Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System

David T. Wang

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.scu.edu/lawreview/vol48/iss3/4

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
JUDICIAL REFORM IN CHINA: IMPROVING ARBITRATION AWARD ENFORCEMENT BY ESTABLISHING A FEDERAL COURT SYSTEM

David T. Wang

I. INTRODUCTION

Winning an arbitration award after a difficult and costly arbitration is normally cause for relief, if not outright celebration. However, in China, this may simply be the beginning of another complex and arduous journey. Arbitral awards in China are enforced through its judicial system. Unfortunately, structural problems inherent in the system, like local protectionism and a weak judiciary, often prevent the enforcement of these awards.

This comment examines how the addition of a federal court system in China will eliminate local protectionism, strengthen the judiciary, and improve the enforcement of arbitral awards. Part II provides background on the structure of China's judiciary, its relationship to the government, and some of the current problems facing the courts. This section also gives a brief overview of Chinese arbitration and the Arbitration Law. Part III identifies the specific legal issues facing China: The government must resolve significant deficiencies in its judicial system to improve the enforcement of arbitral awards. Part IV examines these deficiencies and also discusses some of the inadequate measures taken by the government to facilitate enforcement. Part V proposes the implementation of a federal court system to remedy these institutional deficiencies.
in China’s legal system. This section identifies the numerous benefits a federal court system would offer and explores the likely impact of such a regime on China’s judicial system and enforcement of arbitral awards. Part V also addresses perceived challenges to implementing a federal system.

In recent years, China has taken critical steps to bolster judicial independence and eradicate harmful local protectionism. However, the creation of a federal court system will help China evolve into a first-rate international arbitral forum, inspire greater confidence in the judicial system, and further fuel China’s meteoric growth.

II. BACKGROUND

A. Current Landscape—The Courts and Their Relationship to the Government

China’s judicial system contains courts of general as well as specific jurisdiction. There are four levels of courts of general jurisdiction. The highest court in the nation is the Supreme People’s Court (SPC), located in Beijing. Beneath this court lies the Higher Level People’s Courts (HPCs). There are thirty HPCs: one for each province, autonomous region, and centrally administered-city. Beneath the HPCs

1. See infra Part IV.B.
4. Id. at 7.
6. Id.
7. Clarke, supra note 3, at 7. China is divided into twenty-three provinces. Jessica Zoe Renwald, Foreign Investment Law in the People’s Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution, 16 INT’L & COMP. L. REV. 453, 455 (2006). Each province is then subdivided into prefectures, counties, and cities. Id. In addition, each county may also be subdivided into townships, national minority townships, or towns. Id. Despite these different units of government, the Chinese regime is still a “unitary system” with all authority coming from the central government. Id.
8. Clarke, supra note 3, at 7. An autonomous region is a first-level administrative subdivision of China. See CHOW supra note 5, at 82. Like Chinese provinces, an autonomous region has its own local government, but an
are 389 Intermediate Level People's Courts (IPCs). These courts are established just below the provincial level in prefectures, provincially-administered cities, and within centrally-administered cities. At the lowest level are the roughly three thousand Basic Level People's Courts (BPCs) that exist at the county level. These courts consist of criminal, civil, economic, and enforcement divisions.

The judiciary in China differs significantly from those of developed western countries. Courts in the People's Republic of China (PRC) are weaker institutionally. One of the root causes of this weakness is the organizational structure of the judiciary as established by China's Constitution. Article 126 of the Constitution states “The people’s courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or autonomous region has more legislative rights. See id. It is a minority entity and has a higher population of a particular minority ethnic group. Id. There are five autonomous regions in China: Guanxi, Inner Mongolia, Ningxia, Xinjiang, and Xizang (Tibet). Id. at 81-82.

9. Clarke, supra note 3, at 7. A centrally-administered city is a special municipality directly controlled by the central government, as compared to the local government. Id. There are four such municipalities: Beijing, Shanghai, Tianjin, and Chongqing. CHOW, supra note 5, at 81.


11. A provincially-administered city is a city controlled by the laws and regulations of the province in which it sits. See Peter H. Corne, Creation and Application of Law in the PRC, 50 AM. J. COMP. L. 369, 388-89 (2002). Chinese law permits congresses at the provincial level to enact their own regulations, so long as it does not conflict with the Constitution, national laws and administrative legislation. See id.


13. CHOW, supra note 5, at 200 (“In order to provide additional access to the court system, the basic people's courts [BPCs] have established over 30,000 subordinate divisions known as people's tribunals in towns and villages below the county level. People's tribunals are considered to be a component part of the basic people's courts and the judgments of people's tribunals are considered to be judgments and orders of the basic people's courts.”).


16. Id.

17. See Laifan Lin, Judicial Independence in Japan: A Re-Investigation for China, 13 COLUM J. ASIAN L. 185, 197-98 (1999). “[U]nder the present constitutional system, though the court is a relative independent judicial organization, it is subject to multiple supervision . . . .” Id. at 198.
individuals.”18 However, Article 128 states “The Supreme People’s Court is responsible to the National People’s Congress and its Standing Committee. Local people’s courts at different levels are responsible to the organs of state power which created them.”19 While the former article is in accord with western notions of judicial independence and separation of powers principles, the latter article is not. Indeed, Article 128 more accurately describes the relationship of the courts with other governmental bodies because of the numerous internal and external forces that influence court decisions.20

B. Internal Influences

Judges in China do not enjoy independent judicial decision-making.21 Internally, other judges, judicial superiors, and even higher courts often review the case before the judgment is issued.22 Higher-level courts may assert primary jurisdiction over a lower court in order to adjudicate a particularly influential case in their district.23 Indeed, the “criteria for determining whether higher-level jurisdiction should be exercised include the level in the governmental hierarchy of the departments involved, the amount of money involved, and the complexity of the case.”24 In this manner, the judiciary is managed like an administrative agency because junior judges must follow the opinions of chief judges and the presidents of courts.25

Moreover, if a case is deemed “complicated” but not reviewed by a higher court, the Adjudication Committee of the court may intervene to review it.26 This committee

19. Id. art. 128.
22. STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 260 (1999).
23. Id. at 251.
24. Id.
26. LUBMAN, supra note 22, at 252. Courts of general jurisdiction at all levels have a president, one or more vice presidents, an Adjudication
includes the president of the court, the vice-president, the head of specialized chambers, and regular judges. These members advise individual judges in cases determined to be important. This review by committee members further detracts from judicial independence because Chinese Communist Party (CCP) political considerations might unduly influence the court’s ultimate legal decision. Yet another internal factor affecting judicial independence is the fact that judges can request guidance and instructions from higher-level courts on a particular case. These practices continue because of unclear legislation and a concern by courts that other judges or officials will reverse their decisions.

