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Piercing the Veil of Arbitration Reform in China:

Promises, Pitfalls, Patterns, Prognoses, and Prospects

The promulgation of the China Arbitration Law in 1994 largely reformed and gave shape to the modern Chinese arbitration regulatory framework. However, since then, there has been little legislative improvement in meeting the changing needs. Instead, judicial efforts by China's Supreme People's Court and institutional initiatives by Chinese arbitration commissions have further refined and internationalized the Chinese arbitration system. Recent years have witnessed many changes in the Chinese arbitration landscape, particularly the formation, expansion, and complication of the Chinese arbitration market. This Article first critically examines the current regulatory framework and special features of the Chinese arbitration system, many of which promised in the China Arbitration Law and often referred to as "arbitration with Chinese characteristics." It then analyzes comprehensively arbitral developments of the past decade in order to pierce the veil of arbitration reform in China, highlighting the pitfalls, patterns, prognoses, and prospects. Finally, this Article identifies the "essential" and "highly recommended" ingredients in prospective reform proposals and examines the extent to which such proposals can actually transform China into a favorable international arbitration forum.

INTRODUCTION

Since 1978, when China entered the era of "reform and opening up," the drive toward economic modernization through the policy of attracting foreign investment has been pressing. Over the past three decades, in tandem with increased trade and investment opportunities, China has witnessed a corresponding rise in the number of commercial disputes. It has been noted that among the various ways of settling business disputes in China, arbitration has become a preferred means of resolving trade and investment disputes between Chinese and

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foreign parties.[1] Arbitration therefore plays an increasingly important role in the Chinese economic and legal systems, providing foreign cooperative partners with the confidence and reassurance required to encourage trade and investment.

The promulgation of the China Arbitration Law in 1994 (effective in 1995) largely reforms, and gives shape to, the modern Chinese arbitration regulatory framework. However, there has been little legislative improvement since then in meeting the changing needs over the past two decades. Instead, judicial efforts by China's Supreme People's Court and institutional initiatives by Chinese arbitration commissions have helped further refine and internationalize the Chinese arbitration system. Recent years have seen many changes to the Chinese arbitration landscape, particularly the formation and intensification of competition within the arbitration market in China.

This Article first examines the current regulatory framework and special features of the Chinese arbitration system, often referred to as "arbitration with Chinese characteristics" (Part I). It then probes arbitral developments of the past decade (Part II), highlighting the pitfalls, patterns, prognoses, and prospects of the arbitration reform in China (Part III). Finally, this Article concludes by identifying the "essential" and "highly recommended" ingredients in the prospective reform proposals of the Chinese arbitration system and analyzes the extent to which these proposals can actually transform China into a favorable international arbitration forum (Part IV).

I. ARBITRATION WITH "CHINESE CHARACTERISTICS"

Arbitration in China is marked by a number of distinctive, and even "rigid," features that often catch seasoned practitioners unfamiliar with the system by surprise. The system is often referred to as "arbitration with Chinese characteristics."[2] These "Chinese characteristics" begin with the regulatory framework.

A. The Design and Regulatory Framework

1. Arbitration Law and Other Sources of Regulations

a. Arbitration Law

[1] Weixia Gu, *Arbitration in China*, *in* INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA 77, 78–79 (Shahla F. Ali & Tom Ginsburg eds., 3d ed. 2013).

[2] Gu Weixia, *Preface* to GU WEIXIA, ARBITRATION IN CHINA: REGULATION OF ARBITRATION AGREEMENTS AND PRACTICAL ISSUES, at vii, viii (2012).

China follows the civil law tradition where statutes serve as the primary source of law. In the field of arbitration, the Arbitration Law (AL) was adopted in August 1994 and came into force in September 1995.[3]

The legislation is generally applicable to all arbitrations conducted within China over a wide range of economic disputes on the basis of voluntary agreement to arbitrate. Divided into eight chapters, it deals with the contents of arbitration agreements, the establishment of arbitral tribunals, procedural rules, and means of revocation and enforcement of arbitral awards.[4] The promulgation of the AL was fueled by the rapidly changing economic and legal environment in China in the 1980s and early 1990s, when the outdated domestic arbitration regime hindered the development of commercial arbitration, already increasingly used in China, sparking calls for reform.[5]

One point worth noting is that while the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the "Model Law") was relied on for modernizing China's arbitration regime, the Model Law has never been adopted in China. Academic commentaries show that the Model Law had only served as a guiding reference during the drafting stage of the AL.[6]

b. State Council Regulations

For the purpose of implementing the 1994 AL, China's Central Government, or more specifically the State Council, promulgated several rounds of notices that formed another source of arbitration regulations in China. In particular, these notices served to guide the establishment of Chinese city-based local arbitration commissions, which was provided for under the 1994 AL and took shape only after the AL became effective in 1995.

