ONE COUNTRY, TWO SYSTEMS: HONG KONG’S UNIQUE STATUS AND THE DEVELOPMENT AND GROWTH OF ARBITRATION IN CHINA

Jiali (Keli) Huang*

I. INTRODUCTION

Due to the rapid growth of Asian economies, arbitration has found growing acceptance as a forum for dispute resolution throughout the Asian region. With the establishment of international arbitration locations now within Hong Kong, China, and Singapore, the use of arbitration has become more appealing than ever.

The appeal of arbitration in China is obvious for many reasons. China has maintained a negative bias against litigation and the social disharmony that accompanies it.1 This cultural tradition carried over to the sphere of international commerce and trade. In 1956, China established the China International Economic and Trade Arbitration Commission (“CIETAC”).2 In its beginning, CIETAC handled “no more than a few dozen cases” that involved China and former Soviet states,3 and its jurisdiction was limited to resolving “foreign and only foreign trade disputes relating primarily to contracts.”4

Today, CIETAC stands as China’s pre-eminent permanent arbitration institution with the jurisdiction to settle domestic and international trade disputes. CIETAC’s caseload grew from thirty-

* Notes Editor, Cardozo Journal of Conflict Resolution. B.A. 2010, State University of New York, Binghamton; J.D. Candidate, 2017, Benjamin N. Cardozo School of Law. The author would like to thank her family, friends, and mentors for their love, support, and encouragement. In addition, she thanks Professor Curtis Pew, May Tai of Herbert Smith Freehills, and James Ng of Samuel Goldman & Associates for their insight and guidance in drafting this Note.


4 Id. at 153–54; Ng, supra note 1.

Equally important to the growth in arbitration is foreign investors’ faith in China’s economy, which is intrinsically tied to Hong Kong’s political and economic status. As observed in the aftermath of Hong Kong’s handover to China in 1997, arbitration growth slowed for several years until a compatible regime for handling cross-border disputes between China and Hong Kong was determined.\footnote{Guigo Wang & Priscilla M. F. Leung, One Country, Two Systems: Theory into Practice, 7 Pac. Rim L. & Pol’y J. 279, 285 (1998).} In 2014, China denied Hong Kong citizens’ request for universal suffrage, which triggered the Umbrella Movement that spanned over eleven weeks. Hong Kong citizens’ acts of civil disobedience led to temporary shutdowns of businesses and public transportation.\footnote{Lauren Hilgers, Hong Kong’s Umbrella Revolution Isn’t over Yet: A Democracy Movement Ponders Its Next Move, N.Y. Times (Feb. 18, 2015), http://www.nytimes.com/2015/02/22/magazine/hong-kongs-umbrella-revolution-isnt-over-yet.html?_r=0.} Concern over Hong Kong’s future identity continued to cause riots. In early 2016, government enforcement against unlicensed street vendors selling fishballs and tofu sparked another violent clash between Hong Kong citizens and the Hong Kong government, now dubbed the “Fishball Revolution.”\footnote{Linda van der Horst, A Fishball Revolution and Umbrella Soldiers: The Battle for Hong Kong’s Soul, Diplomat (Feb. 17, 2016), http://thediplomat.com/2016/02/a-fishball-revolution-and-umbrella-soldiers-the-battle-for-hong-kongs-soul/.} Although there is no further immediate threat from citizens of Hong Kong, the threat of economic collapse in Hong Kong should not be ignored if China wishes to foster the growth of arbitration.

This Note evaluates the future of arbitration in China and Hong Kong as the two approach their twentieth year working toward reunification under the implications of the “one country, two
systems” model, which was implemented in Hong Kong when Hong Kong’s sovereignty was transferred back to China in 1997. First, this Note explains Hong Kong’s unique identity, the factors that triggered the Umbrella Movement and the Fishball Revolution, and Hong Kong’s current relationship with China. Second, this Note provides a broad overview of the development of arbitration in China. Third, this Note describes the arbitral history between China and Hong Kong, in particular the development after the 1997 handover. Fourth, this Note examines CIETAC’s development, analyzes some of the key features of CIETAC’s 2015 Rules, and proposes additional improvements to the current CIETAC rules. In addition, this Note discusses the implications of the white paper issued by the Chinese government in June 2014. Lastly, this Note argues for an extension of the “one country, two systems” principle to ensure investors’ confidence in the economies of Hong Kong and China, and the use of referendums to mitigate tensions between Hong Kong citizens and the Chinese governments.

II. BACKGROUND

A. Hong Kong’s Unique Identity and Current Relationship with China

1. Hong Kong’s Early Colonial Days

In 1842, China ceded in perpetuity Hong Kong Island in the Treaty of Nanking to Great Britain after suffering a defeat in the Opium War. Following that, in 1860 China again ceded the Kowloon Peninsula and Stonecutters Island to Great Britain in perpetuity by signing the Convention of Peking. Last, China leased the New Territories to Great Britain in the Convention of

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10 Edward Gargan, China Resumes Control of Hong Kong Concluding 156 Years of British Rule, N.Y. TIMES (July 1, 1997), http://www.nytimes.com/learning/general/onthisday/big/0630.html#article.


12 Id.
1898 for a period of ninety-nine years beginning July 1, 1898.\footnote{13} Collectively, these territories came to be known as Hong Kong.\footnote{14}

As Hong Kong developed, segregation between the Chinese and expatriates of white European ancestry remained obvious.\footnote{15} Few British expatriates in Hong Kong came from upper class families, however, expatriates obtained superior positions compared to those of the Chinese.\footnote{16} Although Hong Kong is and has always been recognized as a Chinese territory, Chinese residents remain inferior to white expatriates.\footnote{17}

Despite Hong Kong’s tarnished past as a colony marked by oppression, it was able to develop as a mecca for free trade. Hong Kong as a British colony thrived economically and became a symbol of capitalism.\footnote{18} Eighteen banks began conducting business in

\footnote{Id.}

\footnote{14} The acquisition of Hong Kong was sparked by Great Britain’s “lust for money.” In the eighteenth century, while the British relied on the Chinese for silks, nankeens, and teas, China had little demand for western products with the exception of opium. Although banned in Great Britain, opium trade was heavily relied upon by the British as a source of revenue. For China, however, the drug was a great economic drain. Despite multiple attempts to ban opium, the drug trade remained prevalent in China. In 1837, fifty percent of the Chinese government’s total revenue went to pay for opium. Hong Kong became an invaluable asset that helped Great Britain facilitate and expand its opium trade across the geographic region. Meanwhile, the poor living in Hong Kong received no government services or aid from Great Britain. Conditions were so horrid that the Hong Kong government suppressed an 1854 official report assessing the state of the Hong Kong people’s health by a government appointed doctor. The report described Hong Kong as being filled with filth, “cowsheds, pigsties and stagnant pools.” In addition, Hong Kong became no stranger to the operations of opium dens, whorehouses, and gambling parlors. See Richard Klein, Law and Racism in an Asian Setting: An Analysis of the British Rule of Hong Kong, 18 Hastings Int’l & Comp. L. Rev. 223, 224–32 (1995); John H. Henderson, Note, The Reintegration of Hong Kong into the People’s Republic of China: What it Means for Hong Kong, 28 Vand. J. Transnat’l L. 503, 506 (1995).

\footnote{15} The British regarded Chinese as inferior people. “In some cases the European looked upon the Chinese as being the lowest form of human life; I have actually seen a European ricksha passenger throw his fare money to the ground rather than risk touching the ricksha coolie.” Land occupied by Chinese was cleared for British expatriates’ occupation. A Hong Kong governor once stated that “it would be very advisable for the interests of the community that the Chinese shall be removed, so as to prevent as much as possible their being mixed up with the Europeans.” Klein, supra note 14, at 260–75.