C. External Influences

Chinese judges also face many external influences, which exert themselves on the judges’ decision-making powers. First, judges are limited by the structure of the judicial system because each level of courts is responsible to the people’s congress at the equivalent level. Thus, at the county level, the local people’s congress supervises the work of BPC judges, the provincial people’s congress supervises the work of IPC and HPC judges and so on. Unlike federal judges in the United States, Chinese judges have no security of tenure and are appointed and removed by the legislative body at the same level. Judges are beholden to the equivalent-level government not only in regards to their employment but to their finances as well.

Local party and government organs control every aspect of local courts, including personnel, funding/budgets, benefits, employment of children, housing, facilities, promotions and

Committee, judges who work in the divisions, and clerks. Id.; see also Reinstein, supra note 21, at 49.
27. Reinstein, supra note 21, at 49.
28. Id.
29. LUBMAN, supra note 22, at 263.
30. Id.
32. Id.
33. LUBMAN, supra note 22, at 256.
34. Clarke, supra note 3, at 42.
Local governments use this power over courts to exercise influence in a particular case. This “local protectionism” occurs because local governments often rely on local businesses for revenues and employment. The local governments fear that their financial interests will be jeopardized by adverse judgments against these businesses. The government’s relationship to firms may be even more direct as businesses may be run by local political leaders who exert influence over the courts to protect their businesses.

Judicial independence and autonomy is further eroded by the judiciary’s various links to the Chinese Communist Party (CCP). Although people’s congresses are officially empowered to appoint judges, in practice “judges are often selected by the CCP Committee on the same level, and the choices ratified by the people’s congresses.” Most senior judges are CCP members, including members of the Adjudication Committee, which has considerable authority in determining the outcome of difficult or controversial cases. Moreover, although direct intervention by the CCP is lessening, judges do discuss cases involving political or difficult legal issues with the Political-Legal Committee of the CCP. Political-Legal Committees include the head of the public security organ, the president of the people’s court, the president of the people’s procuratorate, the head of the judicial administrative organs, and the head of the administrative organ for civil affairs at the provincial or local level. These high-powered committees are established by

35. Id. (citing Chen Youxi & Xue Chunbao, Zaocheng Fayuan Zhixing Nan De San Da Jiben Yinsu [The Three Major Reasons Why Courts Have Difficulty in Execution], ZHEJIANG FAZHI BAO [ZHEJIANG LEGAL SYSTEM NEWS], Aug. 16, 1990, at 3).
36. Id.
37. See id. at 41.
38. Id. at 41-42.
39. Id. at 42.
41. Id.
42. See Jerome A. Cohen, Reforming China’s Civil Procedure: Judging the Courts, 45 AM. J. COMP. L. 793, 797 (1997). “Although there is no formal requirement that judges be members of the CCP, a very large percentage have [sic] been, usually perhaps 90 per cent or more.” Id.
44. Id. at 9.
45. Id.
the CCP and exist at all levels within the judicial system "to ensure that courts and judges act in accordance with party dictates."\textsuperscript{46} The numerous internal and external influences on China's court system have affected all aspects of the rule of law, including the enforcement of arbitral awards in China's arbitration law.

\section*{D. Arbitration Law in China}

Arbitration is an important and frequently-utilized dispute resolution tool in China.\textsuperscript{47} As global interactions increase, parties often rely on arbitration to deal with economic and commercial disputes.\textsuperscript{48} The China International Economic Trade Arbitration Commission (CIETAC) is an international commercial arbitration institution that is responsible for resolving these types of disputes.\textsuperscript{49} CIETAC handles disputes arising from contracts and transactions in foreign trade, particularly disputes between a foreign firm, company, or other economic organization and a Chinese organization.\textsuperscript{50} CIETAC has become the world's busiest international arbitration tribunal, due in part to the increase in commercial transactions between Chinese and non-Chinese parties.\textsuperscript{51}

In order to accommodate the increase in international trade and arbitration, the National People's Congress passed the Arbitration Law of the People's Republic of China (Arbitration Law), effective September 1, 1995.\textsuperscript{52} The Arbitration Law established uniformity between arbitral institutions, provided a procedural code, and set standards for arbitration personnel and awards.\textsuperscript{53} The law also drew upon international arbitration legislation and practices, especially

\begin{itemize}
  \item \textsuperscript{46} Avino, \textit{supra} note 14, at 381.
  \item \textsuperscript{47} See Zhao Xiuwen & Lisa A. Kloppenberg, \textit{Reforming Chinese Arbitration Law and Practices in the Global Economy}, 31 U. DAYTON L. REV. 421, 422 (2006). "The establishment of arbitration law and development of a more robust legal system supporting domestic and international commercial arbitration in China since the early 1980s is an important aspect of these changes in the legal and economic systems." \textit{Id.} at 422.
  \item \textsuperscript{48} \textit{Id.}
  \item \textsuperscript{49} \textit{Id.} at 423-24.
  \item \textsuperscript{50} \textit{Id.}
  \item \textsuperscript{51} See \textit{id.} at 426-27.
  \item \textsuperscript{52} Reinstein, \textit{supra} note 21, at 42.
  \item \textsuperscript{53} \textit{Id.}
\end{itemize}
provisions in the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).\(^{54}\)

Three types of arbitral awards exist in China: Foreign, foreign-related, and domestic.\(^{55}\) Foreign arbitral awards refer to any awards made outside of China.\(^{56}\) Foreign-related awards are awards granted by international arbitration bodies in China, like CIETAC or other local arbitration commissions that involve a foreign element.\(^{57}\) Domestic awards are awards by local arbitration commissions that do not involve foreign elements.\(^{58}\) Under current arbitration law, arbitrations performed outside arbitration commissions are prohibited. In addition, a valid arbitration agreement must designate an arbitration commission.\(^{59}\)

Arbitration has played a critical role in China’s development. Unfortunately, the problems associated with the enforcement of arbitral awards prevent this important alternative dispute resolution mechanism from playing an even larger role in China’s development.

