POST-HANDOVER RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS BETWEEN MAINLAND CHINA AND HONG KONG SAR: 1999 AGREEMENT VS. NEW YORK CONVENTION

MAURICIO J. CLAVER-CARONE*

I. INTRODUCTION

On July 1, 1997, in a reversion of sovereignty from the United Kingdom, Hong Kong became a Special Administrative Region of Mainland China.[1] Despite a complete transfer of sovereignty, Hong Kong's position as one of the world's busiest transport centers, seventh-largest trading entity, and third largest financial center guaranteed it a high degree of autonomy from Mainland China.[2] Under the concept of "one country, two systems," Hong Kong retains a semiautonomous legal system and its separate status as a member of the World Trade Organization and as a signatory to international conventions and agreements.[3] However, analysts have raised questions regarding the post-1997 classification of trade and transactions: will parties to Hong Kong-Mainland China transactions continue to be classified as "foreign" or "domestic?"[4]

It is the practice of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (generally referred to as the

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* LL.M., 2001, Georgetown University Law Center; J.D., 2000, Catholic University of America. Mauricio J. Claver-Carone is now on the faculty of Catholic University's law school in Washington, D.C.

1. *See* Benjamin P. Fishburne & Chuncheng Lian, *Commercial Arbitration in Hong Kong and China: A Comparative Analysis*, 18 U. PA. J. INT'L ECON. L. 297 (1997) (citing Joint Declaration on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 1985 Gr. Brit. T.S. No. 26 (Cmnd. 9543) [hereinafter 1984 Joint Declaration]). Mainland China refers to any part of China other than Hong Kong, Macao, and Taiwan. The term People's Republic of China (PRC) will be used interchangeably when referring to a specific Mainland Chinese government entity or political body.

2. The 1984 Joint Declaration and the Basic Law of the Hong Kong Special Administrative Region guarantees Hong Kong a high degree of autonomy. *See* 1984 Joint Declaration, *supra* note 1, para. 3; Basic Law of the Hong Kong Special Administrative Region of the P.R.C., art. 2 (1990) [hereinafter Basic Law]; Jianming Shen, *Cross-Strait Trade and Investment and the Role of Hong Kong*, 16 WIS. INT'L L.J. 661, 675 (1998).

3. *See* Shen, *supra* note 2, at 671-72.

4. *See id.* at 664.

"New York Convention") that has first shed light on this interesting query. Both Hong Kong and Mainland China are parties to the New York Convention, since 1977 and 1987 respectively.[5] From 1987 until 1997, Hong Kong and Mainland China mutually recognized and enforced each other's arbitral awards under the New York Convention's simple procedures for foreign arbitral awards.[6] Due to the mutual application of this internationally accepted enforcement mechanism, the maturity of its legal professionals, its geography, its climate, its language versatility, and even its cuisine, Hong Kong became a popular arbitration venue for transactions involving Mainland China.[7]

Nevertheless, upon the 1997-handover, international practitioners and investors began to question the applicability of the New York Convention between Hong Kong and Mainland China. Legal and business periodicals reported the new relationship between Hong Kong and Mainland China no longer fit the New York Convention's article I definition of "foreign" awards—awards between two sovereign states—making arbitral awards between Hong Kong and Mainland China unenforceable.[8] These periodicals highlighted the flight of arbitration disputes from Hong Kong to third-country jurisdictions, particularly the Singapore International Arbitration Centre.[9] For the most part, these periodicals failed to consider the possibility of contin-

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5. *See* 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention]; *New York Convention: Contracting States and Reservations*, 1 Int'l Com. Arb. (Oceana) (1996). Bruce R. Schulberg, *China's Accession to the New York Convention: An Analysis of the New Regime of Recognition and Enforcement of Foreign Arbitral Awards*, 3 J. CHINESE L. 117 (1989).

6. *See* Fishburne & Lian, *supra* note 1, at 331.

7. *See* Alistair Crawford, *Plotting Your Dispute Resolution Strategy: From Negotiating the Dispute Resolution Clauses to Enforcement Against Assets*, *in* DISPUTE RESOLUTION IN THE PRC 22, 32, 34-35 (Asia Law & Practice Ltd., 1995).

8. The first sentence in article I of the New York Convention states: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal." *See* New York Convention, *supra* note 5, art. I; *Fears Mount for Hong Kong as a Centre of Arbitration*, INTERNATIONAL COMMERCIAL LITIGATION, Feb. 1, 1999, *available at* 1999 WL 14253768; *Trials and Tribulations*, BUS. CHINA, Mar. 13, 2000, at 5.

9. The Singapore International Arbitration Centre, established in 1991, enjoys the language and proximity benefits of Hong Kong. However, according to Section 34A of Singapore's Legal Profession (Amendment) Act of 1992, foreign lawyers in Singapore may only appear in the arbitration proceedings if accompanied by a local lawyer. *See* Crawford, *supra* note 7, at 34; *Hong Kong: ADR Developments*, 10 WORLD ARB. & MEDIATION REP. 159 (1999).

ued mutual enforcement under the second sentence of article I of the New York Convention, which allows enforcement if Mainland China considered Hong Kong awards as "not domestic."[10]

On June 21, 1999, Hong Kong and Mainland China attempted to settle many of these concerns by signing an agreement ("1999 Agreement") that established the current framework for the reciprocal enforcement of arbitral awards under terms similar to the New York Convention, while linguistically regarding these awards as "domestic."[11] The 1999 Agreement, and its subsequent application, faces the challenge of balancing a respect for Mainland China's sovereign authority with the legitimate concerns of Hong Kong's local and international business community.[12] Unfortunately, the 1999 Agreement is subject to various inconsistencies, which puts Hong Kong awards in a less advantageous position than under previous New York Convention practice, and indicates Mainland China's increasingly protectionist attitude toward its own arbitration institutions. The result might be a further diminishment of Hong Kong's status as a venue for China-related arbitration disputes, not only vis-à-vis third-country venues, but also in relation to Mainland China's arbitration institutions.

This Note seeks to alert practitioners of the challenges presented by current Chinese law concerning the enforceability in Mainland China of Hong Kong arbitral awards, accordingly demonstrating that the best venue for Mainland China-related arbitration is a foreign venue outside of Hong Kong or Mainland China. To do so, this Note will analyze the roots and results of the friction and inconsistencies that exist in domestic and international law on the recognition and enforcement of arbitral awards in Mainland China and Hong Kong. Parts II and III examine the parallel development of arbitration law in Mainland China and Hong Kong respectively, concentrating on both the rules for arbitration and the enforceability of foreign arbitral awards. Part IV explores the interaction between the laws of Mainland China and Hong Kong. Part V analyzes the outstanding challenges posed by the

10. *See* New York Convention, *supra* note 5, art. I ("[The 1958 Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement is sought.").

11. *See* 1999 Agreement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region, June 21, 1999, *in The Mainland and Hong Kong Reach an Agreement on the Reciprocal Enforcement of Arbitral Awards*, 10 WORLD ARB. & MEDIATION REP. 210-11 (1999) [hereinafter 1999 Agreement] (summarizing the 1999 Agreement).

12. *See One Country, Two Legal Systems? Report of the Joseph R. Crowley Program*, 23 FORDHAM INT'L L.J. 1, 49 (1999).

current arbitration framework in Mainland China to the enforcement of Hong Kong and foreign awards. Part VI concludes by examining the relevant considerations in choosing arbitration in a foreign venue as the best form for a dispute resolution clause in a Mainland China-related contract.

II. INTERNATIONAL COMMERCIAL ARBITRATION IN MAINLAND CHINA

A. *Institutional Framework of International Commercial Arbitration in Mainland China*

Historically, arbitration institutions in Mainland China were divisible into those handling foreign-related disputes and those hearing purely domestic disputes.[13] While these distinctions are no longer relevant in practice, the two foreign-related arbitration institutions officially recognized in Mainland China are the China International Economic and Trade Arbitration Commission (CIETAC) and the Chinese Maritime Arbitration Commission.[14] The promotion of CIETAC and its predecessor institutions has been the paramount objective in the development of arbitration legislation and regulations in Mainland China. Today, CIETAC is one of the busiest arbitration institutions in the world.[15]

On May 6, 1954, the Government Administration Council of the PRC ("the State Council") formerly established the Foreign Trade Arbitration Commission of China (FTAC).[16] This entity, created within the China Council for the Promotion of International Trade, became the first international commercial institution in Mainland China.[17] Pursuant to this directive, FTAC promulgated the first set of arbitration rules in Mainland China, the Provisional Rules of the Foreign Trade Arbitration Commission of China ("FTAC Rules"), which went into effect on

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13. *See* Donald C. Clarke & Angela H. Davis, *Dispute Resolution in China: The Arbitration Option*, *in* CHINA 2000 151 (1999).

14. The Chinese Maritime Arbitration Commission, whose jurisdiction is limited to maritime matters, will not be discussed in this paper. *See id.*

15. *See id.* at 152; Sally A. Harpole, *Following Through on Arbitration*, CHINA BUS. REV., Sept.-Oct. 1998, at 33.

16. *See* 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 *translated in* 3 Laws & Regs. of the P.R.C. Governing Foreign-Related Matters (The China Legal System Publ'g House) 1907 [hereinafter FTAC Decision]; WANG SHENG CHANG, RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA 59 (1996) [hereinafter, CHANG, RESOLVING DISPUTES].

17. *See* FTAC Decision, *supra* note 16; CHANG, RESOLVING DISPUTES, *supra* note 16, at 59.

March 31, 1956.[18]

Despite the creation of FTAC in the 1950s, it was not until Deng Xiaoping's "open door" economic reforms in 1978 that international arbitration became an active source of commercial dispute resolution in Mainland China.[19] In accordance with these economic reforms, the State Council expanded the jurisdiction of the FTAC to cover various aspects of Mainland China's economic relationship with foreign countries.[20]

On June 21, 1988, the State Council renamed the FTAC as CIETAC.[21] In terms of foreign investment, CIETAC is by far the most important arbitration institution in Mainland China, as the PRC has entrusted it with the resolution of economic and trade disputes that are foreign or foreign-related.[22] The PRC has empowered CIETAC with the 1989 CIETAC Rules, a new set of arbitration rules replacing the FTAC Rules. The State Council has since updated the CIETAC Rules in 1994, 1995, and 1998.[23] As a result of these updates, today CIETAC applies the 1995 and 1998 CIETAC Rules in arbitrations.

