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**INTERNATIONAL COMMERCIAL ARBITRATION IN CHINA:  
LOCATING THE DEVELOPMENT OF CIETAC IN THE CONTEXT OF  
INTERNATIONAL AND DOMESTIC FACTORS**

Jeff Miller\*

## **Introduction**

Since the People's Republic of China (PRC or China) initiated market-based economic reforms in 1978, the country has become increasingly integrated into the global economy. An inexpensive yet reasonably well-educated labour force, favourable regulatory and monetary policy, and a burgeoning middle class have transformed China into an attractive destination for foreign capital and commercial expansion. This has necessitated the development of legal mechanisms to protect the obligations and rights that are inherent in all transactions occurring in the context of a modern capitalist system. Of particular importance has been the creation of institutions designed to mitigate the tangible and perceived risks facing foreign businesses operating in the PRC. Having been formed in 1956, the China International Economic and Trade Arbitration Commission (CIETAC) has been repurposed to fulfill this role, in part.

CIETAC is a neutral arbitration mechanism for the settlement of commercial disputes arising from interactions between foreign and domestic Chinese businesses. Its operations are informed by both domestic and international law and it is nominally independent of the state, existing under the framework of the China Council for the Promotion of International Trade (also known as the China Chamber of International Commerce), a non-governmental organization.<sup>1</sup> Through multiple revisions to its constituting rules since its inception, it has been adapted to service the requirements of a transforming Chinese economy for a stable and predictable means of dispute resolution. In contrast to the Chinese court system, which is widely regarded as fragmented and inconsistent, CIETAC is an

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<sup>1</sup> Lijun Cao, *CIETAC as a Forum for Resolving Business Disputes* (Oxford: The Foundation for Law, Justice and Society, 2010) at 2.

avenue that is insulated from the immediate political and economic pressures that undercut the effectiveness of the judiciary.<sup>2</sup>

Over time, CIETAC has assumed a more international character, adopting the predominant norms and practices for international commercial arbitration espoused by established entities such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Chamber of Commerce (ICC). As will be demonstrated, CIETAC has gradually incorporated core values and practices of these systems relating to administrative decentralization, party autonomy, and procedural transparency. The alignment of CIETAC with internationally accepted standards has served as evidence that the organization has moved beyond its Maoist-era roots and has accepted the Western liberal ethics of fairness and due process.

However, despite significant realignment of the substantive elements of the CIETAC Arbitration Rules, the organization remains an artifact of its cultural context. CIETAC is typified by a unique approach to international commercial arbitration that fuses Western notions of party autonomy with the Chinese imperatives of harmony and efficiency. As this paper will argue, the evolution of CIETAC in this manner has been a deliberate response to the often-conflicting pressures exerted by international and domestic forces. Rather than converging completely with established international arbitration norms, CIETAC's development has been affected by two trends in the PRC's reform trajectory.

The first trend is the balanced integration of China into the global economic order. The "peaceful rise" foreign policy doctrine espoused by Presidents Jiang Zemin and Hu Jintao postulates China as seeking accommodation within existing global institutions. This accommodation is not exclusively mono-directional; both the country and the institution are mutually constituted. Therefore, while China has sought to assimilate large portions of current institutional practice in the field of international arbitration, it has retained certain culturally specific elements that allow it to project a measure of influence in how international commercial arbitrations are undertaken.

The second trend is the incrementalism that has characterized the PRC's domestic economic reform. Historical development of CIETAC has been incremental, corresponding with the PRC's measured transition to a market economy. This has been done to both protect and enhance the development of the PRC's domestic economic capacity.

This evolutionary trajectory has endowed CIETAC with particular characteristics that distinguish it from other international commercial arbitration bodies. This paper will evaluate four of these elements. The first is institutional centrality. Unlike the frameworks provided by UNCITRAL or the ICC, CIETAC's has a rigid organizational form. The CIETAC secretariat retains the ability to influence the outcome of individual tribunals and the CIETAC Arbitration Rules stipulate compulsory administrative provisions that arbitrating parties cannot mutually agree to displace. Second, the CIETAC Arbitration Rules contain a provision allowing mediation-arbitration, otherwise known as med-arb. This is both a

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<sup>2</sup> Scott Wilson, "Law *guanxi*: MNCs, state actors, and legal reform in China" (2008) 54:17 *Journal of Contemporary China* 25 at 38.

reflection of the legal culture of China as well as an imperative to maximize efficiency in the CIETAC arbitration process. Third, the resolution of disputes in a manner that is efficient and restorative of the relationship between the parties is the overarching value of the CIETAC arbitration framework. Though protections exist for party autonomy, these are balanced against this principal objective. Fourth, the convergence of CIETAC's origins in Chinese civil law with the centralized structure of the institution has given tribunals a high degree of inquisitorial authority. This is in contrast to the purely adversarial method deployed by most international arbitration institutions.

Before evaluating the constitutive factors of CIETAC's evolution and its distinguishing factors, however, this paper will commence with an overview of the organization's historical development and a brief discussion of the economic and legal cultures of contemporary China.

### **Historical development and legal background of CIETAC**

With its origins in 1956, during the heady days of Maoist China, CIETAC has evolved considerably from an organization designed to settle trade disputes in a communist command economy to a modern example of an effective international commercial arbitration institution. As an institution created in the context of a socialist economy, CIETAC's organizational character retains certain features that reflect the predominant practices of that era, such as the organization's high degree of centralization. However, in order to remain relevant to the PRC's transitioning economy and to respond to international pressures, CIETAC's guiding rules have undergone seven revisions since 1978.

The first major reform occurred in 1989 and entailed the replacement of the Foreign Trade Arbitration Commission (as CIETAC was known formerly) Rules with the CIETAC Arbitration Rules<sup>3</sup> that were premised on the UNCITRAL Arbitration Rules.<sup>4</sup> The most significant change arising from this revision was in regard to the composition of the CIETAC Panel of Arbitrators. The CIETAC Panel of Arbitrators is the prescribed list of arbitrators that parties to CIETAC arbitrations must select from. Prior to 1989, all members of this panel were PRC citizens. To facilitate the internationalization of the organization, membership was broadened in 1989 to encompass individuals of other nationalities. This revision had two notable effects. First, Fishburne and Lian note that this change enhanced the confidence of foreign businesses in CIETAC and contributed to the considerable increase in its caseload during the late 1980s and early 1990s.<sup>5</sup> The presence of arbitrators of non-Chinese nationalities reduced the outward appearance of bias that had afflicted CIETAC in years prior. Second, it enhanced the development of CIETAC and its integration into the global mainstream. The participation of arbi-

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<sup>3</sup> *Arbitration Provisions of the China International Economic and Trade Arbitration Commission*, China Council for the Promotion of International Trade, Sept 12, 1988.

<sup>4</sup> *UNCITRAL Arbitration Rules*, GA Res 31/98, UNCITRAL, 1976.

<sup>5</sup> Benjamin P Fishburne III & Chuncheung Lian, "Commercial arbitration in Hong Kong and China: A comparative analysis" (1997) 18 *University of Pennsylvania Journal of International Economic Law* 297 at 303.

trators of differing nationalities served as a mechanism by which new norms could be introduced into the body and organizational learning could be facilitated.

The reform trajectory established by the 1989 revision was continued in both 1992 and 1995 as CIETAC assimilated further norms and practices from established international arbitration bodies, such as the ICC and UNCITRAL.<sup>6</sup> In 1994, modifications were also made to the PRC's domestic law in order to clarify the enforceability of CIETAC decisions in China and to provide a more robust avenue for the appeal of awards made by CIETAC and domestically oriented arbitrations bodies.<sup>7</sup> These alterations were advanced in the 1994 Arbitration Law.<sup>8</sup> The law provided for a unified articulation of PRC law as it applies to both domestic arbitrations and foreign arbitrations. It also resolved discrepancies between the CIETAC Arbitration Rules and the 1991 Law on Civil Procedure of the People's Republic of China by providing for a separate legal mechanism to govern the appropriate conduct of arbitrations in China. However, one of the most significant and controversial implications of the Arbitration Law on CIETAC has been the "virtual monopoly" that it grants to it with respect to international commercial arbitrations involving a party domiciled in the PRC.<sup>9</sup>

Article 6 of the Arbitration Law codifies that all arbitration agreements must specify a commission to oversee the arbitration process in order to be valid and enforceable in China.<sup>10</sup> This prevents the application of *ad hoc* arbitration procedures to international arbitration proceedings in China, which occur outside of the administration of CIETAC. *Ad hoc* rules can be adopted within the CIETAC framework, but the validity of doing so is questionable in the context of Chinese law, as will be discussed shortly. While parties are able to specify a commission separate from CIETAC to govern the proceedings, this practice is rare as there is uncertainty over the extent to which an award granted by an external commission would be upheld by the PRC's courts. Though China is a party to organizations such as the ICC and agreements such as the New York Convention,<sup>11</sup> the courts have been ambiguous in the way that they apply these international structures in domestic law.<sup>12</sup> For instance, while the New York Convention specifies that domestic courts may only review foreign arbitral decisions for fairness, Article 58 of the Arbitration Law broadens this by allowing the courts to review awards for compliance with domestic arbitration standards and public policy.<sup>13</sup> It has been noted that

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<sup>6</sup> *Ibid* at 304.

