

# JOINT VENTURES LAW OF THE PEOPLE'S REPUBLIC OF CHINA: PERSPECTIVES FOR THE WESTERN LEGAL PROFESSION

*Liu Yiu Chu\**

## PRACTICE OF LAW ACROSS CULTURAL BOUNDARIES

Reporting across cultural boundaries has more often resulted in the production of fantasy than effective communication – particularly when the cultural gap is as wide as the one existing between China and the Western world in matters like law and the administration of justice. My limited experience as a Research Fellow in the East Asian Legal Studies Section of Harvard Law School exposed me to the frustration of legal scholars in comparative legal studies and convinced me that it is futile to approach the study of a social institution in an alien culture without first divesting oneself, as far as possible, of all cultural prejudice and then totally immersing oneself in the alien culture in question. This “social studies” approach and the total immersion theory are of course not new. It remains to be assessed, however, as to how many Western scholars are relatively free from the blinding and deafening effects of ethnocentricity to be able to comprehend meaning in an alien cultural context.

The practice of law across cultural boundaries can be equally frustrating. It is an art akin to the translation of poetry. In both cases, the form is often the essence; and form is intranslatable. The end result is a new form inspired by such aspects of the original as the translator considers most important. The new form then takes on a new life in the new cultural context, deriving meaning from connotations which were never contemplated in the original. The successful practitioner does not analyze or explain the process, but simply strives to produce the desired transformation or the desired results according to clients' instructions.

The most challenging of all must be the practice of law astride different legal systems which are historically, culturally, traditionally, conceptually, linguistically and functionally different. It then becomes a continuing process of synthesis/translation/analysis at several levels, in different patterns. Sound training in legal analysis in a Western tradition can at once be an asset and a handicap. Faithfulness to any one tradition may be fatal to the process as a whole. If the objectives are not clear, the task becomes even more impossible.

\*Liu Yiu Chu participated in the preparatory work for Law of the People's Republic of China on Joint Ventures using Chinese and Foreign Investment. She also had the rare opportunity of studying Chinese arbitration with the Legal Affairs Department of the China Council for the Promotion of International Trade.

Oxford (M.A.); Harvard (Research Fellow, East Asian Legal Studies; Special Student in Public International Law, Harvard Law School.)

However, if the practitioner is primarily committed to the sacred duties of a counselor, namely, that of protecting and advancing his clients' best interests, then his main objective should be to help his clients to avoid disputes and, in case of disputes, to help his clients to resolve disputes amicably, effectively, economically and efficiently. Given the existing realities in the West—where legal scholars either publish or perish, where judicial “brethren” are going through an identity crisis, where law firms are hardly distinguishable from other commercial multinationals, where all sorts of other considerations come before the best interests of the clients—the aforesaid objective tends to prove purely idealistic. But it may be comforting for the few remaining idealists to know that the “legal workers” in China (the Chinese equivalent of a legal profession) uphold these ideals in a very real way. They mean what they say and try to act accordingly.

The Chinese ideal is that law must not be so complex as to be incomprehensible and unmanageable by the man of average intelligence. Where foreign interests are involved, the underlying and overriding principle is “equality and mutual benefit,” as stated in the Constitution of the People's Republic of China. The Chinese see law as an embodiment of sentiments and reason, tempered with the wisdom of practical experience. Chinese sentiments set great store by the qualities of generosity, graciousness and sincerity. Coercion, particularly in trading relationships, is considered to be unnecessarily grating.

Chinese reasoning proceeds from the preservation of the whole in preference to the parts and along the aforesaid principle of equality and mutual benefit. Chinese intellectual history has been relatively unaffected by the pretensions of the “Age of Reason.” The Chinese may have called their country “the Middle Kingdom,” but they have never gone so far as to claim that their values are “universal.” On the other hand, China has lagged behind in science and technology. Chinese law and the Chinese legal system have not undergone any scientific systemization movement, since the Industrial Revolution never really touched shore in China. Commerce was traditionally not the concern of the respectable scholar class in China in any case; under the influence of socialist ideals, commercial activities inside China came to a complete standstill.

The law and the legal system which came into being against the aforesaid background necessarily differ from present-day Western law and any present-day Western legal system. The question is whether the difference is great enough to create insurmountable difficulties. It is my opinion that the said difference is the least of our worries since China has shown awareness of the discrepancy between the stages of development between herself and advanced industrial countries and is willing to adopt current international practice in her economic relations with the rest of the world. This preparedness on the part of China to incorporate modern legal concepts developed through international practice into her own traditional legal system will help to modernize Chinese law sufficiently fast to meet current needs.