B. *Legislative Framework for the Enforcement of Foreign Awards in Mainland China*

In addition to the CIETAC Rules, companies conducting arbitration or seeking the enforcement of foreign arbitral awards in Mainland China are subject to a complex and often conflicting legislative frame-

18. *See* NEIL KAPLAN ET AL., HONG KONG AND CHINA ARBITRATION CASES AND MATERIALS 307 (1994).

19. This can be evidenced by the number of cases submitted for arbitration in the China International Economic and Trade Arbitration Commission (CIETAC) and its predecessors FTAC and FETAC. Between 1956 and 1966, only 20 cases were submitted for arbitration. This number would decrease to 7 between 1967 and 1976, but would increase to 150 between 1977 and 1986. With Mainland China's accession to the New York Convention in 1987, CIETAC received 129 submissions that year alone, with this number increasing yearly. By 1995, CIETAC was receiving over 900 yearly submissions, making it one of the busiest international arbitration centers in the world. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 68. *See also* Wang Sheng Chang, *A Comparative Study of the Rule of the Arbitration Institute of the Stockholm Chamber of Commerce and the Arbitration Rules of the China International Economic and Trade Arbitration Commission*, 9 J. INT'L ARB. 93, 96 (1992) [hereinafter Chang, *A Comparative Study*].

20. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 59.

21. *See* Chang, *A Comparative Study*, *supra* note 19, at 96.

22. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 59; Randall Peerenboom, *The Evolving Framework for Enforcement of Arbitral Awards in the People's Republic of China*, 1 ASIAN-PAC. L. & POL'Y J. 12, 3 (2000).

23. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 60-61.

work. Prior to 1982, parties could only enforce foreign-related arbitral awards in Mainland China through voluntary compliance or a bilateral trade agreement.[24] Voluntary compliance simply sought the good will of the losing party. In the event this failed, Mainland China adopted a generally accepted international trade practice by including arbitration clauses in bilateral trade agreements.[25] To provide a comprehensive solution to this dilemma, Mainland China enacted a series of laws that provided increasing power to tribunals to recognize and enforce foreign arbitral awards. These laws include the 1982 Civil Procedure Law, the 1991 Civil Procedure Law, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Arbitration Law of 1994.[26] Together, these laws provide an extensive legislative framework for the recognition and enforcement of foreign arbitral awards in Mainland China.

1. 1982 Civil Procedure Law

The Civil Procedure Law (for Trial Implementation) of 1982 ("1982 Civil Procedure Law") was the first national legislation that provided a basis for the enforcement of domestic and foreign arbitral awards.[27] As such, it was very restrictive in its scope and application.

The 1982 Civil Procedure Law only recognized domestic awards adjudicated by the officially sanctioned arbitration institutions of Mainland China.[28] Accordingly, ad hoc awards were unrecognizable. Furthermore, the 1982 Civil Procedure Law failed to provide Mainland Chinese courts with authority to review domestic arbitral awards. Therefore, under the 1982 Civil Procedure Law, Mainland Chinese courts

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24. *See* Peerenboom, *supra* note 22, at 13.

25. *See* James V. Feinerman, *The History and Development of China's Dispute Resolution System*, in DISPUTE RESOLUTION IN THE PRC: A PRACTICAL GUIDE TO LITIGATION AND ARBITRATION IN CHINA 5, 18-19 (Chris Hunter ed., 1995); *see, e.g.*, Agreement on Trade Relations Between the United States of America and the People's Republic of China, July 7, 1979, U.S.-P.R.C., art. VIII, § 3, 31 U.S.T. 4651 ("Each Contracting Party shall seek to ensure that arbitration awards are recognized and enforced by their competent authorities where enforcement is sought . . . .").

26. Additionally, there are various provisions dealing with international commercial arbitration in other statutes dealing with international trade and investment. *See, e.g.*, Law of the People's Republic of China on Sino-Foreign Cooperative Enterprises, April 13, 1998; Law of the People's Republic of China on Foreign Capital Enterprises, April 12, 1986; Law of the People's Republic of China on Economic Contracts Involving Foreign Interest, July 1, 1985; Law of the People's Republic of China on Sino-Foreign Equity Joint Ventures, July 8, 1979.

27. *See* Civil Procedure Law of the People's Republic of China, *translated in* 1 LAWS AND REGS. OF THE P.R.C. GOVERNING FOREIGN-RELATED MATTERS 304 [hereinafter Civil Procedure Law].

28. *See id.* at 328.

executed domestic awards from officially sanctioned institutions without review.[29]

Although the 1982 Civil Procedure Law provided a legal basis for enforcement of foreign arbitral awards, it was subject to impractical complications. The 1982 Civil Procedure Law only permitted the enforcement of "judgments or rulings" by foreign courts.[30] A party seeking to have a foreign arbitral award enforced must have it converted into a foreign court judgment.[31] However, the need to obtain a final court judgment undermines the entire purpose of utilizing arbitration in the first place. Due to these complications, no courts in Mainland China enforced foreign arbitral awards before the PRC's accession to the New York Convention.[32]

2. 1958 New York Convention

On December 2, 1986, Mainland China acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[33] Through this accession, which went into force on April 22, 1987, Mainland China sought to implement a "policy of opening China to economic cooperation with foreign countries and facilitat[e] the country's foreign trade."[34] Mainland China conditioned its accession with a reciprocity reservation, which limits enforcement of foreign arbitral awards in China to awards made in states party to the Convention ("Convention States").[35] The reciprocity reservation applies only to the site of the arbitration and not the nationality of the opposing party.[36] Mainland China also conditioned accession to the Convention upon a "commercial" reservation which limits enforcement to those disputes arising out of "commercial legal relationships of a contractual or non-contractual nature."[37]

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29. *See* Peerenboom, *supra* note 22, at 14.

30. *See* Civil Procedure Law, *supra* note 27, art. 204.

31. *See* Michael Moser, *China and the Enforcement of Arbitral Awards (Part 2)*, ARBITRATION, May 1995, at 132; Peerenboom, *supra* note 22, at 14.

32. *See* CHENG DEJUN ET AL., INTERNATIONAL ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA 8 (1995).

33. *See* New York Convention, *supra* note 5; CHANG, RESOLVING DISPUTES, *supra* note 16, at 14.

34. *See* Schulberg, *supra* note 5, at 117 (quoting Premier Zhao Ziyang in *China to Ratify Convention on Foreign Arbitration*, XINHUA GENERAL OVERSEAS NEWS SERVICE, Nov. 27, 1986).

35. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 14.

36. *See* Schulberg, *supra* note 5, at 133.

37. The Supreme People's Court Notice on Implementation of the New York Convention provides an extensive list of commercial relationships that give rise to this reservation. According to this list, which is not exclusive, this reservation applies to various economic

On April 10, 1987, the Supreme People's Court issued regulations implementing the New York Convention in Mainland China.[38] These regulations mostly address issues of jurisdiction, venue, and time limitations. Significantly, the regulations granted the Intermediate People's Court authority to refuse enforcement of a foreign arbitral award through the technical or procedural grounds listed in article V of the New York Convention.[39] Additionally, the regulations specifically recognize that the Convention prevails when it conflicts with Mainland China's Civil Procedure Code, but that the 1982 Civil Procedure Law shall apply to the enforcement of awards made in the territory of a

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rights and obligations that arise out of contract, tort, and statutory law. *See* Supreme People's Court Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (April 10, 1987), *reprinted in* DEJUN ET AL., *supra* note 32, at 1173 [hereinafter 1987 Notice]; Schulberg, *supra* note 5, at 134; *see also* Andrew Kui-Nung Cheung, *Enforcement of Foreign Arbitral Awards in the People's Republic of China*, 34 AM. J. COMP. L. 295, 299 (1986) (describing generally the practical and legal considerations of enforcing a foreign arbitral award in Mainland China); CHANG, RESOLVING DISPUTES, *supra* note 16, at 14.

38. *See* 1987 Notice, *supra* note 37.

39. There are four levels of courts in the PRC: the Supreme People's Court, the High People's Courts, the Intermediate People's Courts, and the Basic Level People's Courts. For a further discussion on the court structure in the PRC, see Schulberg, *supra* note 5, at 135; Peerenboom, *supra* note 22, at 8. Article V(1) of the New York Convention states:

> 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; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

New York Convention, *supra* note 5, art. V(1).

non-contracting party State ("non-Convention awards").[40] This provision put non-Convention awards at a severe disadvantage, due to the inadequacy of the 1982 Civil Procedure Law.

3. 1991 Civil Procedure Law

The adoption of the 1991 Civil Procedure Law mitigated the severity of the 1982 Civil Procedure Law concerning non-Convention awards. On April 9, 1991, the President of the PRC promulgated the new Civil Procedure Law of the People's Republic of China ("1991 Civil Procedure Law").[41] This new law completely replaced the original 1982 version and contained various new provisions on the enforcement of arbitral awards. The most significant of these provisions is article 269, which revised the impractical basis for the enforcement of foreign arbitral awards under the 1982 Civil Procedure Law.[42] The new article 269 codified into law the authority of the Intermediate People's Court to refuse enforcement of foreign arbitral awards on grounds listed in the New York Convention.[43]

Article 269 also directs the Intermediate People's Court to "handle [enforcement and recognition] matters pursuant to international treaties which China has concluded or to which China is a party or in accordance with the principle of reciprocity,"[44] referring primarily to the New York Convention.[45] Therefore, upon a strict reading of the provision, previously barred parties could now argue that the Intermediate People's Courts should treat non-Convention awards in the same manner as Convention awards. Furthermore, under article 260 of the 1991 Civil Procedure Law, grounds for refusing to enforce foreign-related arbitral award are similar to those in the New York Convention.[46] However, despite the apparent equalization of Convention and non-Convention awards, many experts believe that in practice it remains very difficult to obtain enforcement of non-Convention awards in Mainland China.[47] Consequently, the most effective way to obtain

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40. *See* Schulberg, *supra* note 5, at 134.

41. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 13.

42. *Compare* 1991 Civil Procedure Law, art. 269, *reprinted in* Peerenboom, *supra* note 22, *with* Civil Procedure Law, *supra* note 27, art. 195.