<sup>7</sup> *Ibid* at 304.

<sup>8</sup> *Arbitration Law of the People's Republic of China*, Standing Committee of the National People's Congress (PRC), August 31, 1994.

<sup>9</sup> Freshfields Bruckhaus Deringer, *Resolving Disputes in China Through Arbitration* (Hong Kong, 2007) at 12.

<sup>10</sup> *Arbitration*, *supra* note 8 at Article 6:

The arbitration commission shall be selected by the parties through agreement.

<sup>11</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 7 June 1959, 330 UNTS 3.

<sup>12</sup> Freshfields, *supra* note 9 at 12.

<sup>13</sup> *Arbitration*, *supra* note 8 at Article 58:

A party may apply for setting aside an arbitration award to the intermediate peoples court in the place where the arbitration commission is located if he can produce evidence which proves that the arbitration award involves one of the following circumstances;

(1) There is no arbitration agreement;

these exemptions have been liberally applied by Chinese courts, in contrast to the restrictive approach commonly taken by courts in other jurisdictions, particularly with regard to the public policy exemption.<sup>14</sup> Moreover, there is an absence of legislated mechanisms to allow for the enforcement of external awards in China. For example, despite becoming a member of the ICC in 1994, Beijing has yet to establish a framework for the enforcement of ICC decisions in the country.<sup>15</sup> The combination of these elements has made recourse to CIETAC for international commercial arbitrations the option of lower risk for both domestic and foreign parties.

In 2000, the CIETAC Arbitration Rules were amended to expand the organization's jurisdiction to encompass purely domestic arbitrations.<sup>16</sup> This change was likely made for two reasons. The first was to make the arbitration process in China more efficient. Prior to this amendment, there was much uncertainty over what constituted a purely domestic business organization versus one that was foreign owned. For example, in some instances joint partnerships between foreign and domestic firms can be variously characterized as either domestic or foreign objects.<sup>17</sup> Enabling CIETAC to manage both types of arbitrations reduced the importance of this distinction and eliminated a potential point of delay in the arbitration process. The second reason was to improve the quality of arbitration as a dispute resolution tool in China. The re-creation of CIETAC as a centralized arbitration centre for the country would make arbitration more uniform throughout the nation and create a mechanism for the transference of best practices from the international domain to the domestic level.

The most significant revision of the CIETAC Arbitration Rules occurred in 2005<sup>18</sup>, with the amendments bringing the organization into general compliance

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- (2) The matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;
  - (3) The formation of the arbitration tribunal or the arbitration procedure was not in conformity with the statutory procedure;
  - (4) The evidence on which the award is based is forged;
  - (5) The other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration; or
  - (6) The arbitrators have committed embezzlement, accepted bribes or done malpractice for personal benefits or perverted the law in the arbitration of the case.

The peoples court shall rule to set aside the arbitration award if a collegial panel formed by the peoples court verifies upon examination that the award involves one of the circumstances set forth in the preceding paragraph.

If the peoples court determines that the arbitration award violates the public interest, it shall rule to set aside the award.

<sup>14</sup> Rechtsanwalt Yves Heinze ("Heinze Law"), *Arbitration in China - The Role of CIETAC and Alternatives* (2009), online: <<http://www.heinze-law.com>> at 3.

<sup>15</sup> Freshfields, *supra* note 9 at 13.

<sup>16</sup> Freshfields, *supra* note 9 at 16.

<sup>17</sup> Huang Tao & Dai Yue, *Forum Shopping in China: CIETAC vs UNCITRAL* (April 2008) online: King & Wood PRC Lawyers <<http://www.kingandwood.com>>.

<sup>18</sup> *Arbitration Provisions of the China International Economic and Trade Arbitration Commission*, China Council for the Promotion of International Trade, May 1, 2005.

with internationally accepted norms and practices.<sup>19</sup> The changes enhanced party autonomy, facilitated greater efficiency, and increased the transparency of the arbitral process. Among the changes, three had the most transformative impact on the way the organization conducted arbitrations, albeit without greatly diminishing the authority of the CEITAC secretariat. The first change was the addition of Article 4.2 (Article 4.3 as of the May 2012 revision), which gives parties the ability to select the rules under which the arbitration will be administered.<sup>20</sup> However, as will be discussed shortly, this ability is strictly truncated. The second change of significance was found in Article 21 (now Article 24.2), which allows for the appointment of arbitrators from outside of the prescribed CIETAC panel subject to the discretion of the CIETAC secretariat.<sup>21</sup> This has the effect of making the process more transparent and flexible for individual participants. Finally, the third change of note is that the CIETAC Arbitration Rules now permit the parties to choose between an inquisitorial approach, as informed by China's civil law tradition, or the adversarial model used in common law jurisdictions and by most established international commercial arbitration institutions. This revision was located in Article 29.3 (now Article 33.3).<sup>22</sup> Regardless of this rule, however, Article 41.1 still affords the tribunal the ability to initiate investigations at its own discretion.<sup>23</sup>

In May 2012, the seventh revision of the CIETAC Arbitration Rules was implemented. While less sweeping than previous revisions, it is significant in that it responds to recent changes undertaken by other major international arbitration institutions and further establishes CIETAC's international character.<sup>24</sup> Recognizing the global increase in demand for commercial arbitration facilities, CIETAC followed the lead of other major arbitration institutions and implemented mechanisms to enhance efficiency and build capacity. For instance, parties are now able to consolidate related arbitrations into a single proceeding.<sup>25</sup> The 2012 rules also

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<sup>19</sup> ILSAC, *The Latest Development in CIETAC Arbitration* (2007) online: Government of Australia <<http://www.ilsac.gov.au>> at 5.

<sup>20</sup> *Arbitration Provisions*, *supra* note 18 at Article 4.2:

Where the parties agree to refer their dispute to CIETAC for arbitration but have agreed on a modification of these Rules or have agreed on the application of other arbitration rules, the parties' agreement shall prevail unless such agreement is inoperative or in conflict with a mandatory provision of the law as it applies to the arbitration proceedings. Where the parties have agreed on the application of other arbitration rules, CIETAC shall perform the relevant administrative duties.

<sup>21</sup> *Ibid*, Article 21:

Where the parties have agreed to nominate arbitrators from outside CIETAC's Panel of Arbitrators, an arbitrator so nominated by the parties or nominated according to the agreement of the parties may act as arbitrator subject to the confirmation by the Chairman of CIETAC in accordance with the law.

<sup>22</sup> *Ibid*, Article 29.3:

Unless otherwise agreed by the parties, the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case having regard to the circumstances of the case.

<sup>23</sup> *Ibid*, Article 41.1:

The arbitral tribunal may undertake investigations and collect evidence on its own initiative as it considers necessary.

<sup>24</sup> Freshfields Bruckhaus Deringer (2012), *Briefing: CIETAC Releases New Arbitration Rules* (Hong Kong, 2012) at 2.

<sup>25</sup> *Arbitration Provisions of the China International Economic and Trade Arbitration Commission*, China Council for the Promotion of International Trade, May 1 2012, Article 17.1:

formalized CIETAC's authority to hold arbitrations outside of the PRC.<sup>26</sup> This is a further step towards CIETAC's internationalization and potentially allows it to position itself as an alternative international framework for commercial arbitrations involving non-Chinese parties. In addition, the new rules also enable parties to agree on the language of the proceedings.<sup>27</sup> Because of CIETAC's centralized structure, administrative efficiency demanded that all proceedings were in Mandarin. However, this rule change makes proceedings more accessible and transparent to foreign parties. It may also assist in the diversification of CIETAC's panel of arbitrators and enable greater institutional learning, as proceedings would be accessible to more parties.