\footnote{16} Few British expatriates in Hong Kong came from upper class families. Yet, the nineteenth century Hong Kong allowed for the metamorphosis of “lower class Europeans” into “supervisors, with a Chinese laboring force under them” and the transformation of lower class English youth into “men of Epicurean tastes, connoisseurs in wines, [and] lavish in expenditure.” The superiority of whites was best exemplified by the expatriates’ indulgences. The life of the Governor in 1991 included “a domestic staff of thirty—a chief steward, a head chef, four number-two chefs, a tailor, twenty-two domestic servants, a Rolls Royce and two Daimlers (chauffeur-driven), and a one hundred foot long boat.” Id. at 261–75.

\footnote{17} Id.\footnote{18} Id. at 223.
Hong Kong within years after Great Britain acquired the New Territories. Hong Kong continued to experience rapid economic growth in the 1980s. China adopted an open-door policy in 1978; between 1979 and 1995, approximately sixty percent of foreign direct investment in China came through Hong Kong. By 1995, Hong Kong’s stock market was the eighth largest in world for total market capitalization, and the second largest in Asia.

2. Hong Kong’s Handover to China

Because New Territories alone composed ninety-two percent of the land in Hong Kong, it was obvious to China that the transfer of land must also include the Hong Kong Island and the Kowloon Peninsula and Stonecutters Island when the British lease for New Territories was near expiring. The two nations compromised with the Sino-British Joint Declaration of 1984. Hong Kong and China would be united under an unprecedented “one country, two systems” model. The Chinese government pledged that Hong Kong would maintain and retain its pre-existing social, economic, and legal systems for fifty years. Hong Kong was able to maintain its “existing British-style legal system, establish its own court of final appeal, retain fiscal independence from the central government, and retain its own currency.” Hong Kong acted as an independent, separate entity from China in most international economic and cultural organizations, including the World Trade Organization, the Multi-Fiber Agreement, and the Asian-Pacific Economic Co-operation forum.

In July 1, 1997, Hong Kong ended its 156-year history as a colony of Great Britain and returned to China as a “highly autonomous” Special Administrative Region (“SAR”) of the People’s Republic of China. The reunification was celebrated in Beijing by

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19 Id. at 241.
20 Lai, supra note 6, at 737.
21 Id. at 739.
22 China refused to enter into negotiations with Great Britain for the return of Hong Kong unless all three territories ceded were treated as one single territory in the return, although only New Territories were under an expiring lease. Furthermore, China used its position as the chief supplier of water to Hong Kong and the chief supplier of resources to threaten to discontinue the supply of water and other resources to Hong Kong. Jackson, supra note 11, 379-80; Henderson, supra note 14, at 509.
23 Lai, supra note 6, at 736.
24 Gargan, supra note 10; see also Lai, supra note 6, at 736.
25 Gargan, supra note 10; Lai, supra note 6, at 736.
26 Lai, supra note 6, at 736.
Chinese government officials.27 China absorbed one of the world’s most prosperous commercial centers.28 By 1997, Hong Kong contributed to fifty-five percent of net foreign direct investment into China and handled fifty percent of all of China’s exports and imports.29 For the international legal and business communities, the reversion of sovereignty brought forth both excitement and anxiety.30

In practice, however, scholars believe that the “one country, two systems” model was “a statement of goals rather than a governing model.”31 Hong Kong’s Basic Law states that China’s intent is to “provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international finance centre.”32 Hong Kong was promised a “high degree of autonomy.”33 However, the Basic Law still requires that Hong Kong’s powers and autonomy must be delegated by China’s central government.34 Scholars argue that Article 108 of the Basic Law is another example of the model’s loftiness.35 “The Hong Kong Special Administrative Region shall, taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation.”36 This language provides no concrete answers for businesses in evaluating the maintenance of conducting business in Hong Kong.

Words of the former Chairman of the Central Advisory Commission of the Communist Party of China and leader of the Chinese Communist Party, Deng Xiao Ping, reflects China’s socialist attitude toward Hong Kong’s development:

‘One country, two systems’ must be discussed on two levels. On one level is the fact that within a socialist country we will be permitting a specially privileged area to be capitalist not just for

28 Jackson, supra note 11, at 379.
30 Fishburne, supra note 27, at 297.
31 Id. at 328.
32 Id.
33 Wang & Leung, supra note 7, at 285.
34 Id.
35 Han, supra note 29, at 328.
36 The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China art. 108 (H.K.).
a short period of time, but for decades or a full century. On another level, we must affirm that the principal system throughout the country is socialist . . . That we uphold the socialist system and the “four cardinal principles” was determined long ago, and is inscribed in our Constitution. The policies we formulate, including our policies toward Hong Kong, Macao and Taiwan, are also determined on the basis of upholding the four cardinal principles. Without the Chinese Communist Party, and without China’s socialism, who could formulate this type of policy?37

The logic behind the “one country, two systems” policy is that China would not intervene “so long as Hong Kong does nothing to affect the sovereignty and unity of China.”38 While China wants to extend its sovereignty to Hong Kong, China also recognizes that foreign investors fear the Chinese socialist system.39

3. The Umbrella Revolution

Scholars predicted potential problems after the reunification, such as corruption, regional disparity, and economic downturns, which could lead to problems ranging from chaos to civil war.40 In late 2014, the world watched as the Umbrella Revolution unfolded and Hong Kong citizens led one of the “politest protests ever”41 for democracy. Over 200,000 protestors,42 composed of a majority of students, engaged in acts of civil disobedience and occupied key intersections of the city, which eventually closed down Central District.43 The revolution began in September 2014 as a movement known as Occupy Central with Love and Peace.44 It earned its title

37 Wang & Leung, supra note 7, at 285.
38 Id. at 287.
39 Id. at 288.
40 Lai, supra note 6, at 743.
41 Protestors left posters on the streets of Hong Kong apologizing for the inconvenience caused by the movement. In addition, protestors voluntarily cleaned up after themselves and recycled water bottles. Heather Timmons, Pardon Me: Hong Kong’s Umbrella Revolution May Be the Politest Protest Ever, QUARTZ (Sept. 30, 2014), http://qz.com/273446/hong-kongs-umbrella-revolution-may-be-the-politest-protest-ever/.
43 Timmons, supra note 41.
44 Initiated by Professor Benny (Yiu-Ting) Tai, an associate professor of law at the University of Hong Kong in January 2013, Occupy Central brought forth discussions of change to the Hong Kong electoral system. The protestors made two key demands: (1) the Chinese government revises its plan for future elections in Hong Kong and (2) Hong Kong’s chief executive, Leung Chun-Ying, steps down from his current position. Initially, Professor Tai planned only to occupy a section of Hong Kong’s Central District in October for a maximum of five days. On August 31, 2014, the National People’s Congress Standing Committee (“NPCSC”) denied Hong Kong the right to democratic elections. The NPCSC decision declared “the implementation of
as the Umbrella Revolution when protestors used umbrellas to protect themselves against the police’s use of pepper spray and tear gas.45

Many would argue the 2014 Umbrella Movement is an example of the failure of the “one country, two systems” principle. As evidenced by the history of the former colony, many citizens of Hong Kong have long been denied democracy.46 The traction gained by Occupy Central and the international fame earned by its student leaders reflects the prominence of the movement. Between September 26–30, 2014, Twitter alone reported 1.3 millions tweets regarding Occupy Central.47 At its peak, there were twelve tweets per second.48 Some student leaders even earned international fame for their efforts. Joshua Wong, a seventeen-year-old high school student, was named one of the twenty-five most influential teenagers by Time Magazine in 2014.49 Although the Umbrella Movement ended over a year ago, the fight for universal suffrage in Hong Kong is far from over. In the words of Professor Tai, “[W]e must continue the fight until we get democracy for Hong Kong . . . It is not over.”50

universal suffrage in Hong Kong implicated China’s ‘sovereignty, security and development interests.’” The NPCSC further determined that “the principle that the Chief Executive has to be a person who loves the country and loves Hong Kong must be upheld.” In essence, all candidates striving for the position of Hong Kong’s chief executive must be pre-vetted and pre-approved by the Beijing headquarter. The NPCSC decision causes great unease because of its indication that China may not fulfill its pledge of granting Hong Kong a high level of autonomy. As a result, the protest that Professor Tai assumed would last no more than five days became a civil disobedience movement that spanned for eleven weeks. Hilgers, supra note 8; Alvin Y.H. Cheung, Road to Nowhere: Hong Kong’s Democratization and China’s Obligations Under Public International Law, 40 BROOK. J. INT’L L. 465, 465–68 (2015); Austin Ramzy & Alan Wong, Hong Kong’s Umbrella Revolution: One Year Later, SINOSPHERE (Sept. 25, 2015), http://sinosphere.blogs.nytimes.com/2015/09/25/hong-kong-umbrella-revolution-anniversary/?_r=0.