The main fabric of the Chinese legal system and the characteristics of the tradition will remain Chinese. Contract terms will continue to be inviolable and good faith will remain basic. Attempts to outsmart an opponent will be frowned upon all round, and will go to the root of the trading or cooperative relationship. Old-fashioned, wholesome attitudes are certainly in vogue in China in legal matters. The ultra-brilliant advocate by Western standards, armed with all the usual Western procedural juggling and courtroom tricks will only

make a fool of himself in China. On the other hand, the down-to-earth marshalling of facts coupled with the client's good reputation will be a great help. The Western theory that the acts of a person and his character are largely distinct does not enjoy the same degree of general acceptance in China as it does in the West. Some may complain that this would mean that the whole man is on trial each time. But it may equally be said that Chinese society is less amoral, and that the Chinese legal system is further away from bankruptcy than its Western equivalent. Although the average Chinese may not be any more "moral" than the average Western man, it remains true that, on the whole, confusion between sophistication and amorality has not reached the same stage of advanced development in China as it has in Western industrialized nations.

### LEGISLATIVE CONTEXT AND APPLICATION

China's preparedness to incorporate into her own traditional legal system modern legal concepts developed through international practice led to the passing on July 1, 1979 of the "Law on Joint Ventures Using Chinese and Foreign Investment."<sup>1</sup> In essence, this law is a declaration by the Government of the People's Republic of China of a new policy, expressed in legal terms, to permit foreign investment in China in joint venture with Chinese interests. This new policy is only one aspect of an overall policy to increase China's participation in international economic cooperation. Hence, the first article of this law begins with the words "With a view to expanding international economic and technological exchange . . ." The rationale behind the policy to expand international economic and technological exchange is the Modernization Movement which is the nation's primary commitment for the present historical period. The fact that this declaration of policy has been expressed in legal terms instead of the previous practice of using governmental directives to implement policies is most significant. It stands as proof of the nation's general commitment to the rule of law and to the development of a modern legal system for commercial matters as well as for the maintenance of order.

The reintroduction of the commercial element into the mainstream of official as well as private activities in China follows upon a theoretical change in the leadership favoring the "observation of the objective principles of economics." The basic argument leading to this theoretical change is that regardless of the social system adopted, there are certain principles of economics which are scientific objective truths: whenever manpower, resources and time are coordinated properly according to these objective principles of economics, the result should be profits. This commercial element must necessarily represent only a limited aspect of the Chinese economy which remains basically a planned economy. However, with each stage of the implementation of the new policy to grant more independent powers to economic units and enterprises in China, the commercial element is bound to grow and leave its imprint in the evolving modern legal system in China.

1. Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment. Adopted July 1, 1979 at the Second Session of the Fifth National People's Congress (reprinted in the appendix to this article).

China's Joint Ventures Law reflects China's full awareness of international practice and provides a very satisfactory framework for economic cooperation between partners from two different social systems. The law provides that when joint ventures are set up in China, the foreign party may be a foreign company or companies, an enterprise or enterprises, any other kind of economic entity or entities, or individual or individuals. However, the Chinese side can only be of the first three-named categories; individual or individuals are not included. This clearly reflects the difference and the similarity between the two distinct systems. In the social system now prevalent in China, Chinese individuals do not and cannot possess wealth in investment because the means of production are subject to either state or collective ownership in China. In many foreign countries, the means of production can be owned by individuals. This is the basic difference.

Similarity lies in the fact that both systems consider investment in enterprises with a view to making profits to be lawful. As pointed out above, China has now committed the whole country to observation of the objective principles of economics, with the firm belief that profits should result when manpower, resources and time are coordinated. China's foreign joint venture partners also hope to maximize profits from their investments. Therefore, there can be absolutely no conflict of interest between the two on the question of profit-maximizing. However, on the Chinese side, besides making profits, there must be some certainty that the joint venture as a whole is beneficial to China's national economy, conducive to China's modernization and does not amount to an infringement on China's sovereignty. These are the normal preoccupations of host countries. The law therefore provides that proposed joint ventures must be subject to approval by the Chinese government and that all the activities of the joint ventures must be in conformity with China's laws, orders and relevant regulations.<sup>2</sup>

