This issue of the International Law Quarterly focuses on the rise of China and the many legal issues involved. These issues affect us all.

Those in international arbitration, for example, will note that—like Latin America—Asia has seen significant growth in arbitration over the past decade.¹ The caseload statistics published by the International Chamber of Commerce (ICC) and the International Center for the Settlement of Investment Disputes (ICSID) are telling. Every year, the ICC sees a significant number of cases filed by Asian parties and, in 2009, approximately 19% of ICC cases filed involved one or more Asian parties.² China entities consistently have filed the highest number of cases for the region,³ while Singapore tends to be the most frequently chosen location.⁴

As a result of the increasing demand for the ICC’s services and in expectation of further growth in Asia, the ICC opened its first-ever branch in Hong Kong in 2008⁵ and in Singapore in January of this year.⁶ Jason Fry, Secretary General, International Court of Arbitration of the ICC, notes that: “In Asia, ICC Arbitration case numbers increased by 13% from 2008 to 2009 and the Secretariat expects this growth to continue.”⁷

Contrary to popular belief and the common narrative of travel books on China, the famous “Silk Road” was not a single, centralized trade artery linking the Asian continent to the rest of the world. Rather, this magical road “filled with riches” was a complex web of interconnected trade routes with a principal axis traversing Asia from East to West. As such, the Silk Road became a transcontinental thoroughfare of sorts where ideas, capital, and visionary risk-takers met, weaving an ever-expanding cultural and economic tapestry that would eventually extend to every region of the then-known world. Certain so-called “caravan posts” along the way served as strategic economic centers and gathering spots where a new “global language” was created and “spoken” through the exchange of money and goods. These centers of trade also served as resting places—safe-harbors where hurried travelers convened and

See “New Silk Road,” page 3
Chair’s Message

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tariat in Hong Kong is now managing 130 cases in the region. These figures stand as a testament to our decision further to enhance our presence in Asia.7

In addition to the ICC, several other reputable arbitration centers in Asia, such as the China International Economic and Trade Arbitration Commission (CIETAC), discussed in Ranes and Berryman’s excellent article elsewhere in this issue, the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC), have seen growth in filings.8 Since 2003, arbitration activity in the CIETAC has increased by 22%, totaling 548 filings in 2008.9 Arbitration filings in the HKIAC and the SIAC have almost doubled in the past ten years.10

The high growth in Asia can be attributed to a number of factors. On the forefront is Asia’s elevated activity in international commerce and its massive economic growth, despite the global financial crisis.11 China’s increasing openness to global trade and new opportunities for trade in the region make Asia, more than ever, an attractive location for investment opportunities and this, in turn, brings a higher demand for objective conflict resolution that caters to both international and local needs.12

In this issue: you will learn how to negotiate everything from arbitration clauses to entertainment contracts with Chinese parties; you will take an incredible journey investigating counterfeit goods; you will learn about China’s new international law center; and you will quickly get up to speed on recent developments in China’s tax laws, product liability law, digital censorship, as well as customs and immigration issues. No matter what your area of practice, you will definitely find this issue required reading.

I know that Editor-In-Chief Alvin Lindsay joins me in attributing the success of this issue to the fantastic job done by China/Asia Law Committee Co-Chairs Mikki Canton and Malcom Riddell. The talent in our Section is made clear by the great work the China/Asia Law Committee has done on this issue. We know you will enjoy it.

Be sure to look for the next issue of the International Law Quarterly focusing on current issues relating to international litigation and arbitration.

Edward M. Mullins
Astigarraga Davis Mullins & Grossman, PA.

Endnotes:
3 Id. See also Chong, supra note 1.
5 Id.
7 Id.
8 Philip J. McConnaughay and Thomas B Ginsburg, International Commercial Arbitration in Asia 2nd ed. pxxvii; See also Chong, supra note 1.
10 Id.
11 See Chong, supra note 1.
12 Id.
NEW SILK ROAD
from page 1

mapped their journey. This was a time of economic and cultural exchange never before seen, a path of trade and discovery down which the world has continued to travel.

Today, we are witnessing the re-birth of the unique phenomenon that was yesterday’s Silk Road. The East is once again at the forefront of a changing world economy and has given life to a “New Silk Road.” China is emerging with new intensity and hunger for recognition and economic growth not seen in centuries. Recently, this new China has quietly positioned itself at the core of the globalization process.

While China has pursued the aggressive growth of its own economy with an unmatched vengeance, it has also paid meticulous attention to forging new ties with the West and has very wisely encouraged its people to think on a more global scale by looking to potential outside partners in regions that were once off-limits. As a result of China’s internal economic growth and newly awakened entrepreneurial spirit, once lesser-known sister cities in China have joined well-established cities, such as Beijing and Shanghai, as key national and international financial, manufacturing and trade centers. As China’s influence continues to reach beyond its extensive borders, these new economic centers, or caravan posts, are emerging throughout China and throughout regions of the Western world, such as Latin America, that have positioned themselves as the eager beneficiaries of China’s international investment largesse, the key component of China’s ambitious international strategy.

Right now, the principal beneficiaries and regional economic winners of this new portal of opportunity between China and Latin America, make up the New Silk Road. As in the days of the original Silk Road, a new tapestry is being woven across Latin America, with an extended reach to other regions of the globe drawn in by the intersection of their own business interests in China and Latin America. The world is adapting to this new geo-economic and geopolitical landscape as a substantial shift in the balance of economic power takes place. These new caravan posts are fast becoming the centers of ideas, business, and trade, with cultural and strategic alliances playing out before our eyes.

Examples of these new caravan posts are many. China has a solid partnership with Brazil. Chile is rapidly gaining on Brazil in influence as China and Chile have developed closer ties in recent years due to the maternal and entrepreneurial business instincts of President Michelle Bachelet, who is focused on tapping and creating new economic opportunities for her country. Likewise, Argentina is gearing up its trade with China while Peru and Bolivia, as unexpected business allies for her country. Likewise, Argentina is gearing up its trade with China while Peru and Bolivia, as unexpected business allies, are selling military hardware to China.

Additionally, now that relations between mainland China and Taiwan have begun to warm, several more countries in Latin American and the Caribbean, previously isolated from doing business with China lest they incur the wrath of their longtime trading partner, Taiwan, will likely join the growing ranks of the caravan posts along the New Silk Road. Among these are the Dominican Republic, Costa Rica, Honduras and Guatemala. Each has tremendous potential for increased opportunities as China’s reach becomes more pervasive in the region as whole.

As to Venezuela, although China and President Chavez have increased their trade and friendly cooperation because of China’s demands for oil and Chavez’s interest in China, the fact remains that China has not joined Venezuela in an anti-United States front or coalition. China is committed to leveraging its power by opening and increasing its economic ties with the rest of the world. In stark contrast with the China of yesterday, today’s China believes in adding friends, not subtracting. It is a hungry investor rather than the old, “move-over, I’m better,” competitor.

Notably, like a smoldering volcano waiting to erupt, is the opportunity presented by a post-Castro Cuba. Recently China has become more deeply involved in Cuba and is now Cuba’s second most important trading partner after Venezuela. To date, Washington D.C., for the most part, has taken a nonchalant position on China–Cuba ties primarily because the political reality that drives Washington’s interest in Cuba is based on the Miami/Cuban-American led embargo and secondary U.S.-Cuba related matters. Perhaps, some may point out, the United States has been asleep at the switch and has undermined the longstanding cultural, historical and familiar ties that bind Cuba (as well as Brazil, Panama, Peru and others) to China. The potential for China’s increased participation in post-Castro Cuba’s efforts at rebuilding, investment, trade and overall growth is enormous. The recent announcement from Cuba upgrading the estimate of the country’s offshore oil deposits to an impressive twenty-billion barrels, if true, could have huge implications to the deepening Cuba-China relationship. In fact, China has already taken the lead—followed by Brazil and Spain—in plans to exploit Cuba’s offshore oil deposits. If Cuba emerges as a competitor to Venezuela for China’s oil thirst, the potential tension between Cuba and its current ally might eventually isolate Cuba from Venezuela, making Cuba even more dependent on its relationship with China.

Given the historical and emerging ties that bind these countries, it is more likely than not that post-Castro reform in Cuba may be led primarily by China and Latin America and not by the United States and Europe, despite their long-standing plans for a lead position in shaping the future of the island when the day comes. The continued, next page
reason for the Cuba-China alliance post-Castro is rather simple: China would permit a post-Castro Cuba to carry out swift economic reforms without much upheaval in Cuba’s present political structure. Leaders in Cuba would have the benefit of China’s financial largesse while retaining their political clout, a paradigm of engagement that the United States is unlikely to follow given its history with Cuba, although Cuba’s upgraded oil estimates may eventually impact the current U.S. embargo.

While this noteworthy rebirth of the Silk Road and its significance to the changed global economic landscape is embraced by the parties involved, it does not come without risks and challenges. The economies of Latin American countries welcome and actively pursue China. China, in turn, eagerly sees Latin America not just as a strategic business partner, but as a golden opportunity to showcase how pragmatic business sense and willingness to be open can lead to increased global cooperation and business development.

Regardless of the present economic slowdowns in areas that have roared and surged in past years, such as mining and manufacturing, Chinese involvement in Latin America will not diminish. Rather, as these opportunities contract, new areas of synergy—agriculture, health care and the environment in particular—between China and the region will draw in more Latin American countries as profitable caravan posts on the New Silk Road. As a result of this vigorous trade and commerce, China and Latin America will likely weather the sub-prime storm better than most: China, by continuing to grow from within, focusing most of its attention on itself despite continuing its strategic international investments; Latin America, by positioning itself as the one region in the Western world that enjoys superior trading, investment and social-cultural ties to China. China and all Hispanic countries (to include Spain) share a long history of friendship and cooperation. A welcome holdover of this past is the goodwill that now plays a key role in establishing and cementing growing economic ties among these countries. United, they will prosper.

Conclusion

The dragon has risen from its slumber and is wide awake. For fresh opportunity, follow the dragon to Latin America. There, it is headed to satisfy a voracious appetite for natural resources, investment prospects and global goodwill. But the dragon needs a guide who is familiar with the new territory on which it has set its sights. It needs a bridge that is solid and tested. The one who takes up the task of leading the dragon to its destination will profit handsomely and establish itself, not only as the bridge, but as the primary bridge-builder among all those who will take part in the exciting quest.

Mikki Canton, Co-Chair of the International Law Section China/Asia Law Committee, has been a well-known attorney at the local, state and federal level for over twenty-three years. Always intrigued and drawn to the emerging Asian countries, with particular emphasis on China and its desire to enter the Latin American market, in 2007 she founded AsiaAmericana International LLC, a strategic business and legal guide to international organizations and clients wishing to capitalize on the growing relationship between China and Latin America. Presently Ms. Canton’s legal practice focuses on international trade, investment and commerce in China and Latin America with emphasis on advocacy and international business transactions. Ms. Canton has written and lectured extensively in the United States and China.
Thank You to Our Annual Sponsors
Keynote Address of Justice (Ret.) Raoul G. Cantero III to the International Law Section Luncheon at The Florida Bar’s Annual Convention in Boca Raton, Florida on June 25, 2010:

The Florida International Commercial Arbitration Act

Thank you for asking me to talk to you today. When I was thinking of possible topics of interest to the International Law Section, I thought of the many cutting-edge issues regarding the arbitrability of disputes, which often involve international elements. For example, just last week, the United States Supreme Court issued its latest decision on arbitration clauses, called Rent-A-Center, West v. Jackson [No. 09–497, slip op. (June 21, 2010)]. That case comes on the heels of the Stolt-Nielsen case, issued in April. [Stolt-Nielsen S.A. v. Maersk Inc., No. 08-1198, slip op. (April 27, 2010)] And, a couple of terms ago, the Supreme Court decided another important arbitration case, Buckeye Check Cashing v. Cardegna, [546 U.S. 440 (2006)], which is of particular interest because it emanated from Florida.2 So, there is no shortage of topics to discuss when it comes to arbitration.

But even more relevant to the International Law Section is a recent development which is at the intersection of arbitration and international law, and which has occurred right here in Florida. And, it has particular relevance because you—that is, the Section—were instrumental in its adoption. And so I speak on this topic with less authority than humility, hoping I don’t say something that will lead some of you—who have greater knowledge of this development than I do because you were directly involved—to correct me.

For those of you who haven’t yet guessed, I’m referring to the Florida International Commercial Arbitration Act, which will take effect in six days, on July 1. That act will repeal the existing Florida International Arbitration Act, enacted in 1986.

The new law covers every stage of the arbitration process—from the initial requirements for arbitration agreements to the recognition and enforcement of awards.

Most notably, this new law mirrors the 2006 amended model law developed years ago by the United Nations Commission on International Trade Law, or UNCITRAL. Although, like the prior law, the new law regulates international arbitrations in Florida, the new law does what the prior one did not—it adopts the UNCITRAL model law and therefore harmonizes Florida’s international arbitration law with those of sixty other countries and six other states.

To the Section’s credit, as a result of the prior law, businesses and lawyers increasingly select Florida as the seat for international arbitration proceedings. In fact, Florida currently ranks second only to New York as the most popular state for holding international arbitrations.

With the adoption of the new law, we will now build on that foundation and, we hope, catapult the state into international recognition as the seat of choice—at least for arbitration of disputes emanating from Mexico, Central and South America, and the Caribbean. The new law epitomizes the collective efforts of practitioners, scholars, arbitrators, and business groups—many of whom are present today.

With the exception of one section, which provides immunity for arbitrators, the new legislation parallels the model law, which allows Florida to become a model law jurisdiction. This is important because such a certification legitimizes the law to an audience of international arbitration and business communities that contemplate and desire only the best arbitration venues and are accustomed to the uniform standards that the model law provides.

Replacing the prior law, however, presented a challenge to the Section and other groups working for its passage. It required proof that the revision would produce increased benefits that would offset any state costs. Thus, the Section garnered support from commercial organizations, arbitration societies such as the Miami International Arbitration Society, and business groups, to demonstrate how the model law would strengthen Florida’s position as a center for international arbitration proceedings. The Section established how the large body of interpretive case law and commentary, along with the model law’s wide acceptance by the international community, would boost the number of arbitration proceedings in Florida. International commercial arbitrations often involve large amounts in dispute, and they generate ancillary services within the seat of arbitration. When more businesses and practitioners select Florida as the...
arbitration venue, the demand also arises for translators, court reporters, expert witnesses, accountants, and investigators. So does the demand for conference rooms, transportation, restaurants, and hotel rooms.

The increase in international arbitration may also increase the amount of litigation. Yet court fees and the positive economic activity generated by the arbitrations and related litigation will balance those costs. In fact, the House Insurance, Business, and Financial Affairs Committee report determined that the cost from the increase in court filings that the new law would produce would be insignificant. Given the overall benefits of the law, the bill successfully moved through the House and Senate committees and passed by a total vote of 149 to 1.

Because the new law is specifically designed to track the UNCITRAL model law, I want to provide you some background about that model law. UNCITRAL adopted the model law to “contribute[e] to the establishment of a unified legal framework for the fair and efficient settlement of disputes.” In 1978, several international arbitration organizations determined that the interests of the international commercial arbitration community would be advanced by greater uniformity in the diverging national laws on arbitration. The model law began with a proposal to reform the New York Convention. For the next four years, a commission of sixty member states chosen to embody diverse geographic, economic, and legal classifications went through a series of consultations, drafting, and revisions. After receiving input from expert arbitrators, institutions, and sovereigns, in 1985 the United Nations adopted a resolution and approved the model law.

For twenty-five years, the model law generated an abundance of judicial and arbitral decisions that help provide businesses and practitioners greater predictability and efficiency. Despite the widespread, worldwide acceptance of the model law for international commercial arbitrations, however, the United States did not overwhelmingly adopt it at the state and federal level. In fact, the only other states to implement the model law are California, Connecticut, Colorado, Illinois, Louisiana, Oregon, and Texas. The unique nature of our federal system—and the preemptive effect of the Federal Arbitration Act—partly explains this phenomenon. Yet the FAA’s scope does not preempt arbitration laws consistent with its purpose. Moreover, arbitrators and courts frequently apply state arbitration statutes in interstate and international cases. The preempt effect also fails to explain why the federal government refuses to adopt a national version of the model law. Whatever the motivations, Florida’s adoption of the model law continues to demonstrate its leadership.

Shortly after UNCITRAL adopted the model law, the Florida Task Force on International Arbitration considered whether to adopt it as well, but it opted instead to pass the Florida International Arbitration Act. The Task Force preferred the FIAA because it believed that the model law proposed strict territorial rules, that the model law did not rigorously limit court intrusions in the arbitral process, and that the model law mandated procedural provisions while the FIAA made them non-binding, which provided greater flexibility. Even with the 2006 amendments, the model law only applies to arbitrations conducted in the state, with certain exceptions. The Florida act applied regardless of the arbitration’s location.

Therefore, since 1986 the Florida act governed international arbitration agreements in Florida. That law regulated how Florida courts could enforce agreements to arbitrate abroad, enforce arbitration agreements within Florida under the law of a different jurisdiction, and recognize and enforce awards from a non-New York convention country. The act also provided non-binding procedural rules for the conduct of international arbitrations.

The act did have some advantages over the model law. First, Florida arbitrators and practitioners have operated under that law for over twenty years and, as a result, they possess unique expertise in the law. Second, the old law included provisions not present in the model law, such as those governing the right to counsel, consolidation of proceedings, and the privacy of arbitral awards. Third, the old law presumes the presence of only one arbitrator while the model law presumes a more expensive panel of three.

Despite these benefits, the model law holds several advantages over the old law. The most important one is its uniform and widespread adoption across the world, as Florida attempts to attract more international arbitrations to the state. Also, the model law’s interpretive commentaries, opinions, and awards dwarf the few authorities that interpret the old law. This body of case law will make arbitration proceedings more predictable and uniform. Businesses can now rely on a well-known standard without the unexpected transaction costs and legal surprises that may arise in foreign jurisdictions. The model law also presumes the existence of a reasoned award, while the old law’s presumption runs the other way.

There are some other specific differences between the old law and the new one. First, the model law expands the definition of “International Arbitrations” and “Arbitration Agreements.” The old law excludes disputes over Florida property, except by express agreement, and those involving domestic relations or political disputes between governments.

Second, the model law provides grounds for challenging a potential arbitrator’s impartiality, independence, or qualifications, and for compelling disclosures from arbitrators.

Third, it provides for termination of an arbitrator’s mandate and the appointment of a substitute if the arbitrator fails to perform certain functions.

Fourth, the model law allows the termination of arbitration proceedings for reasons beyond the settlement of the dispute, including when a continued, next page
party withdraws without the opposition's objection, or when the tribunal finds the arbitration unnecessary or impossible to continue.

Fifth, the model law allows the tribunal to grant a number of interim measures under certain conditions. Finally, the model law provides “pillars” and general rules like those that require the equal treatment of all parties, and a full opportunity for all parties to present their case.

The model law’s broad procedural rules will prove helpful in establishing the general shape of a proceeding, but they do not prescribe in detail the conduct of the arbitration. For example, while the model law imposes default procedures if the parties fail to agree on the rules, it does not detail the terms of the exchange of statements and documents, interview procedures, or witness protocols.

Under the model law, parties may supplement the model law by agreeing to the application of certain rules of procedure, such as the International Bar Association's rules on the taking of evidence in international arbitrations, or the rules of arbitration institutions such as the ICC, AAA, or ICDR. These institutions have established rules of procedure that take into account new developments in the law and practice of international arbitration. They address matters like pre-hearing conferences and the conduct of proceedings. For example, the AAA rules allow for a preparatory conference for the purpose of organizing, scheduling, and agreeing to procedures to expedite the proceedings. Therefore, the model law still provides the freedom to choose detailed procedural rules while maintaining a level of uniformity.

In short, the UNCITRAL model law, as now codified in Florida, will harmonize Florida’s international arbitration laws with those of sixty other nations and will assist Florida in becoming a more prominent seat for international commercial arbitrations. When businesses and lawyers look to select a seat for an international commercial arbitration, they will increasingly look here. The International Law Section should be proud of its hard work in making it happen. We all hope it proves to be a signature accomplishment in the Section’s legacy.

Thank you for having me and I look forward to working as a member of the Section in the near future.

Former Florida Supreme Court Justice Raoul G. Cantero III is a partner at White & Case LLP where he leads the Miami appellate practice in addition to focusing on cross-border disputes relating to Latin America. Appointed to the Florida Supreme Court in 2002 by then-Governor Jeb Bush, Mr. Cantero was the first justice of Hispanic descent and one of the youngest ever to sit on the Court. In his six years as a justice, he heard hundreds of appeals and authored well over 100 majority, concurring and dissenting opinions. He chaired the Florida Supreme Court’s Commission on Professionalism for six years and has been an adjunct professor at Florida State University College of Law.