---


56. Reinstein, supra note 21, at 42.

57. Peerenboom, Evolving Regulatory Framework, supra note 31, at 12:11. A dispute between two Chinese parties may be foreign-related when the object of the dispute is outside China or where the legal relationship between the parties was established, modified, or terminated outside China. Reinstein, supra note 21, at 42 n.32.

58. Peerenboom, Evolving Regulatory Framework, supra note 31, at 12:11. ("According to the [SPC] interpretation, a "foreign element" refers to civil cases in which: one party or both parties are foreigners, stateless persons, foreign enterprises, or foreign organizations; or the legal fact of establishment, modification, or termination of the civil legal relationship between the parties occurred in a foreign country; or the object of the action is located in a foreign country.").

III. IDENTIFICATION OF THE PROBLEM

The Chinese judicial system suffers from serious structural problems like local protectionism and a weak judiciary. These deficiencies impact many areas of law in China, including its arbitration law. The weaknesses in the judiciary have not only stifled the ability of winning arbitration parties to enforce their awards but also inhibited broader social and economic development in China. The government has implemented corrective measures to address these problems, but greater reforms are necessary if China is to realize its ambitions of developing a world-class arbitration system and becoming a legitimate global superpower.

IV. ANALYSIS

A. Obstacles to the Enforcement of Arbitral Awards

A claimant holding a favorable arbitral award must execute it through the Chinese court system when the respondent fails to comply. Unfortunately for the claimant, the enforcement of arbitral awards in China is far from certain. The claimant must overcome significant barriers before recovering her award. Assuming no procedural violations exist with the arbitration agreement itself, the claimant faces a host of systemic challenges in utilizing the judicial system: local protectionism, a weak judiciary, and a low level of judicial competence.

1. Local Protectionism

Local protectionism is the most frequently cited obstacle
The same political and economic forces that influence the outcome of judgments can also create major obstacles to enforcing a judgment against a local individual or enterprise.\textsuperscript{64}

Local protectionism exists in many forms. Local officials may pressure a court to decide a case in favor of the local party, deny an outsider's application for enforcement, or drag out the enforcement process.\textsuperscript{65} For example, some judges have required applicants seeking enforcement of arbitral awards to provide additional documents not required by PRC law, including evidentiary documents the arbitration tribunals relied on in making the awards.\textsuperscript{66} Some courts even require that these documents be translated and notarized to further discourage the applicant and delay the enforcement process.\textsuperscript{67}

Another form of protectionism occurs when local governments help companies hide or transfer assets, or avoid debts.\textsuperscript{68} This appears to have taken place in the much-maligned Revpower arbitration dispute.\textsuperscript{69} In this case, Revpower Limited (Revpower), a United States company, entered into a joint venture with a Chinese company in 1988 to develop a battery factory.\textsuperscript{70} When relations between the two companies soured, Revpower took the case to arbitration.\textsuperscript{71} The arbitration tribunal issued an award to Revpower for $4.5 million USD (U.S. dollars) in July 1993.\textsuperscript{72} When Revpower brought the award to a Chinese court for enforcement, the court refused such enforcement on the grounds that there was an existing action pending abroad involving the two companies.\textsuperscript{73} Under pressure from the SPC, the court finally took the case and recognized the award in March 1999.\textsuperscript{74} However, by that time the Chinese company

\begin{verbatim}
63. Clarke, supra note 3, at 41.
64. LUBMAN, supra note 22, at 268.
65. Id. at 276.
66. Reinstein, supra note 21, at 55.
67. Id.
68. Id.
69. Id.
70. See Peerenboom, Seek Truth from Facts, supra note 15, at 250 n.5.
71. Id.
72. Id.
73. Id.
74. Id.
\end{verbatim}
had transferred all its business and assets to its parent and
grandparent companies, making it impossible for Revpower
to recover.

Economic reforms and the organizational structure of
courts appear to be the root causes of local protectionism. These reforms have led to "a devolution of authority, and
fiscal responsibility, to local governments." Local
governments, deprived of central government subsidies, must
now depend on tax revenues generated from local companies
to meet their fiscal needs. State-owned enterprise reforms
have also increased unemployment and added social welfare
and retraining costs to the already-tight budgets of local
governments. Thus, local governments are concerned that
the enforcement of an adverse award could harm the local
economy through the loss of valuable assets or the closing of a
factory. Additionally, local governments may actually own
all or part of the company against which enforcement is
sought. Not surprisingly, local governments resist
enforcement attempts against firms in which they hold a
direct economic interest.

The position of the courts in the current constitutional
structure also fosters local protectionism. As mentioned, the
government at each level appoints judges and funds courts.
Thus, basic and intermediate level courts rely on the
municipal government for salaries, bonuses, housing, etc.
This dependence grants local governments significant
leverage over the courts. In some cases, government
officials have threatened to sever funding needed to build
housing for court personnel or intimidated individual judges
by ordering the transfer of the judge’s daughter by her
employer to a distant city.

75. Id.
76. Peerenboom, Seek Truth from Facts, supra note 15, at 278.
77. Id.
78. Id.
79. Id.
80. Id.
81. Id.
82. Peerenboom, Seek Truth from Facts, supra note 15, at 278.
83. Id.
84. Id. at 279; see also supra Part II.C.
86. Id.
87. Clarke, supra note 3, at 42.
In Professor Randall Peerenboom's independent study on eighty-nine CIETAC and foreign arbitral award enforcement cases, he downplays the significance of local protectionism.88 He found that insolvency of the respondent was the single biggest reason for non-enforcement.89 Of the thirty-seven non-enforcement cases in his survey, forty-three percent were unenforceable because the respondent did not have the necessary assets to pay the award.90 Yet many of these cases of apparent insolvency could be a result of local protectionism.91 Peerenboom readily acknowledges that "local officials may tip off local companies about an application for enforcement, enabling them to transfer assets."92 Thus, local protectionism may play a larger role in non-enforcement than Peerenboom's study indicates.