45 Ramzy & Wong, supra note 44.

46 The words of student activist, Joshua Wong, reflect Hong Kong’s disappointment with the current system. “We had thought that China’s rise would bring open-mindedness to its leaders, and spur democracy in the mainland, allowing China to catch up with Hong Kong’s democratic development by the year 2047, when Hong Kong’s 50 years of no change ends. We now look back and realize that all this is merely a fantasy, and that the struggle for universal suffrage is futile under the framework of ‘one country, two systems.’ That exists in name only.” Wong, supra note 42.


48 Id.

49 Wong, supra note 42.

Concerns about Hong Kong’s identity sparked another series of riots. In February 2016, Lunar New Year celebrations turned violent in Mong Kok when the Hong Kong police attempted to evict and issue tickets to street vendors selling fishballs and other local delicacies. In previous years, authorities typically turned a blind eye to unlicensed food stalls during the festivity. Unlike previous years, authorities fenced off areas used by the vendors. Protestors hurled bamboo spears, bricks and bottles at police and the police retaliated with pepper spray and batons. For the younger generation of Hong Kong citizens, these fishball vendors are symbolic of Hong Kong’s identity, which is increasingly marginalized, along with the failure to obtain universal suffrage in 2014 and the recent disappearance and arrest of booksellers working on a controversial book about Xi Jinping, the current Chinese president. However, according to Victoria Hui, an associate professor at Notre Dame University, not all Hong Kong citizens share the same feelings as the youth of Hong Kong who joined in the Fishball Revolution; “Middle-aged people, in my generation and beyond, go for stability. So when they see what they consider as real chaos in Hong Kong, there may be a backlash against the entire pro-democracy camp.” Despite criticisms against the Fishball Revolution, scholars predict that the current system in Hong Kong will continue to produce policies and institutions that will escalate “small matters” to bigger clashes.

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52 Id.

53 It was also reported that police fired two warning shots. Id.; see also Yondon Lhatoo, Hong Kong’s ‘Fishball Revolution’ Is a Load of Bull, but There’s No Denying the Dangers of Marginalising Angry Young People, SOUTH CHINA MORNING POST (Feb. 11, 2016), http://www.scmp.com/comment/insight-opinion/article/1911989/hong-kongs-fishball-revolution-load-bull-theres-no-denying?page=all.

54 See van der Horst, supra note 9.

55 Id. Professor Hui has also appeared before U.S. Congress to testify on the future of democracy in Hong Kong.

B. Development of Arbitration in China

1. Historical Background on the Rise of International Commercial Arbitration in China

The success of China’s alternative dispute resolution can be attributed to its historical value on Confucianism and mediation, the traditional inaccessibility of Chinese courts for most citizens, and the corruption and lack of training for Chinese magistrates.57 International commercial arbitration in China can be traced back to 1912; however, most features of its modern system developed after 1978.58 Between 1979–1989, the Chinese government signed almost forty multilateral agreements.59 Although foreign investors and businesses welcomed these new opportunities, they viewed the Chinese court system as unpredictable and corrupt. The court system was widely perceived as tending to favor the Chinese party at dispute,60 leading many foreign investors to add arbitration clauses into their contracts.61 Foreign investors also preferred the flexibil-

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57 Confucianism is a philosophy that has dominated Chinese history for over two thousand years. It promotes the belief that litigation brought social disharmony. Its emphasis on “moral and customary principles of polite conduct” fostered the development of mediation in China as Chinese citizens avoided litigation in fear of disrupting moral and customary standards. For example, until 1949, village and family elders were tasked with the responsibility of resolving disputes through mediation in China. See Reinstein, supra note 6, at 39–42; Benjamin O. Kostrewa, China International Economic Trade Arbitration Commission in 2006: New Rules, Same Results?, 15 PAC. RIM. L. & POL’Y J. 519, 522–23 (2006); Amanda Stallard, Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution, 17 OHIO ST. J. ON DISP. RESOL. 463, 477 (2002); Wah, supra note 1; Jun Ge, Mediation, Arbitration and Litigation: Dispute Resolution in the People’s Republic of China, 15 UCLA PAC. BASIN L.J. 122, 123 (1996); Michael T. Colatrelia, Jr., “Court-Performed” Mediation in the People’s Republic of China: A Proposed Model to Improve the United States Federal District Courts’ Mediation Programs, 15 OHIO ST. J. ON DISP. RESOL. 391, 396–99 (2000).

58 The Great Proletarian Cultural Revolution (“Chinese Cultural Revolution”), launched by the Chinese Communist Party (“CCP”) lasted from 1966 to 1976. Through the Chinese Cultural Revolution, the CCP sought to eradicate traditional Chinese beliefs through the “Destroying the Four Olds” campaign. “One of the dominant slogans in the Cultural Revolution was ‘Destroying the Four Olds’: old ideas, old cultures, old customs, and old social thought. The Four Olds needed to be destroyed on the grounds that they represented feudalism and capitalism, and poisoned people’s minds.” However, Confucius ideology was somehow preserved. During this same time, the Chinese government refused to sign any multilateral agreements. Once the isolation period ended, China welcomed various trade opportunities. Between the years of 1965 to 1979, China withdrew from the international community. Kostrewa, supra note 57, at 523. Jiaqi Liang, The Enforcement of Mediation Settlement Agreements in China, 19 AM. REV. INT’L ARB. 489, 512-513 (2008).

59 Id.

60 Reinstein, supra note 6, at 42.

61 Id.
ity, speediness, and efficiency of the arbitration process.\textsuperscript{62} The development of modern international commercial arbitration in 1978 was a testament to the desire of the Chinese government to benefit from international trade.\textsuperscript{63}

2. The Rise of CIETAC

There are many local arbitration institutions in China; the most important is the China International Economic and Trade Arbitration Commission ("CIETAC").\textsuperscript{64} CIETAC is a permanent international arbitration commission created to independently resolve economic and trade disputes.\textsuperscript{65} It was established in 1956 by the China Council for the Promotion of International Trade ("CCPI\textsuperscript{T}") under the name of Foreign Trade Arbitration Commission ("FTAC"). FTAC became the first international commercial institution in China and promulgated the first set of arbitration rules in China, the Provisional Rules of the Foreign Trade Arbitration Commission of China, which became effective in March 31, 1956.\textsuperscript{66} In 1980, FTAC was renamed to Foreign Economic and Trade Arbitration Commission when its jurisdiction was broadened to include non-trade economic matters. In 1988, the commission changed its name to CIETAC.\textsuperscript{67} Furthermore, CCPIT expanded CIETAC's jurisdiction to encompass disputes arising out of international economics and trade.\textsuperscript{68}

Today, CIETAC is considered to be the most important arbitration institution of China.\textsuperscript{69} Until 1996, CIETAC was the only international commercial arbitration center recognized by the Chinese government.\textsuperscript{70} CIETAC has administered a substantial number of cases involving foreign parties.\textsuperscript{71} The Chinese government further adds to CIETAC's popularity by promulgating Chinese regulations that recommend Chinese domestic parties involved in cer-
tain disputes to resolve disputes through CIETAC. CIETAC is based in Beijing and has the right to establish and maintain sub-commissions. It has established sub-commissions in Shenzhen, Shanghai, Tianjin, and Chongqing. In 2012, CIETAC added its first branch outside of China in Hong Kong.