To afford the foreign partners appropriate protection, the law provides that "the Chinese government protects the investments, due share of profits and other lawful rights and interests of foreign joint venture partners in and from the joint enterprises set up pursuant to the general Joint Ventures Agreement, contracts and Articles of Constitution approved by the Chinese government."<sup>3</sup> This does not only imply that China will not unlawfully appropriate the foreign partners' properties, but it also means that China will not permit unlawful intervention by other people or organizations. The Penal Law passed at the same Session of the People's Congress as was the Joint Ventures Law clearly shows the importance China places on the protection of public and *private* (my emphasis) property and how determined China is to strengthen its legal system. The Vice-Chairman of the People's Congress, Peng Zhen, in his capacity as Director of the Commission of Legislative Affairs of the National People's Congress Standing Committee, referred to the strong common desire of the people for law and the proper enforcement of the law while explaining the essence of the seven laws before the People's Congress. He said that in order to ensure that "law shall be observed, law shall be strictly enforced, and violation of law shall be under check," the following must be done: (1) education across the board, (2) the establishment of specialist

2. PRC Joint Ventures, Arts. 2 and 3 (1979).

3. *Id.*, Art. 2.

organizations and a strong, professional contingent of law enforcers and (3) exemplary behavior of party members and cadres in close observance of the law to make sure that there will truly be equality before the law. China's Joint Ventures Law is a part of her great and solemn commitment to strengthen and to develop her legal system. This context is more significant and should increase the confidence of prospective foreign investors.

The provision regarding freedom of repatriation of capital, profits and income gives further protection to the foreign joint venture partner.<sup>4</sup> It also shows that China perfectly accepts the difference between the two systems and that China has no intention whatsoever of exporting her own system. In capitalist societies, profits from corporations are distributed to individual shareholders in the form of dividends. There is no restriction on the application of the dividends. In socialist societies, the application of profits from enterprises, after distribution, may be subject to the requirements of the national economy or the country's development plans. Under the now more widespread system of collective ownership in China, as opposed to state ownership, the collective owners may exercise increased power of disposal over the distributed profits. Although the various systems are different in regard to this power of disposal over distributed profits, the fact that the law provides for freedom of repatriation of the foreign investor's profits ensures that his power of disposal over his share of the profits in accordance with capitalist principles will not be affected by socialist principles. This clear provision enables investors from capitalist societies to put away all doubts. They can now be sure that their share of the profits can be brought out of China in an agreed foreign currency and can thereafter be used according to capitalist principles.

The Joint Ventures Law provides that the General Joint Venture Agreement, the contracts and the Articles of Constitution should be submitted to the control of Foreign Investment Commission for approval.<sup>5</sup> Deputy Prime Minister Ku Mu is the Chairman of this Commission. Both the form and the contents of these last-mentioned legal documents are left to the mutual agreement of the parties, as are those of the "business contracts"<sup>6</sup> through which the production and business program of the joint venture shall be implemented as required by the Joint Ventures Law. Since there is, as of yet, no comprehensive code of commercial law in China and few precedents for the parties and their counselors to rely on, the legal documentation calls for some deep thinking. (A partial answer to this problem will be discussed in the section concerning Chinese arbitration.) It is the policy of the Chinese arbitration commissions to "give due consideration to international practice." This provides the philosophical base as well as the implementing machinery to bring about the gradual absorption by way of a kind of "judicial" interpretation into China's own traditional legal system of such modern legal concepts developed through international practice as are from time to time found to be desirable and compatible with Chinese culture and current ideology.

In the absence of a comprehensive commercial code, the contract terms are of paramount importance. Once the contracts are signed and approved in accordance with the provisions of the Joint Ventures Law, they become legally

4. *Id.*, Arts.10 and 11.

5. *Id.*, Art. 3.

6. *Id.*, Art. 7.

binding. The Western concepts of offer and acceptance and the Western preoccupation with consideration and form have not yet gained acceptance in the Chinese legal context. Instead, due execution of the agreement by the parties and official approval thereof are generally prerequisites for validity. In some cases, where approval is not required, due execution alone will render the agreement binding. The application of the seal (not the Common Seal in the Western sense, but an official chop<sup>7</sup> according to Chinese tradition) of the Chinese party, with or without the signature of any responsible person representing that Chinese party, is due execution of the document by the Chinese side. Due execution by the foreign side usually requires the signature of some responsible person.

Besides being a declaration of policy, the Joint Ventures Law also lays down general principles and guidelines. More specific provisions were, however, reserved for a later stage. A set of such specific provisions for a new industrial zone called the Shekou Industrial Zone, situated on the South-Western tip of Kwangtung Province, were promulgated on January 15, 1980.<sup>8</sup>