Despite CIETAC's evident trend towards internationalization, it is still imbued with characteristics that distinguish it from the other dominant international institutions in this field. In order to better understand CIETAC's development in response to domestic and international pressures, it is necessary to locate the organization in the broader context of China's post-Maoist economic and legal culture.

### **Economic and legal culture of China**

In thirty years of economic reform, China has developed unique economic and legal cultures that seek to facilitate the operations of a modern market economy and attempt to reconcile the numerous contradictions inherent in a society, and economy, transitioning from communism to a nominally capitalist model. In this brief overview of China's contemporary economic and legal culture, this paper will first consider the nature of market socialism, or "socialism with Chinese characteristics." It will then evaluate the predominant cultural tenet of economic practice in China, *guanxi*. In terms of the country's legal culture, the paper will then move to the tension that exists in the PRC between the rule of law (*Fa*) and informal social mechanisms of incentivization and reprimand (*Li*). Underlying this distinction is the social imperative of achieving harmony, which this paper will consider in the context of historical and proximate factors.

The economic dynamic which has emerged in China since reform commenced in 1978 is a dualist model: one which allows for the investment and growth of capital, while legitimating the authority of the state to intervene to create markets and

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At the request of a party and with the agreement of all the other parties, or where CIETAC believes it necessary and all the parties have agreed, CIETAC may consolidate two or more arbitrations pending under these Rules into a single arbitration.

<sup>26</sup> *Ibid*, Article 34.2:

Unless otherwise agreed by the parties, the place of oral hearings shall be in Beijing for a case administered by the Secretariat of CIETAC or at the domicile of the sub-commission/center which administers the case, or if the arbitral tribunal considers it necessary and with the approval of the Secretary-General of CIETAC, at another location.

<sup>27</sup> *Ibid*, Article 71.1:

Where the parties have agreed on the language of arbitration, their agreement shall prevail. In the absence of such agreement, the language of arbitration to be used in the proceedings shall be Chinese or any other language designated by CIETAC having regard to the circumstances of the case.

protect vested interests. The balance between these two objectives is precarious, but it is one that Beijing assiduously maintains because it views market-driven economic growth as essential for continued social stability.<sup>28</sup> The Communist Party of China (CPC) must provide for the conditions necessary for the operation of the market, but also maintain enough policy instruments at its disposal to guide the development of China in a direction that achieves both stability and prosperity.

In the context of China's market socialist economy, a unique economic culture has developed that fuses historical Chinese business practices with the realities of a globalized economy. One of the most significant features of modern Chinese economic culture is the prevalence of a unique type of network relationship called *guanxi*. These differ from the business networks common in the West by virtue of their emphasis on permanent relations of trust and loyalty.<sup>29</sup> In contrast to Western-style networks that are typified by opportunistic and often fleeting relationships, networks based on the *guanxi* model bind actors to mutual service and are assumed to be more enduring in nature.<sup>30</sup> The presence of these networks in China's economy is partly due to historical factors, rooted in Confucianism, which emphasize the precedence of interpersonal relationships and partly out of a response to corruption endemic throughout the nation's economy which makes it necessary for businesspeople to have close personal contacts with power holders in order to be treated favourably.<sup>31</sup> The implications of *guanxi* can be evidenced in the predominant Chinese attitude towards the rule of law.

Historically, disputes in China were settled by way of private and informal mechanisms. The formal legal system pertained to only disputes that directly impacted the state and capital offences. Civil disagreements, such as contractual claims, were resolved in a manner insulated from the public sphere to allow the parties to "save face"<sup>32</sup> and to ensure that basis of the dispute was settled in a non-adversarial fashion. The preference towards this non-institutional and interest-based approach to dispute resolution was grounded in the Chinese notion of *li*, in which the law was constituted by mutual expectations of obligation and duty.<sup>33</sup> This is in contrast to the rule of law, or *fa*, which emerged in abundance subsequent to the 1949 revolution. The intercession of the state into private law matters and legal positivism, generally, were concepts that were anathematic to the traditional methods of legal ordering. The transition to a positivist conception of the law in China is still ongoing. Traditional concepts of dispute resolution still pervade and are not likely to be fully displaced, even with external pressures

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<sup>28</sup> LLP Gore, *Market communism: The institutional foundation of China's post-Mao hyper-growth* (Hong Kong: Oxford University Press, 1998) at 5.

<sup>29</sup> B Dickson, *Red capitalists in China: The party, private entrepreneurs, and prospects for political change* (New York: Cambridge University Press, 2003) at 60.

<sup>30</sup> *Ibid.*

<sup>31</sup> C McNally, "Insinuations on China's emergent capitalism" (2006) 15 *East-West Centre Working Papers: Politics, Governance, and Security Series* at 41.

<sup>32</sup> Carlos de Vera, "Arbitrating harmony: 'Med-arb' and the confluence of culture and rule of law in the resolution of international commercial disputes in China" (2004) 18:1 *Columbia Journal of Asian Law* 149 at 166. "Face" as equivalent to "honour."

<sup>33</sup> *Ibid* at 162.

demanding an enhanced rule of law in areas such as contractual disputes.<sup>34</sup> The likely outcome is a mixed system, containing elements of both approaches.

As a corollary to the prevalence of *li* in China's legal culture, the imperative of achieving harmony has been described as being an overarching objective in China's approach to legal ordering. De Vera argues that the utilization of informal, private dispute resolution tools detracts from the protection of individual rights, as there is no supervening authority to ensure the protection of weaker parties. However, he goes on to state that this is reflective of the prioritization that Chinese culture lends to the expedient resolution of disputes and the maintenance of harmony.<sup>35</sup> De Vera notes the concept of *rang*, which holds that the central purpose of dispute resolution is to restore harmony and balance.<sup>36</sup> Justice is defined not by the preservation of individual rights, but by the creation of a new status quo that recognizes the proper ordering of social relationships.

Though the contemporary Chinese state has an interest in ensuring the consistency and reliability of dispute resolution processes and has directed the further development of the country's court system in this regard, the preference remains strong among the Chinese business community for informal dispute resolution processes that are tailored to restore positive relationships between parties. The principal objective of the Chinese state is to support economic growth by achieving social stability. But as De Vera remarks, Beijing recognizes that the informal system of private dispute resolution mechanisms may be better suited for settling conflict between actors in *guanxi* networks than the adversarial system of the judiciary, which is premised on the notion of economic actors as being autonomous.<sup>37</sup>

### Factors in the development of CIETAC

Having established the cultural context for the development of CIETAC, the paper will now consider the broader pressures that have structured the organization's approach to arbitration. Two factors that are of particular relevance to the current form of the organization will be discussed. The first relates to the international sphere and the manner in which the current form of CIETAC is the culmination of both external pressures and an instrumentalization of the organization within the context of China's foreign policy. The second factor, often operating against the dynamic imposed by international considerations, concerns the PRC's domestic policy objective of achieving domestic economic development that is sustainable and that maintains the integrity of the state and the leading role of the CPC within it. Together, both of these factors have converged to influence the growth of CIETAC into an organization that accords with generally accepted norms and practices while advancing its own, unique model of arbitration.

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<sup>34</sup> *Ibid* at 165.

<sup>35</sup> *Ibid* at 168.

<sup>36</sup> *Ibid* at 168.

<sup>37</sup> *Ibid* at 169.

### *International*

Since the adoption of the “peaceful rise” doctrine in the 1990s, China has sought to increase its participation in international institutions. Its principal objective in doing so is to leverage the existing global order by embedding itself in established networks of international trade and commerce.<sup>38</sup> The PRC also views this more intensive integration as a means to assuage Western and regional concerns that it is opposed to the dominant global power structure and is seeking to construct itself as a hegemon. By participating in such institutions, it is expressing its acceptance of institutional norms and is sharing in the collective burden of maintaining the international system. As a result of this deeper integration, China also has an opportunity to influence the ongoing evolution of these institutions.<sup>39</sup> The entrance of CIETAC into the global institutional system of commercial arbitration exemplifies this dual trend in Chinese foreign relations. CIETAC represents both an attempt to leverage an existing institutional arrangement as well as to initiate alterations, through the introduction of an alternative approach to arbitration, that will enhance the responsiveness of the global institution to China’s interests.

