in a foreign country'. Only when a contract has passed these qualifying hurdles can subsequent disputes arising out of it be subject to a whole set of special rules for resolving foreign-related disputes under PRC law. Special procedures are also provided in Part IV of the Civil Procedure Law for dealing with foreign-related cases if a dispute or the enforcement of an award is referred to a People's Court.

The deeply rooted mediation culture in China has always been part of the foreign-related dispute resolution mechanism which is the CIETAC. Art.37 of the 1985 FECL requires that any dispute arising out of a foreign-related contract ought, if possible, to be settled by the parties through consultation or mediation by a third party. If it cannot be resolved, the dispute can be submitted to CIETAC or another arbitration body in accordance with a written arbitration agreement. CIETAC operates a combined mediation/arbitration system to resolve disputes. Hence the PRC arbitration legal provisions have significant implications for amicable dispute resolution mechanisms.

### Criteria for foreign-related contracts

A domestic transaction involving a foreign party is not automatically regarded as a foreign-related contract. If the foreign party's rights and duties are only ancillary to the 'main object' of the contract, it will be treated as a domestic contract. Under PRC law, most joint ventures and foreign-financed property development enterprises are classified as a Foreign Invested Enterprise (FIE), which is a legal entity registered in the PRC. In *China International Construction Consultant Corp. v Beijing Lido Hotel Company* (1992), the Beijing Intermediate People's Court ruled that the FIE did not have the required foreign-related elements for its disputes to be accepted by CIETAC (Lewis and Ip, 1995). Para.1(3) of the 1987 Response of the Supreme People's Court to Certain Questions Concerning the Application of the Foreign Economic Contract Law (Response of SPC concerning FECL) also confirms that the provisions of the 1985 FECL shall not apply to economic contracts involving an FIE established within the PRC territory.

By virtue of Art.244 of the 1991 CPL and Art.5(1) of the 1985 FECL, the parties to a foreign-related contract are allowed to select the applicable law and court jurisdiction of a place with a real connection to the dispute. If the parties have not agreed upon the applicable law for resolving disputes, the People's Court will use the 'closest connection test' as laid down in paras 2(6)(i) to (xiii) of the 1987 Response of SPC concerning FECL to determine the applicable law. However, disputes arising from a Chinese-foreign joint venture contract to be performed in the PRC will be

governed by PRC law and come under the jurisdiction of the People's Court because of Art.246 of the 1991 CPL and Art.5(2) of the 1985 FECL. Property development contracts which involve foreign parties but are executed in the territory of the PRC will fall within the scope of Art.243 of the 1991 CPL.<sup>1</sup> This type of contract will most probably be subject to the PRC law on domestic dispute resolution mechanisms.

### The consolidating 1990s

In the first half of the 1990s, under the Socialist Market Economy, the workload for resolving foreign-related disputes in the PRC increased enormously. In terms of cases submitted in 1993, Beijing was the world's largest international arbitration centre after the ICC (Cheng, 1994). The accumulation of experience in dispute resolution in the PRC prompted the enactment of the Arbitration Law, effective since September 1995.

One of the key intentions of the new legal provisions is to separate the administration of both domestic and foreign-related arbitration commissions from direct government control. Under the new Arbitration Law, a non-governmental organization called the China Arbitration Association will be set up to oversee domestic and foreign-related arbitration commissions. CIETAC is confirmed as the sole institution to handle foreign-related disputes. This foreign-related dispute resolution mechanism is subject to the CIETAC Arbitration Rules made under the 1995 Arbitration Law in line with international practice.

The dramatic increase in workload and the corresponding importance of mediation within an arbitration process can be seen in Table 1 (extracted from a publication in Chinese by the CIETAC Secretariat (1995), and also based on responses from CIETAC Secretary General, Mr. Zhu Jianlin, to the author's enquiries in September 1996).

The statistical data in Table 1 also reveal that construction-related cases rarely fall within CIETAC's jurisdiction. This is consistent with the legal analysis in the previous section, viz. that property development contracts with foreign investment in the PRC seldom are classified as foreign-related under PRC law.

### Special features of the amicable dispute resolution mechanism

#### 'Stand-alone' mediation

Apart from the CIETAC's combined mediation and arbitration process, mediation can be a 'stand-alone' process for resolving disputes at the Beijing Conciliation Centre created under the China International Chamber of Commerce or at its provincial centres.