Kwangtung is one of the two southern provinces (the other one being Fukien) which have been authorized by the Central Government to move one step ahead of the rest of China in implementing the nation's new economic management policies and in absorbing foreign investment. The Shekou Industrial Zone has been authorized by the State Council to be developed by China Merchant's Steam Navigation Company Limited. This company is a very prestigious Chinese company with a long history, incorporated in China, with shareholdings vested in the Ministry of Communications. The Chairman of its board of directors is also China's Minister of Communications. The detailed provisions so far announced follow closely the principles of the Joint Ventures Law. They further provide that the contract period of a joint venture shall be determined by the particular line of business of the venture. The average term is around twenty-five years, renewable by mutual agreement. Other features of the provisions include exemption from import tax on supplies of equipment, construction materials, raw materials and daily necessities to the Shekou Industrial Zone; exemption from export tax on finished and semi-finished export products for foreign markets; multiple visas for technical and management personnel; more precise arrangements and powers regarding labor supply and dismissal; salary levels fixed at a mean between the rest of China and Hong Kong; free remittance of money in any foreign currency to and from Shekou through the banks there; ensured power supply and a declared rate for water cost at twenty percent less than that applied in Hong Kong; industrial land use cost at HK\$2 to HK\$4 per square foot per year; and a three to five years tax holiday after which a corporation profits tax of ten percent is payable. These detailed provisions relating to taxation, land, labor and utility costs and other conditions for joint ventures in the Shekou Industrial Zone announced by China Merchants' Steam Navigation Company Limited's Hong Kong office, with the authority of the State Council, represent the latest developments in investment legislation in China. They are implementing regulations made

7. "Chop" is the current English translation used in Hong Kong for a rubber stamp providing the name of the company and space for the director's signature.

8. China Merchant's Steam Navigation Co., Ltd. of Hong Kong, *Investor's Handbook*, "The Shekou Industrial Zone in Shenzhen" (Jan. 1980).

pursuant to the Joint Ventures Law, but only applicable to the Shekou Industrial Zone. Other implementing regulations applicable to other areas in China will be made separately by the various provinces, municipalities and other administrative units. The detailed provisions applicable to Shekou Industrial Zone further provide that "in case of economic or legal disputes, the parties involved shall endeavor to settle them through friendly consultation. Should consultation be exhausted, the disputes may be settled through conciliation or arbitration by an arbitral body of China or through arbitration by an arbitral body agreed upon by the parties."<sup>9</sup> This is virtually a verbatim repetition of Article 14 of the Joint Ventures Law which states that "disputes arising between the parties to a joint venture which the Board of Directors fails to settle through consultation may be settled through conciliation or arbitration by an arbitral body of China or through arbitration by an arbitral body agreed upon by the parties."

### ARBITRATION AND THE JOINT VENTURES LAW

#### The Jurisprudence of Arbitration in China

Foreign investment in China is a new development which is viewed in China as a branching-out from its foreign trade activities. China's foreign trade activities have established a firm tradition of preferring negotiation, consultation, arbitration and conciliation as the proper procedure for resolving disputes. This preference is deeply-rooted in the Chinese instinctive dislike for coercion, particularly in relationships which are based on the continued goodwill of the parties such as trading and cooperative relationships. Although the existing arbitration law in China is only applicable to disputes arising from foreign trade and maritime matters, it has recently been decided that amendments to enlarge the scope are to include disputes arising from foreign investment<sup>10</sup> and other forms of economic cooperation with foreign parties such as compensation trade and "manufacture by assembly of supplied semi-finished parts." With the increased participation of China in international trade and economic cooperation, the growing importance of arbitration is obvious.

Up to now, China has been reluctant to endorse Western claims of impartiality in regard to Western style "international" arbitration. On the other hand, there has been a great deal of ignorance, misreporting and misunderstanding in the West in regard to Chinese arbitration.

From the Chinese viewpoint, a reasonable objection to Western style "international" arbitration is that the Chinese language (spoken by at least one-quarter of mankind) is at present not one of the languages used in such arbitration proceedings. China's insistence on using the Chinese language in Chinese arbitration will restore the balance in accordance with the universal principle of reciprocity. Furthermore, Western style "international" arbitration is closely linked to the Western legal tradition, the main characteristic of which may be said to be devisive, polarizational and adversary, as opposed to the Chinese ideals of resolving disputes by consultation and conciliation.

Chinese arbitration is provided by China as a procedure of last resort for the settlement in China of any disputes that may arise in relation to her

9. *Id.*, at 15.

10. Wholly-owned foreign investment is also permitted in China. It will, of course, not be subject to the Joint Ventures Law. However, many of the provisions of the Joint Ventures Law may be consulted as a pointer to the conditions under which wholly-owned foreign investment may be permitted.

foreign trade and in relation to salvage, collisions, chartering of vessels, shipping documents and marine insurance. It only applies to arbitration in China. It is "a procedure of last resort" because the arbitration clause almost invariably stipulates that disputes shall first be settled through friendly negotiations and consultation. It is only when settlement cannot be reached that the dispute is referred to arbitration. The question as to what point friendly negotiations and consultation are properly considered to have broken down or to have failed to bring about settlement, thereby justifying the use of arbitration, is a preliminary one. The answer to it requires some knowledge of Chinese arbitration, and an appreciation of the context in which it appears.