In explaining this dualist approach, two theories pertaining to the engagement of countries with global institutions are relevant. The first, the functionalist theory of institutions, articulates that states engage with global institutions to reduce transaction costs and to supplement poorly functioning domestic institutions.<sup>40</sup> This is a rationalist conception of state behaviour and presumes that states exploit institutions in a way that will enhance their material interests. This behaviour can be seen in the way that CIETAC has assimilated international norms and practices and has been used as a means to enhance China’s capacity to conduct arbitrations both domestically and with foreign parties.

The second theory, path dependency theory, prescribes a contrary means of understanding the engagement of states with institutions.<sup>41</sup> It proposes that the participation of states in institutions is premised on ideological grounds. Rather than subscribing to institutions for reasons of immediate material gain, states engage with institutions to legitimate their position within the global order and to use them as vehicles for the normalization of behaviours that are advantageous to their interests both internationally and domestically. The theory also presumes that the ongoing creation and revision of institutions is path dependent, meaning that new institutions simply perpetuate existing cultural tools, except in a format more conducive to the present conditions.<sup>42</sup> The deliberate maintenance of CIETAC’s distinctive character is an active example of this theory. While CIETAC has become compliant with the overarching norms of the international arbitration system, it still contains elements that distinguish it and which position the organization as an alternative to the dominant model. These elements create an avenue

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<sup>38</sup> Rosemary Foot, “China’s Strategies in a US-Hegemonic Global Order: Accommodating and Hedging” (2006) 82:1 *International Affairs* 77 at 78.

<sup>39</sup> *Ibid* at 87.

<sup>40</sup> Barry Weingast, “Rational-choice institutionalism,” in Ira Katznelson and Helen V Milner, eds, *Political Science: State of the Discipline* (New York and London: W W Norton & Company, 2002) at 670.

<sup>41</sup> Colin Hay, “Contemporary capitalism, globalization, regionalization and the persistence of national variation” (2000) 26 *Review of International Studies* 26 at 529.

<sup>42</sup> Wilson, *supra* note 2 at 31.

through which the PRC can project its influence in this important global institutional framework.

In explaining the development of CIETAC, neither of these theories will alone suffice. Because the PRC is committed to an export-led model of development, the path dependency theory is irrelevant in isolation as the country has a tangible interest in leveraging the immediate material benefits of a robust commercial arbitration framework. The internationalization of CIETAC demonstrates that China is willing to accede to global norms and bolster the confidence of foreign businesses by providing a mechanism for resolving disputes with Chinese firms. Nor is the functionalist theory of institutions fully applicable. While China does, indeed, seek to exploit institutions for their material potential, it also has a strong interest in securing a global order that best corresponds with its own norms and practices. The distinct arbitration culture of CIETAC represents this. Only when these theories are considered in conjunction with each other, will the complex interplay between the development of CIETAC and international pressures become apparent.

#### *CIETAC as an alternative to domestic courts*

The most immediate objective of the gradual internationalization of CIETAC has been to create an arbitration centre that would enhance the confidence of foreign businesses operating in the PRC. A centre that held to generally accepted arbitration norms would provide a predictable framework for these businesses to resolve disputes with their Chinese counterparts. This requirement was eminently necessary because of the perceived inconsistency and fragmentation of the Chinese court system.

Since 1978, Beijing has endeavoured to consolidate the rule of law in the PRC in order to replace the “rule by man” philosophy that had emerged under the dictatorship of Mao Zedong.<sup>43</sup> The rule of law is premised in a robust judiciary, which the central government has made noticeable progress in cultivating. However, because of the highly decentralized manner in which the law has been traditionally administered in China, the construction of a cohesive court system has been complicated. The typical practice for the implementation of national policies in China is that policy objectives and broad delivery mechanisms are advanced by the central government, while the execution of the policy is delegated to regional and local governments.<sup>44</sup> This localization of policy implementation often leads to significant disparities across sub-national units in the actualization of policy. This is evidence in the administration of the national court system, where standards vary greatly between regions in terms of the interpretation of the law and the training of judges.<sup>45</sup>

The court system is also viewed by officials as an extension of local *guanxi* relationships.<sup>46</sup> Courts are functionalized by governments to legitimate pre-existing relationships and are leveraged as tools of economic development, favouring cer-

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<sup>43</sup> Wilson, *supra* note 2 at 36.

<sup>44</sup> McNally, *supra* note 31 at 21.

<sup>45</sup> Wilson, *supra* note 2 at 36.

<sup>46</sup> *Ibid.*

tain individuals and businesses. The absence of consistency in the application of the rule of law and endemic corruption creates uncertainty for foreign businesses seeking recourse in the institutionalized Chinese legal system. The absence of certainty reduces the risk tolerance of foreign businesses seeking to make productive investments in the country.

The commercial arbitration framework provided by CIETAC represents a suitable compromise between Chinese legal culture and the requirement of foreign businesses for the predictable and transparent administration of the rule of law. Arbitration is the preferred means of dispute resolution in China and CIETAC provides this in a framework that is acceptable to foreign interests. CIETAC fulfills the requirement for effective legal recourse that is otherwise unfulfilled by the domestic court system. While a measure of risk remains in the enforcement of arbitral decisions in China, the 1994 Arbitration Law provides a clear and widely accepted linkage between the validity of CIETAC awards and the obligation of domestic courts to enforce them.

#### *CIETAC as a mechanism of foreign policy*

In addition to the obvious benefits that CIETAC yields in legitimating the rule of law with respect to foreign businesses operating in China, the organization provides an avenue through which the PRC can project its influence into the established institutional framework of commercial arbitration. By providing for an internationally oriented arbitration facility, CIETAC is able to function as a legitimized means by which China can establish components of its economic and political culture in the international domain. The existence of these tools as part of the global commercial arbitration infrastructure gives China a forum where it can engage with the international community on terms that it is most adept at managing, while still abiding by generally-accepted tenets. This is consistent with the country's overarching foreign policy directive that emphasizes deeper integration into the global order while reconstituting it in a way that benefits the country's interests.<sup>47</sup>

The intersection of CIETAC with the PRC's foreign policy is not direct; CIETAC operates as a nominally independent organization under the jurisdiction of a non-profit agency. However, as Lijun Cao, Deputy Director of CIETAC's Business Department, writes, the central government approves the organization's budget and holds veto power over significant decisions, such as revisions to the CIETAC Arbitration Rules.<sup>48</sup> Moreover, the operations of CIETAC and its parent organization are heavily influenced by the PRC's foreign policy. Rather than being a direct instrument, CIETAC functions in harmony with the broader directions set by Beijing. Its success as an organization is contingent on the quality of its contribution to the development of a legal structure which balances both foreign and domestic interests.

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<sup>47</sup> Foot, *supra* note 38 at 87.

<sup>48</sup> Cao, *supra* note 1 at 2.

From 1990 to 2011, CIETAC's annual caseload expanded from 203 cases to 1282.<sup>49</sup> This growth is attributable to not only an increase in foreign business activity in China, but also to an increased recognition of the quality of CIETAC as an arbitration centre.<sup>50</sup> While Chinese parties often insist on designating CIETAC in arbitration agreements as the site of the arbitration proceedings, foreign parties have historically been reluctant to do so. In the wake of both the 1995 and 2005 revisions, however, CIETAC's caseload experienced immediate surges of approximately 50% and 30%, respectively.<sup>51</sup> This was likely due to the reforms that these revisions introduced into the CIETAC Arbitration Rules which brought them into closer alignment with international norms and made the organization more attractive to non-Chinese parties. The growing acceptance by the international community of CIETAC is occurring despite the organization's retention of key elements that are inextricably linked to China's economic and legal culture.

Leveraging the momentum gained by the progressive internationalization of CIETAC, the organization has undertaken to further establish itself as a significant player in the international arbitration system. As part of the 2012 reform package, the organization gained the ability to hear cases in locations other than mainland China.<sup>52</sup> This is noteworthy because it expanded the functional jurisdiction of CIETAC to encompass disputes involving Chinese companies operating in foreign locations. These types of disputes have become increasingly common as Chinese firms establish operations abroad. While the CIETAC Arbitration Rules have never prohibited the organization from hearing such cases, the practical dimension of being constrained to holding hearings within the PRC made doing so inefficient. As of May 2012, however, CIETAC tribunals were no longer territorially bound, thereby significantly expanding the potential number of disputes falling under its purview and enhancing its international impact.

### *Domestic*

While international pressures are dictating the forward progression of CIETAC towards internationalization, domestic pressures are acting simultaneously to restrain this rate of reform. The primary counter-dynamic arises from the incrementalist mode of market liberalization adopted by the Chinese state. This model stipulates a gradual transition to a nominally market-based economy. As a tool for attracting foreign investment, CIETAC has, as well, followed this methodology.