[3] Zhong hua ren min gong he guo zhong cai fa (中华人民共和国仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), 7 CHINA L. & PRAC. 23 (1994).

[4] *See id.*

[5] Katherine Lynch, *The New Arbitration Law*, 26 H.K.L.J. 104 (1996).

[6] Shengchang Wang, The Globalization of Economy and China's International Arbitration (Oct. 15, 2002) (paper delivered at the Seminar on Globalization and Arbitration in Beijing, sponsored by the International Chamber of Commerce (ICC) and the China International Economic and Trade Arbitration Commission (CIETAC)) (on file with author).

For example, a State Council Notice issued in 1996 (the "1996 Notice")[7] related to the jurisdiction of local arbitration commissions and entitled them to arbitrate foreign-related disputes, a task which, prior to the promulgation of the AL, was monopolized by the China International Economic and Trade Arbitration Commission (CIETAC). By doing so, the "dual-track" division of arbitration commissions in China under the AL on the basis of jurisdiction bifurcation could be diluted.[8] Some local arbitration commissions, such as the Beijing Arbitration Commission (BAC), have since grown rapidly and accepted significant numbers of international cases. Generally, however, foreign parties are reluctant to submit their disputes to locally based arbitral bodies due to those bodies' lack of experience with respect to handling foreign-related arbitrations. International arbitrations are still largely conducted before the CIETAC, which continues to pose practical challenges to the State Council-led blurring-of-jurisdiction motive. The issues concerning the dual-track division and competition between the CIETAC and local arbitration commissions will be further examined in the following subsections.

c. Judicial Interpretations

The Supreme People's Court (SPC) has taken up dual roles as both the highest judicial organ and a de facto rulemaking power-holder in China through publication of judicial interpretations (*sifa jieshi*).[9] The SPC has from time to time formed the view that part of the AL is too vague, and in order to fill the gap, it has issued many judicial interpretations relating to the practice of arbitration. These interpretations have mostly taken the form of "replies" and "notices," and have been given by the SPC as directives to lower-level Chinese courts, to facilitate their handling of specific arbitration cases. These "directives" appeared rather sporad-

[7] Guo wu yuan ban gong ting guan yu guan che shi shi zhong hua ren min gong he guo zhong cai fa xu yao ming que de ji ge wen ti de tong zhi (fa fa (1997) 4 hao) (国务院办公厅关于贯彻实施《中华人民共和国仲裁法》需要明确的几个问题的通知) [Notice of the General Office of the State Council Regarding Some Problems Which Need to Be Clarified for the Implementation of the Arbitration Law of the People's Republic of China] (promulgated by the GENERAL OFFICE OF THE STATE COUNCIL, June 8, 1996, effective June 8, 1996) (Lawinfochina).

[8] Gu, *supra* note 1, at 82.

[9] Zhong hua ren min gong he guo ren min fa yuan zu zhi fa (中华人民共和国人民法院组织法 Chinese law name) [Organic Law of People's Courts of the People's Republic of China], (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1979, effective Jan. 1, 1980, revised in 1983 and 2006), art. 33 <Order No. 59 of the President of the People's Republic of China>. However, the scope of the SPC's interpretative power is not clearly defined between *interpreting law* and *making law*, save for the literal distinction that legislation is the act of making a law, while interpretation is the act or process of ascertaining the meaning of existing laws.

ically until they were most recently consolidated in 2006 in the SPC Interpretation on Certain Issues Concerning the Application of the Arbitration Law (the "2006 SPC Interpretation").[10] The 2006 SPC Interpretation is widely regarded as a prelude to future amendments to the AL. Its contents, which will be further discussed in this Article, are an indicator of the judiciary's attempt to further encourage, in a rather purposeful and liberal manner, the development of arbitration in China in accordance with international norms and standards.

d. Arbitration Commissions Rules

Unlike legislation and judicial interpretations, arbitration commission rules do not carry the force of law under Chinese jurisprudence. However, as the Chinese arbitration system requires that all arbitration cases be conducted in accordance with the rules of the chosen arbitration commission,[11] such rules are broadly regarded as part of the legal framework of arbitration in China governing arbitral proceedings.

As the earliest established arbitration institution in China, the CIETAC has played an irreplaceable role in the Chinese arbitration system. Since its inception in 1956, the CIETAC has amended its rules on eight occasions, with the most recent amendment introduced in January 2015, reflecting the international trend of enhancing flexibility in arbitration procedures.[12] The CIETAC's continuous efforts to attract bigger caseloads and improve competitiveness may also be observed in the development of its own specialized arbitration rules. For instance, the publication of the CIETAC's Arbitration Rules for Financial Disputes is one of the Commission's attempts to expand its jurisdiction to cover a broader range of disputes and to follow the international trend of treating financial disputes separately from general commercial disputes.[13] The China Maritime Arbitration Commission (CMAC), which handles

[10] Zui gao ren min fa yuan guan yu shi yong zhong hua ren min gong he guo zhong cai fa ruo gan wen ti de jie shi (fa shi (2006) 7 hao) (最高人民法院关于适用《中华人民共和国仲裁法》若干问的解释（法释（2006） 7 号) [SPC Interpretation on Certain Issues Concerning the Application of the Arbitration Law (Court Statement No. 7 of 2006)] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Sept. 8, 2006) < Court Statement No. 7 of 2006)>.