43. *Compare* 1991 Civil Procedure Law, art. 269, *reprinted in* Peerenboom, *supra* note 22, *with* New York Convention, *supra* note 5, art. V(1).

44. *See* 1991 Civil Procedure Law, art. 269, *reprinted in* Peerenboom, *supra* note 22.

45. *See id.*

46. *See* 1991 Civil Procedure Law, art. 260, *reprinted in* Peerenboom, *supra* note 22.

47. *See* Peerenboom, *supra* note 22, at 27.

enforcement of foreign arbitral awards in Mainland China continues to be through bilateral treaty provisions or reciprocal recognition under the New York Convention.[48]

4. 1994 Arbitration Law

Prior to August 1994, in Mainland China there existed fourteen laws, eighty administrative regulations and nearly two hundred local regulations that contained clauses on arbitration.[49] Many of these laws and regulations were contradictory in nature.[50] Apparently, the government of Mainland China recognized the urgent need for a comprehensive and uniform arbitration law governing both domestic and international arbitration. Therefore, on August 31, 1994, Mainland China adopted the Arbitration Law of the People's Republic of China ("1994 Arbitration Law").[51] While recognizing different treatment for domestic and international arbitration, the 1994 Arbitration Law codified these two types of arbitration into a single law.[52]

The 1994 Arbitration Law sanctioned the establishment of over 140 independent domestic arbitration commissions in centrally governed municipalities, capital cities of provinces, and other major commercial and industrial cities in Mainland China.[53] The most famous and active of these local arbitration commissions is the Beijing Arbitration Commission.[54] In order to supervise and formulate domestic rules for the local arbitration commissions, the 1994 Arbitration Law created the China Arbitration Association.[55] The 1994 Arbitration Law authorized the China Chamber of International Commerce to organize and

48. *See id.*

49. For further explanation, see the written explanation of the draft Arbitration Law by the Director of the Legislative Working Committee of the Standing Committee of the Chinese People's Congress, as presented in CHANG, RESOLVING DISPUTES, *supra* note 16, at 12.

50. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 12.

51. *See* Arbitration Law of the People's Republic of China, Aug. 31, 1994, *translated in* CHINA LAWS FOR FOREIGN BUSINESS (CCH) ¶ 10-470 [hereinafter 1994 Arbitration Law]. The 1994 Arbitration Law, which came into effect on September 1, 1995, consists of eight chapters and eighty articles.

52. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 12.

53. These local institutions were seen as a way to alleviate CIETAC's steadily increasing caseload. The institutions allowed for a quicker resolution period and, to attract parties, lower fees. *See* Clarke & Davis, *supra* note 13, at 152-53. For a summary of cases admitted and concluded by CIETAC from its inception through 1995, see CHANG, RESOLVING DISPUTES, *supra* note 16, at 68-70; 1994 Arbitration Law, *supra* note 51, chap. II.

54. *See* Clarke & Davis, *supra* note 13, at 152.

55. *See* 1994 Arbitration Law, *supra* note 51, art. 15.

establish foreign-related arbitration commissions in addition to local commissions.[56] Based on the language of the law, it was left unclear whether local arbitration commissions also had jurisdiction over foreign-related disputes.[57] The "1996 Notice on Several Issues that Need to be Clarified in Order to Implement the Arbitration Law of the People's Republic of China" ("1996 Notice") resolved this ambiguity by recognizing the ability of local arbitration commissions to adjudicate foreign-related disputes, but only with the voluntary consent of both parties.[58]

The 1996 Notice reveals another complex dilemma in the legislative framework of arbitration in Mainland China: the recognition and enforcement of foreign arbitral awards. In 1995, the Supreme People's Court issued the "Notice on Court's Handling of Issues in Relation to Matters of Foreign-Related Arbitration and Foreign Arbitration" ("1995 Notice"),[59] which forbids any Intermediate People's Court from refusing to enforce an arbitral award by a foreign institution or a foreign-related arbitral award by an authorized Chinese institution without the consent of the Supreme People's Court.[60] Although the language of the 1995 Notice may seem broad, note that the only Chinese institution authorized to adjudicate a foreign-related award is CIETAC.[61] Therefore, the 1995 Notice applies only to foreign awards issued by third-country arbitration institutions and to foreign-related arbitrations undertaken by CIETAC; it does not protect foreign-related arbitrations undertaken by one of the more than 140 local arbitration commissions.[62]

As a final point, while the 1994 Arbitration Law provides a comprehensive framework for arbitration in Mainland China, one cannot completely disregard previous Mainland Chinese legislation, which is still applicable in many circumstances. For example, article 70 of the

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56. *See id.* art. 66; CHANG, RESOLVING DISPUTES, *supra* note 16, at 23.

57. *See* 1994 Arbitration Law, *supra* note 51, ch. II.

58. The General Office of the State Council enacted the 1996 Notice on June 10, 1996. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 22-23.

59. *See* Notice of the Supreme People's Court Regarding Several Issues Relating to the People's Courts Handling of Foreign-related and Foreign Arbitration Matters (NSC Aug. 18, 1995), *translated in* JOHN SHIJIAN MO, ARBITRATION LAW IN CHINA (2001) [hereinafter 1995 Notice]; Peerenboom, *supra* note 22, at 28.

60. *See* 1995 Notice, *supra* note 59. The Supreme People's Court's 1998 Notice Relating to the People's Courts' Setting Aside of Foreign-Related Arbitral Awards ("1998 Notice") sets a two-month deadline for setting aside an award pursuant to the procedures of the 1995 Notice. *See* Peerenboom, *supra* note 22, at 43; Clarke & Davis, *supra* note 13, at 156.

61. *See* Clarke & Davis, *supra* note 13, at 156.

62. *See id.*

1994 Arbitration Law provides special provisions for foreign-related arbitration, but it is properly read in conjunction with article 260 of the 1991 Civil Procedure Law.[63] Furthermore, regarding the recognition and enforcement of foreign arbitral awards, the 1994 Arbitration Law is not of primary importance because its main focus is the invocation of relevant provisions of the 1991 Civil Procedure Law.[64] Therefore, the terms of accession to the New York Convention and the relevant provisions of the 1991 Civil Procedure Law, as incorporated into the 1994 Arbitration Law, govern the recognition and enforcement of foreign arbitral awards in Mainland China.[65]

III. INTERNATIONAL COMMERCIAL ARBITRATION IN HONG KONG SAR

A. *Institutional Framework of International Commercial Arbitration in Hong Kong*

In Hong Kong, as in the PRC, there is a distinction between international and domestic arbitrations.[66] However, unlike Mainland China, this distinction only affects the type of rules applied to the arbitration, and not the choice of institution in which to engage in the arbitration.

The Hong Kong International Arbitration Centre (HKIAC) is the dominant arbitration institution in Hong Kong.[67] It was established in 1985 as a not-for-profit company in an effort to make Hong Kong one of the major international arbitration destinations in the world, particularly as regards to shipping and Asia-related disputes.[68] Although the HKIAC initially received a portion of its funding from the Hong Kong government, it is currently constitutionally and financially independent of the government.[69] HKIAC offers its facilities for the staging of and provides an applicable set of rules for both domestic and interna-

63. *See* 1991 Civil Procedure Law, *reprinted in* Peerenboom, *supra* note 22, at 28, *incorporated by reference in* 1994 Arbitration Law, *supra* note 51, art. 70.

64. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 23.

65. *See* Peerenboom, *supra* note 22, at 13.

66. Mainland Chinese law also refers to "international" arbitration as "foreign-related." Furthermore, Mainland Chinese law is more restrictive in its definition of "international" arbitration. *See* 1995 China International Economic and Trade Arbitration Commision, Arbitration Rules, art. 2, *translated in* CHINA LAW & PRACTICE, Dec. 1995-Jan. 1996, at 21 [hereinafter CIETAC Arbitration Rules].

67. *See* Neil Kaplan & Tony Bunch, *Hong Kong*, *in* 2 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 3-4 (Jan Paulsson ed., 2001).

68. *See id.*; Jonathan Rostron, *Arbitration Law Helps to Repair Standing, Legal Limbo of the Handover Ends*, S. CHINA MORNING POST, May 1, 2000, *available at* http://archive.scmp.com.

69. *See* Crawford, *supra* note 7, at 33; Kaplan & Bunch, *supra* note 67, at 3.

tional arbitrations.[70] For international arbitrations, the HKIAC adopted the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"), but for domestic arbitrations, the HKIAC applies a set of domestic arbitration rules.[71] However, disputing parties are also free to adopt their own ad hoc rules.[72]

HKIAC's institutional or ad hoc rules operate within Hong Kong's legislative framework for arbitration. Today, arbitration legislation in Hong Kong features two ordinances: one for international arbitration and the other for domestic arbitration.[73] This division is far more simple and liberal than the legislative regime for arbitration in Mainland China.[74] Nevertheless, particularly regarding the recognition and enforcement of foreign arbitral awards, there is problematic friction between the legislative frameworks of Mainland China and Hong Kong.

B. *Legislative Framework for the Enforcement of Foreign Arbitral Awards in Hong Kong*

1. Early Enforcement of Domestic Arbitral Awards

Before 1982, arbitral awards rendered within Hong Kong were subject to legal review by the local courts.[75] Hong Kong's principles of arbitration derived from the United Kingdom. As a result, domestic commercial arbitration in Hong Kong was subject to the British common-law "special case" or "case-stated" procedure.[76] Through this procedure, parties could compel arbitrators to submit a point of law to the courts for judicial determination.[77] This special case procedure remained viable until 1982.

2. 1958 New York Convention

Although Hong Kong courts enforced domestic awards under the British common law, they recognized and enforced foreign arbitral

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70. *See* Fishburne & Lian, *supra* note 1, at 301.

71. *See id.* For the complete text of the UNCITRAL Arbitration Rules, see UNCITRAL Arbitration Rules, April 28, 1976, *reprinted in* 4 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (Pieter Sanders & Albert Jan van den Berg eds., 1998) [hereinafter UNCITRAL Rules].

72. *See* Crawford, *supra* note 7, at 32.

73. *See* Fishburne & Lian, *supra* note 1, at 299-300.

74. *See* Crawford, *supra* note 7, at 33.

75. *See id.*

76. *See* W. LAURANCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 595 (2d ed. 1990).