2. Weak Judiciary

The Chinese judiciary differs significantly from its counterparts in western countries, as discussed above.93 The institutional differences and extra-judicial influences over a judge's decision-making powers contribute to local protectionism and the non-enforcement of arbitral awards.94 The importance of judicial independence from corresponding governmental bodies cannot be understated and has long been recognized in the United States.95

88. Reinstein, supra note 21, at 57.
90. Id.
91. Reinstein, supra note 21, at 57.
93. Id. at 294; see also supra Part II.A.
94. See Peerenboom, Evolving Regulatory Framework, supra note 31, at 12:2. "[T]he inability to enforce an award is often due to broader systemic and institutional problems, such as local protectionism, a weak judiciary, corruption, and the fallout from China's ongoing transition from a centrally planned to a more market-oriented economy." Id.

In the United States, ... [judicial independence] was confronted in the debate over adoption of the Constitution. The appointment and confirmation process, combined with the constitutional guarantee of tenure during good behavior and a salary that will not be decreased, is the Constitution's effort both to ensure the independence of the federal judiciary in the face of political pressures, and to assure the people that their disputes will be fairly settled by independent and unbiased arbiters.

Id. at 242-43.
Alexander Hamilton argued in The Federalist Papers No. 79 that "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will." Indeed, as one Ninth Circuit judge for the U.S. Court of Appeals stated, "[j]ustice for sale is the antithesis of judicial independence." The Chinese judiciary's dependency on local party and government agencies represents an enormous obstacle and must be overcome for the successful promotion and development of judicial independence.

Additionally, the judiciary's reluctance to use its contempt powers represents another obstacle in the enforcement process. Chinese courts possess a variety of contempt powers to combat parties that fail to comply with the terms of an award or court order. A court may impose fines, detain, or even imprison individuals for non-compliance. Some courts have even published the name of the defaulting company in local newspapers. Unfortunately, courts hesitate to utilize these tools against parties for non-compliance.

Peerenboom offers several reasons to explain this reluctance. First, local protectionism makes individuals and companies, "for all practical purposes, judgment-proof."

97. Wallace, supra note 95, at 248.
98. Veron Mei-Ying Hung, China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform, 52 AM. J. COMP. L. 77, 122 (2004). "[T]he fundamental problem of China's lack of an independent judicial review system is rooted in the fact that the CCP and local governments control the courts." Id.
100. Id.
101. Id.
102. Id. "Besides putting pressure on the defaulting company to pay up or suffer reputational damage, a public announcement provides notice to other companies that the respondent may be unreliable or in poor economic condition." Id.
103. Id. at 295.
104. Id.
Managers are often constrained by local government officials who pressure or instruct them not to comply with the court’s orders. A court may also fear greater unemployment and social unrest from determining a case which prevents a company from operating. Finally, the low stature of the judiciary in society contributes to courts’ reluctance to exercise their judicial powers because courts fear they will be unable to fine or detain non-compliant individuals. The weakness inherent in the Chinese judiciary poses a substantial problem to the effective enforcement of arbitral awards and the broader development of the Chinese court system.

3. Low Level of Judicial Competence

The low level of professionalism and competency by some judges contribute to enforcement problems. Approximately two-thirds of all judges do not possess a formal legal education. These judges do receive legal training and education but the effects of this are uncertain. Also, approximately one-third of all judges are demobilized military personnel. These military personnel have been a major pool from which judges have been selected since the early 1950s. Thus, because of their limited legal knowledge, some judges base their decisions not on the law, but on communist ideology.

The government has responded to these shortcomings. In 1995 China issued the Judges Law which set forth objective, minimum qualifications for judges. Chapter I, article I notes the law was enacted to enhance the quality of judges, to ensure courts independently exercise their authority, and to ensure judges perform their functions and duties in

106. Id.
107. Id. at 296.
108. Id.
109. Id. at 297.
111. Id.
112. Id.
113. LUBMAN, supra note 22, at 253.
114. Inoue, supra note 110, at 193.
115. LUBMAN, supra note 22, at 251.
accordance with the law.\textsuperscript{116} Chapter IV of the Judges Law establishes minimum qualifications for becoming a judge in the PRC:\textsuperscript{117} judges must be of Chinese nationality; must have reached the age of twenty-three; must endorse the Constitution of the PRC; must have "fine political and professional quality [sic] and be good in conduct;" must be in good health; and must have an advanced degree specializing in law or must have one or more years of work experience if they hold a college degree.\textsuperscript{118} In addition, the law requires all judges who do not possess the above qualifications to receive training to attain those qualifications.\textsuperscript{119}

Despite these efforts to improve judicial competence, many judges remain poorly trained, particularly in regards to the enforcement of judgments.\textsuperscript{120} Peerenboom's research study showed that judges in several cases were unfamiliar with both the rules regarding enforcement and the terms of the New York Convention.\textsuperscript{121} In one case, the court did not know whether it should recognize the award and even what documents were required.\textsuperscript{122} In some cases, courts applied the wrong standard or governing law.\textsuperscript{123}

These lapses of judgment may be caused by several factors. First, the court may simply lack the substantive knowledge necessary to adjudicate the decision. Enforcement work is generally not considered one of the more prestigious assignments for judges.\textsuperscript{124} Accordingly, the judges assigned to enforcement chambers usually have the least legal training.\textsuperscript{125} "The work, for the most part, is not as intellectually challenging as the work in other chambers."\textsuperscript{126} Second, enforcement is difficult in that judges are often hindered by extrajudicial forces over which they have no


\textsuperscript{117} Id. at ch. IV.

\textsuperscript{118} Id.

\textsuperscript{119} Id.

\textsuperscript{120} Peerenboom, \textit{Seek Truth from Facts}, supra note 15, at 297-98.

\textsuperscript{121} Id. at 298.

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 298-99.


\textsuperscript{125} Id. at 10.

\textsuperscript{126} Id.
Indeed, local protectionism may explain what appears to be a lack of judicial competence and sophistication. As mentioned above, requiring the translation and notarization of documents may serve to discourage and delay the enforcement process by forcing parties to leap through additional, unnecessary bureaucratic hurdles. Third, judges might feign ignorance for simple self-preservation. Unfortunately, judges have been threatened or physically abused by outraged parties that did not appreciate the court’s attempts to enforce an award or judgment.