[11] Zhong hua ren min gong he guo zhong cai fa (中华人民共和国仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), arts. 16, 18, *reported in* 7 CHINA L. & PRAC. 23 (1994).

[12] The eight revisions date, respectively, to 1988, 1994, 1995, 1998, 2000, 2005, 2012, and 2014. *See* CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION CIETAC ARBITRATION RULES (rev'd Nov. 4, 2014, effective Jan. 1, 2015), http://www.cietac.org/index.php?m=Page&a=index&id=42&l=en.

[13] *See* CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION FINANCIAL DISPUTES ARBITRATION RULES (rev'd Nov. 4, 2014, effective Jan. 1, 2015), http://www.cietac.org/index.php?

maritime arbitration in China, has also revised its rules on several occasions. As with the CIETAC rules, the CMAC's most recently amended rules took effect in January 2015.[14]

Alongside the CIETAC and the CMAC, there are more than 200 city-based local arbitration commissions established as a result of the promulgation of the AL, each of which formulates its own set of arbitration rules. Among them, the BAC, drawing from the experience of both the CIETAC and international arbitral institutions, has been increasingly recognized as a rising star of arbitration rulemaking in China. The BAC's latest set of arbitration rules, featuring more professional and autonomous arbitral procedures, was revised in July 2014, and took effect in April 2015.[15]

e. International Agreements

Finally, international agreements also form part of the regulatory framework of arbitration in China. Pursuant to Chinese jurisprudence, in cases where provisions of the international conventions signed by China are applicable, they will take precedence over counterpart provisions contained in domestic legislation, save for the reservations that China made during accession.[16] With respect to arbitration, China acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[17] in December 1986; the Convention remains the primary source of international regulation for China in the enforcement of foreign and non-domestic arbitral awards.[18]

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[14] *See* CHINA MARITIME ARBITRATION COMMISSION CMAC ARBITRATION RULES (rev'd Nov. 4, 2014, effective Jan. 1, 2015), http://www.cmac-sh.org/en/rules.asp. http://www.cmac.org.cn/index.php?m=Page&a=index&id=282&l=en

[15] BEIJING ARBITRATION COMMISSION ARBITRATION RULES (rev'd Jul. 9, 2014, effective Apr. 1, 2015), http://arbitrator.bjac.org.cn/page/data_dl/bjac_guize_en.pdf [hereinafter BAC ARBITRATION RULES].

[16] Zhong hua ren min gong he guo min fa tong ze (中华人民共和国民法通则) [General Principles of Civil Law of the People's Republic of China], (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 142 <Order No. 37 of the President of the People's Republic of China>.

[17] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 4739 [hereinafter New York Convention].

[18] Zui gao ren min fa yuan guan yu zhi xing wo guo jia ru de cheng ren ji zhi xing wai guo zhong cai cai jue gong yue de tong zhi (fa fa (1987) 5 hao) (最高人民法院关于执行我国加入的《承认及执行外国仲裁裁决公约》的通知（法发（1987）5号) [Decision on China Joining the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Court Issuance No. 5 of 1987)] (adopted by the Standing Comm. Nat'l People's Cong., Dec. 2, 1986, effective Apr. 22, 1987) < No. 5 [1987] of the Supreme People's Court>. China made two reservations during its accession to the New York Convention in 1986. First, the application of the Conven-

2. Dual-Track Mechanism

The Chinese arbitration system adopts a dual-track distinction, under which different procedures and standards of judicial review apply to the domestic and foreign-related arbitration regimes, respectively. Arbitration in China has been clearly developed from these two tracks, with different arbitral procedures for each, and different standards of judicial review applying to each.

While basic laws in China do not provide an explicit definition of the term "foreign-related," a definition may be inferred from article 178 of the Several Opinions on the Implementation of the General Principles of Civil Law, which provides that a foreign element will exist where:

(a) one party or both parties to the contract are foreign entities, foreign legal persons, or stateless persons; or

(b) the subject matter of the contract is located in a foreign country; or

(c) the act which gives rise to, modifies, or extinguishes the rights and obligations under the contract, occurs in a foreign country.[19]

Besides the three criteria above, cases involving parties from Hong Kong, Macau, and Taiwan are broadly referred to as foreign-related. This situation remains unchanged with regard to Hong Kong and Macau in the post-handover period. Thus, an arbitration would be deemed to be "foreign-related" where it relates to disputes arising out of a contract with a foreign element.