C. Arbitration History Between China and Hong Kong

1. Origin of China’s Arbitration Law

Prior to 1994, China’s Civil Procedure Law, as well as foreign investment legislation, and the New York Convention governed arbitration in China. The passage of the Arbitration Law in 1994 unified and institutionalized arbitration as a dispute resolution system for China. The drafting of China’s Arbitration Law was influenced by the United Nations Commission on International Trade Law Model Law (“Model Law”). The Model Law was drafted in 1985 with the goal of “assist[ing] States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.” The Model Law and the International Chamber of Commerce (“ICC”) Rules of Arbitration are regarded as leading examples in the codification of international procedural norms. The purpose of the Model Law is to establish rules for “ad hoc arbitration that are acceptable in countries with different legal, social and economic systems” and facilitate the “development of harmonious international economic relations.”

73 Schollenberger & Finizio, supra note 64.
74 Id.
75 See infra Part III.2 CIETAC Hong Kong Office.
76 Kostrzewa, supra note 57, at 524.
77 Id. See also Arbitration Law of the People’s Republic of China (promulgated by Decree No. 31 of the President of the PRC, Aug. 31, 1994, effective Sep. 1, 1995).
been increasingly referenced and is “not limited to commercial arbitration but extend to inter-state arbitration and arbitration between states and private investors.”

Yet, in many ways, China’s Arbitration Law differs from the Model Law. First, whereas the Model Law was to govern international disputes, the Arbitration Law applied to both domestic and foreign-related disputes. Second, the Model Law permits the arbitral tribunal to rule on its jurisdiction, including any objection with respect to the existence or validity of an arbitration agreement pursuant to UNCITRAL Article 16. Under Chinese law, a ruling of the arbitration commission on the validity of an arbitration agreement is subject to the review of the People’s Court. Third, the Model Law, UNCITRAL Articles 10–11 vest the power of appointing arbitrators in default in the court or in another specified authority. However, under Chinese law CIETAC Articles 27–28, this power is vested in the chairman of the arbitration commission.

The Arbitration Law also mandated the establishment of local arbitration commissions. In 1996, the Chinese government granted local arbitration centers the ability to accept foreign-related cases. This forces CIETAC to compete with other arbitration centers in China, such as the Beijing Arbitration Commission (“BAC”), which is “considered to be China’s ‘flagship’ arbitration institution.” Even today, BAC remains CIETAC’s fiercest competitor. In 2014, CIETAC accepted a total of 1,610 arbitration cases, including 387 foreign-related cases and 1,223 domestic cases. This caseload continued to increase in 2015; CIETAC took on a total of 1,968 cases, out of which 437 were foreign-related.

81 Id. at 9.
82 China: International Arbitration 2015, supra note 78.
83 Id.
84 “Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.” United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules art. 16 (2010).
86 Reinstein, supra note 6, at 45.
87 Id. at 44.
88 Id.
89 Statistics, supra note 5.
90 Id.
In comparison, BAC took on 2,041 cases in 2014. BAC’s caseload, however, only contains forty-one foreign related disputes.

2. Enforcement of Arbitral Awards between Hong Kong and China Prior to the Handover

Prior to the change in sovereignty, only two applications to enforce the CIETAC award were denied by the Hong Kong courts for public policy reasons. Paklito Investment Ltd. v. Klockner East Asia Ltd was the first case in which a Chinese arbitral (CIETAC) award was not enforced in Hong Kong. The award was not enforced because the respondent was prevented from “presenting its case” and “denied a fair and equal opportunity of being heard.” In March 1994, one year after the ruling of Paklito, CIETAC amended Articles 26–28 of its 1988 Rules to include that “a copy of the expert report conducted by the tribunal be sent to the parties concerned who should also be offered an opportunity to express their opinions; in addition, the parties may require the experts to appear in the hearing to explain their report and conclu-
sions. 97  This amendment shows that China paid attention to the Hong Kong standard of conducting arbitrations. 98

3. Complications After the Change in Hong Kong’s Sovereignty

Pursuant to the Basic Law—the constitution which defines Hong Kong’s relationship with China post-handover—the statutes that governed arbitration in Hong Kong, such as Hong Kong Arbitration Ordinance Cap. 341, and the common law regarding arbitration were retained. 99  However, the New York Convention only deals with enforcement of foreign arbitral awards. 100  Thus, Hong Kong courts could no longer rely on the New York Convention to enforce Chinese awards and vice versa. 101

This problem was demonstrated by Ng Fung Hong Ltd. v. ABC, 102 a 1998 case which a CIETAC award was sought to be enforced in Hong Kong pursuant to Section 2GG of the then Hong Kong Arbitration Ordinance Cap. 341. The Hong Kong court held that the “award could not be enforced directly” given that Section 2GG only applies to arbitration awards where the place of arbitration was within Hong Kong, and, as such, does not apply to Chinese awards. Instead, the applicant could only enforce the CIETAC award by using the award as evidence of an unpaid debt. In Hebei Import-Export Corp. v. Polytek Engineering Co. Ltd., 103 the court explained that awards made in China post-handover cannot be treated as New York Convention. The People’s courts in China adopted the same position. For example, in July 1998, the Taiyuan Intermediate People’s Court indefinitely suspended enforcement of a Hong Kong award. 104  The People’s Courts in Beijing, Anhui, and Guangdong followed suit. 105  The suspension of enforcement was extremely damaging to cross-border exchanges between China and Hong Kong. It was reported that the cross-border arbitration scheme was costing millions of dollars in busi-

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97 Gu, supra note 93, at 91.
98 Id. at 50.
100 Gu, supra note 93, at 53–54.
101 China and Hong Kong claims are considered within one sovereign State and no longer within cross-border arbitration scheme.
104 Gu, supra note 93, at 55.
105 Id.
ness in Hong Kong as people were forced to arbitrate in Singapore in order to get their arbitral awards enforced in China.\footnote{Id. at 56.}

Between 1997–1999, nine Chinese arbitral awards sought enforcement in Hong Kong. In 1999, the Supreme People’s Court of China and the Department of Justice of the Hong Kong SAR signed an Arrangement on Mutual Recognition and Enforcement of Arbitral Awards (“Mutual Arrangement”) between China and Hong Kong under the “one country, two systems” principle.\footnote{Id. at 45.} The “one country, two systems” principle was invented then to allow Hong Kong to develop as a liberal, capitalist city within the more socialist China.\footnote{Tim Hume, \textit{Alarm in Hong Kong at Chinese White Paper Affirming Beijing Control}, CNN (June 13, 2014), http://www.cnn.com/2014/06/11/world/asia/hong-kong-beijing-two-systems-paper/.} The same principle allowed for continued economic growth, even as Hong Kong’s sovereignty changed hands, by allowing Hong Kong to retain a semiautonomous legal system, to retain a separate status as a member of the World Trade Organization, and to remain a signatory to international conventions and agreements.\footnote{Claver-Carone, \textit{supra} note 66, at 369; Jianming Shen, \textit{Cross-Strait Trade and Investment and the Role of Hong Kong}, 16 Wis. Int’l L.J. 661, 671–72 (1998).} Article 7 of the Mutual Arrangement mimics Article V of the New York Convention by offering grounds for refusal of enforcement of arbitral awards.\footnote{“The enforcement of the award may be refused if the court of Mainland China holds that the enforcement of the arbitral award in the Mainland would be contrary to the public interest of Mainland China, or if the court of Hong Kong SAR decides that the enforcement of the arbitral award in Hong Kong would be contrary to the public policy of the Hong Kong SAR.” United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V, U.N. Commission on Int’l Trade L. (June 10, 1958), http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf; see also Arrangement Concerning Mutual Recognition and Enforcement of Arbitral Awards Between Mainland China and the Hong Kong Special Administrative Region, DOJ.GOV.HK (June 21, 1999), http://www.doj.gov.hk/eng/mainland/pdf/mainland_mutual2e.pdf.}

Due to differences in legal systems and ideologies, “an arbitration which has been conducted according to China standards may easily be impeached under public policy grounds by applying a more stringent common law standard in Hong Kong.”\footnote{Id. at 45.} China often defined public policy in public interest to accommodate China’s political or economic interest. Hong Kong, however, continued to define public policy with the same understanding as the New York Convention.
This further complicates the legal relationship between Hong Kong and China in the realm of international arbitration. Hong Kong has already established itself as a hub for international arbitration prior to the sovereignty handover, whereas China’s reputation was deemed less friendly to the international community. While there is a need to modernize the current standard of arbitration in China and to move toward the international standards that Hong Kong maintains, there is still a need to facilitate a cross-border arbitration regime that is compatible under the principles of “one country, two systems.”