**Table 1** Statistical data on CIETAC cases

1985	37 cases accepted in total
1986	75 cases accepted in total
1987	129 cases accepted in total
1988	162 cases accepted in total
1992	267 cases accepted in total; of these, 236 cases were concluded as follows 196 cases in Beijing: 60% arbitrated and award made; 13% settled by mediation with consent award made 27% withdrawn before arbitration commenced (only one case construction related)
1993	486 cases accepted in total 389 cases in Beijing (only 1% construction related) 57 cases in Shenzhen 40 cases in Shanghai (only 1 case construction related). of the 486 cases, 294 cases were concluded as follows 217 cases concluded in Beijing 70% arbitrated and award made (only 1 case construction related) 11% settled by mediation with consent award made 19% withdrawn before arbitration commenced (only 1 case construction related)
1994	829 cases were accepted in total 600 cases in Beijing 141 cases in Shenzhen 88 cases in Shanghai of the 829 cases, 615 cases were concluded as follows 75% cases arbitrated and award made (only 3 cases construction related); 7% cases settled by mediation with consent award made 18% cases withdrawn before arbitration commenced (only 1 case construction related)
1995	902 cases were accepted in total; of these, 892 cases were concluded as follows 81% cases arbitrated and award made (only 3 cases construction related) 7% cases settled by mediation with consent award made 12% withdrawn before arbitration commenced

Alternatively, 'joint conciliation' can be carried out according to the mediation rules at a centre agreed between the Chinese and the foreign party.

The setting up of mediation centres and rules which closely resemble international practice is primarily

based on trust and mutual respect among the parties involved. Such rules include the Conciliation Rules of the Beijing Conciliation Centre, the Beijing-Hamburg Conciliation Rules of the Beijing-Hamburg Conciliation Centre, the Beijing-New York Conciliation Rules and the UNCITRAL Conciliation Rules.

### Combination of mediation and arbitration

Combining mediation and arbitration to resolve civil disputes is unique to the PRC, with characteristics built into CIETAC's foreign-related dispute resolution mechanism. The following sections discuss the combined CIETAC mediation/arbitration mechanism (see CIETAC Secretariat, 1995).

The combined mechanism is governed by the PRC law specially drafted to deal with foreign-related disputes. Legal provisions can be found in the above mentioned Arbitration Law, Civil Procedure Law and Foreign Economic Contract Law. Detailed procedures are laid down in Art.46-51 of the CIETAC Arbitration Rules. The characteristics of the combined mechanism can be summarized as follows.

1. Mediator and arbitrator are the same person (which is not the case in a 'stand-alone' mediation).
2. The mediation is an integral part of the arbitration, in the same tribunal. A mediated settlement will be handed down as an enforceable arbitration award. If no settlement is reached, the same tribunal automatically will revert to arbitration proceedings.
3. Mediation will be carried out only at the request of both parties, without obligation.
4. The mediation process will be extremely informal and flexible. As reflected in Art.47 of the CIETAC Arbitration Rules, there is no set rule to be followed; a tribunal may conduct mediation 'in any way it deems appropriate'.
5. The aggrieved party can apply to the People's Court for revocation of an award under Art.58 of the 1995 Arbitration Law.<sup>2</sup> If the winning party applies for enforcement of the award, the aggrieved party can apply to the People's Court for refusal of enforcement on grounds set out in Art.260 of the 1991 CPL.<sup>3</sup>

### The mediator's role

The role of a mediator is to investigate the facts and set out clearly to the parties the weaknesses and strengths of their claims. The parties are encouraged to reassess each other's underlying problems and compromise wherever possible. The mediator's role can be summarized as follows.