With the chaos and instability of the Maoist era having shaped the current generation of Chinese leadership, the overarching precept of the country's economic development is the maintenance of political and social stability.<sup>53</sup> The CPC had its

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<sup>49</sup> CIETAC, *Cases Resolved by CIETAC*, online: <<http://www.cietac.org/index.cms>>. This number declined precipitously in 2012 to 720 due to the secession of the Shanghai and Shenzhen arbitration centres as a result of an internal dispute over the implementation of the 2012 CIETAC Arbitration Rules. See section entitled "Institutional Centralization" for a discussion of the causes and possible ramifications.

<sup>50</sup> ILSAC, *supra* note 19 at 4.

<sup>51</sup> CIETAC, *supra* note 49.

<sup>52</sup> Article 34(2), *supra* note 26.

<sup>53</sup> Gore, *supra* note 28 at 8.

normative roots in the command economy; it was this type of economics that would deliver the class equality that communism was premised on. The transition to a nominally market-based economy, therefore, destabilized this important pillar of the party's legitimacy to rule. To re-legitimate itself as the natural governing authority of the PRC, the party began to reconstitute itself as a guarantor of the continuing prosperity of the country. It also appealed to a nascent Chinese nationalism founded in traditional Chinese symbolisms that supported the concentration of power in a single ruling institution.<sup>54</sup> Because of this, the transition to a market-based economy was incremental to allow for a gradual technical and normative transformation in the party's ideological base and to avoid the social pitfalls of the rapid "shock therapy" reforms which had occurred in former Eastern bloc countries after the collapse of the Soviet Union.

As an example of this gradualism, state-owned corporations were incrementally privatized or insulated from direct state control and township and village enterprises were introduced to stimulate local innovation and investment.<sup>55</sup> The composition of CIETAC evolved in tandem with this development process. In order to protect the deliberate expansion of investment opportunities in China, CIETAC maintained its highly centralized nature throughout much of the reform period. The competency of the organization's secretariat to review individual awards prior to their disclosure, in particular, ensured that the decisions of the tribunals were in alignment with the developmentalist agenda of the state.<sup>56</sup>

While the imperatives of development have demanded the responsiveness of CIETAC to external pressures, they have also underscored the requirement for CIETAC's reformation to be incremental and conducted in harmony with domestic economic and political change.

### **Defining characteristics of CIETAC**

The confluence of international and domestic pressures has constituted CIETAC in a way that distinguishes it from other international arbitration centres. This paper will review the four most defining features of the organization and locate them in the context of the factors that have influenced its development. It will also evaluate the impact of these features on the effectiveness of the CIETAC system. The four characteristics are as follows: CIETAC's high level of institutional centrality; the presence of provisions allowing for mediation-arbitration in the CIETAC Arbitration Rules; the organization's overarching focus on efficiency; and the role of CIETAC tribunals as inquisitorial.

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<sup>54</sup> *Ibid* at 37.

<sup>55</sup> McNally, *supra* note 31 at 21.

<sup>56</sup> *Arbitration Provisions, supra* note 25 at Article 49:

The arbitral tribunal shall submit its draft award to CIETAC for scrutiny before signing the award. CIETAC may bring to the attention of the arbitral tribunal issues addressed in the award on the condition that the arbitral tribunal's independence in rendering the award is not affected.

### *Institutional centralization*

Among the world's arbitration centres, CIETAC is considered to be the most interventionist.<sup>57</sup> Despite the successful internationalization of the organization and initiatives to devolve greater procedural control to individual parties, it retains a strong secretariat that possesses broad powers to structure the operational aspects of individual tribunals. In particular, the CIETAC Arbitration Rules protect these powers from being usurped by the discretionary adoption of *ad hoc* rules by the arbitrating parties. The maintenance of this centralized authority is likely residue from CIETAC's origins in a command economy as well as a deliberate policy decision to retain a mechanism to ensure the adherence of CIETAC to the developmentalist agenda of the state.

While Article 4.3 of the CIETAC Arbitration Rules permits parties to adopt procedural rules different from those enunciated in the CIETAC Arbitration Rules, this permission does not apply to Chapter 2 – Arbitration Proceedings, which governs the initiation, composition, and conduct of tribunals.<sup>58</sup> This prevents the application of alternative procedural frameworks, such as the more flexible model allowed for in the UNCITRAL Rules, to CIETAC proceedings. Article 4.3 also provides for the restriction of *ad hoc* rules where they are “inoperative or in conflict of the law as it applies to the arbitration proceedings.” This considers the proposed *ad hoc* rules in the context of Chinese law, generally, as it may pertain to the arbitration process and has been frequently interpreted by Chinese courts as a complete bar against the application of such rules in CIETAC proceedings.<sup>59</sup> D'Agostino argues that this broad interpretation of Article 4.3 flows from the proper interpretation of the Chinese term for “inoperative,” which has been otherwise translated verbatim in the official English language rules.<sup>60</sup> He argues that because the direct translation neglects the nuance inflecting the Chinese term, the more appropriate English analogue would be the word “inconsistent.” This interpretation lowers the threshold for finding *ad hoc* rules to be invalid by requiring only that the proposed rule is different, either in purpose or intention, from Chinese arbitration law. The *ad hoc* rule need not be in direct opposition to an existing precept to be ruled invalid. Consequently, alterations made to the CIETAC Arbitration Rules outside of Chapter 2 may be more likely to be found invalid by the courts. This remains a point of ambiguity in Chinese law and has not yet been clarified by either the courts or the government.

The protection that Article 4.3 affords to the procedural aspects of the CIETAC Arbitration Rules has made certain provisions mandatory that serve to distinguish CIETAC from other international arbitration centres and which reinforce the administrative authority of the secretariat. This paper will briefly canvas three of these provisions.

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<sup>57</sup> Justin D'Agostino, “Mixing and matching arbitration rules in mainland China – the pros and cons of using the UNCITRAL Rules in CIETAC arbitration” (March 15 2011) online: Kluwer Arbitration Blog <<http://www.kluwerarbitrationblog.com>>.

<sup>58</sup> *Arbitration Provisions*, *supra* note 20.

<sup>59</sup> D'Agostino, *supra* note 57.

<sup>60</sup> *Ibid.*

The first provision is Article 49, which obligates tribunals to submit draft awards to the CIETAC secretariat for review prior to the disclosure of the award to the parties.<sup>61</sup> This differs from the approach used by other international arbitration systems, such as the ICC and SIAC, wherein central review mechanisms are not mandatory but are available at the discretion of the parties.<sup>62</sup> The opinions of the secretariat from the CIETAC process are not binding on the tribunal, maintaining the independence of the tribunal. The value of this mechanism to CIETAC and the state is that it provides a direct feedback mechanism between the immediate subject matter of the tribunal and the broader policy considerations of CIETAC and the government. It also serves as a mechanism to ensure the consistency of decisions across CIETAC's disparate tribunals—a function of particular importance concerning the relative immaturity of the organization relative to its global counterparts and the absence of a definitive system of precedent in international law, generally, and the civil law system specifically. Whereas tribunals may otherwise arrive at a decision in isolation of the larger context that the commission is situated within, Article 49 allows for the intercession of the secretariat while protecting the integrity of the arbitration. The tribunal exercises independent discretion as to whether to accept this feedback in its final judgment, thereby ensuring the fairness and transparency of the arbitral process. If the feedback is implemented, it is done so in consultation with the parties.

The second provision is Article 6.1, which empowers the CIETAC secretariat with adjudicative authority in disputes over the jurisdiction of the organization.<sup>63</sup> The centralization of this function on the secretariat departs from the typical model for finding jurisdiction in international commercial arbitrations. In most institutional arbitration centres, this task is under the expressed purview of the individual tribunal as per the *Kompetenz-Kompetenz* principle.<sup>64</sup> However, the secretariat can delegate this authority to the arbitral tribunal if the secretariat deems necessary. The presence of this provision influences the arbitration process in two ways. First, it arguably enhances the efficiency and objectivity of the arbitration process. With decisions of jurisdiction being centralized on a single entity, the framework used to assess such questions can be standardized and a nexus of expertise on this matter can be cultivated. Second, it divorces the adjudicative process for jurisdictional issues from the localized expertise provided by individual tribunal panels. In most instances, panels have a familiarity with the subject matter that the secretariat may lack. The separation of jurisdictional issues from the purview of the

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<sup>61</sup> *Arbitration Provisions*, *supra* note 25 at Article 49:

The arbitral tribunal shall submit its draft award to CIETAC for scrutiny before signing the award. CIETAC may bring to the attention of the arbitral tribunal issues addressed in the award on the condition that the arbitral tribunal's independence in rendering the award is not affected.