B. Inadequate Government Measures to Address Enforcement Problems

The Chinese government is aware of these institutional problems and has taken steps to remedy them via legislation. Unfortunately, regulations often contain loopholes and/or inconsistencies that enable parties to escape enforcement. For example, the Supreme People’s Court (SPC) in 1995 created a reporting system to monitor lower courts’ refusals to enforce foreign arbitral awards. Before a lower court can refuse enforcement, it must provide its proposed decision to a higher court. This higher court is then required to report its decision to the SPC and await approval. Thus, the SPC ultimately gives its approval for the non-enforcement of a foreign arbitral award. Although this reporting system offers obvious benefits, it is deficient in many respects.

The reporting system applies only to foreign awards.

127. Id.
129. Id.
131. Id.
133. Id.
134. Reinstein, supra note 21, at 64. The SPC established this reporting system in 1995 when it issued the “Notice of the Supreme People’s Court on Several Issues Regarding the Handling by the People’s Court of Issues Pertaining to Foreign-related Arbitration and Foreign Arbitration.” Id.
135. Id.
136. See id.
137. See id.
issued by foreign arbitration institutions and awards issued by PRC foreign-related arbitration institutions, like CIETAC. The system does not apply to ad hoc foreign or domestic awards and does not even appear to apply to foreign-related awards of domestic arbitration commissions. Additionally, the decision-making process entailed in the reporting system lacks transparency. The parties to the arbitration may neither receive notice nor participate in the hearing by the HPC or the SPC to determine whether to enforce the award. They do not possess the right to submit written documents in support of their position. In fact, parties often discover after-the-fact that delays in IPC determinations are a result of the case being submitted to a higher court for review. Moreover, the 1995 Notice that created the reporting system failed to impose time limits for the IPC to seek approval from the HPC, for the HPC to submit the case to the SPC, and for the SPC to make a decision. In some cases, the SPC has taken years to make a final decision.

The SPC issued new regulations in 2000 and 2002 in order to monitor lower courts and fight local protectionism. These regulations centralized enforcement and increased the powers of Higher Level People's Courts (HPCs) and Intermediate Level People's Courts (IPCs). The 2000 regulations bolstered the enforcement of civil judgments as a whole by allowing HPCs to instruct lower courts to change their decisions if the HPC believes the lower court erred.

---

141. Id.
142. Id.
143. Id.
144. Id.
145. Id.
HPCs may reassign a case from a BPC to an IPC or even decide the case itself. Furthermore, HPCs can criticize lower courts for failing to follow instructions and even recommend disciplinary sanctions.

In terms of the enforcement of arbitral awards, the 2002 regulations confined the jurisdiction over awards to a small number of IPCs and HPCs. These courts are located near the capital cities of provinces and special economic zones. This localization was performed to take advantage of the increased sophistication of cities concerning international commerce and the more qualified, English-speaking judges. Additionally, these specialized forums contain designated departments that deal exclusively with arbitration awards.

It is unlikely these regulations will suffice. Even provincial and high-level governments cannot escape local protectionism. HPCs and IPCs are likely to have a greater interest in local companies in the cities where they reside and in companies within their own province. This is especially true given courts are still financially dependent on local governments who in turn are dependent on local businesses for tax revenues and employment. Consequently, the localization of jurisdiction over arbitral awards may be of limited value without the elimination of local protectionism. Furthermore, judges are not adequately protected and insulated under these new regulations. The local people's congresses may still remove judges with higher-level approval and block a judge's opportunity for advancement. Ultimately, significant hurdles remain.

148. Id.
149. Id. at 321-22.
151. 1 ARBITRATION IN CHINA: A PRACTICAL GUIDE 320 (Jerome A. Cohen et al. eds., 2004).
152. Id.
153. Id. at 319-20.
155. Id. at 322-23.
156. See id.
157. See id. at 323.
158. Id.
V. PROPOSAL

A. Deeper Reforms Are Necessary—Implementation of a Federal Court System

The Chinese government must enact more radical reforms than those already implemented to create a court with sufficient authority to enforce arbitral awards. It must eliminate local protectionism, increase judicial independence, and strengthen the authority and competency of judges. The addition of a federal court system would help achieve these goals.

1. Structure of the Federal Court System

China should maintain multiple court systems. The first would be the local court system, essentially preserving the present three-tiered system based on provincial-, city-, and county-level courts handling cases within their jurisdictions. The second would be a federal system comprised of the SPC, Appeals Courts, and Courts of First Instance. The Appeals Courts would possess jurisdiction over multiple provinces similar to how U.S. Circuit Courts of Appeals possess jurisdiction over multiple states. The SPC could create a total of ten Appeals Courts, with each court maintaining jurisdiction over three provinces. The Courts of First Instance would operate like U.S. federal district courts and possess jurisdiction over designated geographic areas within provinces. The number of Courts of First Instance in a particular area could be based on population density, with more courts being located in densely populated areas.

Furthermore, these federal courts would be courts of limited jurisdiction. The Courts of First Instance would be the trial courts of the federal system that, as the name suggests, represent the initial point of input for the federal judicial system. These courts would have original jurisdiction over cases where the parties fulfill a “diversity” requirement. In other words, these cases must either involve more than one province or one party must be a foreign party. Also, these

159. Cao Siyuan, China’s Ailing Courts Need Federalist Medicine, WALL ST. J., May 9, 1996 at 8.
courts would have jurisdiction over cases relating to national interests or other large, complex cases. If parties fail to meet these requirements, they would be prohibited from utilizing the federal court system and be required to file suit in the local courts. Parties would naturally hold the right to appeal the decisions made in the Courts of First Instance to the Appeals Courts.

In addition, federal courts would assign only one judge to a case. Judges in this system would not preside over cases on a collegiate bench consisting of three judges, which is the current arrangement in enforcement chambers for arbitral awards. Also, the federal judges on each level would rotate for set periods of time to different regional federal courts. For example, a federal judge in a Court of First Instance in the Jiangsu province would transfer to a Court of First Instance in the Hubei province after spending a fixed period of time in the Jiangsu federal court. These measures would further promote judicial independence and curtail local favoritism.