1. To suspend the arbitration proceedings and commence mediation at any time during arbitration if both parties agree to settle their dispute by mediation.
2. To facilitate communication between the parties, including holding 'caucus sessions'.
3. To investigate actively and understand the parties' underlying problems and intentions. Without being under any obligation to give reasons, the mediator may suggest solutions to the parties, wherever possible.
4. Information obtained during the mediation process must not be disclosed or re-used by the mediator or the parties on other occasions, including subsequent arbitration if the mediation fails to produce a result, as this would contravene Rule 51 of the CIETAC Arbitration Rules. Para. 3 of Art.58 of the 1995 Arbitration Law provides for the aggrieved party to apply to the Intermediate People's Court for revocation of an arbitration award.
5. To assist in drafting a settlement agreement and hand it down as an enforceable arbitration award if settlement is agreed between the parties.
6. If settlement is unlikely, or if the parties do not want to continue further, the mediator will conclude the mediation stage and revert to an arbitration process, with the same tribunal (note that under the UNCITRAL Model, this is prohibited).

The qualifications required of a mediator in a combined mediation/arbitration process are the same as those of an arbitrator under Art.13 of the 1995 Arbitration Law.<sup>4</sup> Art.67 provides that foreigners with the right qualifications can be appointed; in 1994, there were 86 foreigners and 213 Chinese arbitrators on the CIETAC panel.

### Advantages of the combined mediation/arbitration mechanism

The combined mediation/arbitration mechanism has been producing successful results in the PRC, at least for domestic cases. This 'oriental experience' has attracted much attention in the international dispute resolution community.

The PRC arbitration institution reckons that the combined mediation/arbitration mechanism offers the following advantages (CIETAC Secretariat, 1995).

1. Time and resources are saved by avoiding the need to proceed through a different tribunal if mediation fails.
2. The success rate is higher than in 'stand-alone' mediation.
3. The mediation settlement will be handed down as an enforceable arbitration award, in contrast to

'stand-alone' mediation awards which constitute only a contractual obligation.

4. After the mediation process, whether settlement is achieved or not, the parties will understand each other better. This tends to preserve good relationships after the final award.

### **Evaluation of the combined mediation/arbitration mechanism**

A research report on Alternative Dispute Resolution (ADR) services in the United States (Brett *et al.*, 1996) indicates that about 78% of cases referred to mediation are resolved, and mediation has a number of other advantages over arbitration: mediation participants are more satisfied than arbitration participants with the process, its implementation and outcome, as well as with its effect on the parties' relationship. The study also concludes that, when interest-based mediation is combined with an advisory opinion, the advisory opinion leads to an additional 20% increase in the success rate. The PRC combined mediation/arbitration practice allows a mediator to assume an advisory role. This may be one of the reasons why it is effective. However, as pointed out by Fellows and Hancock (1994), culture has a significant impact on domestic issues and disputes. The success in resolving domestic disputes in the PRC with the combined mediation/arbitration practice has much to do with Chinese culture, and with a lack of alternatives for locals.

Both the popularity and the effectiveness of applying the same combined mediation/arbitration mechanism for resolving foreign-related disputes are cast into doubt by many (Feinerman, 1995). Sceptics think that if friendly settlements were an easy option for foreign investors in the PRC, the parties would have settled before their disputes were taken to the formal channel under the CIETAC monopoly. CIETAC also concedes that the role of mediation within the arbitration process is losing its significance. The success rate of settling CIETAC cases through mediation within arbitration processes dropped from 50% in pre-1984 to 30% in post-1984 years (CIETAC Secretariat, 1995). The CIETAC statistical data in Table 1 show that the contribution of mediation within arbitration towards facilitating a settlement is diminishing: disputes resolved by methods other than arbitrated awards dropped from 40% in 1992 to 19% in 1995, and consent awards through mediation dropped from 13% in 1992 to 7% in 1995.

The mediation process may be used, by an unscrupulous party, as a delaying tactic (Brooker and Lavers, 1994). However, for foreign-related disputes in the PRC, mediation is not a prerequisite to commencing arbitration; mediation therefore cannot

be forced upon the other party for delaying purposes. With the combined mediation/arbitration practice in the PRC, if a party doubts the other party's sincere wish to mediate, it can switch to arbitration without wasting time and money to instigate another arbitration tribunal; this will improve the parties' sincerity when mediating for a settlement.

For domestic disputes, Art.9 of the 1991 CPL is not clear regarding voluntary requirements for mediation. In a recent discussion with delegates from the PRC, it was confirmed that even for domestic dispute resolution mediation is only a recommended option for the parties.<sup>5</sup> To say that mediation is compulsory or constitutes a prerequisite to commencement of arbitration of PRC domestic disputes is an overstatement. Indeed, Art.51 of the new Arbitration Law states expressly that 'an arbitration tribunal shall mediate when both parties voluntarily seek mediation'.