Endnote:
1 Editor's Note: Justice (Ret.) Cantero was the sole dissenter in Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860 (Fla. 2005), rev’d, 546 U.S. 440 (2006), a decision of the Florida Supreme Court holding that under the Federal Arbitration Act, a party may avoid arbitration by arguing that the contract in which the arbitration clause is contained is illegal. The United States Supreme Court later reversed this decision, thus adopting then-Justice Cantero's position.
A China Life

By Malcolm Riddell, New York

My first business negotiation with Chinese, the proposed joint venture to form the Eagle Star-President Life Insurance Company, occurred in 1990. The Chinese in this case were on the disputed Chinese province of Taiwan. But, as the intervening twenty years have taught me, except for some regional and historical differences, most negotiations with Chinese have characteristics similar to this one. So, this case study may be instructive, especially because the negotiation almost failed several times and because, as I saw it then, the survival of my recently established firm depended on its success. Here’s the story.

In 1988, I left Wall Street to set up my own boutique in Taiwan specializing in advising Western financial institutions on entering the Taiwan and China markets. I established my firm in Taiwan rather than China because at that time Taiwan was booming while China was just beginning its far-from-certain economic ascent. We had a first-mover advantage that brought us a number of leading financial services firms as clients but not enough business from them to do more than eke by.

I had not arrived at this point in my career by chance but from a lifetime interest in China. My grandparents had been in Taiwan during the 1950s working on land reform, the foundation for the later “Taiwan Miracle.” When they returned, they moved to Sarasota, Florida, just half a mile from where I lived and grew up. I was five or six years old.

From their stories, photos, and artifacts, and visits from their Chinese friends, I developed a fascination with all things Chinese. I first visited Taiwan and Hong Kong in 1970, when I was seventeen years old. I went to the border between Hong Kong and “Red China” and stared across into what was then a land forbidden to Americans. I went on to pursue my interest at Columbia and Harvard.

I am one of the fortunate few who has known from an early age what he wanted to do and been able to spend his life and career doing it. I have lived many years in Chinese society and as a member of a Shanghai business family; I have negotiated with Chinese diplomats as a U.S. delegate to the UN; I have done business with Chinese companies as an investment banker and a lawyer—and I have spied on the Chinese government as a CIA case officer.

But in 1990, with my firm just getting by, I needed a break. And, I got it. Through my popular weekly column in the Chinese-language Economic Daily News, Taiwan’s Wall Street Journal, I had met and become friendly with the Chairman of the President Group, a major Taiwanese manufacturer.

The Chairman had decided he wanted to establish a life insurance company. Knowing that I worked as a lawyer and investment banker in that industry, he asked me to find him a foreign joint venture partner. He did not offer to engage me or to pay me. Chinese have an aversion to paying for services. Instead, he told me that I would have to be paid by the foreign side, but that, in any case, he expected me to protect his interests.

What I did not understand then is that the intermediary in a Chinese deal is expected to help shape an outcome that is fair to both sides. This is something like the concept that a civil law notary is responsible to the transaction, not to either party, even if only one of the parties is paying him or her. Even without this knowledge, I knew that I would serve my client, the foreign party, best if I helped structure a joint venture that each found acceptable and that endured.

At that time, the Taiwan life insurance market was hot and just opening to foreign companies. I had no difficulty bringing the best international life insurance companies to meet with the Chairman. In the end, he decided to pursue talks with Eagle Star Life Insurance of the U.K. Eagle Star, owned by the wealthy and powerful BAT Financial Services, had a long and successful history in the life insurance industry in Asia. It was a good choice. (BAT Financial Services, including Eagle Star, was much later acquired by Zurich.)

Knowing that in China, important deals begin with agreement between the corporate leaders on core matters, I arranged for the CEO of Eagle Star to come to Taiwan and meet the Chairman of the President Group. At their first luncheon, the Chairman and the CEO discussed their respective business philosophies, a little of their personal stories, and their perceived differences between British and Taiwanese business practices. They seemed to like and respect each other. The Chairman announced that he would like to go forward with the joint venture. Finally, he told the Eagle Star CEO that his group knew nothing about life insurance; he, therefore, wanted Eagle Star to take over complete responsibility for running the company.

After the luncheon, Eagle Star’s Asia regional manager gave me a sideways look. I knew what he was conveying. I had been warning Eagle Star, during the weeks of preparation for this meeting, that its team should be ready for months of difficult negotiations. But, here, at the first meeting of the leadership, all important matters had been settled. All that was left at this point, he implied, was for me to draft a memorandum of understanding.
staging that recorded the agreed-on terms, carry out a brief negotiation on the details, and then draft the final documents.

I drafted the MOU. Both CEOs signed it. We scheduled the first meeting to negotiate the details that would go into a final joint venture agreement for the following week.

At that meeting, each side pulled out the MOU, and negotiations began. Since I was both negotiating the deal for Eagle Star and responsible for drafting the joint venture documents, I took the lead. I read the MOU out loud just to reaffirm what we all had agreed on and then began to discuss details related to each item.

We moved easily from the table, to corporate structure and ownership, and to other such matters. Then, we reached the section on management. Both leaders had already agreed that Eagle Star, as an experienced life insurance operator, would manage the joint venture company so this matter, I assumed, should be equally easy. When we reached the item called “management control,” I said, “Of course, Eagle Star will appoint the general manager.” I paused to wait for agreement from the Taiwanese negotiating team. Then, all hell broke loose.

What did I mean that Eagle Star will appoint the general manager? This is Taiwan. The President Group, as a leading Taiwanese company, is much better positioned to select—and supervise—the general manager. And, so began months of intense and difficult negotiations over all issues, including those upon which I thought agreement had been reached.

What I had failed to understand were two important aspects of negotiating with Chinese. First, Chinese will often agree to everything at first. “You want my first-born son? No problem.” Then, during negotiations, the agreed-on terms will be slowly whittled down until the Chinese side reaches its true position.

Second, there is a difference between communication and understanding. Since that time, I have often put to my Western clients preparing to negotiate with mainland Chinese this thought: What if the negotiations with a Chinese communist hinged on the Marxist concept of “dialectical materialism”? The interpreter would translate the term into English. You would understand that he just said “dialectical materialism.” But, unless you had a firm grasp of Marxist philosophy, you would not grasp the meaning and implications.

Here the Taiwanese understood well, I am sure, the meaning and implications of “management control” and had agreed simply in order to move the parties into negotiations. But, in mainland China, with decades of a socialist, state-run economy, the same cannot be said. Concepts that we take for granted about business structure, management, finance, marketing, governance, and so on, are relatively new to the Chinese. For this reason, negotiations should also be seen as an opportunity to explain every concept and what it will mean for the coming venture. In this way, the Chinese will grasp how the prospective transaction will actually play out. And, when they sign the final documents, they will understand the terms to which they are agreeing.

In this case, the effect on negotiations of President’s back-pedaling was immediate. Eagle Star’s Asia regional manager was incensed at what he saw as President’s duplicity. As a result, and unbeknownst to Eagle Star’s CEO, the regional management team crafted a hard-line, one-sided negotiating position and told me to stand fast and push it. Negotiations quickly became acrimonious. Finally, after several days, the President team leader angrily accused me of trying to force an “unequal treaty” on them. The Eagle Star side looked perplexed, but I knew what he meant.

After centuries as probably the wealthiest and most powerful country, China was brought low in the 1800’s. This came to a head in the mid-1800’s. Before that, in the early 1700’s, Westerners had begun trading with China to meet the Western demand for Chinese tea, as well as porcelain and other luxury goods. On the other hand, the Chinese—much to the frustration of Western manufacturers—had no interest in Western goods. The result was a severe trade imbalance; so much silver poured into China that it created a serious economic crisis in the West.

Then, in its colony India, the British found the one product that the Chinese would buy, and buy in great quantities: opium. Soon, silver was flowing the other way, out of China, at alarming rates. Now China was in crisis. But the problem was social as well as economic. Opium was shredding Chinese society from the peasants to the Mandarins.

In attempts to end opium imports, China tried to interdict the supply and made countless pleas to Western governments to order the trade halted. Nothing worked. Then, in the mid-1800’s, China took a bolder step: Chinese officials seized and burned opium owned by Western companies and stored in their warehouses in China. This provoked a war, the First Opium War with Britain, which China lost decisively in 1843. This was not the last foreign intrusion.

China lost more wars to Western powers and to Japan. With each loss, the foreigners imposed more and more onerous treaties. These were what the Chinese called—and what the President Group’s lead negotiator referred to as—the “unequal treaties.” To this day, these treaties, among other acts by the Western powers and Japan, are frequently cited as part of China’s “Century of Humiliation.” So I knew, when the Eagle Star position was compared to “unequal treaties,” the negotiations were in serious trouble.

To head off collapse, I decided to draw on the good relations between the President Group’s Chairman and Eagle Star’s CEO. I called the CEO in the U.K. and explained the situation.
Within three days, he was back in Taiwan meeting with the Chairman.

Firm relationships are important in any business transaction. This is particularly true in China where there is often no other route for dispute resolution than a solid relationship, especially between the leaders. That proved to be the case here. The Chairman and the CEO reviewed and discussed their respective positions, made compromises, and sent the teams back to negotiate.

After this intervention, negotiations proceeded more smoothly. Within a couple of months, we had agreed on all the terms, I had drafted the joint venture agreement, and all concurred that the agreement captured the terms reached by both sides. But the President Group did not sign.

With feelings of increasing panic, I dogged the President negotiating team, asking what the problem was and whether there were still changes to be made. They could not or would not tell me why they were uncomfortable or what the problems were. Each day, they said they would sign; each day they didn’t.

Then, after a couple weeks of this, I was sitting in my office late one night. Taiwan’s deadline for new life insurance company applications was coming up soon. There was one chance a year to apply, and we were going to miss it. Then, I had a thought.

I knew that Chinese have traditionally been fond of slogans that we in the West consider banal or even corny. But the Chinese take them very seriously. With this in mind, I went through the joint venture agreement. At the start of each section, I laid out principles applicable to each. These principles included: “We will always work for our mutual good.” “We will never knowingly take advantage of each other.” “We are entering into this joint venture to make money.” “We will work tirelessly to make our new company a success.”

The next morning I presented the revised joint venture agreement to the President Group. They signed it before the end of the day. And, at the same time, the future of my firm was secured.

I have often told clients that for Chinese, the real negotiations begin after the contract is signed. That was no exception for the Eagle Star-President Life Insurance Company of Taiwan. But, later, when issues did arise between the parties, they were resolved more often by relying on the non-binding principles that guided their relationship than on the letter of the contract.

In the years since the Eagle Star-President joint venture, my business moved to China. And, while I have negotiated with dozens of Chinese companies, the lessons learned during this first business negotiation have guided me.

In recent years, I have become active in academics—at Harvard, as an Associate-in-Research at the Fairbank Center for Chinese Studies and an Asia Fellow at the Kennedy School of Government; as academic leader for and teacher at short China programs; and at Peking University Law School, as a senior visiting fellow. Whenever I lecture about Chinese negotiations, I always use Eagle Star-President Life Insurance as a case study.

There is no doubt that doing business in China and negotiating a transaction with Chinese are difficult for foreigners. And because it is the foreigner who is going to China to do business with the Chinese, the Chinese feel little need to meet him or her halfway. This, of course, is changing as Chinese themselves go abroad to do business and as Western-educated Chinese students return home to work. Still, for the time being, rightly or wrongly, the burden falls more on the Western party to adapt to Chinese practices.

Over the years since Eagle Star-President, I have seen many deals between Western and Chinese companies that should have closed but did not, just as mine almost failed to close. Westerners often blame the Chinese for the failure. They say that the Chinese just don’t understand how to do business or how to negotiate. To this I reply, “Well, if the Chinese are so bad at business and at doing deals, why are they making so much money?” Something to consider next time you are sitting across from the Chinese at the negotiating table.

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The sky overhead is clear and blue, and I could as easily be in Wyoming as China, particularly since we went horseback riding and slept in a yurt earlier this week. E’s team promised to show me some of the outback in our down time, and they were as good as their word. Now, carrying a cover story about importing products back to England, we are on a highway in Zhejiang Province heading toward a glove factory. We really have gone over every variable but after all the analysis, there comes the action, and everything can go pear-shaped, as E keeps saying.

E was, until a few months ago, a part-time Chinese student in Shanghai. Spiritually however, he is an English rugby player, escaped from his prominent UK family to China for a few years. He now works for me as an investigations manager. Together we have assembled a team of five or six stringers—some with journalistic backgrounds; some, former classmates of his from the university; and some, simply musicians. They are about the best group of investigators I have seen, creative and productive rather than whiny and reluctant like many former cops I have used in emerging markets like Thailand and Indonesia as well as Latin America.

So here is the plan. We are posing as buyers to gain access to a factory that appears to be producing gloves of various kinds, mostly those industrial and gardening gloves one finds across America in Ace Hardware and Home Depot. Our client, or the client of my law firm, for which we are undertaking this investigation, makes gloves under a trademark that is essentially globally protected, including in China and the United States. Our task today is to come away from this factory with actionable evidence of trademark infringement. Our approach will be to gain access to the facility by pretext, purchase samples or view shipments, or otherwise collect intelligence that can be used to stop the activity. I am the boss, but I am deliberately not in charge today. My Mandarin is rusty after so many years living in English-speaking Singapore, and besides, we are now in the dialect of the Shanghaiese, so I will miss part of what is communicated. We have a female investigator with us, posing as an administrative assistant, who will collect the data with her near-photographic memory. She is diminutive, standing five-feet tall, but is easily the smartest of us all and, as a regular contact of the Administration for Industry and Commerce (AIC), China’s main trademark enforcement authority, by far the most dangerous of our group.

As we approach the facility, I am again struck by the similarity of this region to the American west. It is agricultural in a way that takes me back to my childhood. No big corporate farm signs; just plantations and modest farmhouses. An occasional factory that looks like a fortress or a medieval castle jutting suddenly from the landscape as if about to blast off for outer space. We are in two cars, one Westerner and two Chinese apiece, and we are all in touch continually via mobile phone. I ride alone in back and now Mei turns to me and reports that she received a text from the forward car which is several miles ahead. They see the target factory, and we will see it ourselves soon on our left. I stare out the window, still struck by the similarity to a 1950’s American landscape and almost expecting to see a Tastee-Freez loom alongside the highway. The road itself is very good, although the rest stops leave something to be desired. They consist of a trough-like latrine which drains down a slope into the slough that irrigates the field. Note to self: don’t eat the broccoli.

Now the factory is in view, and we stop to gaze at it from a distance of 100 yards. It looks innocuous enough, a CBS building—Concrete Block Structure—as we say in Florida, three stories high with a red tile roof, occupying what appears to be about one full city block, fenced in. We proceed and see that it actually looks more like a prison complex, built in a pentagonal shape around a courtyard. As we pass the main gate for a loop around the place, we see what would be, continuing the metaphor, the warden’s house in the middle of the courtyard. The warden’s house is fenced in, and even from this distance, I can see two tidy children playing in its yard. The rest looks industrial in a Dickensian way, dim light appearing in the small windows on the upper floors. Prison.

The lead car has parked and although we are expected, there is an administrative procedure for us to gain admittance. Our car waits with the windows down. The air is cool and dry here today, the temperature pleasant, the sky a blazing American blue. Mei turns around and tells me in her charming Meiguo Hwa (American English) that we must wait about fifteen minutes for the head of the factory to receive our guys from the other car. They are now inside the office, and we will join them soon. Mei and the driver are speaking very fast in Shanghaiese to one another, and I glaze over. My mind drifts back a few years as I wonder how this operation will turn out.

From nowhere an old story comes to my mind—one that used to circulate annually around CIA headquarters as new Career Trainees encountered the old salts, has-beens, and genuine heroes of those corridors, everyone
spouting Von Clausewitz and Sun Tzu and Clandestine Service legends. This particular story has as its moral that whatever can go wrong probably will, and it never fails to make the desired impression on the new hires. The story itself is of dubious accuracy but a useful teaching point nonetheless. The story goes that back in the sixties, the Directorate of Science and Technology, at great expense, undertook to implant a tiny microphone under the ear skin of a male feral cat known to be a favorite of the Soviet Embassy in Washington. The cat was supposed to roam freely inside the embassy, broadcasting as he wandered, and provide valuable Cold War “take” to the waiting listening post across the street. The story ends badly as the cat reportedly took an interest in a feline female, embarked upon a frolic, detoured from his mission and was promptly run down by a Yellow Cab before ever broadcasting so much as a soviet sneeze. The punch line is that the microphone implant should have been the cat’s second surgery.

We now stand in the reception room of the factory office, our side consisting of two Westerners and four Chinese; their side consisting of a portly gentleman with a commercial gleam in his eye and a straight-laced Moneypenney-type who looks every bit as deadly as our Mei. The man tells us his name is George (“like George Clooney”). We exchange elaborate greetings as our putative purpose is explained to our host. He is most anxious that we see his production, but his exuberance is not shared by the boss in the UK by phone. When the call is made, actually to E’s father, the recipient has apparently not received the memo. I hear snippets of his confused end of the conversation as E gets down to business as we had rehearsed. My role is to appear to be the “bad cop” who does not want to do the deal, and the plan calls for E to contact the big boss in the UK by phone. When the call is made, actually to E’s father, the recipient has apparently not received the memo. I hear snippets of his confused end of the conversation as E reports to him the quality of the product, occasionally holding up a glove to look it over. E faces me at one point and rolls his eyes and, as the call winds down, I imagine his dad telling him to phone back when he is sober. It is now E’s job to drive a hard bargain so as to appear genuine. The danger is in creating a new source of counterfeits by placing an order for them, which is not part of our assignment and strictly proscribed by our firm’s practices. Up to this point we have no smoking gun. We have not seen products branded with our client’s mark. E is long-faced as he speaks in Shanghainese with George, whose face expresses some concern and disappointment under the glare of Moneypenney, who looks about to pull out a pair of scissors and shed some blood. E and George exchange commercially sympathetic remarks, and then suddenly George becomes animated and drags our entire entourage into the corridor. He pulls out a remarkably large key chain and opens what is apparently a storeroom jammed with product wrapped in plastic, which promptly slides down in a heap into the hallway. On top of it all is a packet marked with our client’s brand, containing around ten different types of gloves, all of them bearing the trademark.

At that moment Moneypenney moves suddenly and with an athleticism I would not have predicted. She tosses the branded packet back into the closet, and she presses the pile back and shuts the door, moving George out of her way as she does so and indicating rudely to us that the tour is over. We have no choice but to return to the office where we had taken tea earlier and conclude our tour. The situation is awkward now, and E tells George that we are considering the deal, that the quality is good and that he has the support of London. He indicates in my direction that the “other director” is less impressed and prefers another manufacturer to George for financial reasons but that it still may work out. We say our goodbyes and make for the cars, drive away from the factory area and stop for a caucus.

See “Ride-A-Long,” next page
I am unhappy to say the least. Everything has gone right, and then gone all pear-shaped, like the old Acousa Kitty Op. We had penetrated the factory, we had seen the brand, but we had been foiled by that suspicious secretary, obviously the real boss of the place, body-checking us out of the way. I wanted to express my disappointment, but the China team was now chattering excitedly in Shanghaiese and pointing to something Mei held in her hand. I came over and saw that it was a digital camera she had been concealing somehow. There were an amazing number of photos there, which I had no idea had been taken. The photos captured the workrooms, the office meetings, the tea, the children beside open flames forming rubber gloves on molds of steel, the dark conditions and, finally, the classic shot of Moneypenney shoving George away from the storeroom door and a very clear image of the gloves bearing our client’s brand.

Bingo. I was amazed. My look said to Mei, “How did you do it?” Then I noticed she wore a kind of trendy-looking satin bow in her hair with what I had assumed were small, glass sequins gleaming out of it, and with a shiny, black circle, apparently the eye of her camera, at its center. Mei was smiling now as I looked at her in awe. “Cannot be helped,” she says, blushing. “I am simply slave to fashion.”

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Negotiating the CIETAC Arbitration Clause: Chinese Dispute Resolution From the Perspective of U.S. Business Investment

By Garett Raines, St. Petersburg and R. Timothy Berryman II, Chicago

Josiah Booker makes high quality Hawaiian-style shirts that he sells throughout Florida. He hopes to shave costs by moving production to Hebei Province, China (Hebei). He and his lawyer have been negotiating with a factory owner there, but the negotiations have hit a snag. Liu Cheng-gong, the Chinese owner, insists that any disputes arising out of the contract be resolved in China and suggests arbitration in Hebei by the Chinese International Economic and Trade Commission (CIETAC). Josiah’s lawyer has disturbing stories to tell about arbitration in China—about biased arbitrators who rule only in favor of Chinese parties, about courts that refuse to enforce arbitral decisions, and about Chinese arbitrators who face arrest after decisions that are unfavorable to Chinese interests. These stories pale in comparison, however, to the stories his lawyer has heard about other methods of dispute resolution and about Chinese courts. Josiah now faces a difficult decision. Does he bow to Liu’s demands, or does he refuse and risk not being able to take advantage of the Chinese labor market?