2. Appointment, Removal, Tenure & Salary

Currently, the National People's Congress (NPC) retains the power to elect and remove the president of the Supreme People's Court (SPC). Also, the Standing Committee of the NPC appoints and can remove the other judges of the SPC. The federal judges of the Appeals Courts and the Courts of First Instance should also be appointed by the Standing Committee of the NPC in order to preserve existing selection and evaluation procedures. The appointment standards upon which these judges are evaluated must be set high and should mirror the standards under which SPC judges are selected. This process would ensure federal judges are of a comparable caliber as SPC judges.

In order to attract top judges, the central government should provide lifetime tenure to federal judges and protect

---

161. Id. at 161.
162. See id. at 162.
165. The Supreme People’s Court, PEOPLE’S DAILY ONLINE, http://english.people.com.cn/data/organs/court.html (last visited Jan. 29, 2008). The Standing Committee is established by the National People’s Congress to exercise its authority when it is not in session. LIN FENG, CONSTITUTIONAL LAW IN CHINA 64 (2000).
the income of judges in a more stringent fashion. As mentioned above, the government currently does not grant tenure to judges.\textsuperscript{166} Judges should not be removed from office absent a showing of good cause such as fraud, misconduct, bribery, etc. In addition, while the salaries of judges can be raised, the law is silent as to reductions.\textsuperscript{167} Income protection provisions should be added to existing laws to guarantee that salaries will not be decreased. Furthermore, the government should increase salaries. These measures will help entice the most capable and qualified judges to federal courts.

3. Justiciability Exception will Address CCP Political Concerns

Ultimately, the key question that arises with the establishment of a federal system in China is whether the Chinese Communist Party (CCP) will allow courts to “achieve sufficient autonomy and independence to command the respect that is necessary to enforce the law.”\textsuperscript{168} While the CCP prefers that a strong and competent judiciary adjudicate commercial cases, it would not want courts deciding against its wishes in politically-sensitive cases.\textsuperscript{169} Accordingly, the federal system should include a justiciability exception for politically-sensitive issues.

This exception could be modeled after the political question doctrine in the United States, which considers the subject matter of a suit to determine whether it is within the power of the courts to decide. China’s judiciary would transfer to the CCP those cases with far-reaching political and/or social repercussions. This justiciability exception would serve the CCP’s interests in monitoring and addressing sensitive government issues while enabling the judiciary to exercise the independence and legitimacy necessary to eliminate local protectionism.

\textsuperscript{166} Reinstein, supra note 21, at 53.
\textsuperscript{167} See Judges’ Law, supra note 116, ch. XII.
\textsuperscript{168} Peerenboom, Seek Truth from Facts, supra note 15, at 324.
\textsuperscript{169} Id. at 324-25.
B. Benefits of a Federal Court System

1. Federal Court System Would End Local Protectionism

The federal system would increase judicial independence and eliminate local protectionism. It would end local favoritism by shifting the jurisdiction of the case to a neutral level encompassing both parties.\textsuperscript{170} For example, if two parties in a suit were from the same county, the district BPC would hear the case. If the two were from two different counties, a higher-level IPC would hear the case; but, if the two were from different provinces or major cities, or one was a foreign party, then a federal Court of First Instance would hear the case. In each instance a higher court, as compared to one from the locales of the two parties, would review the case and local favoritism would be eliminated.\textsuperscript{171}

Furthermore, federal courts would receive funding directly from the central government and not local governments.\textsuperscript{172} This funding structure would sever the judiciary’s dependency on local interests and abolish the localization of power in government and CCP officials. As a result, local governments would be powerless to exert their influence over cases.

Eradicating local protectionism would boost the enforcement of arbitral awards. Judges could exercise their authority without fear that local governments would cut their funding. They would be free from interference with their salaries, housing, personnel, etc. Federal judges would thus operate independently under the rule of law, not the rule of local government and/or party officials.

2. Federal Court System Would Strengthen the Judiciary

With the end of local protectionism, federal courts would possess increased authority over parties who previously had been judgment-proof under the authority of local government and/or CCP officials. Federal courts would exercise their contempt powers to fine, detain, or imprison individuals for non-compliance with an arbitral award. Thus, the provisions

\textsuperscript{170} Siyuan, \textit{supra} note 159.
\textsuperscript{171} Id.
\textsuperscript{172} Dingjian, \textit{supra} note 160, at 161.
in the arbitration agreement and the parties' intent would be properly effectuated under a stronger federal court system.

Moreover, federal judges would cease to be beholden to chief judges or higher courts. These courts would be prohibited from reviewing decisions of federal judges. In contrast to the state system, the SPC would have no authority to strip jurisdiction from federal courts to decide cases. These federal judges would have the autonomy and independence to exercise their own judgment in a case, unlike state judges who must submit to the demands of chief judges and adjudication committees. Federal judges would retain the authority to strike down regulations passed by administrative agencies or local governments that are inconsistent with the law. These increased judicial powers would enhance the judiciary's legitimacy and status. The public's increased respect and faith in the legal system would promote deference and compliance for the rule of law. Indeed, the number of arbitration enforcement cases may actually decrease because parties would respect a stronger judiciary and comply with the provisions of an arbitration award.

In addition, the lifetime tenure and salary provisions proposed above would further promote judicial independence. Judges, including those on the SPC, currently earn roughly $240 USD per month, which is equivalent to the salary of civil servants and mid-level bureaucrats. Chinese judges earn annually ten times less than Chinese lawyers. These low salaries, along with the financial dependence of the courts on the government, tempt unscrupulous judges into accepting bribes or favoring local parties and discourage talented attorneys from accepting posts in the judiciary. Indeed, judicial scandals have been reported frequently in China in recent years. In one of the most notorious cases, thirteen judges of the Wuhan City Intermediate People's Court, including two vice-presidents and some deputy presiding

173. See discussion supra Part II.B.
174. CHOW, supra note 5, at 204.
176. Reinstein, supra note 21, at 53.
177. Lawyer-Judge Relations Under Fire at Legislature Annual Session, supra note 175.
judges, were found guilty of taking more than 4 million yuan ($480,000 USD) of bribes in 2004. More recently, in October 2006, a former judge in east China’s Anhui Province was tried for bribery involving more than 800,000 yuan ($101,000 USD) and for being unable to account for an income of 580,000 yuan. The scandal also implicated the judge’s predecessor, two of his former deputies, and four subordinate judges in the Fuyang court. Awarding judges lifetime tenure and increasing their salaries would promote judicial independence and offer a greater level of protection against judicial misconduct.