Another query concerning the combined process is whether the arbitrator can really disregard all the information gathered during a mediation process and retain the objectivity needed to discharge fairly an arbitrator's duties in the subsequent proceedings. Whether this criticism is valid depends on whether one accepts resolving disputes by arbitration with an acceptable level of 'rough justice' for commercial survival, rather than points of law and rules of evidence. The information gained during mediation definitely will help the arbitrator to understand and process a case faster. It seems that the PRC flexible and informal legal system lends itself to such 'rough justice', with good reason in this respect.

### **Implication for foreign-related construction disputes**

#### **Policy overrides law**

The Preamble of the 1982 Constitution of the PRC confirmed that the Chinese Communist Party's leadership in China on the road to socialist modernization. Li (1984) mentions '... that the laws of the state must be guided by the policies of the Party is a basic condition in guaranteeing that the laws of our country are in keeping with the interests of the people and do not deviate from the socialist track. It is also an important means of guaranteeing that the Party exercises political leadership over the state'.

The PRC leadership accepts that Party policies can only guide the law in principle, not take its place. In reality, new policy often overrides laws by way of interpretation by the local Judicial Committee set up under Art.11 of the 1979 Organic Law of PC and by the local Party political-legal committee (Finders, 1995). The cumulative effect is uncertainty in the legal and

dispute resolution which was criticized by Lubman, (1983).

### Local judicial system and 'local protectionism'

Under Art.62(7) of the 1982 Constitution of the PRC, the President of the Supreme People's Court is elected by the National People's Congress (NPC). Art.67(11) provides the Standing Committee of the NPC with the power to appoint and remove vice presidents and judges of the Supreme People's Court and members of its Judicial Committee, at the suggestion of the President of the Supreme People's Court. According to Art.101, local People's Congresses above county level can elect and have the power to dismiss presidents of People's Courts at a corresponding level. The Standing Committees of local People's Congresses have similar powers to those of the Standing Committee of the National People's Congress, i.e. to appoint and remove key personnel of local People's Courts at the corresponding level. The Courts' judicial independence is provided in Art.126 which lays down that the People's Court shall, according to law, exercise judicial power independently. Art.30 of the 1979 Organic Law of PC also confirms the Court as the state's highest judicial organ which supervises the administration of justice by local People's Courts at various levels.

However, as Finder (1995) points out, Party and state officials customarily discuss the handling of important local issues. For legal issues, the forum for discussion is the local Party political-legal committee, which is established at all levels of government. This is intended to ensure that central policy is implemented correctly at all levels of local government. The committee discusses only very important cases, particularly those involving prominent persons. Since the reform in the 1980s, the central government has delegated much of its power to local government; many government controls also have been transferred to semi-government or private enterprises, and rely on market forces. However, this well-intended decentralization of power has been exploited by the unscrupulous for local- and self-interest. Moreover, the budgets of the local courts and the job security of their personnel are dependent on the local authorities. Local judicial systems are gradually being subjected to indirect control by local governments with local economic interests (Shi, 1995). Mr. Ren Jianxian, the President of the Supreme People's Court in his 1991 address to the National People's Congress, said (Bersani, 1992) 'In recent years, local protectionism has seriously affected the judicial work of the courts. In order to protect local interests, some courts deviated from the principle of basing their judgement on the facts and

using the law as the basis of their decision and were partial to local parties'.

That 'local protectionism' is operating to a damaging extent has been recognized by the central leaders in the PRC. Different organizations place vested interests above any others. In order to safeguard their economic interests, local administrators retain power over, and are reluctant to co-operate with, other administrative departments. This bewilders Chinese leaders, not to mention foreigners, as to where and with whom power lies. Delay in and denial of enforcement of arbitration awards are often due to 'local protectionism'. Because of site location of real estate property development, construction disputes suffer more directly from the ill effects of 'local protectionism'. In the National Conference on Politics and Law held in December 1992, Supreme Court Justice Mr. Ren Jianxian acknowledged the problem and delivered his 'five prohibitions'<sup>6</sup> to counter 'local protectionism' (Cheng *et al.*, 1995).