77. *See id.*

awards under the terms of the New York Convention.[78] In 1977, the United Kingdom acceded to the New York Convention on behalf of Hong Kong.[79] Like Mainland China, the ascension was subject to a reciprocity reservation.[80] Under this reservation, Hong Kong agreed to apply the New York Convention on a reciprocal basis to awards "made in the territory of other contracting states."[81] After the reversion of Hong Kong to PRC sovereignty in 1997, Hong Kong remained a party to the New York Convention through Mainland China's ratification.[82] Henceforth, Hong Kong awards remain enforceable in other Convention States and awards rendered in other Convention States remain enforceable in Hong Kong.[83]

3. 1982 Arbitration Ordinance

In 1979, the British Parliament adopted new legislation that abolished the special case procedure.[84] Following the British example, Hong Kong adopted a new law, the 1982 Arbitration Ordinance, to further accommodate international business and to promote the viability of Hong Kong as an international arbitration venue.[85] Even though, like the British legislation, the 1982 Arbitration Ordinance formally abolished the old British special case procedure, courts retained the ability to review arbitral decisions in most circumstances.[86] The 1982 Arbitration Ordinance retained the right of a disputing party to appeal an arbitration award to a Hong Kong court for judicial review.[87] Moreover, the 1982 Ordinance also retained the jurisdiction of Hong Kong courts to determine any question of law arising out of arbitration.[88] In practice, the only real development for arbitral institutions was that the 1982 Ordinance allowed parties to "waive" their right to

78. *See New York Convention: Contracting States and Reservations*, 1 Int'l Com. Arb. (Oceana) (1996).

79. *See id.*

80. *See id.*

81. *See id.*

82. *See* Peerenboom, *supra* note 22, at 31.

83. *See id.* The question regarding the enforceability of Mainland Chinese awards in Hong Kong and vice-versa will be discussed independently, *infra*, Part IV.

84. *See* CRAIG ET AL., *supra* note 76, at 466-67.

85. *See id.* at 595; *see also* Arbitration Ordinance (1982) (H.K.), *reprinted in* INTERNATIONAL COMMERCIAL ARBITRATION: COMMERCIAL ARBITRATION LAW IN ASIA AND THE PACIFIC, No. 4, H.K. 1 (Kenneth R. Simmonds & Brian H.W. Hill eds., 1987).

86. *See* CRAIG ET AL., *supra* note 76, at 466-67; Fishburne & Lian, *supra* note 1, at 298.

87. *See* Arbitration Ordinance (1982) (H.K.), *supra* note 85, ch. 341.

88. *See id.*

appeal questions of law to the local courts by means of a mutually agreed to clause in the arbitration agreement.[89]

The 1982 Arbitration Ordinance was the first attempt by Hong Kong, in order to follow international practice, to distinguish between international and domestic arbitrations.[90] Despite this effort, the same 1982 Arbitration Ordinance governed both types of arbitration. It was not until 1990, as a result of the efforts of Hong Kong's Law Reform Commission, that Hong Kong established truly separate legislative regimes for international and domestic arbitrations.[91]

4. 1990 Arbitration Ordinance

Under the Arbitration Ordinance of 1990, the government of Hong Kong adopted the UNCITRAL Rules, previously employed by HKIAC, as the law applicable to all international arbitrations.[92] Today, the 1990 Arbitration Ordinance governs international arbitrations, but the 1982 Arbitration Ordinance continues to apply to domestic arbitrations.[93] However, to allow contractual flexibility and to accommodate the international business community, both Arbitration Ordinances remain interchangeable through the contracting parties' choice of law provision.[94] Parties to a domestic arbitration can mutually agree to use the UNCITRAL Rules, while parties to an international arbitration can mutually agree to follow the domestic arbitration system of the 1982 Arbitration Ordinance.[95] Therefore, in practice, parties choose which set of rules to apply to their arbitration, with the statutory distinction used only as default.

IV. MUTUAL ENFORCEMENT OF FOREIGN AWARDS: HONG KONG AND MAINLAND CHINA

The significance of arbitration is that it provides a neutral tribunal in a neutral venue, which is effectively enforceable as a result of the

89. *See id.* § 23B.

90. *See* CRAIG ET AL., *supra* note 76, at 595.

91. *See* Fishburne & Lian, *supra* note 1, at 299.

92. *See* UNCITRAL Model Law on International Commercial Arbitration, Jun. 21, 1985, *reprinted in* ARON BROCHES, COMMENTARY ON THE UNCITRAL MODEL LAW ON COMMERCIAL ARBITRATION app. A (1990) [hereinafter UNCITRAL Model Law]; Arbitration Ordinance (1990) (H.K.), ch. 341 § 1(2), *in* 2 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 4-5 (Pieter Sanders & Albert Jan van den Berg eds., 1998).

93. *See* Kaplan & Bunch, *supra* note 67, at 1.

94. *See* Fishburne & Lian, *supra* note 1, at 300.

95. *See* Arbitration Ordinance, *supra* note 92, §§ 2L, 2M at 15; Kaplan & Bunch, *supra* note 67, at 1.

widespread ratification of the New York Convention.[96] Given the close economic ties of Hong Kong and Mainland China, even prior to the 1997 reversion, and the growing assets held in Hong Kong by Mainland Chinese companies, disputing parties perceived Hong Kong as the premier international arbitration venue for Mainland China-related disputes.[97] Furthermore, since both Hong Kong and Mainland China were independent parties to the New York Convention, pre-1997 arbitral awards had been mutually enforceable under each territory's respective reciprocity reservation.

Nevertheless, immediately following the 1997 reversion, the international business community began to question the true neutrality of Hong Kong as a venue for arbitral disputes related to Mainland China.[98] In particular, the concerns regarded the composition of Hong Kong's new legislative body, the amount of influence Mainland China exerted over Hong Kong's affairs, and the independence of Hong Kong's post-1997 judiciary.[99] Eventually, Hong Kong's stable legal environment and the high degree of party autonomy reserved by the UNCITRAL Rules began to dissipate some of these initial concerns.[100] However, international arbitration practitioners continued to raise concerns about potential ambiguities that affect the enforceability of post-1997 Hong Kong awards in Mainland China and, of apparent lesser importance, the enforceability of Mainland China awards in Hong Kong.[101]

A. *Post-1997 Status of the New York Convention: Hong Kong and Mainland China*

Hong Kong originally became a party to the New York Convention through the United Kingdom's ratification.[102] Upon its reversion to Mainland China in 1997, Hong Kong remained a party to the Convention through the terms of Mainland China's 1987 accession to the Convention.[103] Therefore, Hong Kong arbitral awards currently re-

96. *See* Crawford, *supra* note 7, at 26.

97. *See* Kaplan & Bunch, *supra* note 67, at 3-4; Rostron, *supra* note 68; *Trials and Tribulations*, *supra* note 8, at 5.

98. *See Fears Mount for Hong Kong as a Centre of Arbitration*, *supra* note 8.

99. *See* Crawford, *supra* note 7, at 33.

100. *See id.* at 32.

101. *See id.* at 28.

102. *See* Crawford, *supra* note 7, at 33.

103. *See id.*

main enforceable in other Convention States.[104] However, according to international arbitration practitioners, the primary problem was whether under the terms of the New York Convention Hong Kong awards would remain enforceable in Mainland China and Mainland Chinese awards would remain enforceable in Hong Kong.[105]

International arbitration practitioners felt that the language in article I of the New York Convention raised uncertainty as to the mutual recognition and enforcement of foreign arbitral awards between Hong Kong and Mainland China.[106] According to the first sentence of article I, the New York Convention applies to arbitral awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought."[107] Furthermore, the second sentence of article I states that the Convention applies to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."[108]

Practitioners felt that Hong Kong and Mainland Chinese arbitral awards would no longer be mutually enforceable under the New York Convention because they were no longer technically "not domestic."[109] Therefore, because the New York Convention is an international agreement, Hong Kong's legal relationship with Mainland China no

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104. *See* Peerenboom, *supra* note 22, at 31.

105. *See id.*

106. *See id.*

107. *See* New York Convention, *supra* note 5, art. I.

108. *See id.*

109. As foreign or foreign-related non-Convention awards, Hong Kong awards would be enforceable under article 269 of the 1991 Civil Procedure Law. The 1991 Civil Procedure Law requires that enforcement of a non-Convention foreign or foreign-related award be subject to a bilateral treaty or under the principle of reciprocity. No bilateral treaty existed in 1997 between Hong Kong and Mainland China. However, Hong Kong awards would fit under the principle of reciprocity because Hong Kong had previously recognized and enforced Mainland Chinese arbitral awards. Nonetheless, because a Hong Kong award is no longer considered foreign, it cannot be enforced as a Convention or non-Convention award. The other option would be to seek enforcement of Hong Kong awards under the domestic procedures encapsulated in article 63 of the 1994 Arbitration Law and article 217 of the 1991 Civil Procedure Law. Unfortunately, this option authorizes Mainland Chinese courts to deny enforcement of Hong Kong awards under both procedural and substantive grounds. Therefore, in order to maintain a purely procedural review mechanism, Hong Kong-Mainland China awards need to continue recognizing each other under the New York Convention or, in the alternative, Hong Kong and Mainland China need to create a new arrangement, which would maintain purely procedural grounds for review, while recognizing Hong Kong awards as domestic. This new arrangement came in the form of the 1999 Agreement. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 174-78. *See also* Peerenboom, *supra* note 22, at 26; Fishburne & Lian, *supra* note 1, at 331.

longer fit snugly within the Convention's framework.[110] Moreover, following the transfer of sovereignty, it became politically awkward for Mainland China to treat Hong Kong awards as foreign.[111] As a result, there was widespread concern that soon after the reversion Mainland Chinese courts would treat Hong Kong awards as domestic and therefore unenforceable under the terms of the New York Convention.[112]

While it was common belief that Mainland China would take the first step toward treating Hong Kong awards as domestic, the Hong Kong courts were the first to question the viability of the New York Convention's future application. Perhaps Mainland China was cautious in this area because it did not wish to diminish Hong Kong's reputation as a liberal international arbitration venue. Instead, it was Hong Kong's Court of First Instance that initially conceded that Hong Kong and Mainland China ceased to be separate parties to the New York Convention, "vis-à-vis each other."[113]

In *Ng Fung Hong Ltd. v. ABC*, Judge Findlay of Hong Kong's Court of First Instance entertained a dispute arising from an ex-parte application for enforcement of a post-1997 arbitral award by Mainland China's CIETAC in Hong Kong.[114] The plaintiff, a Mainland Chinese corporation, argued for the enforceability of Mainland Chinese awards pursuant to Section 2GG of Hong Kong's Arbitration Ordinance, while conceding the unenforceability of Mainland Chinese awards under the New York Convention.[115] Failing to raise the legal merits of the enforceability of Mainland Chinese awards under the New York Convention, Judge Findlay simply opted to accept the concession, and to express his regret on the passing of this "convenient" mechanism for mutual recognition.[116] Furthermore, concerning enforceability of Mainland Chinese awards under Hong Kong's Arbitration Ordinance, Judge Findlay concluded that Mainland Chinese awards fit neither the prerequisite definitions of "domestic international agreements" nor "international arbitration agreements," thereby leaving an action similar to common law breach of contract as the only option for enforceability.[117]

Soon after the *Ng Fung Hong* decision, Hong Kong's higher Court of

110. *See* 1999 Agreement, *supra* note 11, at 211.
111. *See* Fishburne & Lian, *supra* note 1, at 331.
112. *See* Crawford, *supra* note 7, at 33.
113. Ng Fung Hong Ltd. v. ABC, [1998] 1 HKLRD 155, 156.
114. *Id.*
115. *Id.*
116. *See id.* at 157.
117. *See id.* at 156; Clarke & Davis, *supra* note 13, at 156.