The founders of the United States recognized the benefits of lifetime tenure and salary protections for judges. Alexander Hamilton and the framers of the U.S. Constitution confronted these issues in the early days of the United States in arguing that tenure offered the best protection against encroachment by the legislative branch. Hamilton stated that tenure provided for the “steady, upright, and impartial administration of the laws.” He also believed lifetime tenure was essential in obtaining the best individuals from a small population of judges who are both qualified and of sufficient integrity to be worthy of the trust placed in them. Thus, China should offer lifetime tenure, as well as increased salary benefits and protections to its federal judges to further encourage judicial independence and recruit top judges. These simple measures would benefit the enforcement of arbitral awards, root out corruption, establish upright judicial personnel, and create an image of a just judiciary.

3. A Federal Court System Would Increase Judicial Competence

The federal court system would raise judicial competence

178. Id.
180. Id.
181. See Wallace, supra note 95, at 243.
183. Id. at 233.
184. Dingjian, supra note 160, at 160.
because federal judges would be required to hold greater skills to execute their authority and administer decisions. These judges must possess a higher level of intelligence, experience, and integrity so that they could adjudicate cases independently. They would be forbidden from relying on chief judges, court presidents, or adjudication committees for guidance or instructions. Additionally, federal judges must possess increased aptitude and competency because they would serve individually on the bench, rather than jointly on a collegiate bench.

The enforcement of arbitral awards would benefit from increased judicial competence. First, the high appointment standards of federal judges would ensure that they possess the substantive legal knowledge necessary to correctly decide an arbitration enforcement case. These judges would undergo intensive legal training and would not apply erroneous standards of law or be unfamiliar with arbitration rules regarding enforcement. Second, the increased legitimacy of a federal judiciary and its relationship with the government would deter threats to individual judges. Non-compliant parties would hesitate to intimidate federal judges and incur the full force and punishment of the central government. Third, a competent and independent judge overseeing a case would boost procedural efficiency. Judges would not unduly delay the enforcement process by demanding unnecessary documents or imposing other unwarranted procedures on parties.

4. Additional Benefits of a Federal Court System

The establishment of a federal court system would yield additional advantages. The new system would alleviate the increased judicial workload state courts currently face. Courts in China’s poorer western regions face a shortage of judges that have left courts virtually abandoned and others relying on unqualified staff to handle cases. In some

186. See Dingjian, supra note 160, at 162.
188. Mure Dickie, China Losing Judges in Poorer Regions, FIN. TIMES (Asia), Mar. 11, 2006, at 3.
courts, secretaries decide cases and judges merely sign the appropriate legal documents. The SPC estimates that nearly 20,000 judges resigned over the last five years, most from western regions.

The reasons for these losses are due in part to a unified national bar exam introduced in 2002 to improve the quality of judges. While the net effect of this exam appears to be positive in that it encourages heightened standards for the judiciary, it has caused candidates from poorer areas to struggle to qualify as judges. Thus, the exam requirements make it difficult to replace those who retired or left because of poor working conditions. These shortages inevitably place a burden on other courts or simply deny citizens the opportunity for basic justice.

These poorer regions would directly benefit from a federal court system, which would offer a much-needed forum to adjudicate conflicts. Competent, independent and trained federal judges would decide cases, not secretaries. Federal courts would also assist overburdened state courts inundated with cases from these poorer border regions.

Furthermore, establishing a federal court system would serve a critical filtering function for the Supreme People's Court (SPC) by allowing the SPC to adjudicate those constitutional, civil, or criminal cases with broader, far-reaching consequences. The federal courts would determine cases with potentially more limited, narrow repercussions. Just as the U.S. Supreme Court has increasingly become a constitutional tribunal with the U.S. Courts of Appeals focusing on statutory interpretation, administrative review, and error correction, Chinese federal courts could operate in the same manner. This would produce efficiency in the allocation of judicial resources and specialization such that the SPC would utilize its expertise in adjudicating only the most significant cases.

189. Id.
190. Id.
191. Id.
192. Id.
193. Id.
C. The Chinese Legal Community Can Successfully Operate the Federal Court System

Some scholars argue that the challenges of a dual court system would be too complicated for Chinese legal professionals and infrastructure. They also argue that the current number of Chinese legal professionals is insufficient to maintain it. The first argument presupposes that Chinese legal professionals are incapable of understanding basic procedural concepts like jurisdiction and transfer rules. It is dismissive of alternative methods of education these legal professionals underwent to compensate for their lack of a formal legal education. Also, both arguments ignore recent developments in legal education and in the legal profession, as explained below.

Although many judges lack a formal legal education, they still undertake considerable training. Former military officers are instructed in “basic legal knowledge” and “legal practice” in special training courses instituted by courts to make up for their low educational level. The SPC established formal training programs at numerous universities where judges attend courses from one to three years. Assistant judges can also enroll in one-year training programs and be promoted to senior judge if they pass an examination. IPC and SPC judges can enroll in six-month training programs. While the knowledge gained from this on-the-job training may not equal that from a formal legal education, it likely assists judges in understanding basic court and procedural processes.

In addition, Chinese legal professionals would be able to capably operate within a dual court system because of two recent developments: the huge growth in legal education and heightened standards within the legal profession itself.

195. See Inoue, supra note 110, at 194.
196. Id.
197. LUBMAN, supra note 22, at 253.
198. Id.
199. Id.
200. Id.
201. See Weifang He, China’s Legal Profession: The Nascence and Growing Pains of a Professionalized Legal Class, 19 COLUM. J. ASIAN L. 138, 145 (2005). “The development of legal education has also improved the quality of the legal profession.... [W]ith a growing market economy and the rising social demand for an independent judiciary, legal professionals are now better educated than
1. The Growth in Legal Education

The number of law schools increased from five in 1978 to more than 300 in 2005. In 1978 only 600 students studied law in China. In 2005, Peking University Law School alone boasted more than 2000 students. Today, the total number of law students in China is estimated at 100,000. The progress in legal education is illustrated “not only by the growth in the number of students, but also by the diversity of law degrees awarded.” Most of these law students are undergraduate students, however in some universities Masters and Ph.D. students outnumber undergraduates. Law has become one of the most popular majors in China and holds greater appeal among more qualified students. This surge in legal education will most likely increase the overall quality and competency of individuals entering the judiciary.