### Enforcement of awards

The main objective of the winning party after mediation/arbitration is to see to it that the award is honoured, voluntarily or through enforcement by the People's Court. The enforcement provisions of the CIETAC Rules have not changed much between 1956 and 1995. During this period, the majority of applications for enforcing international arbitration awards were granted. Table 2 presents the results of a very limited survey carried out by the CIETAC Secretariat on a random sample of Intermediate People's Courts' decisions in 21 major cities (CIETAC Secretariat, 1995). According to the limited statistical data, only 3 out of 28 enforcement applications were refused. One of the refused cases was lodged at the wrong level of the Court and thus rejected. The two others were refused because enforcement would be against the public interest of the PRC. According to the statistics, in theory, foreign parties need not worry about the enforcement provisions. However, it is precisely the lack of clarity of the 'against public interest' rule that worries them. Because of the legacy of the PRC's centrally planned economy to its current socialist market economy, very often the Chinese side of the contracting parties would be a semi-privatized arm of a government department or a joint venture with links to government bodies. The business survival of the Chinese party can be vital to a locality's whole economy. This is particularly the case for large construction projects. When disputes and enforcement issues arise, it is unclear how the 'against public interest' rule will be interpreted (CIETAC Secretariat, 1995).

### Intervention from local People's Courts

The 1995 Arbitration Law allows the parties to a dispute to select their preferred arbitration venue. However, application for enforcement of an arbitration award has to be made to the local Intermediate People's Court where the respondent resides or has property. The Chinese respondent may have its strongest political and economic ties at a local base, from where it can influence the court. Enforcement cases may simply be delayed while the respondent is busy diverting assets, as alleged in the 'Rev Power Dispute' case (Mora, 1995).

### Conclusion

The cause of disputes is closely related to the culture of a society. This agrees with the proposition advanced by Ridgeway (1994) that 'the cause for disputation is cultural'. The culture of a society is not a constant: it changes with the society's social and economic environment. Different methods for resolving disputes also are social phenomena closely associated with a society's unique culture. Chinese culture is said to be in favour of using amicable mechanisms to resolve disputes, and the deeply rooted informal mediation culture is incorporated in the more structured arbitration process dictated by legal rules. The combined mediation/arbitration mechanism is popular and successful in the PRC because of its unique legal system and the social obligations of its people.

However, this culture is changing with the political-economic transformation of the PRC. It is doubtful whether this brand of 'oriental' attitude can be found consistently within international communities: each of them has a different culture and comes together for business reasons only. It is sensible that PRC law does not impose a prerequisite of mediation before commencement of an arbitration for foreign-related dis-

putes.

According to Chornenki (1995), the three As of selection for mediation are adjudication, attitude and alternative. For the PRC scenario, one could argue that the emphasis on mediation is attributed to the fact that, under the circumstances, the parties have no 'alternative' more attractive than the amicable dispute resolution mechanism available there. The combined mediation/arbitration mechanism in the PRC is there for the 'adjudicative' sort who genuinely needs it. Used with a sincere 'attitude', the combined mediation/arbitration system can provide all its inherent advantages.

Disputes involving foreign-financed construction projects will have to rely on the PRC domestic mediation/arbitration system. The damaging effect of 'local protectionism' and the interference with the local judiciary by local government in the name of protecting the local economy are acknowledged at leadership level in the PRC. To improve the legal framework, new legislative measures, such as the Civil Procedure Law and the Arbitration Law, have been introduced gradually, and concrete efforts are being made by the Supreme People's Court to ensure that local judiciaries are consistent and under strict supervision by the central authority. This suggests that the country is taking steps in the right direction.

In Hong Kong and Singapore, which have a similar Chinese culture, the dispute resolution methods have been changing from the traditional informal amicable way to the more formalized Western style (Brooker and Lavers, 1994). In the PRC, commercial activity is being globalized and the legal framework for dispute resolution is improving. The CIETAC statistical data on cases of recent years seem to suggest that a trend towards a more formalized dispute resolution system, similar to what has happened in Hong Kong and Singapore, is emerging also in the PRC.