I. Doing Business in the People’s Republic of China

In 2001, the People’s Republic of China (China or PRC) achieved its longstanding goal of joining the World Trade Organization (WTO). This was a promising sign to foreign business owners seeking to do business in China—owners who normally prefer the WTO-style rule of law to China’s informal relationship-based rules. China’s entry into the WTO led many large Western companies, including Motorola, Ericsson, General Motors, and Bayer, to plan for long-term investments within China. In a lecture to an audience of American legal professionals and students, former Tianjin Mayor Dai Xianglong explained that the Chinese government is well aware that Motorola, for instance, is making substantial profits from its business in China. Contrary to the suspicions of some foreigners who have dealt with China’s draconian foreign business laws, Dai says that Chinese authorities hope and expect that these companies profit substantially from their Chinese operations. The gaps between Chinese and Western social and political cultures, however, increase the likelihood of disputes between even the best-intentioned of parties, and these gaps may provide opportunities to competitors. Motorola, for example, filed a lawsuit in 2008 alleging that Illinois-based Lemko Corporation accessed confidential intellectual property related to Internet Protocol soft-switching technology. Motorola has accused agents of China-based Huawei Technologies, a Motorola business partner, of providing this information to Lemko.

The potential excess cost of resolving disputes arising from dealings within China must be factored into any cost/benefit analysis of a decision to invest in China. Entrepreneurs should not fail to consider several important questions: Will a dispute arise with the Chinese party? If so, how and where will it be resolved? Will it be resolved at all? Answering these questions requires understanding both Chinese law and Chinese culture, since, as one commentator has noted, “Chinese laws are not yet applied rationally and uniformly in a manner consistent with World Trade Organization requirements.” Josiah, the entrepreneur introduced at the beginning of this article, has already decided that manufacturing in China is worth the other costs and risks associated with doing business in a developing market. The question of whether he is willing to resolve disputes through Chinese dispute resolution will thus be the deciding factor in whether he is ultimately willing to sign a contract with Liu. To answer this question, Josiah must first determine the most appropriate dispute resolution mechanism acceptable to both parties.

II. Chinese Dispute Resolution – When Chinese Dispute Avoidance Doesn’t Work

The effect of the vast differences between Eastern and Western cultures as they meet across the negotiation table is easily romanticized or overstated, at least when all parties are reasonably sophisticated and represented by informed legal counsel. It is nonetheless undeniable that Chinese dispute resolution cannot be...
fully grasped without accounting for Chinese culture and legal development. The “fa/li” dichotomy is one concept that a Westerner must consider in order to avoid disputes with Chinese parties or efficiently resolve disputes once they occur. A consultation clause or similar escalation clause should be included in any contract with a Chinese party and should be called upon prior to engaging in any formal dispute resolution mechanism, provided the clause is drafted to avoid a substantial delay in initiating formal dispute resolution.

The Chinese preference for li over fa also leads to a preference for resolving disputes through consultation or conciliation. Consultation, essentially resolving disputes through discussion, is more common sense than formal dispute resolution and is used more artfully in China than it is in the West. Many Western litigants would view a contractual clause requiring parties to attempt to “harmoniously resolve any disputes” as an unnecessary if not naive nicety. In China, such clauses are taken quite seriously. A consultation clause or similar escalation clause should be included in any contract with a Chinese party and should be called upon prior to engaging in any formal dispute resolution mechanism, provided the clause is drafted to avoid a substantial delay in initiating formal dispute resolution.

Conciliation and mediation are other li-centric methods to resolve business disputes with Chinese parties. Few entrepreneurs would hope to rely upon these methods, alone, to resolve a dispute with a Chinese party who has breached an agreement. Even within the rule-of-law-oriented United States, mediation emphasizes harmonious resolution over a clear allocation of liability against a breaching party. Conciliation emphasizes compromise even more than mediation does. This effect can be expected to be even more profound within China, and foreign parties facing a breached contract are thus not typically willing to rely exclusively upon Chinese conciliation or mediation to “split the baby” in a business dispute. Like conciliation and mediation, Westerners view arbitration as a more conciliatory method than adjudication of resolving disputes because arbitrators are more prone than judges are to award a verdict that is a partial victory—and a partial loss—to both parties. Chinese arbitration, like litigation in the West, frequently includes the use of mediation as a tool to provide the parties an opportunity to reach a negotiated settlement. Unlike the dispute resolution methods discussed above, however, arbitration provides a legally enforceable award and forces a breaching party to consider seriously the ultimate risk of an unfavorable award.

As for China’s formal legal system, though China’s courts have grown in
III. Overview of Arbitration in the People’s Republic of China

On September 1, 1995, China’s new Arbitration Law took effect.26 For Western businesses suspicious of China’s infant court system, a uniform arbitration law was a substantial incentive to invest in China’s burgeoning private sector.27 To many, the arbitration law showed that the Chinese government was serious about giving foreign investors a familiar, predictable way to resolve their disputes. In the fifteen years since the Arbitration Law came into effect, the international business and legal communities’ opinions of the usefulness of Chinese arbitration have waxed and waned considerably (see the footnote for examples of commentary both pro and con).30

A steady progression of new laws indicates a sincere concern on the part of the Chinese government for adapting Chinese arbitration for the international community. Unfortunately, some roundly disfavored policies or outright mistakes have kept the international community wondering about the true motives of Chinese authorities or whether they can truly exercise authority over their own system. From 1993 to 1999, for instance, a series of flubbed rulings by the Shanghai Intermediate Court prevented a non-Chinese party from collecting upon a valid award issued by Stockholm arbitrators against a Chinese party.31 Although the Chinese courts finally corrected these mistakes, the non-Chinese party was never able to collect upon the $4.5 million award.32 The effect of this case, the “Revpower Case,” upon the world’s opinion of the Chinese arbitration system has been called “nothing short of staggering.”33

IV. The China International Economic and Trade Arbitration Commission

As foreign money has poured into China in recent years, disputes between foreign businesses and Chinese entities have become commonplace. Despite the popularity of arbitration and other alternative methods of dispute resolution, arbitral institutions, like Chinese courts, are politically weak.34 Chinese law is often described as “instrumentalist.”35 This instrumentalist nature has ensured that the law has, to some degree, remained a tool of the Communist Party of China. Despite the constitutional mandate that establishes rule of law, arbitral institutions, like everything else in China, are to some degree still subservient to the interests of the Communist Party.36

Nonetheless, the volume of arbitration within China has been increasing dramatically. In 1990, for instance, 184 cases were filed with the China International Economic and Trade Arbitration Commission (CIETAC).37 Three years later, CIETAC became the busiest international arbitration institution in the world, admitting 486 new cases, as compared to 352 cases for the second-place International Chamber of Commerce (ICC) and 207 for the American Arbitration Association.38 By 2007, the number of cases admitted by CIETAC had grown to 1118.39 While Chinese and foreign businesses both have shown a preference for arbitration, Chinese law has also reinforced the use of arbitration, and state-owned corporations have arbitration clauses written into their form contracts.40

V. Selecting CIETAC Arbitration

CIETAC is the current successor to the Foreign Trade Arbitration Commission, which was established in 1956.41 CIETAC’s sister organization, the Chinese Maritime Arbitration Commission (CMAC), handles arbitration related to maritime shipping.42 In addition, over 140 smaller organizations have historically handled local, non-foreign-related arbitration.43 Although CIETAC does not handle all arbitration in China, it is without question the most important force in Chinese arbitration and...
the organization with which a large majority of foreigners deal when they find themselves arbitrating a dispute in China. CIETAC is currently the world’s largest arbitral institution in terms of the number of cases handled and cannot be compared comfortably to the world’s other large arbitral institutions. Originally modeled after the Soviet Union’s arbitral system, CIETAC is in practice both semi-official and semi-private, and has strong political and financial connections to the Chinese government. Nominally, CIETAC is a non-governmental institution, and current CIETAC Vice Chairman Yu Jianlong has expressed a clear desire to continue to adapt CIETAC to increase party autonomy and decrease the perception of interference from national and local Chinese officials.

The reform process has not been without considerable controversy. In April of 2006, the international arbitration community was shocked when Dr. Wang Shengchang, then vice-chairman and secretary general of CIETAC and the face of progress in China’s arbitration policies for many Westerners, was arrested on his way to a meeting in Beijing. The Chinese press announced that he was arrested for “financial irregularities,” a charge that has been greeted with tremendous skepticism among outsiders and privately within China. Before his arrest, Wang knew the authorities were investigating the methods he used to pay his arbitrators but claimed to be unconcerned, noting that these methods had been in place long before he took office. As news of his arrest spread, many of the world’s most significant arbitral institutions, including the American Arbitration Institute, sent letters of support to the Chinese authorities on behalf of Dr. Wang. Despite the genuine cultural tension within China regarding the payment of lawyers and arbitrators, many legal practitioners outside of China believe that his arrest was politically linked to his extensive participation in an arbitration pitting Pepsi against Pepsi’s Chinese business partner. A comment posted on the discussion forum OpinioJuris.com summed up the international response well: “This is terrible news,” it read. “CIETAC’s reputation was improving every year and Chinese companies are requiring CIETAC arbitration in more and more contracts. Guess this will give us Westerners more ammunition to require [arbitration in Hong Kong] or Singapore.”

Reforms have begun to open up CIETAC’s monopoly on non-maritime arbitration between foreigners and Chinese parties. In addition, and to the relief of the international business community, the Chinese have also become less reluctant to deal with the International Chamber of Commerce. Nonetheless, choosing non-CIETAC arbitration remains fraught with complications unless a Western party is courageous enough to arbitrate using a local Chinese arbitral organization.

Ad hoc arbitration, previously resulting in awards that were unenforceable within China, remains at best a selection that is not for the faint of heart. Ad hoc arbitration increasingly takes place outside China involving Chinese parties, but the Chinese Arbitration Law still makes it quite difficult to use ad hoc arbitration within China. Dr. Wang’s successor at CIETAC, Yu Jianlong, and CIETAC itself have enjoyed a generally positive reputation even among those legal professionals who do not recommend arbitrating disputes within China. A few scary stories aside, foreigners who have arbitrated in China in the past fifteen years commonly express confidence in the fairness of the process. Statistically, CIETAC panels award decisions to foreign parties as often as, or even more often, than local Chinese parties. CIETAC arbitration is normally not the frightening experience related by those who have experienced the worst of the system. Instead, it is a business risk that our entrepreneur Josiah can weigh like any other business risk. In some situations, arbitration within China through CIETAC will be the best available alternative—period—for a Westerner doing business in China. In most cases, CIETAC will at the very least be a viable alternative for the contracting parties. In light of the procedural difficulty in selecting non-CIETAC arbitration within China, and the general reluctance of Chinese parties to arbitrate through non-Chinese institutions, Josiah and his attorney have determined that CIETAC arbitration is a reasonable method of resolving any disputes with Liu. Josiah and his attorney must now decide whether Josiah should demand arbitration in Beijing or whether Josiah has the ability to arbitrate outside of China altogether.

VI. Choosing a Forum for Arbitration

The Chinese Arbitration Law is flexible with respect to the place and procedural rules of arbitration. Like in Western-based arbitration, party autonomy is considered to be a cornerstone of the arbitral process. As of the 1998 CIETAC Rules, the situs for CIETAC Arbitration might even be outside of China itself. Josiah and Liu may choose any agreed location for the arbitration; otherwise, it will be held at CIETAC or one of its Sub-Commissions. Despite the flexible regulatory structure, however, a Chinese party is likely to insist upon arbitration within China. Indeed, Chinese parties from outside of China’s urban centers will often be reluctant even to travel to either Beijing, the headquarters of the Commission, or to Sub-Commissions in Shanghai, Tianjin or Shenzhen. As a result, Chinese contracts often provide for arbitration at the place of business of the defendant as a default.

Josiah has two primary problems with arbitrating at Liu’s place of business. His first concern is that a local court will refuse to enforce an award in his favor. As discussed below, the best way to address this
concern is to insist upon arbitrating elsewhere, whether in Beijing or at a one of several CIETAC Sub-commissions. Josiah's second concern is the possibility that an arbitrator will be biased in favor of Liu, a local. CIETAC Arbitration Rules require one to three arbitrators, but unless otherwise agreed by the parties, the panel will consist of three arbitrators. Typically, Josiah and Liu would each appoint an arbitrator from the Panel of Arbitrators provided by CIETAC, or if they have agreed to appoint outside arbitrators, they must be approved by the Chairman of CIETAC. Josiah and Liu would each recommend one to three candidates for the presiding arbitrator. If they have a common candidate, then that candidate would be the presiding arbitrator; if they do not, then by default the presiding arbitrator would be chosen by the Chairman of CIETAC. Ordinary, this would result in a presiding arbitrator who would at least appear to be more sympathetic to Liu, the Chinese party. Josiah can avoid this perception of bias, however, by contractually requiring the third arbitrator to be from a neutral country.

Some protection against biased arbitrators is provided by CIETAC Arbitration Rules. If a selected arbitrator feels that he or she might have a conflict of interest, he or she is expected to reveal this potential conflict to the parties. The parties then have ten days to challenge the arbitrator and request removal. Even without a declaration of a conflict of interest, a party with “justifiable doubts” that an arbitrator will be able to perform his or her job fairly and effectively may request that CIETAC remove him or her.

Enforcement difficulties and arbitrator bias aside, however, there are practical reasons to avoid arbitrating outside of Beijing, Shanghai, Tianjin or Shenzhen. Western arbitrators have a reputation for being reluctant to participate in CIETAC arbitrations as a result of CIETAC's comparatively low compensation rates. As a practical matter, a Western arbitrator is less likely to agree to travel to Shijiazhuang in Hebei than to Shanghai, for instance. In addition, a Western party is likely to incur substantial additional expenses over the course of arbitration travelling to an area outside of China's traditional urban centers.

The authors of this article were able to select the residence of their hypothetical parties at will, and invented a Chinese party living in Hebei, a province bordering the major cities of Beijing and Tianjin. For the sake of our hypothetical, Josiah has weighed the difficulties of arbitrating outside of a city with which he was familiar and decides to take a stand on this particular issue. Liu agrees to select Beijing as the forum of arbitration, a reasonable compromise for both parties, and agrees that the third arbitrator will be from a neutral country. A legal practitioner will not always be so fortunate. With the important exception of local bias in the enforcement of an award, however, many of the difficulties of arbitrating in a remote location are more practical than legal and are thus easily accounted for within contractual negotiations.

Josiah has found a reasonable way to acquiesce to Liu's original demands by agreeing to arbitrate through CIETAC Headquarters in Beijing. It is advisable that he still have a basic understanding of how CIETAC arbitration works and how CIETAC awards are enforced. This will allow him to determine whether the remaining terms of his proposed agreement with Liu should be adjusted to account for the choice of CIETAC arbitration.

VII. Protecting the Selection of CIETAC Arbitration

Liu has already expressed a willingness to arbitrate any disputes through CIETAC. Josiah and his attorney would, of course, have been more than happy to resolve any disputes in the United States, but this was not an option contemplated by Liu. At the same time, Liu might have liked the idea of litigating any disputes in the courts of Hebei, his home province, but was likely to realize that Josiah would not agree. At moments like this, Josiah's attorney would do well to remind him of li and fa. Sometimes, rather than press an uncomfortable issue, hoping that arbitration will be unnecessary anyway, a Chinese party will choose to submit without actually intending to go into arbitration. This is an unfortunate manifestation of the Chinese preference for harmony over rule of law, and experience has shown that Chinese parties who do not wish arbitration outside of China can complicate things tremendously through an intimate knowledge of Chinese laws and procedures. Even if Liu is willing to arbitrate at the time of contracting, he might be less conciliatory in the event a dispute arises. To minimize the likelihood of a problem, Josiah's attorney must be intimately familiar with the various ways that a Chinese party might frustrate an arbitration clause, and Josiah himself must at least be aware of the danger so that it can be factored into his decisions.

Under Article 3 of the CIETAC Arbitration Rules, CIETAC has jurisdiction over domestic, international or foreign-related disputes, and disputes related to Hong Kong Special Administrative Region, the Macao Special Administrative Region, or Taiwan. Article 6 states that CIETAC has the power to determine the existence and validity of an arbitration agreement and its jurisdiction over the case. An objection to the arbitration agreement and/or jurisdiction must be raised in writing before the first hearing. If a jurisdictional issue is raised before the appointment of an arbitrator, the CIETAC commission decides whether CIETAC may handle a case. After the appointment of an arbitrator, the commission still generally makes this decision but is authorized to delegate this power to the arbitrators. Complications can arise if one party submits the dispute to CIETAC while the other party submits the dispute to a court, since both bodies will then technically have jurisdiction. In one unreported case, for instance, a
Chinese court held that an incorrectly worded, but basically valid, arbitration agreement should not require arbitration, and the court accepted jurisdiction over the case.\textsuperscript{77} According to Article 26 of the Arbitration Law, if a party submits a pleading to the People’s Court without declaration, while “the other side does not plead before opening the court, then he is regarded as giving up his right of pleading.”\textsuperscript{78} Article 20 of the Arbitration Law treats this situation differently, however, where one of the parties applies to a People’s Court rather than to CIETAC. Article 20 requires a judgment by the People’s Court to take priority in this situation.\textsuperscript{79} This is a notable exception to CIETAC’s power to determine its own jurisdiction.

It is still not entirely certain whether Chinese nationals can enter into contracts with foreigners, but the consensus answer seems to be . . . “sometimes.”\textsuperscript{80} Contracts between Chinese nationals and foreigners for foreign trade will be invalid if proper permission is not obtained from the Chinese government, but an arbitration agreement itself will apparently be upheld, as happened in an unreported 1990 case.\textsuperscript{81} Nonetheless, it would be risky to rely upon an arbitral provision in an otherwise invalid contract.\textsuperscript{82}

Parties to a valid arbitration agreement may not bring a case before a People’s Court, per Article 257 of the Civil Procedure Law.\textsuperscript{83} The surest way to ensure that the parties’ selection of CIETAC arbitration will not be disturbed is thus to ensure that an arbitration clause fully conforming to CIETAC Arbitration Rules Article 5 is included within any contract, and then any dispute that does occur is properly submitted to CIETAC.

\textbf{VIII. Expense and Duration of Arbitration}

Most large arbitration organizations charge substantial fees and are careful not to tout arbitration as a less expensive alternative to trials.\textsuperscript{84} A CIETAC official, in contrast, has been noted to have proudly proclaimed that, “CIETAC is cheap!”\textsuperscript{85} One reason is that CIETAC arbitrators are not paid as well as their international counterparts.\textsuperscript{86} This is reflected in the controversy within China surrounding the substantial fees made by Wang through the course of the Pepsi arbitration.\textsuperscript{87} Normally, an arbitrator’s fee depends on the amount of the claim, ranging from 3.5\% of the claimed amount, with a minimum cost of CNY 10,000, for claims of CNY 1,000,000 or less, to CNY 610,000 plus 0.5\% of the amount above CNY 50,000,000 for claims of CNY 50,000,000 or more.\textsuperscript{88}

CIETAC awards are usually rendered quickly compared to other arbitration organizations.\textsuperscript{89} Articles 50 through 58 of the CIETAC Arbitration Rules contain provisions for the conduct of simplified “summary procedure” arbitration.\textsuperscript{90} Parties using this “fast track” arbitration have reported being quite satisfied with the process.\textsuperscript{91} Before the time limit under CIETAC Arbitration Rules was tightened in 2005, even standard CIETAC cases were resolved within one year from the date of the application for arbitration.\textsuperscript{92} Now, according to Article 42 of the CIETAC Arbitration Rules, an award should be issued within six months of the date on which the arbitration tribunal is formed, with the panel giving an extension only if it is truly justified.\textsuperscript{93} In addition to these limitations, Articles 12 through 14, 36, and 47 through 49 all contain provisions to prevent arbitration proceedings from being unnecessarily bogged down.\textsuperscript{94}

The delay of an arbitral proceeding by the respondent is a problem that has been addressed by successive versions of the CIETAC Arbitration Rules.\textsuperscript{95} The 2000 CIETAC Arbitration Rules brought substantial improvements, including cutting the time limit for the litigants to appoint the arbitrators from thirty days to fifteen days,\textsuperscript{96} and changes to Arbitration Law Article 20 allowing an arbitral panel to hear a case before jurisdiction has been fully resolved.\textsuperscript{97} This prevents delays caused by pleadings seeking to challenge jurisdiction, a tactic that has been used often in the past by Chinese parties.\textsuperscript{98} Of course, the difficulty with this change is that, in the case of an adverse decision regarding the arbitral panel’s ability to hear the case, the case will need to be re-litigated.