Gao Haiyan v. Keeneye Holdings Ltd (“Keeneye”) demonstrated the issue of bias and due process concerns. This case “arose out of a dispute concerning the validity of two shared transfer agreements made between the parties.”112 Hong Kong’s Court of First Instance refused to allow enforcement of the award on the basis of “procedural defects in a mediation conducted as part of the arbitration process.”113 In a private meeting with the arbitrator, “an affiliate of the respondents was told to ‘work on’ a 250 million RMB proposal with the respondents in the med-arb process.”114 Mediation failed and the respondents refused the proposed settlement. The parties proceeded to arbitration, which only offered an award of fifty million RMB. The Xi’an Court upheld the award. The Hong Kong Court of First Instance refused to uphold the Xi’an Court’s decision on the basis of public policy; they concluded that, although the private meeting was insufficient to prove actual bias, the stark contrast between the actual award and the proposed settlement award could “lead to a “reasonable bystander to apprehend bias as a real possibility in the making of the award.”115 On appeal, the Hong Kong Court of Appeal reversed and reinstated the award; holding, although Hong Kong can apply its own public policy when deciding whether an award is to be enforced, deference should be given to the supervising court (Xi’an Court). The result of Keeneye implies that Hong Kong courts lost their clarity in enforcement standards for cross-border arbitral awards.116

113 Id.
114 Id.
115 Id.
116 Id.
III. DISCUSSION

A. CIETAC Overview

1. CIETAC Controversies

CIETAC is not without flaws; one of its most publicized problems involved the split of its sub-commissions. In 2012, CIETAC, headquartered in Beijing, announced the suspension of its Shanghai and Shenzhen branches, which have since renamed themselves as the Shanghai International Economic and Trade Arbitration Commission (or Shanghai International Arbitration Center) and the South China International Economic and Trade Arbitration Commission (or Shenzhen Court of International Arbitration). The two former branches then issued their own arbitration rules in 2012 and 2013.117 The split originated from the promulgation of CIETAC’s 2012 Arbitration Rules, which require all awards issued by sub-commissions to be affixed with CIETAC Beijing’s seals and provide for a default administration by CIETAC Beijing in all cases with arbitration clauses that provide for arbitration in CIETAC. This ultimately deprives sub-commissions of autonomy and reduces their resources. It is no surprise that the rules would spur the Shanghai and Shenzhen branches to declare separation.

CIETAC has also been strongly criticized for its lengthy process. Some believe that it is due to the CIETAC arbitrators having been influenced by China’s historical emphasis on mediation and Confucianism as discussed above.118

CIETAC rules also afford parties less autonomy than the rules of many other institutions. CIETAC arbitrators are more involved in the various stages of arbitration than most other arbitral institutions.119 Furthermore, unless the parties have agreed otherwise, CIETAC rules also mandate that arbitrators will be chosen from CIETAC’s list, which, while increasingly international, consists primarily of Chinese arbitrators.

Finally, as noted above, arbitration awards determined in China may face difficulty in enforcement in Hong Kong and vice versa due to different perceptions of public policy.120 Thus, inves-
tors must carefully choose the location of the arbitration even when agreeing to CIETAC arbitral rules. Practitioners typically believe that CIETAC arbitration in Hong Kong is more favorable to foreign investors than that of CIETAC in China.121

2. CIETAC Hong Kong Office

In 2012, CIETAC attempted to address the problems with Hong Kong and established an arbitration center in Hong Kong. The Hong Kong center was also the first CIETAC branch outside of Mainland China. This response was initially met with great initial enthusiasm. According to Rimsky Yuen, the Hong Kong Government’s Secretary for Justice

[T]he establishment of the CIETAC Hong Kong Arbitration Centre, coupled with the existing arbitral institutions in Hong Kong, including the Hong Kong International Arbitration Centre and the Secretariat of the International Chamber of Commerce International Court of Arbitration (Asia Office), will place Hong Kong in an even stronger position to meet the demand for high-end arbitration services.122

Establishment of CIETAC Hong Kong in 2012 alone did not resolve the concerns that remained after the handover. Despite the excitement for the new branch, ambiguities loomed regarding the laws that CIETAC Hong Kong would apply, and the jurisdiction and enforcement of CIETAC Hong Kong awards.123 CIETAC’s 2012 Rules were released prior to the establishment of the Hong Kong office and did not discuss the seat and jurisdictional authority of CIETAC Hong Kong.124 Amendments to the Hong Kong Arbitration Ordinance implemented on July 19, 2013, which included Section 22B(1), strongly favored other international arbitral centers already established in Hong Kong, such as the Hong Kong International Arbitration Centre (“HKIAC”) and the Inter-

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national Court of Arbitration (“ICA”).\textsuperscript{125} Section 22B(1) granted authority to Hong Kong courts to enforce emergency arbitration relief in Hong Kong. This provision was mirrored by the HKIAC’s amended Administered Arbitration Rules 2013.\textsuperscript{126} The lack of arbitral hearings held at the Hong Kong Arbitration Center between 2012 and 2014 reflects investors’ lack of faith in the center.\textsuperscript{127}

3. CIETAC 2015 Rules

Since its founding in 1956, CIETAC has had eight versions of its procedural rules; each revision attempted to align CIETAC with international commercial arbitration norms.\textsuperscript{128} The most recent revision to the rules occurred in January 2015.\textsuperscript{129} The 2015 revision of the CIETAC rules is designed to improve the efficiency of CIETAC’s arbitral proceedings and to bring the CIETAC rules closer to those of arbitral institutions of the international community. The Global Arbitration Review noted six key features in its 2015 Asia-Pacific Arbitration Review. These features included provisions dealing with: (1) post-split problems; (2) the use of single arbitration concerning multiple contracts; (3) joinder of additional parties; (4) compulsory consolidation of proceedings; (5) emergency arbitration; and (6) special provisions for CIETAC Hong Kong Arbitration center.\textsuperscript{130}

i. Provisions Dealing with the Post-Split

On December 31, 2014, the CIETAC headquarters reorganized its Shenzhen and Shanghai sub-commissions. Article 2.6 of the 2015 rules reflects the re-acceptance of the two branches by stating that the CIETAC headquarters shall render the final decision when the sub-commission agreed upon by the parties does not

\begin{itemize}
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Statistics, \textit{supra} note 5.
\item \textsuperscript{130} Fei & Wang, \textit{supra} note 91.
\end{itemize}
exist or when the authorization of the sub-commission has been terminated.131