<sup>62</sup> Andrea Sturini & Lorrain Hui, "Commentary on the Arbitration Rules of the China International Economic and Trade Arbitration Commission" (2011) 15:2 *The Vindobona Journal of International Commercial Law and Arbitration* at 288.

<sup>63</sup> *Arbitrations Provisions*, *supra* note 25, at Article 6.1:

CIETAC shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. CIETAC may, where necessary, delegate such power to the arbitral tribunal.

<sup>64</sup> ILSAC, *supra* note 19 at 7.

tribunal marginalizes the impact of this key contextual element in assessments of CIETAC's scope of authority.

The final aspect of the CIETAC Arbitration Rules that is mandatory across all arbitrations administered by the commission concerns the appointment of arbitrators. This is encapsulated by Articles 24 and 25, which, together, govern the appointment of arbitrators to CIETAC tribunals.

Article 24 requires that party select arbitrators from the CIETAC Panel, a list of 998 individuals whom the CIETAC secretariat has deemed qualified to serve as arbitrators in CIETAC proceedings.<sup>65</sup> The disposition of this panel reflects the increasing internationalization of the commission. As of 2011, approximately 28% of the panel is comprised of foreign nationals.<sup>66</sup> This has been the consequence of a deliberate effort by CIETAC since 1989 to balance the need for the standardization of arbitrators with the requirement of diversity for both the sake of appearance and the external knowledge that doing so contributes to the institution.<sup>67</sup> However, if the parties prefer to select an arbitrator from outside of the CIETAC Panel, Article 24.2 states that the approval of the chairman of CIETAC must be obtained for the appointment to occur, thus maintaining the ability of the secretariat to regulate the qualifications of all arbitrators operating within the CIETAC system.

Article 25 prescribes a framework for appointment that significantly constrains the length of time afforded to parties in which to agree on the composition of the tribunal.<sup>68</sup> Rather than the five months allowed for by the UNCITRAL Rules, Article 25 of CIETAC specifies a time limit of thirty days for parties to select a panel of three arbitrators. Although this measure enhances the efficiency of the arbitral process, it may create a structural bias in favour of Chinese parties that are experienced

<sup>65</sup> *Arbitration Provisions*, *supra* note 25 at Article 24:

(1) CIETAC establishes a Panel of Arbitrators which uniformly applies to itself and all its sub-commissions/centers. The parties shall nominate arbitrators from the Panel of Arbitrators provided by CIETAC.

(2) Where the parties have agreed to nominate arbitrators from outside CIETAC's Panel of Arbitrators, an arbitrator so nominated by the parties or nominated according to the agreement of the parties may act as arbitrator subject to the confirmation by the Chairman of CIETAC in accordance with the law.

<sup>66</sup> CIETAC, *Composition of CIETAC Panel of Arbitrators*, online: <<http://www.cietac.org/index.cms>>.

<sup>67</sup> Wilson, *supra* note 2 at 39.

<sup>68</sup> *Arbitration Provisions*, *supra* note 25 at Article 25:

(1) Within fifteen (15) days from the date of receipt of the Notice of Arbitration, the Claimant and the Respondent shall each nominate, or entrust the Chairman of CIETAC to appoint, an arbitrator, failing which the arbitrator shall be appointed by the Chairman of CIETAC.

(2) Within fifteen (15) days from the date of the Respondent's receipt of the Notice of Arbitration, the parties shall jointly nominate, or entrust the Chairman of CIETAC to appoint, the third arbitrator, who shall act as the presiding arbitrator.

(3) The parties may each recommend one to five arbitrators as candidates for presiding arbitrator and shall each submit a list of recommended candidates within the time period specified in the preceding Paragraph 2. Where there is only one common candidate on the lists, such candidate shall be the presiding arbitrator jointly nominated by the parties. Where there is more than one common candidate on the lists, the Chairman of CIETAC shall choose a presiding arbitrator from among the common candidates having regard to the circumstances of the case, and he/she shall act as the presiding arbitrator jointly nominated by the parties. Where there is no common candidate on the lists, the presiding arbitrator shall be appointed by the Chairman of CIETAC.

(4) Where the parties have failed to jointly nominate the presiding arbitrator according to the above provisions, the presiding arbitrator shall be appointed by the Chairman of CIETAC.

with the CIETAC framework and familiar with the pre-approved arbitrators that comprise the CIETAC Panel.

The protection of procedural elements of the CIETAC against replacement with *ad hoc* rules in tribunal proceedings has given the organization's arbitrations a distinct character and has maintained the interventionist character of the commission.

Despite the legal centrality of the organization, the recent changes made in the 2012 Arbitration Rules have exposed functional divisions within CIETAC. To facilitate the efficient delivery of arbitration services in a country of China's size, CIETAC operates, in part, through regional sub-commissions. Although they are nominally extensions of the Secretariat in Beijing, they exercise some autonomy to the extent that they stringently adapt the CIETAC to regional expectations and practices.<sup>69</sup> For reasons not officially reported, the Shanghai and South China Sub-Commissions rejected the new rules shortly after their implementation in May 2012 and announced that they would secede from the legal and administrative framework of CIETAC.<sup>70</sup> The CIETAC Secretariat responded by issuing a directive removing the authorization of these sub-commissions to adjudicate arbitrations and subsuming all existing arbitration agreements subscribing to the jurisdiction of these sub-commissions under the jurisdiction of the CIETAC Secretariat in Beijing.<sup>71</sup>

There has been little speculation as to the cause of these divisions, but a probable explanation could be that the sub-commissions are exploiting the loosening of restrictions as to the choice of arbitration rules to create a domestic alternative to the CIETAC monopoly. This would enable forum-shopping, allowing parties to pursue the arbitration system most likely to determine in their favour. While not explicitly prevented by the 1994 Arbitration Law, it would likely be seen as an anathema to the efforts of the state to create an integrated commercial arbitration apparatus and would, for this reason, be opposed by the government. Moreover, the recognition of CIETAC awards by the PRC's judiciary and the organization's established reputation would render these divergent sub-commissions as high-risk alternatives in a country where the rule of law is still uncertain.<sup>72</sup>

The implications of this split are as yet unknown, but will likely not adversely affect the development of CIETAC as the principal mechanism for commercial arbitrations in the PRC because of the predictability that it offers.

### *Mediation-Arbitration and CIETAC*

The second defining feature of CIETAC is that it provides for mediation-arbitration (med-arb) within the framework of the commission. Article 45 of the CIETAC Arbitration Rules sets forth a scheme whereby parties can agree to use a tribunal convened under CIETAC as mediators with the understanding that the

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<sup>69</sup> *Arbitration Provisions*, *supra* note 25 at Article 2.

<sup>70</sup> CIETAC, *China International Economic and Trade Arbitration Commission Statement* (May 1, 2012), online: <<http://www.cietac.org/index.cms>>.

<sup>71</sup> CIETAC, *China International Economic and Trade Arbitration Commission Announcement on Issues Concerning CIETAC Shanghai Sub-Commission and CIETAC South China Sub-Commission* (December 31, 2012), online: <<http://www.cietac.org/index.cms>>.

<sup>72</sup> de Vera, *supra* note 32 at 175.

same panel will adjudicate the subsequent arbitration if the conciliation fails.<sup>73</sup> This facility is unique among international commercial arbitration centres. While other centres allow for both mediation and arbitration, CIETAC is the only organization that adopts a combined approach.<sup>74</sup>

This methodology has elicited criticism for compromising the impartiality of arbitrators and undermining the integrity of both the mediation and arbitration. Critics contend that the ability of tribunals to objectively assess the positions of the parties in an arbitration will be adversely influenced by the comparatively unstructured disclosure of information during the mediation.<sup>75</sup> Although Article 45.9 prevents evidence and statements arising from the mediation from being introduced into the arbitration, authors, such as de Vera, argue the practical impossibility of expecting arbitrators to selectively “forget” elements of the mediation.<sup>76</sup>

However, as de Vera also argues, this feature of CIETAC’s med-arb methodology and the expected diminishment of the tribunal’s objectivity is an anticipated

<sup>73</sup> *Arbitration Provisions*, *supra* note 25 at Article 45:

(1) Where both parties wish to conciliate, or where one party wishes to conciliate and the other party’s consent has been obtained by the arbitral tribunal, the arbitral tribunal may conciliate the case during the course of the arbitration proceedings. The parties may also settle the case by themselves.