Translation costs and the possible necessity of retaining Chinese counsel should be considered when planning for the costs of arbitration. Article 67 of the CIETAC Arbitration Rules allows parties to use a language other than Chinese if they both agree. It is possible, though not likely a point of agreement for the Chinese party, to agree to conduct all proceedings in English. One way for Josiah to control expenses and ensure that his counsel is able to represent him properly in the course of arbitration is to include a contractual provision that requires the arbitration to be conducted in both English and Chinese. This is potentially a controversial point because of the increased translation expenses associated with conducting arbitration in multiple languages. A seasoned entrepreneur accustomed to doing business in China and with a multinational law firm in his or her corner might prefer to conduct all arbitration in Chinese and avoid the extra translation costs. Josiah, unaccustomed to dealing with Chinese parties, is taking the more conservative and predictable route and insisting upon bilingual arbitration.

There are practical limitations to Article 67. Arbitral panels can, and often do, require the parties to translate submitted documents into Chinese.\textsuperscript{99} Written submissions are generally expected to be in Chinese, but tribunals often take a relaxed view of this requirement with certain documents.\textsuperscript{100} In addition, CIETAC Arbitration Rules are interpreted to allow foreign lawyers to represent parties before tribunals.\textsuperscript{101} In one case, a Chinese counsel complained to a CIETAC panel that the opposing counsel was an American, and
the panel reprimanded the Chinese counsel, pointing out that CIETAC Arbitration Rules allow agents to be Chinese or foreign.102

CIETAC’s bifurcated approach to resolving legal and factual issues also helps to minimize the necessity of extensive consultation with Chinese legal counsel. This approach takes “facts as the basis, and the law as the criterion.”103 A tribunal first determines all of the facts surrounding a dispute, and the legal questions are resolved only once the factual circumstances have been satisfactorily determined.104 This bifurcated approach is preferred by the Chinese and is also looked upon favorably by the international arbitration community.105

IX. Collecting a CIETAC Award
Josiah’s primary concern over arbitrating disputes in Liu’s home province of Hebei was that protectionism in the local courts would lead to difficulties enforcing an award against Liu. Enforcement problems for parties seeking to enforce arbitral awards against Chinese parties have reached “legendary” status according to one writer.106 An arbitral award is not directly analogous to a court ruling, since an arbitral award is not self-executing.107 In the event that a party is reluctant to comply with an award, Chinese courts have the power of confirmation for recognition and enforcement of the award.108

CIETAC Arbitration Rules allow only limited scrutiny of the form of foreign-related arbitral awards.109 Such scrutiny is governed by Article 70 of the Arbitration Law, which provides: “If a party presents evidence which proves that a foreign-related arbitration award involves one of the circumstances set forth in the first paragraph of Article [258] of the Civil Procedure Law, the People’s Court shall, after examination and verification by a collegiate panel formed by the People’s Court, rule to set aside the award.” Thus, Article 258 of the Rules of Civil Procedure provides the yardstick for determining whether an award will be set aside.110 Article 258 allows an award to be set aside when:

- There is no binding arbitration clause or agreement;
- The defendant did not receive proper notice of the proceedings;
- The defendant is unable to state opinions or arguments due to reasons beyond its control;
- The tribunal or process did not conform with the arbitration rules;
- The matter exceeded the scope of the arbitration agreement or is beyond the jurisdiction of the arbitration body;
- The Chinese court believes the award is contrary to Chinese social and public interests.111

With the possible exception of the rarely-used “social and public interest” exception, the risk of any of these issues arising can be minimized or eliminated entirely by competent counsel. In addition, the People’s Congress differentiates between revocation of an arbitral award, which results from undue process, and a dis-

See “Negotiating CIETAC,” page 22

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missal of the execution of an arbitral award, which results from insufficiency of evidence for the determination of the fact or the erroneous application of law.112

The arbitral award in the 1999 Zhongshi House Development Company Case, for instance, was overturned by the Second Intermediate People’s Court of Shanghai under Article 260.113 In this case, neither of the Chinese respondents in a dispute over a Chinese-foreign joint venture were present at the arbitration and because of this, the court found that the award “infringed on [the Chinese] parties’ legal lawful rights and interests.”114 Apparently, the court determined “the tribunal or process did not conform with the arbitration rules,” which is a valid reason not to enforce the award under Article 258. It does not appear, however, that the Chinese parties received insufficient notice, as this was not the explanation given by the court for overturning the award.115 Thus, it appears that the Chinese parties were able to get out from under the award by simply not showing up to the arbitration.

One highly unusual aspect of the enforcement of arbitral awards in China is that parties have remedies not only as to the award itself, but also as to the refusal of a court to set aside an award.116 The unsuccessful party to a setting-aside ruling has three remedies.117 Most obviously, and least likely, the parties can simply agree to write a new arbitration agreement and re-arbitrate the dispute.118 Second, a party can apply to have the ruling overturned.119 Surprisingly, Articles 177 and 178 of the Civil Procedure Law, which allow parties to apply to have a court decision overturned, may also be used to overturn a court’s decision to leave an arbitral award intact.120 This was one of the avenues used by Pepsi’s former Chinese partner to try to avoid paying an arbitral award in Pepsi’s favor.121

Third, Article 9 of the Arbitration Law allows a party to sue in the People’s Court over the very same issues that were decided in the arbitration.122 Although this is not seen as likely to occur very often, it should cause some concern in cases where the claimant is a well-connected Chinese party.123 Some commentators have argued that Article 9 effectively allows the court to review both reasoning and procedure, and that a CIETAC award is not truly final.124

Unlike trials, where the availability of numerous avenues of appeal means that many verdicts will never be collected, arbitral decisions are notoriously difficult to appeal.125 This is normally considered one of the primary benefits of arbitration, since costs can be accounted for more reasonably, and parties are protected against substantial delays in the enforcement of an award.126 In China, however, arbitral awards have become notorious for a different reason. As of 1999, foreign investors who obtained favorable awards against Chinese parties were typically forced to seek enforcement in Chinese courts.127 Unfortunately, some practitioners claim that the courts may be of little help. Up to 40% of judgments are not enforced in certain provinces.128 According to a study by Professor Randall Peerenboom of UCLA, only 52% of foreign awards and 47% of CIETAC awards are enforced by courts.129 Investors “can expect to recover 50-75% of an award amount about a third of the time, and half of the award at least 40% of the time.”130 For about one-third of the seventy-two arbitration cases reviewed, a party “was able to obtain 75-100% of the award and half of the award in about 40% of the cases.”131 Peerenboom’s study, however, also indicates that these results are less problematic than they first appear, estimating “the rate of non-enforcement for suspect or illegitimate reasons such as local protectionism, judicial incompetence, corruption and the like” to be somewhere from 17% to 29%.132

In most countries, courts are very restrictive about interpreting the rules which allow arbitral decisions to be overturned.133 As exemplified by the Zhongshi House Development Company case, supra, however, Chinese courts have at times been willing to read Article 258 quite broadly. The Supreme People’s Court has issued notices in an attempt to tighten up the courts’ interpretation of rules allowing the overturning of arbitral decisions, and a 1995 notice required the creation of “judicial supervisory committees.”134 In 2000, the Supreme People’s Court issued a notice which imposed liability upon “enforcement personnel” for failing to enforce valid arbitral awards.135 Most practitioners agree that an arbitrary failure to enforce CIETAC arbitration awards has become less likely as a result of the Chinese government’s reform measures.

By arbitrating under CIETAC in Beijing and insisting upon a third arbitrator from a neutral country, Josiah has entered into an arbitration agreement that he feels will maximize his chances of both obtaining and collecting upon an award if Liu fails to live up to their agreement. Certain risks, such as that of Liu’s insolvency, are much more related to Josiah’s choice in a business partner than to any flaw in Chinese arbitration. Other risks have been minimized or at least managed through the advice of Josiah’s attorney.

In the past two decades, China has been in a “long march towards rule of law.”136 Reaching this destination depends not only upon the Chinese legal structure, but also on how that structure is enforced. President Ren of Supreme People’s Court continually calls for the improved enforcement of arbitral awards.137 Court judgments in general—particularly economic judgments—are often not enforced in China.138 This lack of enforcement is almost certainly more of a matter of culture than a result of how the laws are written. Article 258 of the Civil Procedure Rules, in fact, is similar to the favored ICC Rules for enforcing arbitral awards.139 Insufficient court funding, Communist Party influence, lack of training, corruption and local protectionism all cause otherwise
well-written laws to be poorly applied.\textsuperscript{140} Even when a court does try to enforce an award, a party may simply ignore it because of the historical lack of respect for courts in China.\textsuperscript{141}

**Conclusion**

A successful arbitration depends upon both a fair and predictable arbitral organization and an effective legal system to enforce the award. Even arbitration that takes place outside of the PRC must be enforced within its borders when the award requires payment from a Chinese party. As Wang sat in jail and the arbitral community waited to see whether the PRC courts enforced the Pepsi case award, supra, few seemed confident.\textsuperscript{142} At the time, one commentator suggested not entering into arbitration agreements at all in China.\textsuperscript{143} The Arbitration Law and the CIETAC Arbitration Rules have made great improvements. Arbitration, however, relies upon a functioning legal system for enforcement. Institutional arbitration is a buffer from the PRC’s legal system, not an escape from it.\textsuperscript{144} Although the PRC has put great effort into CIETAC’s reform, this no substitute for functioning courts.\textsuperscript{145}

The international community’s pessimism, though, is exacerbated by its unrealistic expectations. A Chinese proverb notes that “victories and defeats are a general’s ordinary things.”\textsuperscript{146} This is certainly true of the Chinese legal system. For every triumphant reform in the CIETAC’s Arbitration Rules, there seems to be a corresponding disaster that resurrects the calls for reform. We have been careful to catalogue the problems with CIETAC arbitration in this article, but not to suggest that the system is broken. For Josiah Booker and others like him, there is profit to be made in China. By choosing to arbitrate any dispute that arises from his transaction with CIETAC within mainland China, Josiah is showing his Chinese partner-in-business, as well as China itself, a respect that they both seek. More importantly, he is now able to determine his risks, weigh them properly in his negotiations, and proceed with his business.

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**Endnotes:**


4 Lecture of Dai Xianglong, Tianjin, China (July 26, 2006).

5 Id.

6 Motorola accuses China’s Huawei in theft of secrets, S.F. CHRON., July 22, 2010. 7 Id.

8 Note that this factor is not mentioned in the Williamson & Zeng article.


12 Id.

13 Id.


16 For a rare exception to the world’s disdain for Chinese courts, see Cole Sternberg, Comment, *Chinese Courts: More of a Gamble than Arbitration?* 4 INT’L BUS. L. REV. 31 (2004) (suggesting that the state of the PRC’s arbitration system is so bad that Chinese courts might be a favorable alternative).


20 Id. at 23.

21 Lecture of Zhang Yong, Professor of Law, Nankai U. Coll. of L. (July 11, 2006); see also Dehner et al., supra note 18, at 8.

22 Redfern & Hunter, supra note 19, at 23.

23 Id. at 24.

24 Id.

25 Id.

26 Id. at 26.

27 See infra Section VIII (noting the favorable speed and cost of CIETAC arbitration).


30 For criticism of China’s arbitral system, see Jonathan H. Zimmerman, *When Dealing continued, next page*
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64 CIETAC Rules art. 20.
65 CIETAC Rules art. 21.
66 CIETAC Rules art. 22(3)
67 CIETAC Rules art. 25(2).
68 CIETAC Rules art. 26(1).
69 CIETAC Rules art. 26(2).
70 Metro. Corp. Counsel, supra note 30.
71 Cheng et al., supra note 37, at 14.
72 Id.
73 CIETAC Rules art. 6(3).
75 Id. at 439-40
76 Id. at 439.
77 Cheng et al., supra note 37, at 69-70.
79 Guo Xiaowen, supra note 62.
80 Cheng et al., supra note 37, at 41.
81 Id. at 61.
82 In one instance, when a court found a contract to be invalid because of fraud, that court did not uphold the corresponding arbitration agreement. China Nat’l Technical Import and Export Corp. v. Indus. Resources Co. Inc. (the IRC Case). This controversial ruling is no longer valid as of the release of the 1995 CIETAC Arbitration Rules. Id. at 66-67.
83 “[If] parties have stipulated clauses on arbitration in the contract or have subsequently reached a written agreement on arbitration, they shall submit such disputes for arbitration to the foreign affairs arbitration agency of China, and they shall not bring suit in a people’s court.” Civil Procedure Law art. 257. Note that a Supreme Court interpretation of the Civil Procedure Law has narrowed this provision by allowing a People’s Court to take jurisdiction where a party submits a complaint without making mention of the arbitration agreement and the opposing party subsequently submits a defense on the merits of the case. Opinion of the Supreme People’s Court on Certain Questions Concerning the Implementation of the Civil Procedure Law, Article 148 (1997).
86 Id.
87 Xinhua News Agency, supra note 52.
89 Perez, supra note 85, at 512.
90 Chinese Law, supra note 46, at 798.
91 Perez, supra note 85, at 512.
92 Cheng et al., supra note 37, at 94.
93 CIETAC Rules art. 52.
94 CIETAC Rules art. 12, 13, and 14 contain deadlines for statements of defense, counterclaims, and amendments, respectively. Article 36 contains deadlines for the production of evidence. Articles 47, 48, and 49 contain deadlines for the correction of an award, the issuance of an additional award, and the execution of an award.
95 Guo Xiaowen, supra note 62.
96 Id.
97 Id.
98 Id.
99 Id.
100 Cheng et al., supra note 37, at 80.
101 Id. at 86.
102 CIETAC Rules art. 16(2); Cohen, supra note 30.
103 Cheng et al., supra note 37, at 90.
104 Id.
106 De Vera, supra note 10, at 177.
107 Harer, supra note 9, at 414.
108 Id.
109 Li Hu, Setting Aside an Arbitral Award in the People’s Republic of China, 12 Am. Rev. INT’L. Arb. 1, 17 (2001); CIETAC Rules art. 45; Cheng et al., supra note 37, at 117. The CIETAC approach is generally modeled after the ICC Rules approach. Id.
110 The criteria under article 258 of the Civil Procedure Rules are far narrower than those criteria provided for overturning domestic awards under Article 58 of the Arbitration Law, which allows an award to be overturned when: “there is no arbitration agreement between the parties; the matters of the award are beyond the extent of the arbitration agreement or not within the jurisdiction of the arbitration commission; the composition of the arbitration tribunal or the arbitration procedure is contrary to the legal procedure; the evidence on which the award is based is falsified; the other party has concealed evidence which is sufficient to affect the impartiality of the award; and when the arbitrator(s) has (have) demanded or accepted bribes, committed graft or perverted the law in making the arbitral award.” This provides six different ways for a domestic award to be overturned.
111 Civil Procedure Law art. 258.
113 See Gao Fei, Some Noticeable Problems in Hearing the Cases about Joint Venture: Double Thinking that is Caused by Decision Reversed, available at http://www.cietac.org (discussing the Zhongshi Case).
114 Id.
115 Id.
116 Cheng et al., supra note 37, at 120.
117 Id.
118 Id.
119 Id.
120 Id.
121 See supra Part V.
122 Cheng et al., supra note 37, at 120.
123 Id.
124 Harer, supra note 9, at 420.
125 Garnett, supra note 84, at 113-122.
126 Reffren & Hunter, supra note 19, at chapter 10.
127 Harer, supra note 9, at 415.
128 De Vera, supra note 10, at 172.
129 Seek Truth from Facts, supra note 2, at 254.
130 Id. at 264.
131 Id.
132 Id. at 310.
133 Richard Garnett et al., supra note 84, at 1-17.
134 Perez, supra note 85, at 507; Civil Procedure Law arts. 177-78.
135 Evolving Framework, supra note 41, at 17.
136 Seek Truth from Facts, supra note 2.
138 Id.
139 Id.
140 Id. at 83, 85.
141 Such behavior is often made easier by Chinese laws. Although Civil Procedure Law articles 102, 212, 221, 223, 227, 292 provide penalties for failing to comply with a court decision, Chinese courts do not have the ability to find a party in contempt, and local enforcement officials are sometimes reluctant to pay any attention to court orders. Id. at 84.
142 Xinhua News Agency, supra note 52.
143 Harer, supra note 9, at 415.
144 Brown & Rogers, supra note 54, at 336.
145 De Vera, supra note 10, at 172.
Geneva, The Hague, Heidelberg, New York and New Haven are commonly regarded as cities of important influence on international law. Should Xiamen in China be added to this list? This year the Xiamen Academy of International Law held its fifth consecutive summer course on international law. The program is modeled after the one offered in the Peace Palace. Every year for the past five years, international law scholars from all over the world have gathered for an intensive three-week summer course. It offers one general course on international law along with several others on recent developments in this field. I had the opportunity to attend this year.

The Xiamen Academy is rapidly building an impressive reputation and has managed to attract some of the leading scholars worldwide. This year the courses were taught by Professor W. Michael Reisman (of Yale Law School and the President of IC- SID), Professor Christine Chinkin (of the London School of Economics and a former member of the U.N. Goldstone Commission), Professor Ralph Wilde (of the University of London) and Judge Abdul Koroma (from the International Court of Justice), among many other scholars. The Xiamen Academy, as Judge Koroma explained, has full support from the Justices of the World Court, and its members regularly come forward to teach each year.

Xiamen is a lesser known city in the mainland, right across the strait of Taiwan, but it is quickly developing a reputation in international law and an ability to attract leading policymakers and academics in the field. Past lecturers have included notable space law scholar Professor Bin Cheng; Professor Malcolm Shaw; Oxford Professor Vaughan Lowe; Max Planck Institute for Comparative Public Law and International Law Director Professor Dr. Armin von Bogdandy; and Professor Ivan Shearer. This impressive list includes important academics, policymakers and practitioners. The tentative program for next year includes several U.N. undersecretaries and the President of the International Tribunal for the Law of the Sea.

The establishment of an international law academy of world repute in China is of great interest. China’s relation to traditional notions of international law has not always been harmonious. As Professor Wilde of the London School of Economics explained, international law, as we know it, is mostly a product of Western influence and European policy.

China is an important policymaker in the global field and a permanent member of the U.N. Security Council. There has always been at least one Judge of Chinese nationality in the International Court of Justice. Most recently, Judge Shi Jiuyong retired and was replaced with Judge Xue Hanqin. China, however, has never been party to a proceeding before the U.N. World Court nor has it accepted its compulsory jurisdiction. This reluctance to participate in international adjudicatory institutions is not limited to the World Court but includes most permanent international tribunals. China, and a large part of Asia in general, refrain from creating or participating in international tribunals. This could be a result of an adherence to Confucianist ideals of harmony. Some have argued that the use of formal court proceedings on the international field would be disruptive to the principles of balance and harmony. In the case of China, this reluctance can also be understood as a strategic decision aimed at achieving a better negotiated outcome of disputes by using its economic clout and influence. As one Xiamen Law School Professor confided, however, China’s reluctance to participate in formal adjudicating institutions is sure to change soon. This, she indicated, would include an acceptance of the compulsory jurisdiction of the International Court of Justice.

Some have argued that adherence to international courts is necessary for continued prosperity in Asia. We can see some examples of this already; among them was China’s acceptance of WTO dispute resolution procedures. I remain skeptical since there is an important degree of difference between arbitration panels, even those with appellate procedures like the WTO, and permanent judicial institutions. In China, in matters of international law, there is still an important cultural and policy preference for negotiation, consultation and consensus as well as an important economic leverage in negotiations. While the rest of the world is active in creating permanent tribunals (e.g., Court of Justice of the European Union, European Court of Human Rights, Central American Court of Justice, Andean Tribunal, African Court of Human Rights), Southeast Asia and China are still relying on negotiation and consensus. Whether this will continue to be the case remains to be seen.

The Xiamen Academy of International Law presents an important opportunity for international law scholars to gather and discuss current issues from their own legal traditions and perspectives. Although Xiamen University is large and well-funded, it is not yet as impressive, nor does it have the resources, of the major European and U.S. institutions.
Notwithstanding, the Chinese appeal has managed to attract scholars from many parts of the world. It was surprising to see a few foreign students, including some from the U.S., Iran, Turkey and Russia, working towards their law degrees in Xiamen University Law School. During the summer course, participants from all over the world provided an important forum for discussing current topics of international law. Among these: the threat or use of nuclear weapons; maritime barricades; anticipatory self-defense; international criminal law; and the declaration of independence of Kosovo. The International Court's opinion regarding this last issue was released during the course taught by Judge Koroma, which provided an interesting opportunity for discussion.