In the Chinese arbitration system, friendly negotiations and arbitration form a continuous process: neither should be considered in isolation without reference to the other. Even after a formal written reference to arbitration has been made to the relevant Chinese Arbitration Commission, the initial approach of the Commission is still settlement through friendly negotiations. There are two such Commissions, both under the aegis of the China Council for the Promotion of International Trade (CCPIT). They are the Foreign Trade Arbitration Commission and the Maritime Arbitration Commission. As above mentioned, the scope will soon be enlarged to include foreign investment and other forms of economic cooperation with foreign parties.

Chinese arbitration clauses consist of three varieties: (a) arbitration in China, (b) arbitration in the country of the defendant, and (c) arbitration in a third country. Both the first and the second variants of the clause involves arbitration in China, because if the foreign party is the claimant, the country of the respondent is China. The new Joint Ventures Law promulgated in July 1979 further provides: "Disputes arising between the parties to a joint venture which the Board of Directors fail to settle through consultation may be settled through conciliation or arbitration by an arbitral body of China or through arbitration by an arbitral body agreed upon by the parties."<sup>11</sup>

Very often, it is possible to find a solution satisfactory to both parties. This solution need not be restricted to settling the issues originally raised. It should, however, resolve the dispute in a practical way, and as far as possible, do so by revealing the underlying contradictions. As is true in real life, the points which the parties at first believe to be the issues in dispute very often prove not to be the real issues at all. A similar process of sorting out the real issues takes place in pleadings in the Anglo-American system. This process usually takes considerable time and requires as much expertise as the actual hearing itself. Its importance is obvious. Sometimes the parties manage to reach conciliation through friendly negotiations with the assistance of the Arbitration Commission. This is similar to a settlement after commencement of proceedings or a judgment by consent in Western litigation, with the main difference being that the Arbitration Commissions in China shows more initiative in helping with friendly negotiations, conducting independent investigation into the facts of the case, and exploring possible avenues and formulae of conciliation than a Western court or a Western arbitral tribunal.

China places great emphasis on the educational value of this process of dispute resolution whereby the parties learn to analyze issues more comprehensively and become more ready to appreciate the other party's viewpoint and to grasp the whole situation which affects their respective interests. This is believed to

11. PRC Joint Ventures, Art. 14 (1979).



be a more mature and more constructive approach to dispute resolution and conducive to better relations. Its spirit is the exact opposite of the Western adversary system in which the parties are artificially posed as adversaries, each holding on to his own viewpoint, each attacking the other's, without taking any initiative to resolve the dispute themselves or to go beyond the immediate issues in dispute to arrive at an understanding of the ultimate cause of the disagreement. Such an adversary system is thought to be divisive, passive and unimaginative. The Chinese prefer to conduct their foreign trade and foreign economic relations in an atmosphere relatively free from the confrontation characteristic of the adversary system.

Because traditional Western arbitration is modeled closely on the Western legal process, many underlying legal assumptions have been unconsciously adopted for arbitration, including the adversary system referred to above, the emphasis on the hearing and on the examination of witnesses, the concept that justice is blind in the sense that the tribunal should not take any initiative in seeking the truth beyond the evidence adduced and furthermore, that attempts at conciliation are time-consuming and are in any case no business of the adjudicating tribunal. All these assumptions are open to challenge; a closer look into their history and their validity is overdue. Even in the West, particularly where international elements are involved, the present trend is towards conciliation and mediation.

Contrary to common belief, China is not reluctant to go to arbitration, and does not consider it unfriendly on the part of foreign trading partners to ask for arbitration. In fact, China encourages the use of its arbitration procedure. It is less complicated than involving a third country and it is on the whole less costly than other means of dispute resolution.

China sincerely believes that this system offers a greater guarantee of justice and satisfaction to both parties. There is also an awareness that the West has not developed the necessary confidence to feel secure with Chinese arbitration. Lack of knowledge always breeds distrust. In order to encourage the development of knowledge and to dispel this distrust, China welcomes more interest in this field. China's arbitration hearings are held in open sessions, unless otherwise requested by the parties.

Subject to any objection the parties may have, persons with a genuine interest in the case or in the work of the Arbitration Commission generally (for instance, representatives from the Embassy of the country of the foreign party) are welcome to attend these open sessions and to judge for themselves whether it is a fair hearing.