(2) With the consent of both parties, the arbitral tribunal may conciliate the case in a manner it considers appropriate.

(3) During the process of conciliation, the arbitral tribunal shall terminate the conciliation proceedings if either party so requests or if the arbitral tribunal believes that further conciliation efforts shall be futile.

(4) Where settlement is reached through conciliation by the arbitral tribunal or by the parties themselves, the parties shall sign a settlement agreement.

(5) Where a settlement agreement is reached through conciliation by the arbitral tribunal or by the parties themselves, the parties may withdraw their claim or counterclaim. The parties may also request the arbitral tribunal to render an arbitral award or a conciliation statement in accordance with the terms of the settlement agreement.

(6) Where the parties request for a conciliation statement, the conciliation statement shall clearly set forth the claims of the parties and the terms of the settlement agreement. It shall be signed by the arbitrators, sealed by CIETAC, and served upon both parties.

(7) Where conciliation fails, the arbitral tribunal shall resume the arbitration proceedings and render an arbitral award.

(8) Where the parties wish to conciliate their dispute but do not wish to have conciliation conducted by the arbitral tribunal, CIETAC may, with the consent of both parties, assist the parties to conciliate the dispute in a manner and procedure it considers appropriate.

(9) Where conciliation fails, any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation, shall not be invoked by either party as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, judicial proceedings, or any other proceedings.

(10) Where the parties have reached a settlement agreement by themselves through negotiation or conciliation before the commencement of an arbitration proceeding, either party may, based on an arbitration agreement concluded between them that provides for arbitration by CIETAC and the settlement agreement, request CIETAC to constitute an arbitral tribunal to render an arbitral award in accordance with the terms of the settlement agreement. Unless otherwise agreed by the parties, the Chairman of CIETAC shall appoint a sole arbitrator to form such an arbitral tribunal, which shall examine the case in a procedure it considers appropriate and render an award in due course. The specific procedure and time limit for rendering the award shall not be subject to other provisions of these Rules.

<sup>74</sup> de Vera, *supra* note 32 at 181.

<sup>75</sup> *Ibid* at 186.

<sup>76</sup> *Ibid*.

outcome of the arbitration process for parties that are conditioned in Chinese legal norms.<sup>77</sup> According to de Vera, the mediation and arbitration components are not viewed in isolation; they are conceptualized as overlapping elements of a process which prioritizes the restoration of harmony between the parties over the protection of autonomy.

Moreover, the integration of the two mechanisms allows for greater efficiency and the maintenance of positive relations between parties. Historically, Western interests have also not been averse to using the med-arb facility. As of 2012, approximately 20-30% of the international commercial disputes administered by CIETAC have been resolved using Article 45.<sup>78</sup>

Going forward, the ability of parties to select mediation-arbitration under Article 45 may affect the evolution and integration of CIETAC into the international commercial arbitration system in two respects.

First, the dissonance between the practices contained in Article 45 and predominant international conventions exposes CIETAC to the risk of reputational harm should problems arise with this mechanism. More so than any other provision of the CIETAC Rules, Article 45 reflects the cultural distinctiveness of CIETAC in terms of its prioritization of the restoration of harmony between parties.<sup>79</sup> In allowing the same individuals to serve as both mediators and arbitrators in the same ruling, the provision heightens the vulnerability of the CIETAC system to isolated incidents of indiscretion among its arbitrators. The failure of arbitrators to adequately compartmentalize the mediation and arbitration proceedings could serve to jeopardize the reputation of the organization as a whole and undermine its efforts to legitimate itself among its peers in the international community.

The second challenge presented by Article 45 is that the perceived impartiality of adjudicators in mediation-arbitration proceedings may affect the enforceability of CIETAC decisions arrived at through this mechanism in other jurisdictions. This is particularly problematic in Western jurisdictions where party autonomy is a defining value and the role of adjudicators is tightly circumscribed.<sup>80</sup> In these cases, CIETAC decisions may be set-aside due to an apparent failure of the process to insulate the arbitration panel from submissions made during mediation.

Although the enforcement of CIETAC decisions in foreign jurisdictions is provided for under the New York Convention, domestic courts retain the right to reject arbitration decisions on the grounds of procedural fairness.<sup>81</sup> The recent Hong Kong decision of *Gao Haiyan v Keeneye Holdings Ltd* exemplifies this possibility with respect to Article 45.<sup>82</sup> In that case, the court rejected a CIETAC decision arrived at through this procedure because of the appearance of bias arising from the combined role of mediator and arbitrator. The court remarked that while

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<sup>77</sup> *Ibid.*

<sup>78</sup> Peter Godwin, Dominic Roughton, David Gilmore, Gavin Margetson, Paul Smith & Naomi Lisney, "Med-arb – an alternative dispute resolution practice" (February 28 2012) online: Lexology <<http://www.lexology.com>>.

<sup>79</sup> de Vera, *supra* note 32 at 181-182.

<sup>80</sup> *Ibid* at 186.

<sup>81</sup> See the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 11.

<sup>82</sup> *Gao Haiyan v Keeneye Holdings Ltd* [2011] HKEC 514.

the mechanism is not fundamentally unsound, it is subject to a high degree of risk from actual and perceived bias.<sup>83</sup>

These challenges aside, in terms of the innovation that CIETAC brings to the global commercial arbitration institution, the combined mediation-arbitration tool provided by Article 45 is perhaps the most valuable. Though its operationalization conflicts with prevalent Western notions of party autonomy, it serves as a useful template for an approach that maximizes efficiency while minimizing the potential harms of adversarial dispute resolution.

### *The imperative of efficiency*

Influenced by the culturally-prescribed prioritization of harmonious dispute resolution and the external pressures associated with the PRC's integration into the global economy, efficiency has been a principal focus of CIETAC's reform. Though efficiency is a concern of most international arbitration centres, due to increasing caseloads, CIETAC is exceptional in the degree to which it is expressed through its practices and rules. This focus on efficiency is evidenced in both the normative foundations of the operations of the tribunals and in the rules that govern CIETAC arbitrations.

According to a 2011 study by linguists Han Zhengrui and Li Xiaoyu, the imperative of the efficient resolution of disputes in CIETAC proceedings extends beyond the boundaries established by the CIETAC Arbitration Rules.<sup>84</sup> In their discursive analysis of thirty representative CIETAC decisions from the past decade, they found that the precedential value of the awards were often diminished by an absence of clear reasoning and appropriate citations locating the decisions in the broader legal context. While CIETAC tribunal decisions are rarely disclosed to the public, they do serve as valuable mechanisms for institutional learning and provide a mechanism of internal precedent for parties that regularly use the arbitration centre. The authors characterized the reasoning provided in CIETAC arbitral decisions as *pro forma*, done to satisfy the "socially recognized purpose of observing standardized CIETAC Arbitration Rules."<sup>85</sup> The functional emphasis is on efficiency as defined by an expeditious and direct result. The rising popularity of CIETAC as an arbitration centre is a testament to the fairness of its tribunals; nonetheless, the provision of clear reasons can only enhance the evolution of the organization.

The imperative of efficiency is also expressed through the CIETAC Arbitration Rules, principally in terms of the timing provisions and the availability of summary judgment. Whereas the UNCITRAL Rules delegate the time limits for such matters as the serving of documents and the issuance of awards to the discretion of the individual tribunal, the CIETAC Arbitration Rules specify non-negotiable time limits for these activities.<sup>86</sup> For example, Articles 14<sup>87</sup> and 15<sup>88</sup> of the CIETAC Arbitration

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<sup>83</sup> Sturini & Hui, *supra* note 62 at 283.

<sup>84</sup> Han Zhengrui & Li Xiaoyu, "Discourse of international commercial arbitration: The case of Mainland China" (2011) 43 *Journal of Pragmatics* 1380.

<sup>85</sup> *Ibid* at 1387.

<sup>86</sup> Huang et al, *supra* note 17.

<sup>87</sup> *Arbitration Provisions*, *supra* note 25 at Article 14.1:

The Respondent shall file a Statement of Defense in writing within forty-five (45) days from the date of receipt of the Notice of Arbitration. If the Respondent has justified reasons to request an

Rules indicate that statements of defense and counterclaims, respectively, must be submitted 45 days from receipt of the Notice of Arbitration. As well, Article 46.1 requires that tribunals render their award within 6 months of the date on which the tribunal is formed.<sup>89</sup> The CIETAC Arbitration Rules, through Chapter IV, also provide for summary judgment of matters concerning amounts of RMB 2,000,000 or less. Provisions for summary judgments are rare among international commercial arbitration organizations, but Chapter IV allows for such a procedure wherein evidence can be adduced exclusively through written submissions and an award issued within three months of the formation of the tribunal.