Although more than half of the attendees originated from mainland China, there was significant diversity. Participants included scholars from Latin America, Europe, Africa and Asia, including Taiwan, providing a unique opportunity to share views on sensitive topics like Taiwan. This was interesting for me in particular considering that my country, Guatemala, is one of the few States that has official diplomatic relations with the island.

Besides scholarly work, the course was also an opportunity to explore our cultural differences. I have lived in Latin America, the U.S. and Germany, but this was the first time I have really experienced “culture shock.” On one occasion I was chased down the street by a waiter trying to give me back the tip I had left on the table at the restaurant. Most people refused tips. In the Western world, it is common for students to get a suntan or go to tanning beds. Chinese students, and women in particular, are meticulous about avoiding the sun. They even carry parasols to avoid getting a tan, which I was told was not regarded as attractive. I had a difficult time finding people outside the university who spoke English, even in Beijing or Shanghai. Taxi drivers generally don’t speak English or read Latin characters, so be sure to have your hotel address spelled in Chinese characters. You can expect crowds everywhere and at all times. Foreigners are usually stopped in the street for pictures. This was common in Xiamen but also in large cities like Beijing.

Xiamen, located in the Fujian province, is a city of more than 2.5 million, which is small by Chinese standards. It is a lovely city near the ocean. It was ranked as the cleanest city in China and the second-best city in which to live. (I quickly learned that in China rankings are given a high degree of importance). Its most regarded tourist attractions are the Gulangyu Island and the Nanputuo Temple. Curiously, the city is also the world’s largest producer of sunglasses.

During this academic exchange, some topics could not be overlooked. Limitations on access to information are obvious and a big setback for...
mainland students. Youtube, Facebook and many other sites are blocked. The people, however, are not as isolated as one may think, and some have ways of getting around the government’s barriers. There is a noticeable difference between those in the mainland and those students from the rest of the world, including Hong Kong or Taiwan, regarding access to information on world events. This is also creating a larger gap between Taiwanese and mainland cultures. Nevertheless, there is a strong awareness of the world outside the firewall and a big interest in the Western world, particularly U.S. universities.

Although the culture and experience of Xiamen University is very different from European or U.S. campuses, there is a common denominator: Chinese students. It has been reported that students from China are the fastest growing set of foreign students at university campuses in the U.S. and Europe. One report indicates more than 98,000 Chinese students a year go to the U.S. alone. Available disposable income in China has fostered the desire to attend the best universities in the world, wherever they may be. A thriving economy means that jobs will be available for them when they come back. Their experience abroad will certainly be an important factor in shaping China in the future. Additionally, some universities and law schools have established specialized institutions in order to conduct scholarly work relating to China. At Yale, for example, the China Law Center has been working for several years.

Under the loud sound of the cicadas, the tropical climate of Xiamen, and the unique roof styles that characterize Chinese architecture, the fifth consecutive summer course of the Xiamen Academy took place this year. The Academy is quickly turning into an important counterpart to the course offered in The Hague, considering the latter has been established for almost ninety years. Judge Koroma explains that its prestige is gaining important attention in international legal circles. Its curatorium includes some of the world’s leading scholars. Among them are NYU Professor Andreas Lowenfeld, who is a trade law specialist, and Brazilian World Court Justice Antônio Cançado Trindade. One important difference, however, must be noted: in contrast to the course at the Peace Palace, the Xiamen Academy places an important focus on the domestic legal culture of the host country. The Xiamen Academy emphasizes the participation of local professors in teaching courses and seminars. Learning about Chinese culture was an important part of what attracted many of us to attend.

China, as the largest developing economy, has demonstrated its ability to attract the interest of the world. The Xiamen Academy of International Law is an example of this for three weeks each year in the field of international law. Whether this will result in a growing consideration of cultural sensibilities within classical notions of international law, an increased responsibility of China in maintaining world public order, and a harmonization of Chinese domestic legal policy with international law, as would be desirable, I remain hopeful.

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Endnotes:
1 Judge Bruno Simma of the International Court of Justice was also scheduled to appear but had to cancel for health issues.
2 For support of this view, see Mark L. Movsesian, International Commercial Arbitration and International Courts, 18 Duke J. Comp. & Int’l L. 422 (2007). (Professor Movsesian explains why States are more reluctant to accept permanent binding tribunals than ad hoc arbitration panels).
3 In Southeast Asia, for example, ASEAN still does not have a permanent judicial institution for trade or human rights. This preference for consensus as opposed to legalization has been referred to by some as the “ASEAN Way.”
4 One explanation is that domestic tourists from the provinces visiting the main attractions in the cities have seldom seen foreigners.
6 http://www.law.yale.edu/intellectuallife/ChinaLawCenter.htm.
Melamine-Tainted Milk:
An Ongoing Problem for China
An Overview of the Scandal and the Attempts for Redress by the Victims’ Families

By Adam Gutin, Palm Beach Gardens

I. Background

The goal of this article is to provide a cohesive history and understanding of the events surrounding the melamine-tainted milk scandal that occurred in 2008 affecting nearly 300,000 infants in China. In addition, this article will illustrate the difficulty affected families have had trying to find relief in the legal system of China, the United States, and Hong Kong. A lack of transparency by China’s government has made certain portions of this piece difficult to research; therefore, the information used herein has been derived mainly from news articles and one U.S. case.

a. Chinese Melamine-Tainted Dairy Products are Discovered

In September and October of 2008, fear permeated China, Asia, and the world as melamine-tainted milk was discovered to be coming from Chinese dairy producers. Melamine is a nitrogen-rich industrial chemical found in plastics and fertilizer. Consuming melamine-contaminated food may result in kidney stones, kidney failure, and death. Melamine was being included in milk by producers to swindle dairies. To ensure that they are not purchasing watered-down milk, Chinese dairies measure protein content “by a test that measures the nitrogen found in protein.” Rather than refrain from adding water to milk in response to the test, unscrupulous milk producers instead included melamine in the milk to give the appearance of appropriate protein levels.

The inclusion of melamine in milk devastated the Chinese dairy industry and caused one of China’s “worst food safety scandals.” Most tragically, the largest population segment affected by the scandal was infants, as melamine-tainted powdered milk led to the contamination of baby formula. In total, melamine-tainted powdered milk killed at least 6 children (known deaths) and caused an estimated 300,000 others to fall ill.

b. Domestic Response

Facing intense domestic health issues, international pressure from Asian countries, the European Union, the United States, and the United Nations, and realizing the “Made in China” brand was in peril, China responded to the scandal in several ways including: (1) removing potentially contaminated goods from the stores; (2) pursuing criminal investigations of parties who added the melamine to the milk; and (3) attempting to force a settlement between the dairy industry and the harmed individuals. These three responses are discussed below.

i. The Incomplete Removal of Melamine-tainted Goods from Stores

“On Tuesday, [14 October 2008], the Chinese government ordered all liquid and powdered milk manufactured before September 14 to be removed from store shelves for testing.” New Zealand questioned whether these efforts were timely by suggesting China had possessed information about the tainted milk well before the recall. Chinese officials were forced to issue a public apology for delaying the response to the tainted milk—a delay many believe was an attempt to preserve China’s reputation through the Beijing Olympics.

In the wake of the scandal, China’s government made substantial changes to the structure of regulations governing food safety and placed responsibility of regulating food safety under the National Ministry of Health. Since these changes were implemented, critics have noted positive results; however, shortcomings remain in food safety regulation in China. Although the Chinese Ministry of Health has ordered all melamine-tainted dairy products destroyed, such goods have reappeared on Chinese markets’ shelves several times throughout 2010. In January and July of 2010, tainted dairy products resurfaced in the marketplace. In both cases, the products are believed to be leftovers from 2008 that were not destroyed.

ii. Pursuit of Criminal Investigations

Various criminal prosecutions were pursued in conjunction with the melamine-tainted milk scandal. Approximately nineteen people were sentenced to prison terms. Notably, among the nineteen was Tian Wen-hua, the chairwoman of Sanlu, one of China’s largest dairies and a focus of the investigation. Ms. Wenhua faced charges based on the allegation “that the company knowingly sold adulterated milk.” At trial, Ms. Wenhua admitted that Sanlu had been aware continued, next page
that the baby formula contained melamine and that the company failed to report it for months. Ms. Wenhua received a life sentence. In addition, two men involved in selling the tainted milk received death sentences for their part in the scandal.

China may have hoped that the pursuit of the criminal prosecutions would quell the public scrutiny. An opaque legal system, however, hindered the victims’ families from obtaining closure through the punishment of the wrongdoers: families were not allowed into the courtrooms; the proceedings were not public; the press was cordoned off outside of the courthouse; and only government-approved journalists were allowed into the proceedings. As a result, coverage of the trials was limited to men paraded around in handcuffs with their heads bowed. Interested parents called for greater transparency and accountability in the process to help parents ensure that officials were doing what was best for the harmed babies, but these requests were stonewalled by China’s government.

Further, families of the victims questioned the completeness of the criminal investigations. The two executed men were referred to as scapegoat middlemen by several affected families. Families felt that there were more guilty parties, many of whom were members of regional governments in China, but that those parties were being ignored. From the beginning of the scandal, gradual fallout occurred as Chinese officials found to be guilty or negligent were fired or punished. Two years after the initial scandal, however, there are still concerns that bribery and corruption remain in the system.

iii. Questionable Attempts to Force a Settlement

The melamine-tainted milk scandal implicated a total of twenty-two dairy companies. The Sanlu Group, at the center of the scandal, filed for bankruptcy in mid-December of 2008. Early attempts to pursue lawsuits against these companies were met with resistance from the Chinese courts and government. There were several reports that representatives of the families were detained to prevent them from making public comments. Chinese officials sought to prevent litigation by negotiating a settlement with China’s Dairy Industry Association (i.e., the twenty-two dairy companies implicated by the scandal) on behalf of the victims. These efforts, however, were unsatisfactory to many of the injured families. In December of 2008, a compensation plan was announced by the twenty-two dairy companies at the center of the melamine-tainted milk scandal. The plan arranged for payments to be made to the victims in amounts ranging from $290 for children with less substantial health problems to more than $29,000 to the parents of deceased children. All in, the dairy companies committed between $130 and $160 million to the fund to compensate the suffering families. While some families opted to settle for the compensation provided by the fund, many did not feel the plan adequately addressed the potential long-term health care costs of the affected...
children or the emotional suffering felt by the victims and their families. In late January of 2009, China’s dairy industry officials reported that approximately 90% of the families affected had accepted the settlement. With nearly 300,000 victims, however, the number of families that remained outstanding at that time was in the thousands. Dissatisfied with the settlement offers, these families sought to bring legal action in the Chinese courts and abroad.

II. Litigation

As part of the ongoing fallout from the melamine-tainted milk scandal of 2008 in China, many families petitioned the Chinese courts to hear collective litigation actions against the dairy manufacturers. In addition, after facing opposition in the Chinese court system, at least one case was filed by aggrieved parties in the United States’ court system, and another in Hong Kong. The victim’s attempts at litigation in China, the United States, and Hong Kong are discussed below.

a. Litigation Efforts in China

Initial efforts to bring collective actions against the Sanlu Group and other dairy manufacturers faced opposition by the Chinese courts. Commentators have speculated the opposition stemmed from the Chinese government pressuring the courts “because government officials were involved in covering up the deaths and illnesses.” In one of the more extreme cases, it was reported that one group of parents planning to hold a press conference before filing a suit was detained by authorities before they could address the media.

After encountering these initial obstacles, the families’ prospects seemed to improve with the issuing of a statement from the Chinese Supreme Court. Finally, on 26 March 2009, the New York Times reported that a Chinese court had agreed the previous day “to consider a lawsuit by parents of a sick child against” a manufacturer of the tainted milk. Based, however, on the case filed in the United States District Court in the District of Maryland (see subsection infra) it appears that after accepting the cases, the Chinese courts have continued to delay and hinder the adjudication of the plaintiffs’ claims.

b. An Uphill Battle in U.S. Courts

On 15 January 2009, a group of Chinese plaintiffs turned to the U.S. courts for redress; however, overcoming the burden of forum non conveniens proved to be too much for the foreign plaintiffs. In Tang v. Synutra Int’l, Inc., the plaintiffs, a group of 100 parents on behalf of fifty-three minor children, brought a claim against Synutra International, Inc. (incorporated in Delaware) and Synutra, Inc. (incorporated in Illinois), parent companies of Sheng Yuan Nutritional Food Co., Ltd., a Chinese company found to have produced sixty-nine batches of the melamine-tainted milk. The defendants responded by filing a motion to dismiss on forum non conveniens grounds.

The district court followed the forum non conveniens analysis set forth in the seminal Supreme Court decision on the matter, Piper Aircraft Co. v. Reyno. The analysis considers whether: (1) there is an alternative and adequate forum available to the parties; (2) that forum presented an adequate remedy to the plaintiffs; and (3) “certain private and public interest factors militate in favor of dismissal.” Plaintiffs argued that China was an inadequate forum because attempts by attorneys to file cases in China’s courts have been met with inaction by the courts amounting to a failure to adjudicate or process claims. In cases unrelated to melamine-tainted milk, but involving the issue of forum non conveniens, both the Supreme Court and the Fourth Circuit have recently found China to be an adequate alternative forum. Consequently, the district court found the first prong of the analysis satisfied. Attacking the second prong of the analysis, plaintiffs argued that the settlement negotiated by the Chinese government did not offer a legal remedy to the victims and, therefore, could not be considered as a factor in favor of finding the Chinese courts an adequate forum. Unfortunately for the plaintiffs, in 2001, the Ninth Circuit held that the forum non conveniens inquiry does not require a finding that a judicial remedy is offered to the plaintiffs. Relying on the Ninth Circuit ruling, the district court found plaintiffs’ argument that the settlement was not a legal remedy unpersuasive. Finally, the district court also ruled that private and public factors militate in favor of dismissal because: (1) it is reasonable to assume there would be more Chinese witnesses than U.S. witnesses; (2) the barriers to compelling such witnesses to the U.S. are large; (3) most such witnesses do not speak English; and (4) while the case affected many Chinese individuals, it touches very few in the United States.

c. Litigation Attempts Unsuccessful in Hong Kong

The parents of four children affected by the melamine-tainted milk filed suit in Hong Kong against Fonterra, one of the dairy companies involved in the scandal. Fonterra is based in New Zealand with a subsidiary registered in Hong Kong. Fonterra’s subsidiary in Hong Kong held a “43% stake, and three out of seven board seats, in Sanlu,” a dairy firm at the center of the scandal.

Faced with similar jurisdiction obstacles as those facing the plaintiffs in the U.S., the parents’ attorney argued that it should be Fonterra’s, the defendant’s, base that is most relevant to establishing jurisdiction, because it is common practice for companies to set up subsidiaries in Hong Kong to invest in China. The argument was to no avail, however, and on 27 May 2010, Hong Kong’s Small Claims Tribunal dismissed the case stating that the appropriate forum was on mainland China. The Small Claims adjudicator further stated that Fonterra’s Hong Kong subsidiary “did not owe a duty of care to the victims.

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because it did not have controlling power.”81 Plaintiffs, the parents, have been denied leave to appeal the Small Claims Tribunal’s ruling.82

III. The Next Phase

Having been unsuccessful in the United States and Hong Kong, it remains unclear where victims dissatisfied with the government-negotiated settlement might turn next for relief. Meanwhile, confidence in the Chinese government to regulate the marketplace remains shaky as tainted products reappear on the shelves83 and new problems stemming from the 2008 scandal arise. Recently, in August of 2010, parents of babies who consumed the tainted milk have complained to authorities that their children are showing signs of premature puberty.84 Consequently, China’s Health Ministry ordered an investigation into the parents’ claims and found no evidence that the condition was caused by consumption of tainted milk powder.85 In addition, as recently as July of 2010, parents of affected babies seeking to petition the government for help have reported interference from local police.86 Also in July, the father of one of the deceased children from the scandal was sentenced to one year in a labor camp for “re-education” for posting angry comments online.87

Although the U.S. and Hong Kong have decided that their courts are inappropriate forums for melamine-tainted milk cases, China’s courts do not appear to offer a willing forum either. Until China opens its courts and actually adjudicates victims’ claims, it is likely that victims will continue to seek other forums, thereby increasing tension and forcing China’s government to decide whether to continue down its current path or begrudgingly acquiesce to the victims’ wishes to have their day in court.

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tor degree from the Florida Interna-
tional University College of Law in May of 2010. He also has a Master of Business Administration, Bachelor of Science in Finance, and a Bachelor of Arts in English from the University of Florida. Adam would like to thank Professor Manuel Gomez, Brittney Keck, his family, and friends at the International Law Section of The Florida Bar for their work on the publication. An earlier version of this paper and the underlying research was prepared for The Globalization of Collective Litigation Seminar at FIU College of Law in the spring of 2010.

Endnotes:

4. Poisoning the Milk, supra note 2.
5. Id.
6. Patti Waldmeir, Beijing quality chief resigns over tainted milk scandal, Fin. Times, Sept. 23, 2008, at 4 (explaining melamine “can be used to boost the apparent protein content of watered-down milk”).
11. See Anderlini & Waldmeir, supra note 1 (explaining that Singapore banned all Chinese dairy imports in response to the melamine-tainted milk scandal); see also Blaine Harden, China’s Reputation On Product Safety Reaches a New Low, Wash. Post, Oct. 7, 2008, at A.14 (“Even Burma — where one of the world’s most repressive and isolated military governments relies on trade with China—... warned its people to steer clear of all Chinese dairy products.”).
13. Zhang & Mundy, supra note 8; see also FDA cautions Asian community, supra note 3.
15. See Lazarus, supra note 2 (quoting Chinese Premier Wen Jiabao speaking at an economic forum: “We will make the entire ‘Made in China’ brand worry-free and reputable for both the Chinese and the people across the world”).
16. Id.
20. See Melamine return a timely reminder, South China Morning Post, Jul. 13, 2010, at 12 [hereinafter Timely].
21. See id.
23. Id.
25. See id.
26. See id.
29. See McDonald, supra note 26; see also Jacobs, supra note 26.
30. Jacobs, supra note 26; see also Demick,

Id.

For a frame of reference, $290 “is about three months of the average worker’s salary.” Id.; see also Michael Wines, Local Court Is China’s First to Accept a Tainted-Milk Suit, N.Y. Times, Mar. 26, 2009, at A.12; see also Hu Yinan and Cui Xiaohuo, Appeals sought in milk case, China Daily.com, chinadaily.com.cn.

Id. supra note 47 (valuing the compensation plan at $160 million); but see Anthony Lin, Chinese Courts to Accept Tainted-Milk Suits, L.A. Times, Mar. 9, 2009 (valuing the compensation plan at $130.43 million).

Id. supra note 51 (According to China’s official Xinhua news agency, twenty-two Chinese dairies contributed $130.43 million to a compensation fund, most of which has now been paid out.).

Id. supra note 47 (Our biggest demand is not the compensation, but medical treatment and academic research on the influence that melamine will have on the health of our children”); see also Wines, supra note 50 (“But as many as 600 families refused to accept the offers unconditionally, saying they were entitled to more damages for emotional suffering and other losses.”); see also Families, supra note 43 (stating the families have “demands that go beyond the government’s one time payouts”).

Id. supra note 39.

Id. supra note 33.

Id. supra note 34.

Id. supra note 31.

Id. supra note 32.

Id. supra note 35.

Id. supra note 36.

Id. supra note 37.

Id. supra note 40.

Id. supra note 41.

Id. supra note 42.

Id. supra note 43.

Id. supra note 44.

Id. supra note 45.

Id. supra note 46.

Id. supra note 47.
For $190, U.S. Customs Will Police Your Brand

By Peter Quinter and Jennifer Diaz, Miami

How would you like the almost 56,000 U.S. Customs and Border Protection (U.S. Customs) employees to protect your brand at 327 U.S. ports of entry? If you own a copyright or trademark, this article will help you understand the significance of taking the extra step to “record” the copyright or trademark with U.S. Customs. Many companies mistakenly believe that registering a trademark or copyright with the U.S. Government provides sufficient protection and remedies and, therefore, do not take the extra step to record those trademarks or copyrights with U.S. Customs. Registering a trademark with the U.S. Patent and Trademark Office (USPTO) or copyright with the U.S. Copyright Office gives public notice of one’s ownership of the trademark or copyright. On the other hand, the purpose of recording a trademark or copyright with U.S. Customs is to prevent the unauthorized importation of merchandise that bears a recorded trademark or copyright. U.S. Customs prevents counterfeit and otherwise infringing products from entering or exiting the United States for registered trademark or copyright holders who have also taken the extra step to record their trademarks or copyrights with U.S. Customs.

U.S. Customs officials may detect infringing merchandise at the time of entry into the United States. When a trademark or copyright is recorded with U.S. Customs, the information is entered into an electronic database accessible to U.S. Customs officers around the world. U.S. Customs uses this information to target suspect shipments for the purpose of physically examining merchandise to prevent the importation into or exportation from the United States of infringing goods.