2. Heightened Standards Within the Legal Profession

Moreover, changes in the legal profession itself are encouraging and suggest members of the legal community would be able to successfully manage a dual court system. Twenty years ago, judges possessed little legal education and could not be trusted with complex legal matters. However, the 1995 Judges Law raised the overall competency of the judiciary by requiring that judges take examinations and fulfill academic qualifications. The grades from these examinations serve as a basis for rewards, punishments, training, dismissals, and readjustment of wages. Judges face annual performance reviews and can be dismissed for, among other reasons, an “incompetent” rating in two consecutive years. Furthermore, as mentioned above, in

their predecessors.” Id. at 145-46.

202. Id. at 145.
203. Id.
204. Id.
206. He, supra note 201, at 145.
207. Id.
208. Id.
209. See id.
210. LUBMAN, supra note 22, at 254-55.
211. Id. at 255.
212. Id. at 255-56.
2002 the Standing Committee of the National People's Congress introduced a unified national bar exam to improve the quality of judges.\footnote{213} That year 300,000 individuals took the bar exam with a seven percent pass rate.\footnote{214} While these exam requirements may initially produce challenges in poorer regions of China, they will most likely boost the overall sophistication and quality of judges in China. Consequently, Chinese legal professionals would be able to successfully manage the complexities of a dual court system.

Furthermore, the current number of legal professionals would be sufficient to maintain this dual system. First, the federal system would not be as expansive as the local court system. China could initially establish a limited number of Courts of First Instance and Appeals Courts and gradually create more as needed. This phased transition would conserve judicial personnel and resources and enable the government to perfect the operational details of running a federal court system before creating additional courts. Second, the Chinese legal community would be able to staff these federal courts because of the large number of law students graduating each year and the current number of legal professionals practicing in China. Today, the Chinese legal community consists of approximately 102,000 lawyers and over 200,000 judges.\footnote{215} Moreover, offering lifetime tenure and increased benefits and salaries to judges would surely expand the pool of capable individuals interested in populating a federal judiciary.

3. Costs of a Federal Court System Are Not Prohibitive

The costs of a federal system would not be prohibitive because federal courts would not mirror the structure of state courts. First, as mentioned above, the government could create a small number of Courts of First Instance and Appeals Courts in order to minimize costs. Second, Adjudication Committees would be eliminated in federal courts.\footnote{216} This would reduce costs, increase trial efficiency, ensure the neutrality of judges, allow judges to concentrate

---

213. He, supra note 201, at 146.
214. Id.
215. Lawyer-Judge Relations Under Fire at Legislature Annual Session, supra note 175.
216. Dingjian, supra note 160, at 162.
their energies on hearing and deciding cases, and lessen judicial opportunities for corruption. Each federal court would thus possess a president, vice-president, judges and clerks. Third, the government would abandon the collegiate bench structure that characterizes the current local court system. A single judge would review cases in federal courts, which would lower costs and increase procedural efficiency.

The total costs of a federal court system do not represent an insurmountable obstacle. These costs are far less onerous when compared against China’s vast financial resources. The government’s foreign exchange reserves recently broke all global records and reached $1.4 trillion USD. China clearly possesses the means to implement such a system. The enforcement of arbitration awards is just one of many areas of law that would directly benefit from a federal system. The long-term gains to society of a reliable and independent judiciary will most certainly outweigh the short-term costs of implementing this system.

VI. CONCLUSION

China’s judiciary contains severe structural deficiencies that limit judicial independence and encourage local protectionism. The enforcement of arbitral awards is hindered significantly by these structural problems. Current reform measures are insufficient and more radical reforms are necessary. The Chinese government should implement a federal court system to promote judicial independence and eradicate local protectionism and favoritism. Such implementation would empower the judiciary considerably and facilitate the enforcement of arbitral awards. Also, a robust, independent judiciary would further entice foreign investors to China, maintain the country’s dramatic growth and keep it on course to becoming a legitimate, global

217. Id. at 161-62.
218. Id. at 162; see also LUBMAN, supra note 22, at 252.
219. Dingjian, supra note 160, at 162.
220. Id.
superpower.

China's efforts in judicial reform over the past twenty years allow for cautious optimism. The government has enacted meaningful, albeit flawed, regulations to help limit government interference in judicial decision-making.\footnote{See discussion \textit{supra} Part IV.B.} In addition, recent statements made by the SPC and CCP on judicial reform and curbing government interference\footnote{Hung, \textit{supra} note 98, at 124. In July 2002, the SPC made strong statements about government interference and its plan to deal with the problem. \textit{Id.} Xiao Yang, President of the SPC, stated "judges should be 'immune from local interference.'" \textit{Id.} (citing \textit{China Vows to Improve Judicial System, Address Problem of 'Incompetent' Judges}, AFX-ASIA, July 8, 2002, available at LEXIS, News Library, News Group File). The SPC pledged to eliminate "interference from administrative organs, social organizations, and individuals" and "interventions from local and departmental protectionism." \textit{Id.} at 124 (citing \textit{Zuigao Renmin Fayuan Guanyu Jiaqiang Faguan Duiwu Zhiyehua Jianshe De Ruogan Yijian} [Supreme Court's Several Opinions Concerning Strengthening the Construction of Professional Judge Contingent], para. 10 (promulgated and effective July 29, 2002). Furthermore, the CCP several months later pledged to "reform" courts' financial and personnel arrangements. \textit{Id.} at 124. In 2003 the CCP adopted a resolution emphasizing "that 'institutional reform' is the priority task for judicial reform." \textit{Id.}} suggest the government recognizes the value of judicial independence and possesses the political will to remedy and prevent violations. A federal court system may indeed lie in China's foreseeable future and provide arbitration parties, as well as Chinese citizens and foreign investors, a genuine reason to celebrate.