The basic policy that guides the arbitration work is "independence and initiative." In carrying out this policy, the principle of "equality and mutual benefit" is applied, with due consideration for current international practice. Arbitration hearings in China are held at the seat of the Arbitration Commission, which is in Beijing (Peking). Where necessary, hearings may be held at other places within the Chinese territory. Therefore, there is no reason why a claimant should not request arbitration at Guangzhou (Canton) or in any other part of China.

Records are taken at every session of the proceedings, and these records are signed by the umpire or the sole arbitrator as the case may be. The Arbitration Tribunal may require the parties or their attorneys, witnesses or other persons to sign their names on the records for authentication.

**Procedure For Arbitration**

The procedure for arbitration in China is set out in the respective Provisional Rules of Procedure of the two arbitration commissions.<sup>12</sup> These two arbitration commissions are the Foreign Trade Arbitration Commission and the Maritime Arbitration Commission. This section will generally review the procedures under these commissions.

An application for arbitration need not be in any prescribed form, but it must be in writing, stating the name and address of the claimant and of the respondent, the claim, the facts and evidence upon which the claim is based, the name of an arbitrator chosen by the claimant from among the members of the relevant Arbitration Commission or a statement authorizing the Chairman of the Arbitration Commission to appoint the arbitrator on behalf of the claimant. Original documents relevant to the application or certified duplicates or copies thereof must accompany the application. As many duplicate sets of application and documents as there are respondents should also accompany the original application. These should be sent to the relevant Arbitration Commission in Beijing.

A deposit must also accompany the application for arbitration. The amount of the deposit is equivalent to 0.5 per cent of the amount of the claim in the case of foreign trade arbitration and one per cent in the case of maritime arbitration as payment of costs for arbitration. The maximum actual costs of arbitration for foreign trade disputes is one per cent of the amount of the claim and for maritime disputes, two per cent. This is borne either entirely by the losing party or proportionally by both parties according to the actual circumstances of the case. The losing party may also be required to pay the winning party's costs as a compensation. This party-and-party costs will not in any case exceed five per cent of the award.

Upon receipt of the application, the Arbitration Commission will notify the respondent forthwith and forward to him a duplicate set of the documents. Within fifteen days from the date of receipt of the notice, the respondent must notify the Arbitration Commission either of his choice of an arbitrator or of his authorization to its chairman to appoint one on his behalf. Should the respondent fail to do so within the specified time, the Chairman of the Arbitration Commission shall, upon the request of the claimant, appoint the arbitrator for the respondent. The two arbitrators so chosen or appointed shall appoint an umpire. These three will form the arbitral tribunal. The parties may also elect to have a sole arbitrator by mutual consent. These procedures are more or less standard in arbitration throughout the world.

Parties may be represented by Chinese nationals or citizens of other nations. Foreign nationals who intend to appear at the hearing may have their visa applications expedited with the assistance of the Arbitration Commission. It is therefore advisable to put in a request in this respect along with their application for arbitration.

12. Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade, (adopted March 31, 1956, Fourth Session of the China Council for the Promotion of International Trade); and the Provisional Rules of Procedure of the Maritime Arbitration Commission of the China Council for the Promotion of International Trade, (adopted Jan. 8, 1959, Seventh Session of the China Council for the Promotion of International Trade). Copies of these rules are available from the China Council for the Promotion of International Trade in Beijing.

After receipt of a formal reference, the appropriate arbitration commission plays a more active role. It not only assists in the friendly negotiations, but also analyzes the issues, calls for further information from the parties where necessary, conducts independent investigation into the facts of the case, and explores possible avenues and formulae of conciliation. As more weight is placed on documentary evidence and the results of independent investigation than on deposition, the consideration of the dispute by the arbitration commission in the initial stage and later by the sole arbitrator or the arbitral tribunal, as the case may be, can properly be considered a most important part of the arbitration process.

The procedure of the hearing is informal and consideration is given to the wishes of the party in deciding the procedure. Usually, it is in the form of a conference. A party will never have his case struck out or his claim defeated due to ignorance of the rules of procedure.

An arbitration award in China consists of three parts: the facts of the case, the determination of liability, and the principal part of the award. It is a reasoned award in that it consists of a summary of the findings on the facts and an analysis of the factors which determine liability.

The principal part of the award is read to the parties at the closing session of the hearing. The full award together with the reasons for the decision is made in writing within fifteen days from the date of the reading of the principal part. Awards are final and no appeal for revision before a court of law or any other organization is possible. However, an explanation of the award or reasons of the award may be made if clarification is sought and is found to be necessary or desirable. If the award is not satisfied within the time specified, it will be enforced by the People's Court of the People's Republic of China by motion of the party in whose favor the award has been made. When the dispute is settled before an award is made, a record of the agreement called a "Conciliatory Statement" is kept by the arbitration commission which may also decide what costs are due to it for work done. A conciliatory statement is also enforceable by the People's court.