The strict approach to procedure exemplified in the CIETAC Rules is reflective of the nature of the organization as an instrument in the development of a modern market economy in the PRC and as a tool to both adapt to and influence the country's international environment.

As mentioned previously, the institutionalization of a predictable rule of law is foundational to the PRC's transformation into a modern market economy.<sup>90</sup> As part of this emerging legal structure, CIETAC operates as a mechanism to assure foreign parties of a fair and binding avenue through which disputes with their domestic Chinese counterparts can be resolved. However, the procedural protections accompanying this system conflict with the developmentalist imperative of maximizing the efficient allocation of capital. It is in the best interest of achieving sustained economic growth to facilitate the expeditious resolution of economic disputes. Rather than adopt the flexible procedural approach used by UNCITRAL, CIETAC has implemented procedural rules that stipulate defined time limits and allow for the efficient conduct of proceedings. While these standards depart from international norms, they represent an attempt to balance assurances of procedural protection with procedural efficiency.

The strict procedural paradigm employed by CIETAC is also the result of international pressure, specifically in regards to historical concerns about the reliability of the PRC's legal apparatuses.<sup>91</sup> The implementation of defined procedures, in contrast to the *ad hoc* ones allowed for under the UNCITRAL Rules, provides an objective assurance of procedural integrity. The variability permitted by the UNCITRAL Rules may undermine the careful efforts of the organization to distance itself from historical perceptions of the PRC's legal system as arbitrary and

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extension of the time period, the arbitral tribunal shall decide whether to grant an extension. Where the arbitral tribunal has not yet been formed, the decision on whether to grant the extension of the time period shall be made by the Secretariat of CIETAC.

<sup>88</sup> *Ibid* Article 15:

The Respondent shall file a counterclaim, if any, in writing within forty-five (45) days from the date of receipt of the Notice of Arbitration. If the Respondent has justified reasons to request an extension of the time period, the arbitral tribunal shall decide whether to grant an extension. Where the arbitral tribunal has not yet been formed, the decision on whether to grant the extension of the time period shall be made by the Secretariat of CIETAC.

<sup>89</sup> *Ibid* Article 46.1:

The arbitral tribunal shall render an arbitral award within six (6) months from the date on which the arbitral tribunal is formed.

<sup>90</sup> Wilson, *supra* note 2 at 37.

<sup>91</sup> Fishburne & Lian, *supra* note 5 at 303.

to cultivate a reputation of consistency. Although the UNCITRAL Rules are broadly accepted in the international community, they lack the predictability required to reinforce the perception of CIETAC's commitment to the rule of law in the context of a still uncertain Chinese legal system.

Internationally, the extensive procedural rules set forth by CIETAC and its emphasis on efficiency are also exemplifications of the instrumentalization of the organization as a tool to influence the development of the country's external environment. The practice of the organization in these two areas departs significantly from standard international practice, therefore positioning CIETAC as an alternative model for the settlement of commercial disputes. The CIETAC model is especially attractive to parties that prioritize the expeditious resolution of commercial disputes over the ability to exercise procedural discretion. This may increase its prominence relative to other arbitration centres that espouse the UNCITRAL rules, particularly in East Asia where CIETAC has expanded its competitive presence by recently establishing the CIETAC Hong Kong Arbitration Center.<sup>92</sup>

The adaptation of CIETAC to generally accepted international standards has been inflected with a strong emphasis on procedural efficiency. For reasons grounded both in culture and practicality, the prioritization of efficiency has been more evident with CIETAC than with other arbitration centres and frameworks. However, a principal advantage of arbitration as a dispute resolution tool is that it allows parties the flexibility to elect the procedural framework best suited to their circumstances and economic imperatives. The strict approach used by CIETAC suppresses this flexibility and while it has distinctive benefits in terms of efficiency and predictability, there is a risk that it could adversely affect CIETAC's ability to adapt to the evolving needs of commercial parties.

#### *CIETAC tribunals as inquisitorial*

The final distinguishing characteristic of CIETAC is the presence of Article 41, which empowers tribunals to undertake investigations independent of the individual parties.<sup>93</sup> While parties can use Article 33.3 to elect between either the adversarial or inquisitorial approach as the dominant structure of the arbitration, the tribunal reserves the authority to initiate investigations where it deems necessary.<sup>94</sup>

This authority is unusual among international commercial arbitration frameworks because it contradicts the prioritization of party autonomy. It concedes an independent ability to the arbitrators to shape the proceedings. Though other international commercial arbitration centres operating in civil law countries afford the parties the freedom to select their preferred system<sup>95</sup>, this selection is absolute;

<sup>92</sup> CIETAC, *CIETAC Holds Launch Ceremony of Hong Kong Arbitration Center & Arbitration Seminar* (24 September 2012), online: <<http://www.cietac.org>>.

<sup>93</sup> *Arbitration Provisions*, *supra* note 25 at Article 41.1:

The arbitral tribunal may undertake investigations and collect evidence on its own initiative as it considers necessary.

<sup>94</sup> *Ibid* Article 33.3:

Unless otherwise agreed by the parties, the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case having regard to the circumstances of the case.

<sup>95</sup> For example: German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit eV, DIS).

there is no residual authority left to the tribunal to undertake additional investigations. It is uncertain whether parties can use Article 4.3 to exclude or replace this provision.

This practice is consistent with the latent centralization that still pervades CIETAC's approach to arbitration. It is also in alignment with the overarching imperative of achieving harmony through the litigation process and, in particular, the traditional deference that Chinese legal culture grants to superior authorities, such as arbitrators, to facilitate the restoration of this harmony.

Among the benefits that this approach yields to participants is that it provides for an additional perspective in the dispute resolution process. In arbitrations where the cases put forth by the parties are largely equal in merit, the independent investigatory powers of the arbitrators can result in a more decisive resolution by identifying further relevant evidence. However, the powers of the arbitrators to pursue such evidence may be limited by jurisdictional constraints, such as their ability to exercise investigatory powers abroad.

Article 41 also benefits the integrity of CIETAC by promoting the internal consistency of decisions. The ability of arbitrators to initiate independent investigations provides the organizations with another avenue to ensure that decisions conform with established procedure and precedent. It also serves to ensure the quality of CIETAC decisions by enabling arbitrators to base their decisions on the fullest possible body of evidence and law.

However, Article 41 does bring certain disadvantages to the CIETAC process, principal among which is the uncertainty it causes in arbitrations. The ability of arbitrators to initiate independent investigations raises questions about the freedom of the parties to define the terms of the proceedings. Since the arbitrators likely retain this ability regardless of the terms of arbitration, their ability to deploy it is theoretically unrestricted. This undermines a key feature of arbitrations as being dispute resolution forums where the powers of the arbitrators are determined by the parties.<sup>96</sup> By yielding more power to the arbitrators, Article 41 diminishes the autonomy of parties to determine the structure of the proceedings. It also makes the proceedings more susceptible to the biases of the arbitrators, particularly where the parties have selected an adversarial format. In that scenario, the expected role of the arbitrators as decision-makers is tempered by their secondary role as inquisitors. Without the procedural protections of an inquisitorial format, which anticipate this type of engagement, the parties may be ill-equipped to address evidence introduced by the arbitrators.

## Conclusion

CIETAC's evolution as an institution has occurred at the confluence of an array of pressures exerted from both within and outside of the PRC. Yet it has not grown passively as an organization; it is a component of a broader matrix of tools that the Chinese state has at its disposal to facilitate economic reform. In response to these pressures, CIETAC has served to both reflect the predominant norms being pro-

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<sup>96</sup> de Vera, *supra* note 32 at 153.

jected toward it by foreign and domestic sources, and as a vector for the introduction of new norms and practices into the global commercial arbitration architecture and into China's developing legal system. Faced with this complex combination of influences, CIETAC has developed an approach to arbitration that hybridizes the generally accepted tenets of international commercial arbitration with mechanisms that ensure the appropriateness of the organization to its functional and cultural context. Going forward, the success of CIETAC will be determined by how well it is able to sustain its continued internationalization and maintain its relevance to policymakers in Beijing.