Advantages to Recording a Trademark or Copyright with U.S. Customs

The first and most obvious advantage to recording a trademark or copyright with U.S. Customs is that the agency will monitor and seize infringing merchandise at the ports of entry. Because U.S. Customs does this, the trademark or copyright holder does not have to locate and prosecute every unauthorized importer, distributor, or retailer illegally using a trademark or copyright.

In 2008, U.S. Customs seized more than $272 million worth of merchandise that infringed intellectual property rights (IPR). Comparatively, in 2007, the total domestic value of merchandise seized by U.S. Customs was almost $100 million less, at $196 million, still a large increase from the total value of seized goods of $94 million in 2003. In 2008, footwear, handbags, pharmaceuticals, apparel and electronics comprised over 68 percent of the total merchandise seized, worth more than $200 million. In 2008, the top commodity seized was footwear, with a domestic value of $102 million and representing 38 percent of the total value of infringing goods seized. In 2007, although footwear was still the top commodity seized, the total domestic value was $77 million, representing 40 percent of the total goods seized.

Second, U.S. Customs has the authority to issue monetary fines against anyone who facilitates the attempted introduction into the United States of seized and forfeited counterfeit merchandise. Typically, that is the U.S. importer; however, it may also be the foreign exporter or freight forwarder.

Third, U.S. Customs may go to the U.S. Attorney’s Office and request that those involved in the illegal activity be criminally prosecuted under the Trademark Counterfeiting Act of 1984. First-time violators of the Act are subject to penalties of up to ten years imprisonment and/or a $2 million fine, while repeat offenders are subject to twenty years imprisonment and/or a fine of up to $5 million.

Finally, U.S. Customs may coordinate and participate in raids on counterfeit production facilities internationally. U.S. Customs officers located at American embassies around the world routinely cooperate with foreign law enforcement agencies and share information for the criminal prosecution of manufacturers and exporters of counterfeit merchandise located overseas.

Customs e-Recordation System

Trademark and copyright recordations may now be filed on-line with U.S. Customs’ new IPR e-Recordation online system. There are highly technical issues in U.S. Customs regulations found in 19 C.F.R. Part 133, and in the specific questions that are asked on the application, matters that are most appropriately addressed by an attorney who is knowledgeable and experienced with recording trademark or copyrights with U.S. Customs.

The following is a checklist of some the information necessary to submit
an electronic trademark or copyright application:

- Description of trademark or copyright registered with the USPTO;
- USPTO Registration Number;
- Country of manufacture of protected goods bearing the trademark or the country of manufacture of the protected copyright work;
- Names of any parent companies, subsidiaries, or other entities that are under common control with, or share any type of ownership interest or relationship with, the U.S. trademark owner, or names of all parties authorized to use or reproduce the copyrighted work;
- Fee of $190 for each trademark or copyright. If the trademark is registered in more than one class of goods, the fee is $190 per class recorded with U.S. Customs. When filing a trademark through U.S. Customs’ e-recordation website, it is advisable to attempt to obtain “gray market” protection from U.S. Customs. Gray market goods are foreign-made articles bearing either a genuine trademark or a trade name that is identical to or substantially indistinguishable from one owned and recorded by a U.S. citizen or company, which are imported without authorization from the U.S. holder. For more information, see www.customsandinternationaltradelaw.com.

CORRECTION: In the Summer 2006 edition of the International Law Quarterly, the biography of Ivan A. Rodriguez Seda listed him as a “U.S. Attorney for the Jurisdiction of Puerto Rico.” The intent of the statement was merely to point out that Mr. Rodriguez Seda, as an attorney licensed to practice in Puerto Rico, operates under the United States judicial system, not that he was a “U.S. Attorney” or in any way employed by the Department of Justice. We regret any confusion our error may have caused.

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You have the plane tickets and the itinerary at hand. In your briefcase, you carry the last draft of your international entertainment agreement and an English/Chinese dictionary. You appear to be ready for face-to-face negotiations with your Chinese counterpart. But are you really prepared? You may think that you are. Think again. Negotiations with the Chinese are not like negotiations with Westerners, especially when dealing in niche areas such as entertainment law. Negotiations with the Chinese have their own flavor, and you must be prepared for them. You must not only be an expert on the regulations governing your deal but also on the art of negotiating with the Chinese. If you master these two areas, you can be certain you will be successful at negotiating your entertainment deal with the Chinese.

The entertainment industry is one of the fastest growing industries in China. Even though no Chinese law defines what constitutes matters of entertainment law, these matters are understood to include “organization and brokerage of performances; production and distribution of films; production, distribution, and broadcast of television programs; production of music works; export and import of entertainment products; operation of places of entertainment; operation of online games; and the brokerage of management of actors.”¹¹ Last year alone, the entertainment industry in China generated total revenue of 195.9 billion yuan ($28.7 billion),² and it promises to keep growing. About 97% of China is now covered by radio and TV networks, and film screenings are reaching most villages.³ Further, this year’s revenue is expected to increase to 200 billion yuan ($29.3 billion) and box office returns to pass the 10 billion yuan ($1.47 billion) barrier.⁴ With so much money at play, it is no wonder that more and more people consider entering this industry. Do you have what it takes to do it successfully? Below are some pointers.

Do your research
First and foremost, you need to make sure that you have done your research. Entertainment agreements cover a vast array of practice areas (i.e., intellectual property, contracts, international law, immigration, taxation, labor, business, securities and litigation), and the legal framework regulating these areas affects the entertainment industry and the accepted business practices.⁵ As a good negotiator and advocate, it is advisable that you understand Chinese regulations affecting your deal. To begin, you should know whether your entertainment agreement is one that can be performed in China. The legal options for foreigners who are interested in the entertainment industry depend on the specific type of entertainment.⁶ For example, foreign investors can invest in performance brokerage and performance venues through equity joint ventures or contractual joint ventures but not as wholly owned enterprises.⁷ Likewise, foreign investors cannot invest in the production of films, but they can cooperate with a qualified Chinese entity to make television programs.⁸

Besides knowing American law (which you may be asked about or agree to as the governing law) and Chinese law, you should also be educated on the international agreements to which China and the U.S. are signatories. Examples of international agreements affecting the entertainment industry are the Universal Copyright Convention, the Berne Convention, and the World Trade Organization’s working documents, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The common trend in these treaties is the requirement that foreign works get national treatment. That is, at a minimum, the Chinese government must give foreign works the same protection it offers to its nationals.⁹

Significantly, you must also be mindful of the Chinese government’s active role in censoring information which it deems inconsistent with the Communist Party’s political dogma, especially since most media outlets are owned by the Chinese government.¹⁰ “Beijing decides what will be said, and when, and how.”¹¹ The government uses the media to put across its own opinions and policies.”¹² You should research what, if anything, the General Administration of Press and Publication,¹³ State Administration of Radio, Film and Television,¹⁴ Ministry for Information Industry,¹⁵ State Council Information Office,¹⁶ and the Central Propaganda Department¹⁷ have to say regarding the content of your entertainment agreement. You may need to obtain approval from them in order for your contract to have validity in China.¹⁸

On the more technical side you should be fully aware of the different technologies existent and of the role of artistic organizations such as the performing right societies (for music deals)¹⁹ and the creative guilds
These organizations may have collective bargaining agreements that dictate some of the terms of your entertainment agreement. For instance, they may dictate the basic fee arrangements and working conditions for the creative and technical personnel involved in your entertainment agreement. Understanding and interpreting these agreements to determine if they apply to your contract, and the extent of their application if they do, however, is not as easy as one would hope. There is no established body of authority interpreting such agreements. This absence of authority is further complicated by the fact that a strike or threatened strike often results in the agreement not being completed. To avoid any future problems in the performance of the agreement, however, it is advisable that you do thorough research to determine the extent to which their regulations can affect the terms of your international entertainment contract.

Finally, it is advisable that you read as much as possible about Chinese culture and customs to better understand your “negotiating rival.” Read the 36 Strategies. The 36 Strategies are derived from proverbs that date back to the 1600s and that are based on deception and deceit. They were forgotten for several years but recovered strength with the Communists. They will help you to understand how the Chinese think, react and act during the negotiations. Do not be naive and enter your negotiations thinking that the same concepts of fairness and honor have been inculcated in your Chinese counterpart as they have been in you. On the contrary, be cognizant of the fact that the rule of law “has yet to hit bedrock in China.” Thus, if you prepare yourself for a tough negotiation and you understand or, even better, use to your advantage, the 36 Strategies, you will be one step ahead of the game and will probably obtain an advantageous result.

Be Well Prepared for your Face-to-Face Meeting

Your time is valuable. Do not waste it arguing issues that could and should be resolved in anticipation of your face-to-face meeting. And even though your Chinese counterpart may prefer face-to-face meetings over phone calls or emails, you should definitely arrive at your first meeting with a good working draft of the agreement. This way, you not only save money and time, but you also give yourself time to consider, at your leisure, new terms of the agreement.

Just as important as a good working draft is a good translator. You will probably need a translator who speaks Mandarin, the official dialect of China. Different areas of China have different dialects, but most businesspeople speak Mandarin.

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knowing for a translator, make sure you find one who not only interprets words but one who also excels at interpreting underlying meanings.32

The last thing you want is to lose your deal in translation!

Taking a translator with you, however, should not prevent you from learning a few Chinese words. The Chinese will feel honored by your interest in their language and customs.33 Once again, surprise them with your knowledge of their culture, and you will be headed towards a meaningful and successful negotiation.

Every culture has its own unspoken rules of etiquette and behavior. If you violate them, knowingly or not, you risk causing grave insult to your negotiating partner and losing the deal. Below are some pointers that you should know and follow during your negotiation:

• The first thing you must understand is that you are dealing with a different culture.

• Whereas the United States has and encourages a low context culture where “people communicate directly and explicitly and are said largely to rely on the spoken words,”34 the Chinese belong to a high context culture where “the meaning of the communication lies mainly in the context and is not fully verbalized.”35

• The Chinese are not confrontational.

• The value of relationships is far greater than in the United States. Much of what is accomplished depends on who you know and who your contact is.36 The Chinese call it guanxi (pronounced gwentshee).37 It is never too late or too early to start building your network. Be proactive in this area, and it will eventually pay off.

• Know that the most senior Chinese official or representative will probably not attend the negotiation. The Chinese respect age and status and treat others based on how they fit into the age and status categories.

• If you want them to consider the deal seriously, explain in advance the title of the attendees and take with you only older associates.38 It is also a good idea to provide them with an organizational chart of the company you represent.39

Finally, make sure that prior to your meeting you have considered and discussed whether your client should obtain an Errors and Omissions insurance policy. “It is only the most experienced entertainment lawyer who really understands what is or should be or can be covered by Errors and Omissions Insurance and how to implement it.”40 It is important to obtain this insurance at the beginning of your negotiations because even if it is not required when drafting the preliminary agreements, you may learn down the road that the financier or the distribution organization requires that the project qualify for Errors and Omissions Insurance.41 Accordingly, you are better off getting it at the beginning and not having regrets down the road for not looking into it earlier.

Make Sure Your International Entertainment Contract has the Important Clauses that all International Contracts Must Have

Entertainment contracts address a multitude of matters such as “ownership of rights in the material to be produced; licensing concerns; the engagement of creative talent, editors and technicians; the securing of locations, sets, costumes, facilities and equipment; marketing relationships, distribution; licensing of collateral products; and financial and legal matters. The list is never-ending.”42 Thus, this article will address only the three legal clauses that all international agreements should have: a dispute-resolution clause; a choice-of-law clause; and a forum-selection clause.

Alternative Resolution Methods

Disputes are common in the entertainment industry. The nature of this industry, however, requires that they be solved creatively, rapidly and efficiently. That is why alternative dispute resolution methods have succeeded greatly in this area. The two most often used methods are arbitration and mediation.43

In China, the general commercial practice is to settle all kinds of disputes by “friendly consultations (youhao xieshang) between the parties or by mediation or conciliation (tiaojie).”44 When these methods fail to provide a resolution to the conflict, however, the Chinese commonly turn to arbitration (Zhongcui).45 This practice is recognized by Art. 128 of the Chinese Contract Law, which provides that the parties may settle their disputes through conciliation or mediation.46 If the mediation or conciliation fails, the parties may apply to an arbitration institution, in China or elsewhere.

Under Chinese Law, arbitrations can be held in China or elsewhere depending on whether the entertainment contract contains a “foreign element.”47 If the arbitration is conducted in China, it can be done through the China International Economic and Trade Arbitration Commission (CIETAC).48 CIETAC is headquartered in Beijing. Significantly, you can be certain that an arbitration clause will be included in your agreement if you are dealing with the Chinese government. Most standard form contracts used by the government contain arbitration as the means for settling disputes.49 Read this clause carefully as you may need to modify it to add an express waiver of sovereign immunity.50

In the United States, the three organizations most used for entertainment-related dispute resolution are: American Arbitration Association (AAA); American Film Marketing Association (AFMA); and JAMS/Endispute.51 The arbitrators working with AFMA and AAA are entertainment attorneys who have worked on domestic and international disputes.
arising out of “production agreements, talent agreements, motion picture, television and multimedia licensing agreements, financing agreements and sales agency agreements.”52 The arbitrators who work with JAMS/En dispute, on the other hand, are retired judges.53 Since these institutions are more experienced in resolving entertainment disputes, it may be advisable to designate them as the arbitral tribunal in your entertainment agreement. Considering the entertainment industry is at an infant stage in China compared to the United States, it might be advisable to select an American arbitral institution rather than CIETAC for the arbitration of your entertainment dispute. Having arbitrators who understand all aspects of your deal is certainly an advantage of American arbitration institutions that cannot be ignored.

Choice-of-Law Clause

As an American lawyer, you will probably want American law to apply to the entertainment contract for a couple of reasons. First, because of your working knowledge of American law and, second, because the United States has well-structured copyright laws that will probably afford better protection to your client. Luckily for the American negotiator, China also recognizes the principle of party autonomy and, excluding certain issues, it allows parties to a contract to choose the law that will govern their relationship as long as there is a “foreign element.”54 Chinese law defines “foreign element” as one where “one or both parties to the contract are foreigners; the subject matter of the contract is in a foreign country; or [t]he contract was made, modified, or terminated in a foreign country.”55 Additionally, while in some countries the law chosen must have some relationship to the transaction, in China this requirement does not exist.56 The parties may choose the law of any country that is in force, as well as international customs and/or international civil and commercial treaties.57

China, however, has some limits on the freedom of parties to choose the governing law. First, the chosen foreign law will be excluded if its application would “harm the social public interest of China.”58 Second, if China has made reservations to a treaty, those provisions must be excluded from the choice of law selected by the parties.59 Third, the choice-of-law clause has to observe rules that mandate the application of Chinese law; for example, issues dealing with the capacity of parties and the formalities of the contract.60 Additionally, at present, the application of Chinese law is mandatory in deals involving “foreign investment enterprises.”61 Foreign enterprises include “contracts for Chinese-foreign equity joint ventures, for Chinese-foreign cooperative joint ventures, or for Chinese-foreign cooperative exploration and development of natural resources to be performed within the territory of China.”62 Chinese law must also be applied to contracts between a wholly foreign-owned enterprise and other company, enterprise, economic organization or individual.63 The reasoning behind the mandatory application of Chinese law to joint venture contracts is that “foreign investment has great impacts on the national economy and the retaining of application of the domestic laws will effectively put the foreign investment under the reasonable control in light of the nation’s interest.”64

If an agreement can be reached as to the applicable law, it is advisable that the choice-of-law clause expressly acknowledge or reject the authority of foreign courts to grant injunctive relief that would govern conduct abroad.65 This clause will certainly be appreciated by the litigators when they want to prevent conduct in violation of the agreement from continuing abroad.

Choice-of-Forum Clause

Choice-of-forum clauses are allowed under Chinese law but with certain restrictions. According to Article 244 of the Civil Procedure Code of China (CPL), parties can choose in their agreement a forum for their disputes that has an actual connection with the dispute if the dispute involves foreign contracts or foreign property rights.66 Neither the CPL nor the Supreme People’s Court of China has clarified what “actual connections” are.67 Many believe, however, that this term includes “place of a party’s domicile or residence,” “place of contract,” “place of performance,” “place of the object of the contract,” or “place of a party’s principal business office or business operation.”68 Additionally, the CPL expressly denies jurisdiction to foreign courts over disputes involving contracts of foreign investment enterprises.69

As an American lawyer you may want, if possible, to negotiate the United States as a forum or even possibly a third, neutral country. Do not forget, however, that a “contract is only as good as its enforcement,”70 and if the Chinese party does not have any assets outside of China, it may be hard to have your judgment enforced unless you agreed to arbitrate the dispute. In that case, enforcement is simplified by the fact that the United States and China are signatories to the New York Convention on the Recognition of Arbitral Awards, which facilitates the recognition of international arbitral awards. Thus, if you know that the Chinese party does not have assets outside of China, you must have an arbitration agreement if you want to litigate your dispute outside of China and eventually be able to enforce any award rendered in your favor.

Conclusion

Entertainment agreements cover many practice areas and business fields. To successfully negotiate an entertainment deal with a Chinese party, you not only must know about the specific requirements of your deal; you should also know about Chinese culture and laws in order to be effective. A good understanding of the basic elements that model your “negotiating rival’s” reasoning and actions will give you a comparative advantage. Take advantage of it.
and negotiate for your client the best possible entertainment deal. You can be certain your client will call you back to negotiate more entertainment deals with the Chinese, as there is no shortage of opportunities in this growing industry!

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Endnotes:
1 1 Media, Advertising & Entertainment Law Throughout the World §7:48 (hereinafter 1 Media).
2 http://english.cri.cn/6666/2010/05/19/2483e570777.htm.
3 Id.
4 Id.
6 See 1 Media, supra note 1.
7 Id.
8 Id.
11 China’s Constitution provides that the “State shall promote the development of radio and television broadcasting and sponsor mass cultural activities.” See 1 Media, supra note 1.
12 See Saxon, supra note 10.
13 “The General Administration of Press and Publication is the government’s administrative agency responsible for drafting and enforcing China’s prior restraint regulations, as well as for screening books discussing ‘important topics.” See www.ccecc.gov/pages/virtualAcad/exp/expCensors.php.
14 This agency “controls the content of all radio, television, satellite, and Internet broadcasts in China [including where it is
able, foreign satellite broadcasts.” Id.
15 The Ministry is “responsible for regulating China’s telecommunications and software industries.” Id. It also “controls the licensing and registration of all Internet information services.” Id.
16 It is the supreme administrative organ. It is responsible for promoting Chinese media to publicize China to the world and for regulating who posts news on the Internet. Id.
17 It is the Communist Party’s counterpart to the government’s General Administration of Press and Publication and the State Administration of Radio, Film and Television. It is responsible for preventing publishers from printing anything inconsistent with the Communist Party. Id. To do this, it issues guidelines to the only official news agency, Xinhua, which must be followed by other media outlets if they want to continue in business. See Saxon, supra note 10 at 19.
18 See 1 Media, supra note 1.
19 The performing rights societies are extralegal regimens that “regulate the ability of authors, composers, and publishers ..., to collect royalties and otherwise exercise domain over the music to which they are legally entitled.” See Martin Perlberger & Michael Novicoff, Recent Developments in International Entertainment Law, 17 Whittier L. Rev. 191, 192 (1995). The performing rights societies in the United States consist primarily of American Society of Composers, Authors and Publishers (“ASCAP”) and
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Broadcast Music, Inc. (“BMI”). Id.
2o The principal creative guilds in the United States are the Directors’ Guild of America, the Screen Actors’ Guild, the Writers’ Guild of America, and the American Federation of Television and Radio Artists. Id. at 195. See also David P. White, High Stakes, 30-May L.A. LAW 22, 24 (2007).
21 See Schrader, supra note 5 at 9.
22 See Perlberger & Novicoff, supra note 19 at 196.
23 Id.
24 Id.
25 John Barkai, Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-Cultural Negotiation and Dispute Resolution, 8 PEPP. DISP. RESOL. L. J. 403, 439 (2008).
26 See Saxon, supra note 10 at 55.
27 Id. at 56.
29 Id. at ¶ 212.
30 Id.
31 See Saxon, supra note 10 at 50.
32 Id. at 51.
33 Id.
34 See Barkai, supra note 25 at 407.
35 Id.
36 See Saxon, supra note 10 at 56.
37 Id. at 57.
38 Id. at 195-96
39 Id. at 57.
40 See Perlberg & Novicoff, supra note 19 at 196.
41 Id.
45 Id. at 4.
46 Article 128 of Chinese Contract Law provides: “The parties may resolve a contractual dispute through settlement or mediation. Where the parties do not wish to, or are unable to, resolve such dispute through settlement or mediation, the dispute may be submitted to the relevant arbitration institution for arbitration in accordance with the arbitration agreement between the parties. Parties to a foreign related contract may apply to a Chinese arbitration institution or another arbitration institution for arbitration. Where the parties did not conclude an arbitration agreement, or the arbitration agreement is invalid, either party may bring a suit to the People’s Court. The parties shall perform any judgment, arbitral award or mediation agreement which has taken legal effect; if a party refuses to perform, the other party may apply to the People’s Court for enforcement.” 47 Id.
49 See Cheng, Moser & Wang, supra note 44 at 5.
50 The protection rendered to foreigners by arbitration clauses which remove the dispute from local courts can be rendered illusory if the state, in this case China, can defend against enforcement of an arbitral award by claims of sovereign immunity. See Alexis Blane, Sovereign Immunity as a Bar to the Execution of International Arbitral Awards, 41 N.Y.U. J. INT’L L. & POL. 453, 455 (2009). Thus, it is advisable to include in the entertainment agreement an express waiver of any defense based on sovereign immunity grounds. Nonetheless, it is important to remember that the extent of the contractual waiver will still depend on the sovereign immunity laws of the country where the assets are located. Id.
51 See Wortherly, supra note 43 at 169.
52 Id. at 171.
53 Id.
54 Article 126 of the Chinese Contract Law provides: “Parties to a foreign related contract may select the applicable law for resolution of a contractual dispute, except otherwise provided by law. Where parties to the foreign related contract failed to select the applicable law, the contract shall be governed by the law of the country with the closest connection thereto.” See also Zhang, supra note 48 at 330-31.
56 See Zhang, supra note 48 at 332-33.
57 Id. at 333.
58 Id.
59 Id.
60 Id.
61 Id.
62 Id.
63 Id.
64 Id. at 334.
65 See Perlberg & Novicoff, supra note 19 at 201.
66 See Zhang, supra note 48 at 347.
67 Id.
68 Id.
69 Art. 246 of the CPL provides that the People’s Courts of China shall have jurisdiction over disputes concerning the “performance within China for contracts of Chinese foreign joint ventures, Chinese-foreign contractual joint ventures, or Chinese-foreign cooperative exploration and development of the natural resources.” Id. at 348.
70 See Chow, supra note 55 at 23.