Appeal directly addressed and further elaborated on the issue of the enforceability of Mainland Chinese awards in Hong Kong. In *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*,[118] the plaintiff, Mainland Chinese company Hebei, sought enforcement in Hong Kong of a CIETAC arbitration award against the defendant, Hong Kong-based Polytek.[119] Unlike the *Ng Fung Hong* case, which involved an ex-parte application for enforcement, in *Hebei*, Hong Kong's Polytek argued against the enforcement of the Mainland Chinese award.[120] Polytek argued that the award was not enforceable under the New York Convention because the Convention, which only applies to foreign arbitration awards,[121] did not apply following the 1997 handover and the end of Hong Kong's sovereignty.[122] The Court of Appeal decided that since both the award and the original application for enforcement were made prior to July 1, 1997, the Mainland Chinese award was a Convention award, and therefore converted into a Hong Kong award.[123]

Outside of the holding of the case, the Court of Appeal elaborated on the status, if applicable, of Mainland Chinese awards for which post-1997 Hong Kong enforcement is sought. The three-judge panel in *Hebei* held that the intention of the New York Convention is to "facilitate the recognition and enforcement of arbitral awards made in a territory where there is one legal system in another territory with a separate (or even different) legal system."[124] Consequently, because under the "one country, two systems" concept Hong Kong has a separate and independent legal system from Mainland China, courts should give a "purposive meaning" to the term "domestic awards" within the second sentence in article I of the New York Convention.[125] Therefore, the Hong Kong Court of Appeal did not consider Mainland Chinese awards as domestic awards in Hong Kong. The Court concluded that the New York Convention should continue to apply reciprocally after July 1, 1997.[126]

Obviously, the Hong Kong Court of First Instance and the Court of

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118. *See* Hebei Imp. & Exp. Corp. v. Polytek Eng'g Co., [1998] 1 HKLRD 287.

119. *See id.* at 290.

120. *See id.*

121. *See supra* text accompanying notes 106-108.

122. *See Hebei Imp. & Exp. Corp.*, [1998] 1 HKLR at 288. On appeal, Polytek also raised issues concerning whether, pursuant to Section 44(3) of Hong Kong's Arbitration Ordinance, it would be contrary to public policy in Hong Kong to enforce the award. *See id.*

123. *See id.* at 291.

124. *Id.*

125. *Id.*

126. *See id.*

Appeal had opposing opinions of how to interpret post-1997 Mainland Chinese awards in Hong Kong under the New York Convention. However, both courts' opinions conclude by converging on a single point. They both urged the relevant Hong Kong authorities to avoid any further uncertainty by entering into an agreement with Mainland Chinese authorities and considering amendments to the appropriate Arbitration Ordinance.[127]

B. *1999 Agreement on the Mutual Recognition and Enforcement of Arbitral Awards*

On June 12, 1999, Hong Kong and Mainland China signed the 1999 Agreement providing for the reciprocal enforcement of arbitral awards[128] and implemented the 1999 Agreement in their domestic laws.[129] According to a press release issued by the government of Hong Kong, under the 1999 Agreement, the New York Convention still applies to enforcement of international arbitral awards in Hong Kong, but the Convention no longer applies to the enforcement of arbitral awards between Hong Kong and Mainland China.[130] The press release asserted that the parties crafted the terms of the 1999 Agreement in accordance with the spirit of the New York Convention.[131] Therefore, because arbitral awards between Hong Kong and Mainland China are no longer subject to international law, awards from either party are henceforth to be considered domestic.[132]

Although the new reciprocal arrangement between Hong Kong and Mainland China only became effective on February 1, 2000,[133] the 1999 Agreement allows for its retroactive implementation to the date of the

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127. *See id.* at 292; *see also Ng Fung Hong Ltd.*, [1998] 1 HKLRD at 157 (asserting that the Rules Committee should enact the appropriate amendments to the Ordinance).

128. *See* 1999 Agreement, *supra* note 11, at 210.

129. Hong Kong's Legislative Council implemented the 1999 Agreement through the 1999 Arbitration Ordinance. *See* 1999 Arbitration (Amendment) Ordinance (Jan. 2000). Mainland China implemented the 1999 Agreement pursuant to the Supreme People's Court January 20, 2000 judicial interpretation (Fa Shi [2000] No. 3). *See Trials and Tribulations*, *supra* note 8, at 5. Through this judicial interpretation, the Supreme People's Court instructed all of its national courts to enforce Hong Kong arbitral awards according to the provisions of the 1999 Agreement. *See Inland China, Hong Kong Reach Accord on Arbitration*, RENMIN RIBAO [PEOPLE'S DAILY], OVERSEAS EDITION, June 22, 1999, *available at* http://english.peopledaily.com.cn/other/archive.html (last visited Mar. 12, 2002).

130. *See* 1999 Agreement, *supra* note 11, at 210-11.

131. *See id.* at 211.

132. *See id.* at 210-11.

133. *See* Peerenboom, *supra* note 22, at 32.

handover.[134] Therefore, the 1999 Agreement permits awards made since July 1, 1997, to be reviewed under the new arrangement, and even allows for the re-application of awards refused during the interim period.[135]

The 1999 Agreement permits the High Court of Hong Kong to enforce Mainland Chinese awards made pursuant to the Arbitration Law of the People's Republic of China.[136] More specifically, it authorizes the enforcement of awards made in over 100 mainland arbitral commissions established under the auspices of the CIETAC and the China Maritime Arbitration Commission.[137] Reciprocally, it allows Mainland China's Intermediate People's Court to enforce awards made in Hong Kong pursuant to Hong Kong's Arbitration Ordinance.[138]

Procedurally, the 1999 Agreement describes the appropriate documents and translations needed for enforcement, which remain virtually unchanged from practice under the New York Convention. However, the 1999 Agreement features an interesting provision that precludes parties from simultaneously seeking enforcement in both Mainland China and Hong Kong.[139] The provision states that if the award debtor resides or has property located in both Hong Kong and Mainland China, then the applicant can proceed in one location to recover the remaining amount owed only when the enforcement of the courts in the other location is insufficient to recover in totality.[140]

The 1999 Agreement also addresses the grounds under which an applicable court can deny enforcement of a respective award.[141] The 1999 Agreement put to rest foreign investors' fears that courts in Mainland China would review Hong Kong awards under the permissive substantive standards to which domestic awards were subject.[142] Under the 1999 Agreement, the grounds for denial mirror the procedural grounds set forth under article V of the New York Convention.[143] Similar to the New York Convention, the 1999 Agreement further

134. *See* 1999 Agreement, *supra* note 11, at 212.
135. *See id.*
136. *See id.* at 211.
137. *See* Rostron, *supra* note 68.
138. *See* 1999 Agreement, *supra* note 11, at 211.
139. *See id.*
140. *See id.*
141. *See id.*
142. *See* Peerenboom, *supra* note 22, at 34.
143. *See* New York Convention, *supra* note 5, art. V. For the complete text of article V, see *supra* note 39; 1999 Agreement, *supra* note 11, at 211.

provides "public grounds" for denial of enforcement.[144] Although these public grounds had already been controversial under the New York Convention, they now encounter a new dynamic under the 1999 Agreement.[145]

V. Problems and Issues Arising From the 1999 Agreement Concerning the Enforcement of Arbitral Awards

Foreign investors must be aware of the challenges presented by the 1999 Agreement when drafting their dispute resolution clauses and choosing their arbitration venue. Today, post-1997 courts enforce arbitral awards between Hong Kong and Mainland China under the 1999 Agreement. However, to the regret of proponents who called for the relevant authorities to resolve this "inconvenient" ambiguity and to the continued concern of international arbitration practitioners, the 1999 Agreement continues to pose challenges. Many of these concerns previously existed under the New York Convention, while others have resulted directly from the 1999 Agreement. The majority of these challenges simply accentuate, with practical consequences, the inconsistencies behind the new "domestic" classification of Hong Kong-Mainland China arbitral awards. The most flagrant of these concerns are the ambiguities surrounding Mainland China's recognition of ad hoc awards, the grossly divergent Statute of Limitations provisions for the application of enforcement, the potential inapplicability of Mainland China's beneficial 1995 Notice to Hong Kong awards, and the vagueness inherent in Mainland China's definition of "public interest." Unfortunately, these concerns render Hong Kong a less attractive venue for arbitrating Mainland China disputes than foreign locations or Mainland China itself.

A. *Ad Hoc Awards*

Pursuant to article 16 of Mainland China's 1994 Arbitration Law, arbitration agreements "shall contain. . .(3) a designated arbitration commission."[146] Under article 18 of the 1994 Arbitration Law, any arbitration agreement that fails to specify a selected arbitration institution "shall be void."[147] Consequently, courts do not recognize, and thus

144. *See* 1999 Agreement, *supra* note 11, at 211-12.
145. This issue will be further discussed in Part V(D) of this Note.
146. *See* 1994 Arbitration Law, *supra* note 51, art. 16 (3).
147. *See id.* art. 18.

do not enforce, ad hoc[148] awards made within Mainland China.