The new 2015 rules, unlike their 2012 predecessors, were uncontroversial.132 The Supreme People’s Court of China issued a clarification on the jurisdiction of the various Chinese arbitral commissions, which has been widely welcomed and gave clarity regarding which of CIETAC Beijing, Shanghai International Economy and Trade Arbitration Commission / Shanghai International Arbitration Center (“SHIAC”), and Shenzhen Court of International Arbitration (“SCIA”) will have jurisdiction over a given dispute.133 As a result, investors have more clarity and confidence in clauses. However, while clients may have started requesting SHIAC/SCIA clauses, this has yet to become a strong trend. Practitioners still recommend the selection of CIETAC Beijing wherever possible if arbitrating in China.134 If parties particularly want to arbitrate in Shanghai or Shenzhen, practitioners will usually advise using SHIAC/SCIA over the “new” CIETAC sub-commissions in those cities, on the basis that the Supreme People’s Court of China has endorsed those commissions recently, and that in practice SHIAC or SCIA are staffed by the people who staffed the “old” CIETAC sub-commissions, who are therefore likely to be more experienced. Few practitioners have yet to directly experience the “new” CIETAC sub-commissions.135

ii. Use of Single Arbitration Concerning Multiple Contracts

Article 14 of the 2015 CIETAC Rules allows arbitral parties to commence a single umbrella arbitration regarding disputes that arise from multiple contracts between the same parties. According to Article 14, a claimant may initiate a single arbitration concerning multiple contracts if: (1) the contracts involve the same parties

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131 Where the sub-commission/arbitration center agreed upon by the parties does not exist or its authorization has been terminated, or where the agreement is ambiguous, the [CIETAC Beijing] Arbitration Court shall accept the arbitration application and administer the case. In the event of any dispute, a decision shall be made by CIETAC.


132 E-mail from May Tai to author, supra note 121.


134 E-mail from May Tai to author, supra note 121.

135 In 2015, the Hong Kong Arbitration Center accepted a total of five cases. Prior to that, the Hong Kong center did not accept any. Statistics, supra note 5.
and legal relationships of the same nature; (2) the contracts consist of a principal contract and ancillary contracts; (3) disputes arise out of the same transaction or the same series of transactions; and (4) the relevant arbitration agreements are identical or compatible.136

iii. Joinder of Additional Parties

Article 18 of the 2015 CIETAC Rules allows additional parties to join in an ongoing arbitration.137 Third parties can be invited to join the proceeding at any stage. To do so, an arbitral party wishing to add a third party may file a request with CIETAC. CIETAC will make a decision that binds all parties, including the additional parties.

iv. Compulsory Consolidation of Proceedings

Article 19 of the 2015 CIETAC Rules allows a party to have an unprecedented right to request compulsory consolidation of parallel arbitration proceedings, even without the consent of the other parties.138 Two or more proceedings can be compulsorily consolidated by CIETAC at any party’s request if any of the following conditions are satisfied: (1) the proceedings share the same arbitration agreement; (2) the arbitrations involve the same parties and share the same legal nature; (3) the multiple contracts involved consist of a principal contract and ancillary contracts.139

v. Emergency Arbitration

Article 23 of the 2015 CIETAC Rules allows parties to appoint arbitrators and apply for an emergency arbitration for matters requiring urgent interim relief.140 This is an important feature and aligns CIETAC with other major international arbitration institutions, such as the International Chamber of Commerce (“ICC”), American Arbitration Association (“AAA”), Stockholm Chamber of Commerce (“SCC”), Singapore International Arbitration Care (“SIAC”), and Hong Kong International Arbitration Centre (“HKIAC”). However, this adoption is in conflict with current Chinese laws, as China’s Arbitration Law and Civil Procedure Law

136 Fei & Wang, supra note 91.
137 Id.
138 Id.
139 Id.
140 Id.
allows only courts to grant conservatory relief. This implies that this new procedure is designed to be applied by CIETAC’s Hong Kong Arbitration Center.

vi. Special Provisions for CIETAC Hong Kong Arbitration Center

One key feature of the CIETAC 2015 Rules includes special provisions for CIETAC Hong Kong Arbitration center, which are addressed in Chapter VI of the 2015 Rules. Article 73 of the CIETAC 2015 Rules first and foremost established and recognized the Hong Kong Arbitration Center. According to Article 74, unless agreed otherwise by the arbitral parties, whenever CIETAC Hong Kong Arbitration Center administers a case, the following rules always apply: (1) the seat of arbitration will always be Hong Kong; (2) the law of the arbitration shall be the Arbitration Ordinance of Hong Kong; and (3) the arbitral award shall be a Hong Kong award. CIETAC Hong Kong awards are enforceable in China due to a reciprocal enforcement arrangement between China and Hong Kong. In addition, Article 23 allows CIETAC to adopt emergency arbitrator procedures. If an applicant is suc-


142 Fei & Wang, supra note 91.

143 Id.

144 1. CIETAC has established the CIETAC Hong Kong Arbitration Center in the Hong Kong Special Administrative Region. The provisions of this Chapter shall apply to arbitration cases accepted and administered by the CIETAC Hong Kong Arbitration Center. 2. Where the parties have agreed to submit their disputes to the CIETAC Hong Kong Arbitration Center for arbitration or to CIETAC for arbitration in Hong Kong, the CIETAC Hong Kong Arbitration Center shall accept the arbitration application and administer the case.


145 Fei & Wang, supra note 91.

146 1. Where a party applies for conservatory measures pursuant to the laws of the People’s Republic of China, CIETAC shall forward the party’s application to the competent court designated by that party in accordance with the law. 2. In accordance with the applicable law or the agreement of the parties, a party may apply to the Arbitration Court for emergency relief pursuant to the CIETAC Emergency Arbitrator Procedures (Appendix III). The emergency arbitrator may decide to order or award necessary or appropriate emergency measures. The decision of the emergency arbitrator shall be binding upon both parties. 3. At the request of a party, the arbitral tribunal may decide to order or award any interim measure it deems necessary or proper in accordance with the applicable law or the agreement of the parties and
cessful in applying, emergency interim relief may be granted. The relief may include preservation of evidence and early disclosure.\textsuperscript{147}

vii. Overall Implications

The promulgation of the articles has major implications for the growth of international commercial arbitration in Hong Kong and China. First, CIETAC Hong Kong awards are now enforceable in China due to a reciprocal enforcement arrangement between China and Hong Kong.\textsuperscript{148} This can help promote the growth of CIETAC, which has been unsteady since the handover. For example, in 1996, CIETAC resolved a total of 797 cases.\textsuperscript{149} Yet, that number fell after the handover. Between 1997–2004, CIETAC resolved between 694 and 766 cases.\textsuperscript{150} Although CIETAC’s caseload skyrocketed between 2005 and 2012, even reaching a total of 1,382 cases resolved in 2010, CIETAC’s caseload fell to only 720 cases in 2012.\textsuperscript{151} For business matters involving Chinese companies or Hong Kong companies, parties need not avoid CIETAC Hong Kong in fear of awards not being recognized by CIETAC headquarters. This helps to manage party expectations for the arbitration process when dealing with CIETAC Hong Kong. At the same time, party autonomy continues to be valued in the arbitration process in Hong Kong. Investors recognize that agreeing to CIETAC arbitration in China may lead to different results than agreeing to CIETAC arbitration in Hong Kong because the seat of the law differs. Given that arbitration in Hong Kong has been historically more favorable to foreign investors than compared to CIETAC in China, the clarification through Articles 73 and 74 will allow CIETAC Hong Kong to compete with HKIAC and other international arbitral centers in Hong Kong.\textsuperscript{152} Overall, reactions to CIETAC’s provisions regarding CIETAC Hong Kong have been positive.\textsuperscript{153}

\begin{itemize}
\item may require the requesting party to provide appropriate security in connection with the measure.
\end{itemize}


\textsuperscript{148} Tang et al., \textit{supra} note 133.

\textsuperscript{149} \textit{Statistics}, \textit{supra} note 5.

\textsuperscript{150} \textit{Id}.

\textsuperscript{151} \textit{Id}.

\textsuperscript{152} Zimmerman, \textit{supra} note 121.