On the other hand, it is interesting to see that Western communities, increasingly too tied up with legal rules, are fascinated by and are exploring the amicable dispute resolution method. One can wonder whether we are chasing round a circle between informal amicable and 'judicialized' dispute resolution.

**Table 2** Statistical data of enforcement of awards in the PRC Courts

	1990	1991	1992	1993	Sept. 1993	Total
Enforcement applications	2	6	4	6	10	28
Refused enforcement cases	0	1	1	1	0	3

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## Endnotes

<sup>1</sup>Art. 243 of the CPL: 'Where an action is instituted against a defendant without a domicile inside the territory of the PRC concerning a dispute over a contract or rights and interests in property, if the contract was executed or performed within the territory of the PRC, or the subject matter of the action is located within the territory of the PRC, or . . . the action may come under the jurisdiction of the People's Court of the place where the contract was executed . . .' Note that if parties insist on having their action outside the PRC, the PRC People's Court could carry on and try the case. The problem will arise when a party seeks enforcement of an award in the PRC People's Court.

<sup>2</sup>Art. 58 of the 1995 Arbitration Law: 'where the parties concerned provide evidence to testify that the arbitration award has one of the following circumstances, they may submit an application to the intermediate People's Court in the place where the arbitration committee is located for the revocation of the arbitration award: (1) no arbitration agreement was reached; (2) matters decided in the award fall beyond the scope of an arbitration agreement for the authority of an arbitration institution; (3) the composition and procedure of the arbitration tribunal are against the procedure stipulated by the law concerned; (4) evidence on the basis of which the award was made had been forged; (5) the other party withheld evidence sufficient enough to produce an impact on the impartiality of an arbitration; or (6) in the course of arbitration, the arbitrators demanded and/or accepted bribes, practiced graft or made an award that perverted the law. Where the examination and verification of an award by a collegiate bench formed by the People's Court involve any of the circumstances set forth in the preceding paragraph, the People's Court shall rule to vacate the award. Where the People's Court determines that the award is contrary to the public interest, it shall rule to vacate the award'.

<sup>3</sup>Art.260 of the 1991 CPL: 'Where a respondent presents evidence which proves that an arbitral award made by the foreign-related arbitration institution of the PRC involves any of the following circumstances, the People's Court shall, after examination and verification by a collegiate bench formed by the People's Court, rule to deny enforcement: (1) where the parties failed to include an arbitration clause in their contracts or subsequently reach a written arbitration agreement; (2) where a respondent failed to obtain a notice of appointing an arbitrator or carrying out the arbitration proceedings, or to express his opinions due to reasons for which he was not responsible; (3) where the forma-

tion of an arbitral tribunal or arbitration procedures failed to comply with the rules of arbitration; or (4) matters decided in an award fell beyond the scope of an arbitration agreement or the arbitral authority of an arbitration institution'.

<sup>4</sup>Art.13 of the Arbitration Law: 'Arbitrators engaged by the arbitration committee should be just and have moral integrity. Arbitrators should meet one of the following requirements: (1) have been engaged in arbitration works at least eight years; (2) as a lawyer for at least eight years; (3) as a judge for at least eight years; (4) have been engaged in law research or teaching and have the senior titles concerned; or (5) be equipped with legal knowledge and have been engaged in economic or trade work with senior titles or the same qualification'. The arbitration committee should have a list of arbitrators in different specializations.

<sup>5</sup>In September 1996, the author discussed the mediation topic with Mr Xu Song-lu, one of the 10 delegates from the PRC Ministry of Construction to Hong Kong. Mr Xu is a domestic arbitration practitioner in Beijing and a Deputy Secretary-General of the China Construction Association, Ministry of Construction.

<sup>6</sup>The five prohibitions are: (1) prohibiting local party cadres from interfering with the judicial process in an attempt to protect local interest; (2) prohibiting government officials and other parties from making threats or launching campaigns against judicial officers carrying out the execution of a court order; (3) prohibiting judicial organs from practising favouritism towards local parties by making unfair rulings or avoiding their proper responsibilities; (4) prohibiting officials of the public security and procuratorial organs from interfering with the adjudication of economic cases by treating contract and debt disputes as offences; and (5) prohibiting any organ or individual from obstructing the execution orders of the People's Courts in any other way.

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