While the 1994 Arbitration Law precisely indicates that domestic ad hoc awards are not recognizable within Mainland China, the status of ad hoc awards made outside of Mainland China is unclear. Even more complicated remains the issue of whether ad hoc awards made within Mainland China, pursuant to foreign institutional rules, such as the rules of the International Chamber of Commerce or the UNCITRAL Rules, would be recognizable and enforceable.[149]

Indeed, Mainland Chinese courts could find foreign ad hoc awards applying Mainland Chinese law invalid under the terms of the New York Convention. Practitioners now widely accept that due to Mainland China's accession to the New York Convention, ad hoc awards made in a Convention State are recognizable and enforceable within Mainland China.[150] However, parties to a foreign ad hoc arbitration are free to agree that Mainland Chinese law governs their dispute.[151] Under article V(1)(a) of the New York Convention, Mainland China can refuse to enforce an award if the arbitration agreement "is not valid under the law to which the parties have subjected it."[152] Since Mainland China's 1994 Arbitration Law considers ad hoc arbitrations invalid, then Mainland Chinese courts could find foreign ad hoc awards unenforceable, despite its reciprocity obligation under the New York Convention.[153]

Likewise, ad hoc awards made within Mainland China pursuant to foreign institutional rules remain subject to speculation. According to Professor Donald C. Clarke, there exists an unpublished, undisclosed document from Mainland China's Supreme People's Court that orders courts not to enforce agreements that call for arbitration in Mainland China pursuant to the UNCITRAL Arbitration Rules.[154] This alleged Supreme People's Court document directs Mainland Chinese courts to consider agreements calling for arbitration under UNCITRAL Rules as ad hoc arbitration and, therefore, unenforceable.[155] Nevertheless, Clarke indicates that other Mainland Chinese sources have informed

148. Ad hoc arbitrations can be defined as arbitrations conducted without the supervision of an institution, such as CIETAC or the HKIAC. *See* Crawford, *supra* note 7, at 30.

149. *See* Peerenboom, *supra* note 22, at 13.

150. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 29.

151. *See* Clarke & Davis, *supra* note 13, at 159.

152. *See* New York Convention, *supra* note 5, art. V (1)(a). For the complete text of article V (1)(a), *see supra* note 39.

153. *See* Clarke & Davis, *supra* note 13, at 159.

154. *See id.*

155. *See id.*

him that agreements calling for arbitration within Mainland China, under the auspices of the International Chamber of Commerce and the Singapore International Arbitration Centre, will be held valid and enforceable.[156] As a result, while not officially documented, there is evidence that courts will consider ad hoc awards made within Mainland China, pursuant to foreign institutional rules alone, unenforceable. However, if the awards are sanctioned under the auspices of an authorized foreign arbitration institution, then they are no longer ad hoc and therefore enforceable.

In light of Mainland China's efforts to modernize and liberalize its arbitration regime, including the Supreme People's Court official recognition of 1999 as the "year of enforcement," its recalcitrance against ad hoc awards is not very practical.[157] The prevailing theory behind Mainland China's resistance stems from CIETAC's unwillingness to subject itself to further competition for foreign-related arbitrations.[158] CIETAC's dominance of Mainland China's foreign-related arbitration market initially diminished as a result of the 1994 Arbitration Law and 1996 Notice, which sanctioned over 140 local institutions to also hear foreign-related arbitrations.[159] Today, CIETAC continues to be a popular arbitration venue even though many of the over 140 local institutions have become economically unviable.[160] Apparently, Mainland China believes that by recognizing ad hoc arbitrations domestically, it would not only economically destroy more local institutions, but also seriously damage CIETAC's prestige, dominance, and income.[161]

In contrast, Hong Kong's liberal arbitration regime gives disputing parties the freedom to choose the arbitration venue and rules of their choice, whether institutional or ad hoc. Since its inception, HKIAC has promoted the UNCITRAL Rules as its own institutional rules.[162] When the United Nations Commission for International Trade Law created the UNCITRAL Rules in 1976, it intended that disputing parties would

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156. *See id.*

157. In 1998, the Supreme People's Court orchestrated a national campaign to accelerate the backlog of arbitral awards. Therefore, it designated 1999 as the "year of enforcement." *See Trials and Tribulations, supra* note 8, at 6.

158. *See* Peerenboom, *supra* note 22, at 13.

159. *See id.*; *see also* CHANG, RESOLVING DISPUTES, *supra* note 16, at 22, 23 (discussing the 1996 Notice); 1994 Arbitration Law, *supra* note 51, art. 66..

160. *See* Jerome A. Cohen & Adam Kearney, *Domestic Arbitration: The New Beijing Arbitration Commission, in* DOING BUSINESS IN CHINA § 4, ch. 3.01 (2000).

161. *See* Peerenboom, *supra* note 22, at 13.

162. *See* Crawford, *supra* note 7, at 32.

adopt the rules for ad hoc arbitrations.[163] Nevertheless, the HKIAC allows parties to arbitrate under any set of rules they choose to adopt, whether institutional or ad hoc, international or domestic.[164] In the same manner as Mainland China, Hong Kong recognizes foreign ad hoc arbitrations from other contracting states to the New York Convention in accordance with its own reciprocity reservation as a Contracting State.[165]

Despite the fact that Mainland China and Hong Kong have mutually agreed that the New York Convention no longer applies between them, ad hoc awards between Hong Kong and Mainland China are recognizable in both jurisdictions. Hong Kong recognizes Mainland China ad hoc arbitrations, like it recognizes all other ad hoc arbitration without prejudice. Of course, Mainland China does not permit domestic ad hoc arbitrations, so Hong Kong is unlikely to have ever been presented with a Mainland Chinese ad hoc award to enforce.[166]

Under the 1999 Agreement, Mainland China's recognition of foreign ad hoc awards from Convention States includes Hong Kong. Hong Kong continues to be a party to the New York Convention.[167] However, the New York Convention no longer applies to the enforcement of arbitral awards between Mainland China and Hong Kong, which are instead subject to the 1999 Agreement.[168] According to the 1999 Agreement, which supercedes the 1994 Arbitration Law's prohibition on enforcement of domestic ad hoc arbitral awards, the People's Courts of Mainland China must enforce arbitral awards made in Hong Kong pursuant to Hong Kong's Arbitration Ordinance.[169] Since Hong Kong's Arbitration Ordinance recognizes ad hoc awards, then Mainland China is bound under the 1999 Agreement to recognize and enforce ad hoc awards made in Hong Kong.[170]

Although subject to different legislative arrangements, ad hoc awards between Mainland China and Hong Kong are essentially treated the same under the terms of the 1999 Agreement as they were under the terms of the New York Convention.[171] Because the 1999 Agreement's

163. *See id.* at 30.
164. *See id.* at 32; Fishburne & Lian, *supra* note 1, at 300.
165. *See New York Convention: Contracting States and Reservations*, 1 Int'l Com. Arb. (Oceana) (1996).
166. *See* 1994 Arbitration Law, *supra* note 51, arts. 16, 18; Clarke & Davis, *supra* note 13, at 159.
167. *See* Peerenboom, *supra* note 22, at 31.
168. *See* 1999 Agreement, *supra* note 11.
169. *See id.* at 211.
170. *See* 1990 Hong Kong Arbitration Ordinance, *supra* note 92, ch. 341, §§ 2L, 2M at 15-22.
171. *See* 1999 Agreement, *supra* note 11; New York Convention, *supra* note 5.

grounds for refusal of enforcement mirror those of the New York Convention, both Hong Kong and Mainland China are still bound to recognize each other's arbitral awards, including those that are ad hoc, in the same manner as under the New York Convention.[172] Thus, the concern raised by international practitioners and investors regarding ad hoc awards is not one of legal consequence.

It is politically significant that Mainland China is willing to subject itself to the inconsistency of not recognizing domestic ad hoc awards within Mainland China, yet recognize domestic ad hoc awards issued within another part of its sovereign, Hong Kong. There are two possible explanations for Mainland China's inconsistent behavior. One explanation is that Mainland China, subject to the international investment community's demand for greater contractual flexibility, seeks to eventually adjust its own domestic practice and accept ad hoc awards within its own regulatory framework.[173] However, this position is doubtful due to strong opposition from CIETAC.[174] Another notion is that this type of inconsistency is unimportant, particularly when compared to the potential awkwardness of Mainland China having to accept Hong Kong awards as "not domestic."[175] In other words, it is no more inconsistent than the overall concept of "one country, two systems."

However, there exists the potential for practical consequences, particularly regarding Hong Kong. The linguistic ambiguity has prompted international practitioners to advise in favor of "playing it safe," and therefore, against ad hoc arbitration in both Mainland China and Hong Kong.[176] Unfortunately, such advice might taint Hong Kong's liberal arbitration regime, which made it a popular international arbitration venue, regarding China-related disputes. Consequently, international investors might begin searching for seemingly safer and more consistent options, such as the Singapore International Arbitration Centre.[177] Ironically, the potential flight of arbitration customers was one of the reasons given for entering into the 1999 Agreement in the first place. Despite this linguistic discrepancy, ad hoc arbitral awards made in Hong Kong remain enforceable in Mainland China.

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172. *See* 1999 Agreement, *supra* note 11; *see also* New York Convention, *supra* note 5, art. V.

173. *See* Peerenboom, *supra* note 22, at 2.

174. *See id.* at 13.

175. *See* Fishburne & Lian, *supra* note 1, at 331.

176. *See* Clarke & Davis, *supra* note 13, at 159. Obviously, this advice is merited in Mainland China, where ad hoc arbitrations are illegal.

177. *See Fears Mount for Hong Kong as a Centre of Arbitration*, *supra* note 8; Rostron, *supra* note 68; *Trials and Tribulations*, *supra* note 8, at 5.