\textsuperscript{153} E-mail from May Tai to author, \textit{supra} note 121.

The introduction of emergency arbitrator procedures in CIETAC Rules is another way in which CIETAC attempted to align itself with the international commercial arbitration community and compete with HKIAC’s increasing popularity. The significance of the passage of Article 23 is especially important because Article 23 may directly conflict with China’s law, which states that the power to grant emergency relief is limited to the People’s Courts. Given that CIETAC has not been authorized to determine a party’s application for conservatory measures, practitioners believe that either (1) this provision is limited to cases administered by CIETAC Hong Kong, or (2) the measures can only be enforced in Hong Kong.154 While this provision shows CIETAC’s respect for internationalism, the practicality of the provision could be improved or better clarified.

B. Issuance of White Paper from Beijing in 2014

When Hong Kong’s sovereignty was returned to China in 1997, the Chinese government promised that Hong Kong would be ruled under the “one country, two systems” principle, in which Hong Kong would be able to maintain its pre-existing social, economic, and legal systems for fifty years. However, the “one country, two systems” principle did not lead to a smooth transition, as evidenced by the Umbrella Revolution in 2014. In June 2014, China’s central government issued a white paper, which reminded the public that the “power of interpretation and amendment of the Basic Law [is] vested in the National People’s Congress and its Standing Committee” and highlighted that Hong Kong courts can only interpret the Basic Law “within the limits of Hong Kong’s autonomy.”155 The Hong Kong Bar Association read this to imply that Hong Kong judges should remain patriotic to China’s central government in the midst of the political tensions that revolve around Hong Kong citizens’ rally for the ability to choose their next chief executive without restrictions from the central government.156 Because CIETAC arbitrators are not government officials

154 Tang et al., supra note 133.
155 The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China art. 158 (H.K.); id. art. 159. See also Tim Summers, White Paper Does Not Mark Major Shift on Hong Kong, CHATHAM HOUSE (July 11, 2014), https://www.chathamhouse.org/expert/comment/15140.
156 See Summers, supra note 155.
and they have an obligation to maintain neutrality according to Article 24 of the CIETAC 2015 Rules, the requirement of patriotism does not apply to CIETAC arbitrators. Thus, the white paper should not affect the decision making process by the CIETAC arbitrators.\textsuperscript{157}

However, it does not mean that the white paper should be ignored. The white paper generated criticism as citizens alleged that China’s central government was “reneging on its pledges to abide by the ‘one country, two systems’ policy that allows for a democratic, autonomous Hong Kong under Beijing’s rule.”\textsuperscript{158} The “one country, two systems” policy was originally expected to last from 1997–2047. China’s unwillingness to provide a clear answer as to its future implementation of policies in Hong Kong creates additional doubts for Hong Kong and uncertainty as to its future.

The issuance of the white paper led to speculation that the policy may collapse prior to 2047.\textsuperscript{159} According to Alan Leong Kah-Kit, a legislator and leader of the pro-democracy Civic Party in Hong Kong, “[h]onestly, had the white paper been published in 1990, when the Basic Law was promulgated, I can bet you anything that Hong Kong would not have reverted to Chinese sovereignty as smoothly as we did.” The threat of this collapse is significant because China has benefited greatly from Hong Kong’s unique status.

[Hong Kong] is a city that is sealed off from the mainland but closely connected to it; a territory that is fully integrated into the global economy but ultimately controlled by the Communist Party in Beijing. Even with its unique status, however, there is no question where the balance of power lies in Hong Kong’s relationship with China: about half of Hong Kong’s exports end up in China; one-fifth of its bank assets are loans to Chinese customers; and tourism and retail spending, mostly from China, account for 10% of Hong Kong’s GDP. In the opposite direction, the Chinese economy’s direct exposure to Hong Kong is vanishingly small. But it would be a grave mistake to conclude that Hong Kong therefore does not matter to China. If China

\textsuperscript{157} “An arbitrator shall not represent either party, and shall be and remain independent of the parties and treat them equally.” CIETAC Arbitration Rules art. 24 (2015); see also E-mail from May Tai to author, supra note 121.


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were to do anything that jeopardised their special relationship, Hong Kong would suffer most; but China would also pay a heavy price.160

For example, since 2012, Chinese companies have raised $43 billion in initial public offerings in the Hong Kong market, whereas the mainland markets aggregated only to $25 billion.161 Furthermore, the Chinese economy has slowed in 2015.162

IV. PROPOSAL

A. Improvements to the Current CIETAC Rules

As noted above, CIETAC has made eight different revisions to its rules since its inception.163 The last two revisions in 2012 and 2015 include major overhauls to align CIETAC with international standards in commercial arbitrations. Despite CIETAC’s historical progression towards internationalization, greater strides still need to be taken before CIETAC and its Rules can fully conform to international norms. This Note proposes two suggestions.

First, CIETAC should be addressed for impartiality. The international arbitral community has frequently complained of CIETAC’s bias in its selection of mostly Chinese arbitrators on arbitral panels. Major arbitral institutions tend to promote diversity of nationalities in the selection of arbitrators, and international procedural rules generally favor national diversity on arbitral panels.164 For example, although the 1976 UNCITRAL Rules do not stipulate a requirement for diversity, the rules consider national diversity when appointing arbitrators.165 The ICC Rules stipulate that the ICC Court consider an arbitrator’s nationality

161 Id.
163 See supra note 128 and accompanying text.
164 Ng, supra note 1.
165 “[I]n making the appointment[,] the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.” United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules art. 6(7) (2010).
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and relationships with the nationalities of the parties.\textsuperscript{166} The Hong Kong International Arbitration Center Rules provide that where the parties are of “different nationalities,” either the sole arbitrator or arbitral tribunal chairman cannot be of the “same nationality as any party.”\textsuperscript{167} Unlike its international counterparts, the current CIETAC Rules lack provisions providing for the national diversity of arbitrators. The Chairman of CIETAC has the duty of appointing either the sole arbitrator or the presiding arbitrator when the parties do not jointly agree.\textsuperscript{168} Practitioners suggest that the Chairman will likely select a Chinese arbitrator that may not have a foreign party’s best interest.\textsuperscript{169} To increase the appearance of impartiality and ensure foreign parties’ confidence, CIETAC should adopt language into its Rules that provides for the diversity of nationality on the arbitral panel in addition to increasing the national diversity of its list of arbitrators.

Second, CIETAC should remove its power to scrutinize the awards of its sub-commissions. As discussed above, this was a major complaint of the 2012 CIETAC Rules, which eventually led to the split of two sub-commissions.\textsuperscript{170} Although the 2015 CIETAC Rules reiterate the prevailing international norm for impartial-

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\textsuperscript{166} In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator’s nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator’s availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).

\textsuperscript{167} “Where the parties to an arbitration under these Rules are of different nationalities, a sole arbitrator or the presiding arbitrator of an arbitral tribunal shall not have the same nationality as any party unless specifically agreed otherwise by all parties in writing.” Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules art. 11(2) (2013).

\textsuperscript{168} The parties may each recommend one to five arbitrators as candidates for presiding arbitrator and shall each submit a list of recommended candidates . . . 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.

\textsuperscript{169} Gemmell, supra note 5, at 161.

\textsuperscript{170} See infra III.A.1. CIETAC Controversies.
ity, the CIETAC headquarters still retains the power of “scrutiny” before an award is signed. The independence of arbitrators may be compromised by CIETAC’s ability to scrutinize the arbitrators’ decision before an award is rendered. It is international practice to offer arbitral tribunals wide independence in rendering arbitral awards. CIETAC defenders contend that such concerns are unwarranted because, practically speaking, CIETAC is “far too busy to bother writing or reviewing arbiters’ awards.” This practice is inefficient and wastes resources, as exemplified by the split of CIETAC sub-commissions. If CIETAC is truly “too busy” to rewrite arbitrations awards, then CIETAC should remove such a rule. Doing so would increase CIETAC’s credibility within the international community.