So far, China has no formal arrangement for reciprocal enforcement of arbitral awards with any foreign state in the form of a treaty or convention. Informal arrangements may exist with some states. From the viewpoint of lawyers, the most interesting aspect of Chinese arbitration must be the opportunities it affords to arrive at an understanding of China's position as to which "international practice" is considered to be binding and which is not. This is of great importance to the progressive development of international trade law. In view of the present lack of a comprehensive code and the scarcity of published works on the subject from China itself, no lawyer with any serious interest in the matter can afford to overlook the immense significance of this opening.

#### **CONCLUSION: COMMITMENT TO LEGAL AWARENESS**

The new economic policies in China have placed the contract system in center stage. Great emphasis is also given to the codification of current law and practice as well as the promulgation of new law to regulate new areas of activities like joint venture in China using Chinese and foreign capital. The inevitable result is a new climate of heightened legal awareness on the part

of Chinese foreign trade officials. Although this is not likely to make the Chinese any more litigious, given their innate abhorrence to confrontation and traditional preference for consultation and conciliation, this new legal awareness will definitely help to establish greater precision in the legal implications of economic relations in China and make the Chinese legal system more acceptable to Western businessmen and their legal counselors.

In this atmosphere of legal awareness, the standing Committee of China's Fifth National People's Congress at its Twelfth Session held on November 26, 1979, passed a resolution to re-affirm the validity of all the laws and regulations made since the founding of the People's Republic of China where the same do not conflict with those passed by the Fifth People's Congress. Such a resolution was deemed necessary due to the wholesale denouncement of law in China during the "Gang of Four" period which had left traces of doubt in the mind of the people as to whether the laws and regulations made since the founding of the People's Republic were still valid. The resolution put all doubts to rest and restored to life many laws and regulations which had to all intents and purposes become dead letters.

## APPENDIX

**LAW OF THE PEOPLE'S REPUBLIC OF CHINA  
ON JOINT VENTURES USING CHINESE AND  
FOREIGN INVESTMENT\***

**ARTICLE 1.** With a view to expanding international economic co-operation and technological exchange, the People's Republic of China permits foreign companies, enterprises, other economic entities or individuals (hereinafter referred to as Foreign Participants) to incorporate themselves, within the territory of the People's Republic of China, into joint ventures with Chinese companies, enterprises or other economic entities (hereinafter referred to as Chinese Participants) on the principle of equality and mutual benefit and subject to authorization by the Chinese government.

**ARTICLE 2.** The Chinese government protects, by the legislation in force, the resources invested by a Foreign Participant in a joint venture and the profits due him pursuant to the agreements, contracts and articles of association authorized by the Chinese government as well as his other lawful rights and interests.

All the activities of a joint venture shall be governed by the laws, decrees and pertinent rules and regulations of the People's Republic of China.

**ARTICLE 3.** A joint venture shall apply to the Foreign Investment Commission of the People's Republic of China for authorization of the agreements and contracts concluded between the parties to the venture and the articles of association of the venture formulated by them, and the Commission shall authorize or reject these documents within three months. When authorized, the joint venture shall register with the General Administration for Industry and Commerce of the People's Republic of China and start operations under license.

**ARTICLE 4.** A joint venture shall take the form of a Limited Liability Company.

In the registered capital of a joint venture, the proportion of the investment contributed by the Foreign Participant(s) shall in general not be less than 25 per cent.

The profits, risks and losses of a joint venture shall be shared by the parties to the venture in proportion to their contributions to the registered capital.

The transfer of one party's share in the registered capital shall be effected only with the consent of the other parties to the venture.

**ARTICLE 5.** Each party to a joint venture may contribute cash, capital goods, industrial property rights, etc. as its investment in the venture.

The technology or equipment contributed by any Foreign Participant as investment shall be truly advanced and appropriate to China's needs. In cases of losses caused by deception through the intentional provision of outdated equipment or technology, compensation shall be paid for the losses.

The investment contributed by a Chinese Participant may include the right to the use of a site provided for the joint venture during the period of its operation. In case such a contribution does not constitute a part of the investment from the Chinese Participant, the joint venture shall pay the Chinese Government for its use.

The various contributions referred to in the present article shall be specified in the contracts concerning the joint venture or in its articles of association, and the value of each contribution (excluding that of the site) shall be ascertained by the parties to the venture through joint assessment.

\*Adopted July 1, 1979 at the Second Session of the Fifth National People's Congress. The above is a semi-official translation of the Joint Ventures Law from the People's Republic of China newsmedia. It has been subsequently reprinted by Wen Wei Po (July, 1979).