B. *Statute of Limitations*

Similar to ad hoc awards, the 1999 Agreement's discrepant treatment of the statute of limitations, the time limit for requesting the enforcement of an award, is an example of sacrificing legal consistency for the sake of considering arbitral awards between Mainland China and Hong Kong as domestic.[178] According to the 1999 Agreement, the statute of limitations for requesting the enforcement of an award will correspond to the domestic provisions of the venue of enforcement.[179] Since the 1999 Agreement considers arbitral awards between Hong Kong and Mainland China as domestic, it appears that these provisions should be identical, or at least, consistent. To the dismay of many international investors and practitioners, the 1999 Agreement continues to foster a worrisome linguistic discrepancy that may scare investors and practitioners away from Hong Kong as an arbitration venue for Mainland China related disputes.

In Mainland China, the statute of limitations for corporations and other organizations to submit an application for enforcement of an arbitral award is six months.[180] If one of the parties is a natural person, the time limit extends to one year.[181] In contrast, Hong Kong's statute of limitations is six years for all persons.[182] Pursuant to international practice, the statutes of limitations in both entities begin to run after the deadline for voluntary compliance prescribed in the arbitral award.[183]

This disparity between the statutes already existed under the enforcement mechanism of the New York Convention. Under article III of the New York Convention, Convention States must recognize and enforce arbitral awards in accordance with the procedure of the country where enforcement is sought.[184] Therefore both Mainland China and Hong Kong continue to enforce foreign arbitral awards under their domestic procedures. However, even though the 1999 Agreement has not dis-

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178. *See* 1999 Agreement, *supra* note 11, at 211.

179. *See id.*

180. The 1991 Civil Procedure Law states: "If either or both parties is or are citizens, the time limit for applying for enforcement shall be one year. If both parties are legal persons or other organizations, such time limit shall be six months." *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 174.

181. *See id.*

182. *See* Limitation Ordinance ch. 347, § 4 (1)(c) (1991) (H.K.).

183. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 174.

184. *See* New York Convention, *supra* note 5, art. III ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.").

turbed this practice, it has highlighted the inconsistency of having a domestic arbitral award between Hong Kong and Mainland China enforced under two different domestic statutes of limitations. As explored in the previous section, this inconsistency will scare investors and practitioners away from Hong Kong and to Mainland China or foreign venues for Mainland China-related arbitration.[185]

C. *1995 Notice*

A third concern of international practitioners and investors is the inapplicability of Mainland China's 1995 Notice to Hong Kong awards.[186] The 1995 Notice forbids any Intermediate People's Court to deny recognition and enforcement of a foreign or foreign-related award without the ultimate approval of the Supreme People's Court.[187] The purpose of the 1995 Notice is to ease foreign investors' fears of local protectionism by providing a more centralized refusal mechanism.[188] Nonetheless, some practitioners argue that this mechanism is flawed because it does not effectively prevent local protectionism: instead of submitting the awards for higher-level review, many local courts simply stall and do not act on the award.[189] Despite this detraction, the 1995 Notice is a significant advantage for arbitral awards coming under its rubric because it discourages local courts from denying enforcement of awards and subjects those courts that do deny enforcement to rigorous review.

In Mainland China, the 1995 Notice only protects foreign awards and CIETAC awards, and notably not awards from other domestic institutions. Under the 1995 Notice, lower courts need approval to deny enforcement of a "foreign" award rendered by a "foreign arbitral organ" or a "foreign-related" award rendered by a "domestic Chinese institution for foreign related arbitration."[190] Accordingly, the applicability of the 1995 Notice relies solely on the identity of the arbitration institution.[191] Among domestic Chinese institutions, the 1995 Notice only technically applies to CIETAC awards, because Mainland Chinese domestic arbitration commissions did not have the right to handle

185. *See supra* text accompanying notes 176-177.

186. *See* 1995 Notice, *supra* note 59.

187. *See supra* text accompanying notes 59-62; CHANG, RESOLVING DISPUTES, *supra* note 16, at 180.

188. *See id* at 181.

189. *See* Peerenboom, *supra* note 22, at 29.

190. *See* 1995 Notice, *supra* note 59; Clarke & Davis, *supra* note 13, at 156.

191. *See* 1995 Notice, *supra* note 59; Clarke & Davis, *supra* note 13, at 156.

foreign-related arbitrations until 1996, after the Supreme People's Court formed the 1995 Notice.[192]

Today, the 1995 Notice no longer protects Hong Kong awards enforced in Mainland China. Prior to the 1997 handover, Hong Kong awards were "foreign" awards rendered by a "foreign arbitral organ" and therefore protected by the 1995 Notice.[193] After the handover, however, Hong Kong awards are not considered foreign as they are no longer subject to the New York Convention and therefore no longer benefit from the protection of the 1995 Notice.[194]

The 1995 Notice has also boosted CIETAC's business at the expense of Hong Kong arbitration institutions. Although the Supreme People's Court issued the 1995 Notice to ease foreign investors' fears of local protectionism, it appears to actually foster Mainland China's current trend towards CIETAC protectionism. The 1995 Notice brings more business to CIETAC because among all Mainland Chinese arbitration institutions, only CIETAC arbitration awards benefit from the 1995 Notice's enforcement protection mechanism.[195] On the other hand, Hong Kong institutions, once advantaged as foreign arbitration institutions through the 1995 Notice protection in Mainland China, no longer receive such protection as domestic institutions. As a result, CIETAC awards promise parties more reliability than Hong Kong awards for enforcement in Mainland China. For this reason, parties in Mainland China-related disputes are more likely to arbitrate at CIETAC or a foreign venue, both of which receive 1995 Notice protections, over a Hong Kong venue.

D. *Public Interest Exception*

Although both Hong Kong and Mainland Chinese laws include a public interest exception, Hong Kong courts interpret this ground

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192. *See* CHANG, RESOLVING DISPUTES, *supra* note 16; Peerenboom, *supra* note 22, at 29; Clarke & Davis, *supra* note 13, at 156. Because the language of the 1995 Notice was open enough to cover all foreign-related arbitrations, some practitioners argue that courts should give the 1995 Notice broader interpretation. Thus far Chinese courts have not adopted this view. *See* Peerenboom, *supra* note 22, at 29.

193. *See* Peerenboom, *supra* note 22, at 30.

194. *See* 1999 Agreement, *supra* note 11, at 210-11. *But see* Peerenboom, *supra* note 22, at 30 (arguing that because the Supreme People's Court issued the 1995 Notice, when Hong Kong awards were still foreign, the Court implied an intention to continue treating them as foreign for purposes of the 1995 Notice after the handover; conceding, however, that it remains unclear whether Mainland Chinese courts intending to refuse enforcement of a Hong Kong award must first seek higher court approval).

195. *See* Clarke & Davis, *supra* note 13, at 156.

much more narrowly than Mainland Chinese courts. According to the New York Convention, "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 the recognition or enforcement of the award would be contrary to the public policy of that country."[196] Both Hong Kong and Mainland China have adopted this standard. Under Hong Kong's 1990 Arbitration Ordinance, which mirrors the UNCITRAL Rules,[197] the High Court of Hong Kong may refuse enforcement of a foreign arbitral award if it finds that the award conflicts with the "public policy" of Hong Kong.[198] In Mainland China, the 1994 Arbitration Law directs the Intermediate People's Courts to vacate any arbitral award that it determines to violate the "public interest."[199] The 1994 Arbitration Law incorporates language from the 1991 Civil Procedure Law, which permits the refusal of awards rendered by Mainland China's foreign-related arbitral institutions, if enforcement violates the "social and public interests of the country."[200]

As a result of the 1999 Agreement, after the handover, public policy or public interest grounds for refusing enforcement continue to exist. Under Hong Kong's 1999 Arbitration (Amendment) Ordinance, which codified the 1999 Agreement, courts can refuse enforcement of a Mainland Chinese award if Hong Kong's High Court finds it contrary to Hong Kong's public policy.[201] Similarly, under the 1999 Agreement, the Intermediate People's Court of Mainland China may refuse to enforce a Hong Kong award if it finds that enforcement would be contrary to the public interests of Mainland China.[202]

Mainland Chinese courts interpret the public interest exception more broadly than Hong Kong courts.[203] The reason for this difference

196. *See* New York Convention, *supra* note 5, art. V (2)(b).

197. UNCITRAL Rules, *supra* note 71, art. 34(2)(b).

198. *See* 1990 Hong Kong Arbitration Ordinance, *supra* note 92, § 44(3); UNCITRAL Model Law, *supra* note 92, art. 34(2)(b)(ii). This same ground exists for refusing to enforce domestic awards in Hong Kong. *See* Kaplan & Bunch, *supra* note 67, at 41-42.

199. *See* 1994 Arbitration Law, *supra* note 51, art. 58 ("Where the People's Court determines that the award is contrary to public interest, it shall rule to vacate the award.").

200. *See* 1991 Civil Procedure Law, art. 260, *reprinted in* Peerenboom, *supra* note 22, at 28; 1994 Arbitration Law, *supra* note 51, art. 58.

201. *See* 1999 Agreement § 40E (3), *supra* note 11, at 213.

202. *See* 1999 Agreement, *supra* note 11, at 212. Recall, however, that in Mainland China, Intermediate People's Courts can deny enforcement of Mainland China-related awards arbitrated in Hong Kong on public policy grounds without review. *See supra* Part V(C).

203. *See* Schulberg, *supra* note 5, at 144.

stems from the general discrepancy that exists in the overarching concept of "one country, two systems."[204]

In Hong Kong, the concept of public policy is a part of the common law tradition.[205] Pursuant to this tradition, in *Paklito Investment Ltd. v. Klockner East Asia Ltd.* Hong Kong adopted the public policy standard set forth in the U.S. case *Parsons & Whittemore v. RAKTA*, which states that "[e]nforcement of foreign arbitral awards may be denied on [a public policy] basis only where enforcement would violate the forum State's most basic notions of morality and justice."[206] Therefore, Hong Kong narrowly construes article V(2)(b) of the New York Convention, which established the public policy ground for denial of enforcement of arbitral awards.[207] Moreover, Hong Kong courts have stipulated that they will not condemn any foreign arbitral decision as having violated "most notions of morality and justice" unless it is "clearly the case."[208] Thus, Hong Kong courts rarely employ and narrowly interpret the public policy grounds to refuse enforcement of an arbitral award.