B. Extension of “One Country, Two Systems” Principle

To ensure that Hong Kong remains an economic powerhouse and that arbitration continues to grow in both China and Hong Kong, it would be beneficial for CIETAC and China’s central government to continue to align CIETAC Hong Kong with the international commercial arbitration community, even if the result may clash with the current central government’s ideology and political beliefs, as exemplified in some of the key changes in the 2015 Rules.

171 “The arbitral tribunal shall independently and impartially render a fair and reasonable arbitral award based on the facts of the case and the terms of the contract, in accordance with the law, and with reference to international practices.” China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules art. 49(1) (2015).

172 “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.” China International Economic and Trade Arbitration Commission [CIETAC] Arbitration Rules art. 51 (2015).

173 The UNCITRAL Rules provide that arbitral awards are only open to technical correction after they have been rendered.

Within 30 days after the receipt of the award, a party with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request.


174 Gemmell, supra note 3, at 165; Ng, supra note 1.
Taking a step further, China should consider an extension of the “one country, two systems” principle beyond the year 2047. This would suggest to the international community that Hong Kong’s status as a SAR will not disappear and that China will not look to usurp complete control over Hong Kong. Some have even predicted that in 2016, foreign companies would avoid going into China for business transactions as wholly foreign-owned enterprises and instead attempt to sell products via distribution agreements and re-seller agreements. Also, CNBC has reported the slowing of China’s GDP. “China’s economic expansion may be far less than official estimates of 6.8 percent and could be closer to 2.4 percent.” These are evidence of the lack of faith in China’s economy. China cannot afford to lose the economic benefits that accompany keeping Hong Kong as a SAR.

In addition, China should consider a referendum to solicit opinions from Hong Kong’s youth and student leaders. Through social media, student leaders and individuals now have a voice that cannot easily be ignored. China should note the success of an unofficial referendum organized by Occupy Central in 2014. In June 2014, a total of 790,808 voters took part in an unofficial referendum on universal suffrage in Hong Kong.

Noting the popularity of this unofficial referendum, China should consider the usage of referendums to understand the needs of the Hong Kong citizens. Various European countries have long made use of referendums at both the local and national levels. For example, Australia, New Zealand, Canada, Italy, Ireland, and

175 Harris, supra note 162.
177 Id.
178 The poll showed that forty-two percent of voters supported a proposal that allowed the public, a nominating committee, and political parties to name candidates for the Chief Executive position. The winning proposal calls for candidates to be nominated by at least 35,000 registered voters or by any political party that secured at least five percent of the vote in the last election for Hong Kong’s legislative council. Voters were able to vote either in person at polling stations or online. Although this was an unofficial referendum, one of five citizens in Hong Kong took part. According to Professor Kin-man Chan, sociology professor at the University of Hong Kong and one of the founders of Occupy Central, the turnout for the referendum was an unexpected and encouraging sign; “I believe that people feel that our autonomy has been threatened and is going to be threatened even more by Beijing. People feel outrageous [sic outraged] and so they want to make their voice heard.” Hong Kong Democracy Referendum Draws Nearly 800,000, BBC (June 30, 2014), http://www.bbc.com/news/world-asia-china-28076566.
Denmark all utilize a system for national referendums. Switzerland has been recognized as the paradigm for direct citizen voting in modern Western democracies. Use of referendums is not limited to Western democracies. In 1947, the Philippines became the first amongst Asian countries to use a referendum system. The referendum process varies from country to country but is noted by two main features: “(1) whether the measure originates with citizens or the government, and (2) whether the outcome binds or simply advises the government.” While referendums may produce positive law, they can also produce advisory polls for significant issues. Here, a government sponsored advisory poll is suitable to resolve the mistrust between Hong Kong citizens and the Chinese government. The outcome of the polls would not bind the Chinese government to decisions that conflict with its current system, and would offer legislative flexibility to “predict the outcome of a provision that reconciles possible conflicts.”

V. Conclusion

After experiencing an initial decline in the aftermath of Hong Kong’s handover, arbitration in China has grown. At the commencement of the open door economic policy, China saw a tremendous increase in arbitration cases. The year 2015 represents the height of arbitration’s success resulting from the open door economic policy in terms of caseload, number of claims, and diversity on the Arbitrator’s List. In 2015, CIETAC accepted a total of 1,968 arbitration cases, of which 437 were foreign-related and 1,531 were domestic. This reflects a twenty-two percent increase in cases arbitrated by CIETAC from 2014 and the highest caseload ever in CIETAC history. Furthermore, the total cost of claims arbitrated by CIETAC in 2015 reached $42.5 billion RMB (approximately $6.5 billion USD), which represents an increase of 12.4

180 Id.
181 Switzerland’s first recorded decision by direct vote by citizens took place more than 700 years ago and its referendums began in 1449 on issues regarding war taxes and alliances. To date, the Swiss have held over five hundred referendums on national levels. Id. at 835–36.
182 Id. at 841–42.
183 Id. at 848.
184 Statistics, supra note 5.
185 Id.
186 Id.
percent from the $4.7 billion RMB\textsuperscript{187} (approximately $7.2 million USD) in 2014. Arbitral parties came from forty-eight countries and regions. The 2014 Arbitrator’s List is comprised of 1,212 arbitrators from forty-one countries.\textsuperscript{188}

While the 2015 CIETAC Rules made significant steps closer to the international procedural norms, current CIETAC Rules still do not give as much consideration to national diversity on arbitral panels as other institutional procedural rules. Furthermore, CIETAC continues to scrutinize the awards of arbitral tribunals far more than is common in the international arbitral community. However, the fact that CIETAC made major changes to its arbitration rules twice within the last three years is an indication that CIETAC will continue to improve and adapt to be friendly for international parties. In particular, the establishment of the CIETAC Hong Kong branch and the exceptions granted to the CIETAC Hong Kong branch reflect China’s acknowledgement of the essential role that Hong Kong plays in commercial arbitration.

While this Note recognizes CIETAC’s achievements and willingness to align with the international norms, revisions to CIETAC rules are not enough. If China wants to remain competitive in international commercial arbitration, it must do more than just create favorable terms that mimic language similar to UNCITRAL Model Law or ICC Rules. China’s success in arbitration is highly tied to China’s implementation of “one country, two systems” in Hong Kong. Hong Kong’s recent Umbrella Revolution gained international traction and created concern regarding the sustainability of the “one country, two systems” principle. The Umbrella Revolution should not be treated as a one-time aberration, as demonstrated by the Fishball Revolution. The threat of the “one country, two systems” collapse is not only real but also imminent. Despite being sealed off from mainland China, Hong Kong’s unique status contributes to enormous economic growth in China. Thus, China cannot ignore the political needs of Hong Kong if China wants to continue to develop in the international arbitration sphere, which is tied to the growth of the Asian economies. This Note recommends the extension of the “one country, two systems” principle beyond its current deadline and the use of government-sponsored referendums to reconcile the existing mistrust and misunderstandings between Hong Kong citizens and the Chinese government.

\textsuperscript{187} Id. \\
\textsuperscript{188} Id.
As witnessed in the handover in 1997, uncertainty about the future of Hong Kong and differences in public policy concepts between China and Hong Kong affected the growth of arbitration. Similarly, Hong Kong’s unique status as a SAR of China will continue to affect the growth of arbitration. Foreign investors will avoid doing business in Hong Kong if its economic growth is stumped by the collapse of the “one country, two systems” principle. As demonstrated in the past, foreign investors avoided arbitration in China and Hong Kong when there was a lack of clarity in whether arbitral awards could be enforced. In the same way, foreign investors will avoid arbitration in China and Hong Kong if the future of Hong Kong becomes uncertain again. If Hong Kong loses this unique status, China’s growth in arbitration will inevitably suffer as well.