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1. Inbound into China—
Hong Kong is not China
under U.S.– China Income
Tax Treaty

The U.S.– China Income Tax Treaty (the Treaty) limits the income tax burden China or the U.S. can charge on interest, dividends, royalties, and similar “passive” income earned from within the respective nation by the nationals of the other nation. The beneficiary of the payment must meet the “residency” definition set forth in the Treaty (Article IV) as well as other Treaty and fiscal limitations. The tax is collected by withholding charged to the person making the payment “at source,” who later is also charged with remitting the payment to the fisc and filing the requisite information and transmittal forms. The Treaty’s favorable rate is 20% less than the 30% tax rate imposed by the Internal Revenue Code and its Treasury Regulations on similar payments. In other words, U.S. persons paying interest to Chinese companies must withhold 10% if the payor reasonably believes that the Treaty applies. If the Treaty does not apply (and if no other income tax treaty was available), the U.S. person must withhold the full 30% before making each payment. In either case, the U.S. person is also charged with observing all filing requirements such as obtaining the proper documentations from the payee as the ultimate beneficiary of the payment, etc. The issue is also relevant to the counterparty to the transaction since it will see a lesser rate of return on its investment due to the 20% extra tax if the treaty were not to apply.

a. Direct Investment—
New York
Guangdong Finance, Inc. v.
Comm’r

The facts cited in the Fifth Circuit’s Opinion in New York Guangdong Finance, Inc. v. Comm’r, No.08-60792 (5th Cir. Nov. 20, 2009) are as follows. A U.S. company extended loans to two foreign companies. One company, GITIC, was incorporated and conducted business in mainland China and the second company, GXE, was organized in Hong Kong and apparently conducted business in Hong Kong and mainland China. Neither foreign company was related to the U.S. company, but GXE’s equity was 50% owned by GITIC, the mainland Chinese company. GXE’s possible residency in mainland China was not raised at trial, and the Fifth Circuit found GXE resided in Hong Kong since it was incorporated in Hong Kong and conducted business in Hong Kong, arguably to offset GXE’s claims that it was acting as an accommodation party or just as an agent of GITIC, the real ‘obligor’ to New York Guangdong Finance, Inc. The Fifth Circuit hewed to the facts showing that GXE was paid interest independent of the interest paid to GITIC. Once it was found GXE was incorporated in Hong Kong and so did not meet the Treaty definition of residency as a Chinese company under Article (2)(1), the Court had to find the U.S. company liable for the 30% tax it failed to withhold on GXE’s behalf under IRC section 881(a) and also liable for penalties for not filing the tax returns due whether or not the treaty had applied.

b. IRS Notice 97-40—
U.S. Deems
Hong Kong Fiscally Separate
from China

The Fifth Circuit’s holding in New York Guangdong Finance, supra, rests on the rationale of Notice 97-40 (Notice) confirming that the original language of Article (2)(1) limiting the geographic scope of the Treaty to mainland China remain unchanged even after China extended its jurisdiction over Hong Kong on July 1, 1997. The Notice reasons that Chinese tax law still did not apply to Hong Kong on or after 1 July 1997. The Notice also cites U.S.-Hong Kong Policy Act of 1992, Section 201, 22 U.S.C. section 5721 (1996), which in essence states that any change in U.S. law relevant to Hong Kong must be made by express law or Executive Order.

c. Representative Offices—
China Increases its Scrutiny

The activities conducted by Representative Offices (“Rep. Offices”) of foreign companies in mainland China may not give rise to revenue and in general should be limited to market surveying, business liaisons, product introduction, and the like; hence, the Rep. Office does not rise to the level of a Permanent Establishment (“P/E”) which would serve to “tie in” any income attributed to the establishment to China’s income tax jurisdiction. As of 4 January 2010, the State Administration for Industry and Commerce (SAIC) and the Ministry of Public Security jointly released a Notice limiting the number of actual individuals within the Rep. Office to four, stating that the foreign company must show documentation indicating it had been in existence for two or more years as of the time of applying for its certificate of registration. The issuance of the Notice arguably was prompted by false documentation or untaxed revenue-producing activities carried out.
on by some Rep. Offices of foreign companies. The Notice provides for administrative fines (beyond taxing the revenue from the purported profit-making activities of the Rep. Offices). The term of the registration certificate is now limited to one year as of the time the Rep. Office effects a change or extension. In effect, the Rep. Office becomes a “permanent establishment” which may likely ‘tie in’ gains from sales or exchanges of stock of intangibles by the foreign parent company.


Under China’s 2008 Corporate Income Tax Law, the marginal income tax rate of a “high and new technology enterprise” (HNTE) is reduced from 25% to 15% provided it applies for reduced taxation by successfully applying for the reduced rate (which by definition must represent at least one year; and the company engaged in a preferential field as published by the State Administration of Tax (“SAT”)). The issue for most foreign companies holding IP in low or tax-haven jurisdictions is that the SAT requires the company applying for the reduced rate (which by definition must be a Chinese company) to own the “core” IP from which the revenues are derived. It is possible for the foreign parent to grant an exclusive five-year license to the Chinese company for purposes of applying for the reduced taxation; still the 8% marginal rate of tax reduced may not be cost effective if the exclusive rights must be disentangled from the overall rights. Finally, the revenue arising from the favored technology must be 60% of the total Chinese company revenues.

2. Exit or Reorg.

Strategies—Capital Gains on Sales of Stock of Chinese Companies

On 10 December 2009, China’s State Administration of Taxation (SAT) issued Guo Shui Han [2009] No. 69811 (Notice) enlarging China’s scrutiny over companies formed in jurisdictions “where the effective tax burden is less than 12.5%” or where offshore income is not taxed. Under this Notice, China will tax the gains arising from transfers of shares of Chinese companies by offshore holding companies located in such low or no tax jurisdictions. The rate of tax presumably may be a non-preferential 25%. Albeit to date it is unclear just how the SAT will enforce the terms of its Notice, the transferor (over whom China’s tax jurisdiction may or may not hold using a traditional comparative jurisdictional analysis) must disclose information relevant to the transfer, including any shareholder agreements, within thirty calendar days of the transfer. Capital gains will be assessed on the difference between the direct equity investment or the ‘basis’ of the investment in the hands of the transferor and the sales price or the price based on retained earnings (and in this the Chinese do not segregate pre- from post- 2008 earnings or earnings before and after the law is deemed effective). The only exception is for companies who were traded on a recognized exchange as of the time the Chinese subsidiary was established. Absent this Notice, only sales of stock of Chinese companies holding more than 25% real estate holdings were taxable under the Treaty.

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Endnotes:
2 Id.
3 IRC section 871(a) taxes FDAP (Fixed or determinable, annual or periodical income) at a fixed 30% flat rate (without deductions). Section 1441 then obligates the payor to withhold the 30% unless the payor has at hand at the time of making payment the payee’s documentation reasonably proving entitlement to a reduced treaty rate or exemption. Section 871(b) taxes at regular progressive rates income net of related deductions “connected with a U.S. business”; i.e., activities giving rise to ‘business’ revenues taking place within the geographic boundaries of the U.S.
4 IRC Sec. 881(a) imposes a 30% withholding tax on interest earned by foreign corporations, just like IRC Sec. 871(a) imposes the same 30% withholding tax on interest earned by foreign individuals and pass-through entities owned by foreign individuals.
6 Article (2)(1) was negotiated on or about the same time as the 1984 Sino-British Joint Declaration which allowed China to extend its sovereignty over Hong Kong as of July 1, 1997, even if the Treaty and its Protocols were not effective until 1988.
7 The Notice also states that Hong Kong retains its own separate shipping and aircraft agreement with the U.S. In fact, the U.S.–China shipping and aircraft agreement remains outside the 1984-1988 U.S.–China Tax Treaty & Protocol which does not provide for international operation of ships and aircrafts.
9 The full title of the Notice is “Notice of Further Strengthening the Administration of Registration of Foreign Enterprises Resident Representative Offices.”
10 The approved activities are: electronic information technology; biology and medical technology; aerospace technology; new material technology; high tech services, new energy and energy conservation technology; resources and environment technology; and technology transformation of traditional industries. These categories, as well as more than 200 sub categories of technologies, products and services, are listed in the guidance issued by the Chinese government.
11 The full title of the Notice is, “Notice on Strengthening the Administration of Corporate Income Tax Concerning Equity Transfer for Nonresident Enterprises.”
Promoting People-to-People Exchange with China

By Giselle Carson, Jacksonville

The number of U.S. non-immigrant visa applications issued to Chinese nationals has been steadily rising over the last decade. In 2009, almost half a million applicants in China received non-immigrant visas to come to the U.S., a 4% increase over the prior year.

Most of the U.S. visas issued in China in 2009 were B-1/B-2 visas, used for temporary visits to the United States for the purpose of business or pleasure. Other very popular visa options are the F and J visas, available for student and exchange visitors and their spouses, as well as the H1-B visa for temporary workers or trainees in specialty occupations.

In order to accommodate the rising number of applications, the U.S. Department of State has been adopting new procedures. A summary of the recent changes follows.

New Non-Immigrant Visa Application Form, DS-160

In 2009, the U.S. Department of State introduced a new Online Non-immigrant Visa Electronic Application, the DS-160, for foreign nationals wishing to come to the United States on a non-immigrant visa. This online form is intended to facilitate information collection and the visa application process. The new application replaces several “hard copy” forms such as the DS-156, 157, 158 and 156K. This new form is being phased in throughout Embassy and Consular posts across the globe. All U.S. Consulate Posts in the People’s Republic of China are using the DS-160.

Typically, completing the entire DS-160 takes about 75 minutes, and applicants should make sure to set aside time to complete the application without interruption. For security reasons, the form “times out” after 20 minutes of inactivity. When this happens, all of the information that has been entered can be lost and applicants will be required to start over.

In order to prevent data loss, it is highly recommended the application be “saved” at frequent intervals (for example, by clicking the “save” button upon completion of each questionnaire page). If the applicant needs to leave the computer during the process, he or she should permanently save the form to a secure location on his/her computer’s hard drive. Upon return, the applicant will be able to upload the saved file and continue completing the form with the previously entered information.

Applicants completing the DS-160 should also remember to use only the navigation buttons at the bottom of the page to move through the form. Using the internet browser’s “back” and “forward” arrows may result in a loss of information or changes.

After completion, applicants should save the application to their computer’s hard drive, a flash drive, or CD. This way, if the post rejects the application as incomplete, applicants can easily access the application, correct the errors and resubmit. Also, frequent non-immigrant visa applicants will save time on their next visa application by having the prior application as a reference.

The new form allows applicants to upload a digital or scanned photo with their application. Applicants must follow all requirements and guidelines for visa photographs to ensure acceptance.

Once the application has been successfully submitted, a one-page confirmation form is automatically generated. Applicants will need to print the confirmation page and bring it with them to their visa interview appointment. This page is necessary to retrieve the application data and is needed during all phases of the visa process.

More Flexible Visa Application Process

In order to facilitate the visa process, non-immigrant visa applicants can now schedule an interview appointment at any U.S. Consular Section in China, regardless of the province or city in which they live. Consular Sections are located at the U.S. Embassy in Beijing and U.S. Consulates General in Chengdu, Guangzhou, Shanghai, and Shenyang.

Although the basic application process is the same, specific times vary at each post. Before applying for a visa, applicants should check each post’s website for procedures specific to that post. For more information on how to schedule a visa interview appointment, applicants can go to: http://beijing.usembassy-china.org.cn/niv_appointment.html. Beijing’s Consulate website also offers the most up-to-date appointment wait times.

The appointment procedure for a visa interview remains unchanged. Applicants should make appointments for interviews at least 45 days in advance of travel. Even after a visa interview is completed, if special processing/checking or more information (such as evidence of additional ties to the home country) is required, issuance of the visa may be delayed. Applicants are advised to plan ahead and allow for processing time and delays as consulates are rarely, if ever, sympathetic to requests for expedited visa issuance.

Tips for a Successful Application Interview

The applicant should:

• Bring an extra passport photo to the interview in case the uploaded
photo on the DS-160 is unclear or there are technical problems.

- Arrive at least thirty minutes prior to the interview appointment, fully prepared for the interview. Bring all necessary documentation including the receipt for the application fee, forms or documents required for the type of visa, and any documentation relevant to proving non-immigrant intent if applying for a non-immigrant visa.

- Check the passport’s expiration date. The passport should be valid for at least six months or more.

- Be prepared to explain clearly and succinctly the purpose for coming to the U.S. Applicants should read and understand their visa application forms and documents in support. The visa issuance decision is highly dependant on how well the applicant presents his or her case during a short interview.

- Answer all questions truthfully. Material misrepresentations can lead to a potential permanent exclusion. Applicants for certain work visas, like the H-1B and L-1, should be prepared to answer detailed questions about their U.S. employer and position as consulate officers are scrutinizing these applications.

- In the case of a visa denial, do not argue with the officer at the window. After the interview, review the facts and the reasons for the denial, and if an erroneous decision was made, reapply or seek review at the post. Applicants are permitted to reapply an unlimited number of times. It is highly recommended, however, that applicants take some time following the visa denial to compile new evidence to support their visa re-applications. Reapplying without new supportive evidence is highly unlikely to result in visa issuance.

New Non-Immigrant Visa Fees
Beginning 4 June 2010, the U.S. Department of State began charging increased fees worldwide for non-immigrant visa applications to ensure sufficient resources to cover the rising cost of processing non-immigrant visas. Prior to June, the application fee for all non-immigrant visas was $131.

As a result of the change, applicants for non-petition-based non-immigrant visas (B1/B2, F, M and J) must pay $140. The fee for petition-based non-immigrant visas (H, L, O, P, Q, and R) is now $150. K visa applications require a $350 fee, and E visa applicants must pay $390.

If the last decade is any indication, the United States can expect to see greater numbers of Chinese nationals looking to live and work in America. Continuing the positive people-to-people exchange with China is important to our nation’s economy, though the constant evolution of policies and procedures may present obstacles. Staying informed of current immigration practices and procedures with regard to Chinese nationals will help maintain the flow.

Giselle Carson, a shareholder with Marks Gray, P.A., in Jacksonville, practices primarily in the areas of U.S. and global immigration and business, civil litigation, and wills and estate planning. Ms. Carson has first-hand knowledge of immigration as she was born in Cuba, immigrated to Montreal, Canada, and later to the United States. She is a frequent writer and lecturer on immigration issues and is an active member of several professional and community organizations. Ms. Carson is currently General Counsel for the Jacksonville Regional Chamber of Commerce.

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The Foundation of the New Silk Road: Commercial Agreements between the People’s Republic of China and the Countries of the Western Hemisphere

By Dr. Jianfei Xin, Shanghai and Francisco Corrales, Weston

Below is a compilation of commercial agreements between the People’s Republic of China and the countries of the Western Hemisphere. These agreements may prove useful in planning and developing a commercial project or transaction or in understanding the inroads that China is making in establishing a commercial presence in these countries. We hope that you find these materials helpful.

Authors’ Note: As nearly every country in the Western Hemisphere was a member of the World Trade Organization by China’s accession date, 11 December 2001, that date is used below to show when the WTO benefits and obligations became binding.

Antigua and Barbuda
- Agreement between the Government of the People’s Republic of China and the Government of Antigua and Barbuda on Economic and Technological Cooperation (Signed: July 24, 1992);
- World Trade Organization (December 11, 2001);
- Agreement between China and Antigua and Barbuda on Economic and Technological Cooperation (Signed: January 2003).

Argentina
- Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Argentina (Signed: February 2, 1977);
- Agreement on Economic Cooperation between the Government of the People’s Republic of China and the Government of the Republic of Argentina (Signed: June 7, 1980);
- Supplementary Protocol to the Agreement on Economic Cooperation between the Government of the People’s Republic of China and the Government of the Republic of Argentina (Signed: November 7, 1985);
- Agreement between the Government of the People’s Republic of China and the Government of the Republic of Argentina on Promoting the Establishment of Joint Ventures (Signed: November 15, 1990);
- Agreement on Legal Assistance in Civil and Commercial Affairs between the Government of the People’s Republic of China and the Government of the Republic of Argentina (Signed: April 9, 2001);
- World Trade Organization (December 11, 2001).

Bahamas

Barbados
- Agreement between the Government of the People’s Republic of China and the Government of Barbados on Economic and Technological Cooperation (Signed: May 11, 1990);
- Agreement between the Government of the People’s Republic of China and the Government of Barbados on Economic and Technological Cooperation (Signed: July 27, 1992);
- Agreement between the Government of the People’s Republic of China and the Government of Barbados Concerning the Encouragement and Reciprocal Protection of Investments (Signed: July 20, 1998);
- Bilateral Investment Agreement (Signed: July 20, 1998 – Entry into Force: October 1, 1999);
- World Trade Organization (December 11, 2001).

Belize
- Bilateral Investment Agreement (Signed: January 16, 1999);
- World Trade Organization (December 11, 2001).

Bolivia
- World Trade Organization (December 11, 2001).

Brazil
Respect to Taxes on Income (Signed: August 5, 1991 – Entry into Force: July 1, 1997);

- World Trade Organization (December 11, 2001).

Canada

- The Trade Agreement between the Government of the People’s Republic of China and the Government of Canada (Signed: October 13, 1973);
- The Protocol on Economic Cooperation between the Government of the People’s Republic of China and the Government of Canada (Signed: October 19, 1979);
- The Agreement between the Government of the People’s Republic of China and the Government of Canada on Protection of Investment (Signed: January 18, 1984);
- The Agreement between the Government of the People’s Republic of China and the Government of Canada on Prevention of Double Taxation and Tax Evasions (Signed: May 12, 1986);
- World Trade Organization (December 11, 2001).

Chile

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Digital Censorship and the Great Firewall of China

Corporate Codes of Conduct a Viable Means to Lift the Information Curtain

By Santiago A. Cueto, Coral Gables

Earlier this year, U.S. Secretary of State Hillary Clinton traveled to China where she sternly condemned strict Internet censorship in China and pledged to help Chinese citizens tear down the “Great Firewall of China.” The remarks of Secretary Clinton that “we stand for a single Internet where all of humanity has equal access to knowledge and ideas” echoed the stern tone of Ronald Reagan twenty years ago when he challenged Soviet leader Mikhail Gorbachev: “Mr. Gorbachev, tear down this wall!”

In 2010 digital walls have replaced Soviet-era “bricks and mortar” to divide repressed citizens of authoritarian regimes from the world’s free-flowing current of information and ideas. Since Secretary Clinton’s visit to China, the State Department has brought the issue of online freedom to the forefront in its diplomacy around the world and joined with Internet providers and social-media companies to forge a public-private partnership in Internet freedom. Such collaboration is key, since authoritarian regimes so often contract out the daily work of censorship to private companies. But it may not be enough. Alternative solutions in U.S. domestic laws and international-trade law have fallen short of posing a viable challenge to digital censorship in China. In the final analysis, voluntary corporate codes of conduct may be the only viable force to bring down the Great Firewall of China.