In Mainland China, a communist-civil law system, domestic awards are more vulnerable to denial on public interest grounds than foreign or foreign-related awards. In establishing its refusal of enforcement procedures within the Arbitration Law of 1994, Mainland China sought to reconcile two approaches.[209] On the one hand, Mainland China believed its courts should have the limited authority to supervise arbitration proceedings to ensure that these proceedings do no violate the public interest.[210] On the other hand, Mainland China remains aware of the international practice of limiting refusal of enforcement to the procedural grounds set forth in the New York Convention.[211] Consequently, a dichotomy currently exists in Mainland China, in which Mainland Chinese courts review both the substantive and procedural grounds of domestic awards, while they only review the procedural grounds raised in foreign awards or in foreign-related awards

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204. *See* Shen, *supra* note 2, at 662.

205. Hebei Imp. & Exp. Corp. v. Polytek Eng'g Co. Ltd., [1999] 1 HKLRD 665, 672.

206. Paklito Inv. Ltd. v. Klockner E. Asia Ltd. [1993] 2 HKLR 39, 50 (quoting Parsons & Whittemore v. RAKTA, 508 F.2d 969, 974 (2d Cir. 1974)).

207. *See Paklito Inv. Ltd.*, 2 HKLR at 50.

208. *Hebei Imp. & Exp. Corp.*, 1 HKLRD at 299.

209. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 153.

210. Although there is no clear statement of "public policy" or "public interest" in Mainland China, see Schulberg, *supra* note 5, at 142-144, for an explanation of Mainland China's concepts of Socialist "basic principles of law," "national or socialist interest," and "public interests."

211. *See id.*; *see also* New York Convention, *supra* note 5, art. V (providing a description of the procedural grounds for refusal of enforcement).

issued by CIETAC.[212] As a result, although Mainland China's public policy standard remains vague,[213] that standard is divergent between domestic and foreign or foreign-related awards.

Fortunately, under the 1999 Agreement, Mainland Chinese courts review Hong Kong awards under the same procedural grounds as they had been previously reviewed under the New York Convention.[214] Therefore, Mainland Chinese courts review Hong Kong awards under the procedural grounds reserved for foreign awards.[215] However, linguistically, Mainland China no longer recognizes Hong Kong awards as foreign. This leaves open the future possibility of Mainland Chinese courts reviewing Hong Kong awards under the foreign procedural grounds dictated in the 1999 Agreement, but with a public interest standard that also considers substantive domestic concerns. As examined above, this prospect of future changes due to the linguistic inconsistency may scare investors and practitioners away from Hong

212. *See* Peerenboom, *supra* note 22, at 34.

213. *See* Schulberg, *supra* note 5, at 142-43; *see also Hebei Imp. & Exp. Corp.*, 1 HKLRD at 672.

214. Under the 1999 Agreement, refusal is permitted where:

> (1) a party to the arbitration agreement was (under the law applicable to him) under some incapacity, or the said arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the place where the arbitral award was made; (2) the party against whom the application is filed was not given proper notice of the appointment of the arbitrator or was otherwise unable to present his case; (3) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or the award contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration will be enforced; (4) the composition of the arbitral authority or the arbitral procedure was not in accordance with agreement of the parties or, failing such agreement, was not in accordance with the law of the place where the arbitration took place; (5) the award has not yet become binding on the parties, or has been set aside or suspended by the court of competent jurisdiction or in accordance with the law of the place where the award was made.

1999 Agreement, *supra* note 11, at 211-12. The court may also refuse to enforce the award if it finds that the dispute is incapable of being settled by arbitration under the law of the place of enforcement. Also, the Mainland may refuse to enforce awards that run counter to its social public interests, while Hong Kong courts may refuse to enforce awards that run counter to the public policy of Hong Kong. *See id.*

215. The grounds for refusal in the 1999 Agreement are similar to the grounds provided under article 260 of the 1991 Civil Procedure Law, which lists Mainland China's grounds for refusal of "foreign" and "foreign-related" awards. *See* the 1991 Civil Procedure Law, art. 260, *reprinted in* Peerenboom, *supra* note 22, at 28.

Kong as a venue for Mainland China-related disputes.[216]

VI. Conclusion

Foreign investors engaged in commerce between Hong Kong and Mainland China have two important choices to make in drafting their dispute resolution clauses or agreements. The first choice involves which method of dispute resolution to apply: to arbitrate or to litigate. The second choice involves the venue for the trial or arbitration. For contracts in which one of the parties is from or a substantial amount of the assets involved are located in Mainland China and, therefore, enforcement of some type can be anticipated in Mainland China, the dispute resolution clause should call for arbitration in a foreign venue, not in Hong Kong or Mainland China.

First, arbitration is the superior choice because of the difficulty of litigation in Mainland Chinese courts. If litigation is chosen, parties can either submit their dispute to a competent Mainland Chinese court, Hong Kong court, or a third-country's court. Most practitioners do not trust Mainland China's domestic courts with handling international commercial disputes because the judiciary lacks commercial expertise, the procedures are slow and complex, and there is a danger of local protectionism.[217] Unlike Mainland China, Hong Kong courts are more sophisticated and capable of handling international commercial disputes.[218] However, since no agreement exists for the mutual recognition of court judgments between Hong Kong and Mainland China, enforcement of Hong Kong judgments in Mainland China would be equivalent to obtaining an original Mainland Chinese court decision. The final option would be to pursue litigation in a third-country, but this involves complex jurisdictional problems and, once again, the party seeking enforcement would need a subsequent judgment in Mainland China.[219] Because of the difficulties associated with litigation, arbitration is likely to remain the more popular choice for resolving Mainland China-related international commercial disputes.[220]

Second, it is best to arbitrate Mainland China-related disputes in a

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216. *See supra* text accompanying notes 176-177.

217. *See* Crawford, *supra* note 7, at 25-26.

218. *See* Peerenboom, *supra* note 22, at 8.

219. *See* Crawford, *supra* note 7, at 26.

220. This is true for other reasons, including Mainland China's attitude towards dispute resolution. *See* Crawford, *supra* note 7, at 23-24.

foreign venue. With Hong Kong's reversion to Mainland Chinese sovereignty in 1997, the question of venue has taken on a new dimension. Basically, disputing parties have three options concerning venue: they can arbitrate their disputes domestically in Hong Kong, domestically in Mainland China, or in a foreign venue, such as the International Chamber of Commerce or the Singapore International Arbitration Centre.

Domestic arbitration in Hong Kong has become the least attractive of the three choices. This stems from the inconsistent treatment of Hong Kong arbitrated awards in Mainland China. Hong Kong awards no longer enjoy the same enforcement protections as foreign and CIETAC awards under the 1995 Notice in Mainland China.[221] Due to the fact that Hong Kong arbitrations can feature ad hoc rules, a longer statute of limitations, and more narrowly interpreted public policy grounds for refusal of enforcement, as a result of the 1999 Agreement, Hong Kong has lost much of its luster as an arbitration venue for Mainland China-related disputes, as foreign investors and practitioners become wary of future inconsistent enforcement of Hong Kong arbitral awards in Mainland China.[222] Therefore, because arbitral awards lack 1995 Notice protections in Mainland Chinese courts and linguistic inconsistencies make the future enforcement of Hong Kong arbitral awards in Mainland China uncertain, today Hong Kong is the least attractive venue for Mainland China-related disputes.

While arbitration in Mainland China offers more certainty and protections than arbitration in Hong Kong, there are still a number of significant disadvantages. Domestic arbitration in Mainland China usually means arbitrating in CIETAC under the CIETAC Rules.[223] Unfortunately, the CIETAC Rules exclude the option of ad hoc arbitration, which removes the possibility of the parties designing rules for their arbitration according to their specific needs.[224] Furthermore, CIETAC awards are vulnerable to refusal of enforcement under the broadly interpreted public policy grounds of Mainland Chinese law.[225]

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221. Hong Kong awards are not recognized under Mainland China's 1995 Notice. *See* 1995 Notice, *supra* note 59. The discussion in Part V(C) of this Note further elaborates this proposition.

222. *See supra* text accompanying notes 176-177, 185, 216; *see also Trials and Tribulations*, *supra* note 8, at 5.

223. Parties should choose CIETAC for domestic arbitration in Mainland China because CIETAC is the only domestic arbitral institution that receives the protection of the 1995 Notice. *See* CIETAC Arbitration Rules, *supra* note 66.

224. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 60-61.

225. *See supra* note 210 and accompanying text.

Of course, CIETAC awards are subject to a variety of enforcement protection mechanisms within Mainland China, including the protection against denial of enforcement under the 1995 Notice, but foreign arbitral awards also enjoy these protections.[226] Overall, domestic arbitration in Mainland China is only marginally more attractive than arbitration in Hong Kong for Mainland China-related disputes.

Choosing to arbitrate in a foreign venue is the best option for arbitrating Mainland China-related disputes. Arbitrating in foreign venues allows parties to engage in arbitration under ad hoc or institutional rules, while still having the awards recognized in Mainland China through the New York Convention.[227] Additionally, similar to CIETAC awards, foreign awards receive enforcement protection under the 1995 Notice and are immune from most public policy grounds refusals of enforcement.[228] Thus, of the three options, foreign venues are the most attractive option for Mainland China-related arbitration because the awards receive the highest level of protection in Mainland China and will be enforceable even if arbitrated under ad hoc rules.

Mainland China can return Hong Kong to its previous position as the center of Mainland China-related arbitration by considering Hong Kong awards as foreign under the 1995 Notice and making stern statements that laws protecting other areas of the enforcement of Hong Kong arbitral awards will remain consistent with pre-1997 practice. This return to New York Convention practice between Hong Kong and Mainland China is doubtful, and perhaps, to protect CIETAC from excess competition, Mainland China might not want to change Hong Kong's current domestic status.[229] However, if Mainland China is truly interested in stemming the flight of arbitration from Hong Kong, as it purported to be one of the original reasons for entering into the 1999 Agreement,[230] then a return to full New York Convention practice is absolutely necessary.

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226. *See supra* text accompanying notes 59-62.

227. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 29.

228. *See supra* text accompanying notes 187, 212. "Foreign" awards are enforceable in Mainland China subject to Mainland China's "reciprocity" and "commercial" reservations. *See* CHANG, RESOLVING DISPUTES, *supra* note 16, at 14; *see also* 1995 Notice, *supra* note 59.

229. *See* Peerenboom, *supra* note 22, at 13.

230. *See* 1999 Agreement, *supra* note 11, at 210-11.