**ARTICLE 6.** A joint venture shall have a Board of Directors with a composition stipulated in the contracts and the articles of association after consultation between the parties to the venture, and each director shall be appointed or removed by his own side. The Board of Directors shall have a Chairman appointed by the Chinese Participant and one or two Vice-Chairmen appointed by the Foreign Participant(s). In handling an important problem, the Board of Directors shall reach decision through consultation by the participants on the principle of equality and mutual benefit.

The Board of Directors is empowered to discuss and take action on, pursuant to the provisions of the articles of association of the joint venture, all fundamental issues concerning the venture namely, expansion projects, production and business programmes, the budget, distribution of profits, plans concerning manpower and pay scales, the termination of business, the appointment or hiring of the President, the Vice-President(s), the Chief Engineer, the Treasurer and the Auditors as well as their functions and powers and their remuneration, etc.

The President and Vice-President(s) (or the General Manager and Assistant General Manager(s) in a factory) shall be chosen from the various parties to the joint venture.

Procedures covering the employment and discharge of the workers and staff members of a joint venture shall be stipulated according to law in the agreement or contract concluded between the parties to the venture.

**ARTICLE 7.** The net profit of a joint venture shall be distributed between the parties to the venture in proportion to their respective shares in the registered capital after the payment of a joint venture income tax on its gross profit pursuant to the tax laws of the People's Republic of China and after the deductions therefrom as stipulated in the articles of association of the venture for the reserve funds, the bonus and welfare funds for the workers and staff members and the expansion funds of the venture.

A joint venture equipped with up-to-date technology by world standards may apply for a reduction of or exemption from income tax for the first two to three profit making years.

A foreign participant who re-invests any part of his share of the net profit within Chinese Territory may apply for the restitution of a part of the income taxes paid.

**ARTICLE 8.** A joint venture shall open an account with the Bank of China or a bank approved by the Bank of China.

A joint venture shall conduct its foreign exchange transactions in accordance with the foreign exchange regulations of the People's Republic of China.

A joint venture may, in its business operations, obtain funds from foreign banks directly.

The insurances appropriate to a joint venture shall be furnished by Chinese insurance companies.

**ARTICLE 9.** The production and business programmes of a joint venture shall be filed with the authorities concerned and shall be implemented through business contracts.

In its purchase of required raw and semi-processed materials, fuels, auxiliary equipment, etc., a joint venture should give first priority to Chinese sources, but may also acquire them directly from the world market with its own foreign exchange funds.

A joint venture is encouraged to market its products outside China. It may distribute its export products on foreign markets through direct channels or its associated agencies or China's foreign trade establishments. Its products may also be distributed on the Chinese market.

Wherever necessary, a joint venture may set up affiliated agencies outside China.

**ARTICLE 10.** The net profit which a foreign participant receives as his share after executing his obligations under the pertinent laws and agreements and contracts, the funds he receives at the time when the joint venture terminates or winds up its operations, and his other funds may be remitted abroad through the Bank of China in accordance with the foreign exchange regulations and in the currency or currencies specified in the contracts concerning the joint venture.

A foreign participant shall receive encouragements for depositing in the Bank of China any part of the foreign exchange which he is entitled to remit abroad.

**ARTICLE 11.** The wages, salaries or other legitimate income earned by a foreign worker or staff member of a joint venture, after payment of the personal income tax under the tax laws

of the People's Republic of China, may be remitted abroad through the Bank of China in accordance with the foreign exchange regulations.

**ARTICLE 12.** The contract period of a joint venture may be agreed upon between the parties to the venture according to its particular line of business and circumstances. The period may be extended upon expiration through agreement between the parties, subject to authorization by the Foreign Investment Commission of the People's Republic of China. Any application for such extension shall be made six months before the expiration of the contract.

**ARTICLE 13.** In cases of heavy losses, the failure of any party to a joint venture to execute its obligations under the contracts or the articles of association of the venture, force majeure, etc. prior to the expiration of the contract period of a joint venture, the contract may be terminated before the date of expiration by consultation and agreement between the parties and through authorization by the Foreign Investment Commission of the People's Republic of China and registration with the General Administration for Industry and Commerce. In cases of losses caused by breach of the contract(s) by a party to the venture, the financial responsibility shall be borne by the said party.

**ARTICLE 14.** Disputes arising between the parties to a joint venture which the Board of Directors fails to settle through consultation may be settled through conciliation or arbitration by an arbitral body of China or through arbitration by an arbitral body agreed upon by the parties.

**ARTICLE 15.** The present law comes into force on the date of its promulgation, the power of amendment is vested in the National People's Congress.