What is the Great Firewall of China?

Over sixty laws and administrative regulations have been enacted by the Chinese government to censor and limit access to the Internet. These laws and regulations are implemented and enforced under an elaborate and sophisticated system known as the “Great Firewall of China.” The “Great Firewall of China” is a complex matrix of filters, censors and barriers that regulate the flow of online information within the People’s Republic of China. The matrix, officially known as the “Golden Shield Project,” is comprised of both technological and human elements that work together to create a distorted version of the Internet—one without all the information the government does not want its citizens to see.

Four key elements make up the Great Firewall of China:

- **IP Blocking**—The government can block a unique computer address if it hosts prohibited content.
- **Keyword Filtering**—The government monitors all international Internet gateways and blocks specific pages based on keywords and content matched against a “blacklist.”
- **Self-Censorship**—The government requires all Internet companies operating within China to self-censor their content or face harsh penalties and possible shutdown if they fail to do so.
- **Enforcement**—It is estimated that approximately 30,000 Chinese “Internet police” are monitoring Internet traffic and blocking prohibited content.

This elaborate system can block whole sites, individual pages and even up-to-the-minute search results that constantly change in response to unfolding global news and events.

While the Chinese government identifies broad categories of prohibited content, the rules are far from clear, leaving a great deal of ambiguity about what is off limits. Without any guidance or official statement about why something may have been blocked, companies operating within China often err on the side of caution and diligently delete anything that may bring them into disfavor with the government. This is one of the reasons Google exited the country earlier this year. Given the oppressive unpredictability and gross inequities of China’s Internet censorship regime, many attempts have been made to limit its effect both in the U.S. and internationally.

Legal Challenges to Great Firewall of China

The United States

Difficulties arise when U.S. Internet companies venture into foreign markets to reach out to millions of additional Internet users. In the case of China, companies that want to provide Internet services in the country must become subject to the laws and regulations of the Chinese authorities. Because most of these regulations are contrary to the liberal approach of Internet regulation found in Western states, U.S. companies are caught in a vice-grip between the demands of the Chinese government and the marked displeasure of the U.S. government.

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Great Firewall of China

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and human rights organizations. The most popular examples of companies caught in this grip are U.S. software giants Google, Microsoft, Yahoo!, and hardware maker Cisco Systems. Microsoft and Yahoo! both censor the results of their Chinese-language search engines to varying degrees by removing politically sensitive content from the search results. Google left China earlier this year but recently renewed its license with the Chinese government. The search giant, however, did not make any concessions regarding censorship—for now. For its part, Cisco Systems has been accused of supplying the Chinese government with some of the hardware used to build the Great Firewall.

The tension between China’s strict Internet censorship regime and the United States’ decidedly hands-off approach to the Internet prompted the U.S. Congress to consider passing a statute to promote freedom of expression on the Internet: the Global Online Freedom Act. The primary purpose of the bill is to establish an Office of Global Internet Freedom empowered to draft a list of “Internet-restricting countries.” The bill aims “[t]o prevent United States businesses from cooperating with repressive governments in transforming the Internet into a tool of censorship and surveillance, to fulfill the responsibility of the United States Government to promote freedom of expression on the Internet, to restore public confidence in the integrity of United States businesses, and for other purposes.”

Section 201 of the Act states that a “United States business that creates, provides, or hosts any Internet search engine or maintains an Internet content hosting service may not locate, within a designated Internet-restricting country, [any materials] involved in providing such search engine or content hosting service.” Under the Act, Internet companies are also prohibited from altering their search engines to produce different results for users accessing the search engine from different countries. Although the bill is unlikely to be enacted for a host of reasons, it nonetheless points to a promising U.S. trend to look for innovative legal solutions to put an end to digital censorship in China.

Another legal innovation recently employed in the U.S. to chisel away at the Great Firewall of China is the Alien Tort Claims Act (ATCA). The ATCA provides a private cause of action for aliens for torts committed in violation of the law of nations or a treaty of the U.S. In April 2007, the U.S.-based NGO “World Organization for Human Rights” filed a major lawsuit in a U.S. district court against Yahoo! based on the Alien Tort Claims Act, accusing the Internet corporation of aiding andabetting the Chinese authorities to arrest and torture a Chinese journalist.

According to the Complaint, Yahoo! revealed, at the request of the Chinese authorities, the name of the journalist who was using a Yahoo! Internet account to disseminate his calls for democracy in China. Use of the ATCA could add some pressure on Internet service providers to show more respect toward basic human rights and democratic standards of free speech. Given the Supreme Court’s recent trend toward narrowing the applicability of the ATCA, however, it remains to be seen whether new claims brought under the Alien Tort Claims Act will exert any meaningful pressure of China to reconsider its current regime of Internet censorship. While the U.S. continues to develop alternative ways to address Internet regulation in China, some compelling arguments are being made at the international level.

International Trade Law

Many in the international community have argued that China’s firewall system is a barrier to entry and violates international trade law. The thrust of this argument is that the Chinese government is using the “Great Firewall” as an instrument of online protectionism, by systematically excluding foreign providers in favor of domestic services. This is why, for example, Google’s search engine is being squeezed out by Baidu, Facebook by Ren Ren Wang, and Youtube by Tudou and Youku.

Although there may be some challenges related to audio-visual media content under the General Agreement on Trade and Tariffs (GATT), the more logical approach relevant to search engines and social networking services would be to challenge the practice under the General Agreement on Trade in Services (GATS). Given the crucial structural difference between GATT and the GATS, however, the arguments are far from straightforward. One of the most difficult challenges to overcome regarding the filtering of online content by the Chinese government is the General Exceptions clause in Article XIV of the GATS. Unless the contested measure constitutes a means of unjustifiable discrimination, the GATS cannot be invoked to prevent the adoption of laws that are “necessary to protect public morals or to maintain public order.” It is possible, however, that a challenge to the measure could prevail under the WTO framework if it is shown that there exists a reasonably available alternative that is less restrictive.

While there are valid points to challenging the Great Firewall of China in the WTO context, the incendiary political fallout from bringing such a claim would undoubtedly fuel a trade war unprecedented in scale. Given the political volatility of such an approach, other less-confrontational solutions must be considered. Corporate codes of conduct present such an alternative.

Corporate Codes of Conduct a Viable Means to Challenge Digital Censorship in China

Corporate codes of conduct played a major role in the collapse of apartheid in South Africa and are a viable means to end digital censorship in China. Secretary Clinton’s remarks concerning the “information curtain”...
dividing the world, echoes the injustices of the apartheid era where much greater injustice and unspeakable acts against humanity were challenged and ultimately overcome through the use of corporate codes of conduct.

These corporate codes of conduct, which came to be known as the Sullivan Principles, were pioneered by the African-American minister Rev. Leon Sullivan, a zealous promoter of corporate social responsibility. In 1977, Rev. Sullivan was a member of the board of General Motors. At the time, General Motors was one of the largest corporations in the United States. General Motors also happened to be the largest employer of blacks in South Africa, a country that was pursuing a harsh program of state-sanctioned racial segregation and discrimination targeted primarily at the country’s indigenous black population.

**Corporate Codes of Conduct Originally Developed to Challenge Apartheid**

Rev. Sullivan developed the codes to apply economic pressure on South Africa in protest of its system of apartheid. Before the end of South Africa’s apartheid era, the principles were formally adopted by more than 125 U.S. corporations with operations in South Africa. Of those companies that formally adopted the principles, many completely withdrew their existing operations from South Africa. The principles eventually were widely adopted by United States-based corporations and played a significant role in the collapse of the South African regime. In reflecting on the success of his anti-apartheid efforts, Rev. Sullivan recalled:

Starting with the work place, I tightened the screws step by step and raised the bar step by step. Eventually I got to the point where I said that companies must practice corporate civil disobedience against the laws and I threatened South Africa and said in two years Mandela must be freed, apartheid must end, and blacks must vote or else I’ll bring every American company I can out of South Africa.

Given the success of the Sullivan principles in ending apartheid, we should look at applying the same principles to lift the information curtain in China.

**Why Multinationals Should Adopt Corporate Codes of Conduct**

Google, to its credit, has pioneered the corporate-code movement. Google’s defiance of China’s censorship mandate illustrates the power of corporate social responsibility initiatives to influence and reshape the repressive policies of authoritarian regimes.

While most major multinational companies consider a presence in China critical to their future success, Google has demonstrated that even the largest of corporations are willing to forgo short-term gain in the interest of an ultimate triumph over censorship—similar to how corporations sacrificed profits to challenge apartheid in the 1970’s and 1980’s. In Google’s case, this will come at a cost of an estimated $300 million a year in revenue. Although this will hardly make a dent in Google’s coffers, it is a step in the right direction.

**Conclusion**

Corporations adopting codes of conduct must be unified and patient in their approach. The challenge now will be to put these ideas into practice by incorporating them into diplomacy and trade policy. Doing so will apply meaningful pressure on companies to act responsibly through the adoption of corporate codes of conduct with respect to their China operations. Pressing China to open the Internet to its people and allow for freedom of expression will not happen overnight. Indeed, the Chinese experience with the Internet is still in the early phases of development. Just as the Great Wall of China became an ancient relic of times gone by, the Great Firewall of China may one day become one, too.

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**Endnotes:**

1. These laws are not applicable in Hong Kong and Macau, which are designated as special administrative regions not subject to most of the laws of the People’s Republic of China, including limits placed on the free-flow of information. H.K. Basic Law, ch. II, arts. 8, 9.

2. Global Online Freedom Act, H.R. 2271, 111th Cong. (2009-2010). This bill is in the first stage of the legislative process. It has been referred to the House Foreign Affairs Subcommittee and the House Energy and Commerce Subcommittee.

3. Id. Preamble.

4. Id. § 203.

5. 28 U.S.C. § 1350 (2006). The ATCA states that: “The district courts shall have original jurisdiction of any civil action by an alien for...
a tort only, committed in violation of the law of nations or a treaty of the United States.”


7 See Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). In Sosa, the U.S. Supreme Court cautioned against liberal expansion of the ATCA beyond the original scope of offenses contemplated when it was passed in 1789: “[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when section 1350 was enacted.” Id. at 732-33. Within this historical context, the Court struck a balance and set forth a standard which recognized the evolving nature of international law and provided a modern framework for determining whether a tort constitutes a cause of action. The framework incorporates four features that approximate the considerations used in 1789 to establish a private right of action: universality, obligatory nature, specificity and prudential considerations.

8 The primary structural difference between the GATT and GATS is that the GAT applies to all categories of goods except those a Member specifically excludes, whereas under the GATS, they are obligated only to the sector-specific commitments they choose to assume. For example, a Member may accept GATS obligations in relation to cross-border supply of data processing services but make no similar commitments in relation to financial services.

9 Corporate codes of conduct have also been proposed to address international environmental concerns. See, e.g., Santiago A. Cueto, Oil’s Not Well in Latin America, Curing the Shortcomings of the International Environmental Law Regime in Addressing Industrial Oil Pollution Through Corporate Codes of Conduct, 11 FLA. J. INT’L LAW 535 (1997).


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China’s New Tort Law: A Product Liability Revolution

By Alvin F. Lindsay, Miami

After nearly a decade of discussion and drafting, China’s new Tort Law (“Tort Law”) became effective on July 1, 2010. Enactment of the Tort Law effectively completes China’s civil code, and thus the legal fabric defining the rights and protections of its citizens. With punitive damages, required product recalls, and emotional distress damages all acknowledged for the very first time by China’s People’s Congress, the Tort Law is truly an historic step in the jurisprudence of this republic that had virtually no civil law as recently as 1979.

Given China’s current status as the world’s manufacturer, understanding the products liability regime now blanketing its own people might well assist those involved with the international aspects of the manufacture and sale of goods made in China.

The Tort Law codifies and centralizes much existing national law. Its twelve chapters include general sections on how liability arises and how it can be excepted or reduced, as well as specific chapters on product liability, medical malpractice, hazards, injury caused by falling objects, motor vehicle accidents, domestic animals, and environmental pollution. The law includes several new and important concepts relating to liability for the manufacture and sale of products.

The first chapters define the nature and extent of tort liability generally. Chapter One provides that the Tort Law was formulated for the purposes of protecting the lawful rights and interests of civil subjects, clarifying tort liability, preventing tortious acts, and promoting “social harmony and stability.” The law protects “civil rights and interests” defined to include personal and property rights such as “the rights to life, health, name, reputation, honor, image, privacy, marital freedom of choice, guardianship, [and] ownership.” The law also protects trademark, security and copyright interests. Any party whose civil rights and interests have been infringed upon “is entitled to hold the tortfeasor liable.”

Chapter Two provides for joint and several liability and includes what can be described as a comparative-fault mechanism. The amount of damages to be paid by jointly and severally liable tortfeasors shall be determined by their “respective liability” unless that is “difficult to determine,” in which case liability shall be assumed on an equal basis. Further, jointly and severally liable parties forced to pay an amount exceeding their own percentage of damages have the right to recover the excess from the other liable parties.

Chapter Three affords reduction in liability based on factors including what we would call contributory negligence (“where the party whose rights have been infringed is also negligent . . . the liability of the tortfeasor may be reduced”), the doctrine of impossibility (“no liability shall be assumed [for] an event of force majeure”), self defense (“when injury is caused . . . by an act of appropriate defense, the party carrying out the act . . . shall not assume liability”), and necessity (exempting “emergency actions to prevent danger”).

Remedies afforded by the Tort Law include what is effectively injunctive relief, such as requiring cessation of the offending act, elimination of the danger, return or restoration of the property, “restoration of reputation,” monetary compensation, and even a “formal apology.” Compensatory damages for property loss shall be based on the market price at the time of the loss. Loss for infringement upon personal rights and interests is based on either the value of the losses suffered, or of the benefit accrued to the tortfeasor, unless it is difficult to determine through this analysis in which case the “people’s court” shall determine the amount of compensation based on the circumstances.

Chapter Five of the Tort Law, titled “Product Liability,” provides for strict liability against manufacturers of defective products; i.e., there is no requirement to show fault. “Where damage is caused to another due to a defective product, the manufacturer must assume liability.” Sellers are held liable only if they are at fault, unless the seller is not able to identify the manufacturer clearly, in which case the seller is strictly liable. Victims may proceed against both the seller and manufacturer, and the manufacturer shall indemnify the seller for any defect caused by the manufacturing, just as the seller will indemnify the manufacturer for any defects caused by the seller.

For product liability practitioners, the following points are new and especially important.

First, the Tort Law recognizes punitive damages for the intentional marketing of defective products. Article 47 provides that “[w]here a manufacturer or seller knowingly produces or sells a defective product, thus causing the death or severe damage to the health of another, the party whose rights and interests were infringed is entitled to claim corresponding punitive damages.” This is the first general provision of Chinese law to permit punitive damages. Moreover, it is a change from the general Chinese system that usually continued, next page
looks to actual compensation rather than deterrence through civil punishment. Of course, there is debate and speculation as to how this provision will be applied both in terms of the showing of knowledge required and amount of damages imposed.

Second, the Tort Law recognizes mental or emotional damages. Article 22 provides that “where an infringement upon the personal rights or interests of another causes serious mental injury, the person whose rights have been infringed may claim damages for mental distress.” This is the first general provision of Chinese law to recognize mental distress damages. As with the application of punitive damages, only time will tell the nature and level of “serious mental injury” that the people’s courts will require before imposing these damages.

Third, the Tort Law provides for liability for failure to take effective action to remove defective products from circulation:

Where it is discovered that a product is defective after being placed in circulation, the manufacturer and seller must promptly take remedial measures, such as issuing warnings and product recalls. When these parties fail to take such remedial measures in a timely fashion, or these measures are ineffective thus causing damage, the manufacturer or seller assume liability.

Tort Law, Art. 46. This is China’s first general, non-industry specific recall provision that requires producers and sellers to adopt remedial measures.3 Going forward, one might watch with interest the degree and geographical extent to which Chinese product recalls will extend.

Finally, the Tort Law imposes liability on treating hospitals and medical institutions for the pharmaceuticals, blood and medical devices they use. Article 59 states:

Where defective drugs, disinfectants, medical instruments, or the transfusion of substandard blood causes a patient to suffer loss, the patient may claim compensation against the manufacturer or the supplier of the blood; the patient may also claim compensation against the medical institution. Where the patient claims compensation against the medical institution, the medical institution may, after paying compensation, recover the same from the producer or supplier which is liable.

Tort Law, Art. 59. Holding medical institutions liable for product failures is another new concept under general Chinese law. Formerly, medical institutions could not be deemed liable under product liability theories because they were not considered “sellers” and the drugs administered were not considered “sales.”4 Plainly, this will force Chinese medical institutions to examine more rigorously the dangers and efficacy of the products they dispense.

Now that China has a powerful and unified product liability regime protecting its own citizens, the interesting question will be to what extent the republic will begin to permit domestication and enforcement of product liability judgments entered by other courts around the world against its domestic manufacturers. This is something that, at least until this point in its manufacturing revolution, China has seemed far less interested in addressing.

Alvin F. Lindsay is a partner in the Miami office of Hogan Lovells US LLP where he specializes in defending international product liability and catastrophic-defect cases. He is co-chair of The Florida Bar International Law Section's Publications Committee and Editor in Chief of the International Law Quarterly.

Endnotes:
1 See Steven M. Dickinson, Foreign Firms Beware (Harris & Moure ed., March 2010).
2 This article relies upon a proprietary translation of the Tort Law graciously authorized and provided by Eugene Chen, Esq. of the Shanghai office of Hogan Lovells International LLP, to whom the author extends his thanks and gratitude.
4 Id.
Ten Tips on Handling Cross-Border E-Discovery

Webinar: Wednesday, October 13, 2010
12:00 noon – 1:00 p.m. Eastern Standard Time

Webinar: Audio by Phone with Slides over the Internet

12:00 noon – 1:00 p.m.

Ten Tips on Handling Cross-Border E-Discovery

While many lawyers are now up to speed on litigation holds, back-up tapes, data processing, and other issues related to the collection and production of electronically stored information in federal and state litigation, most have no idea that what is required by U.S. courts may be illegal abroad. Privacy laws, blocking statutes and a global hostility toward U.S.-style discovery require that the lawyer representing a foreign client in U.S. litigation proceed with extreme caution. This seminar, presented by Alvin F. Lindsay, a partner at Hogan Lovells and author of the book *Technology In Litigation*, will teach ten critical best practices for addressing e-discovery when the foreign client is subject to U.S. e-discovery obligations.

Alvin F. Lindsay, Hogan Lovells U.S. L.L.P., Miami

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The Florida Bar Continuing Legal Education Committee and the International Law Section present

The New Silk Road: Negotiating China

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Webinar: Wednesday, November 17, 2010
12:00 noon – 1:00 p.m. Eastern Standard Time

WEBINAR CONNECTION

12:00 noon – 1:00 p.m.
Negotiating China: Avoiding Pitfalls Along the New Silk Road

Expertise in corporate law and the art of the deal are not enough for the corporate lawyer quarterbacking a multi-million dollar deal in Shanghai. Success in China is dictated by “guanxi,” or the “personal touch” necessary in a culture driven by carefully cultivated relationships and a common understanding of the practice of business and law. This webinar, presented by the co-chairs of the International Law Section China/Asia Committee, will help you understand the most important aspects of doing business in China. In addition to an overview of the specific types of business deals involving China and Chinese parties that the Florida lawyer is likely to encounter, the program will teach critical cultural issues necessary for effective negotiation with Chinese counterparties, and focus on specific approaches for many important contractual elements, including arbitration clauses, choice of law, venue, and currency of payment.

Mikki Canton, AsiaAmericana International LLC, Coral Gables
Malcolm Riddell, Riddell Tseng, Sarasota

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Service of Process Abroad

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Webinar: Wednesday, December 15, 2010
12:00 noon – 1:00 p.m. Eastern Standard Time

12:00 noon – 1:00 p.m.

Service of Process Abroad
Every international litigator must know how to achieve service of process abroad. Don’t risk having your client’s case dismissed for failure to perfect service of process. Ed Joffee, former chair of The Florida Bar International Law Section, presents this one-hour lunchtime webinar that will teach lawyers how to do international service right. Among other things, he will discuss service abroad using Rule 4, Federal Rules of Civil Procedure, the Hague Convention, and the Inter-American Convention on Letters Rogatory. He will also address issues relating to due process, personal jurisdiction, forum selection clauses, service by consent, and other issues relating to this important area.

Edward M. Joffe, Joffe & Joffe, LLC., Coral Gables

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