Although the AL covers both domestic and foreign arbitration and applies equally to both regimes, there are provisional gaps differentiating the two tracks, effectively giving foreign arbitration a more favorable treatment. Chapter VII (articles 65–73) of the AL specifically regulates the foreign-related track and prescribes a series of privileges exclusively reserved to

tion in China must be based on "reciprocity," i.e., where a country is not a member state to the New York Convention, for recognition and enforcement of arbitral awards in China, parties will have to rely on relevant judicial assistance agreements which China has entered into with the relevant country or region. Second, the arbitral award seeking enforcement in China must arise out of a "commercial" dispute, with the exception of investment disputes between foreign investors and the host nation which receives the investment. *See* Gu, *supra* note 1, at 85–86.

[19] Zui gao ren min fa yuan guan yu guan che zhi xing zhong hua ren min gong he guo min fa tong ze ruo gan wen ti de yi jian (最高人民法院关于贯彻执行《中华人民共和国民法通则》若干问题的意见) [Several Opinions on the Implementation of the General Principles of Civil Law] (adopted by the Sup. People's Ct., Jan. 26, 1988, effective Apr. 2, 1988), art. 178, CLI.3.3689(EN) (translation by the author).

foreign-related arbitrations, including greater freedom enjoyed by foreign-related arbitration commissions when deciding upon their own organizational structure,[20] more flexible and user-friendly rules governing the application for interim measures of protection, etc. [21] Moreover, Chapter VII of the AL also provides less stringent qualification requirements for foreigners applying to serve as arbitrators in China.

The most significant disparity between the two tracks lies in the enforcement of arbitral awards. While the grounds for the exercise of judicial supervision in setting aside, or denying the enforcement of, foreign and foreign-related arbitral awards in China, in line with Article V(2) of the New York Convention and international practice, are limited to procedural grounds,[22] the review of domestic awards involves even substantive matters, such as effects of the evidence on which the award is based and mistakes in application of the law.[23] The broad power held by the courts to "refuse enforcement" of domestic arbitral awards has, however, been narrowed with the most recent amendments to China's Civil Procedure Law (CPL), effective on January 1, 2013.[24] Under the most recent CPL amendments, "incorrect application of the law" was removed as a ground for refusing enforcement of domestic awards, such that the substantive aspects of the review are now curbed.[25] While substantive

[20] Pursuant to article 66 of the AL, there is no exact limit for the number of members on a foreign-related arbitration commission. In contrast, article 12 limits the number of members on a local arbitration commission to sixteen. Zhong hua ren min gong he guo zhong cai fa (中华人民共和国仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 66, *reported in* 7 CHINA L. & PRAC. 23 (1994).

[21] The relevant rules for domestic arbitrations are stipulated in article 46 of the AL, while that for foreign-related arbitrations are in article 68. *Id.*

[22] Arbitration Law, Aug. 31, 1994, arts. 70–71 (referring to Zhong hua ren min gong he gong min shi su song fa (中华人民共和国民事诉讼法) [Civil Procedure Law] (adopted by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991), art. 260(1), <Order No. 44 of the President of the People's Republic of China >.

[23] *Id.* art. 58.

[24] Within the dual-track enforcement for domestic and foreign-related arbitral awards, there seems to be further bifurcation in the domestic track. Article 58 of the Arbitration Law provides for grounds to "set aside" (*chexiao*) a domestic arbitral award, while article 213 of the pre-amended Civil Procedure Law provides for grounds of "refusing to enforce" (*buyu zhixing*) a domestic arbitral award. The latter ground, which includes both evidentiary-related grounds and the ground of incorrect application of the law, was broader than the former prior to the amendments.

[25] Zhong hua ren min gong he guo min shi su song fa (2012 xiu zheng) (中华人民共和国民事诉讼法（2012修正）) [Civil Procedure Law (2012 Amendment)] (adopted by the Standing Comm. Nat'l People's Cong., Aug.

grounds relating to the correctness of evidence still remain, the broad ground of "insufficiency of the main evidence" was replaced by two grounds of "fabrication" and "withholding of main evidence,"[26] both of which carry higher standards of burden of proof than the previous "insufficiency" ground. In narrowing down the substantive power of the courts in judicial review of domestic arbitration, the 2013 CPL amendments are praiseworthy as they align the power of the courts to "refuse enforcement" (*buyu zhixing*) with their power to "set aside" (*chexiao*) domestic awards under the AL;[27] the reform has been generally welcomed by arbitration scholars and practitioners. However, as substantive grounds are still available for review of domestic arbitral awards, unequal treatment still exists with respect to the two tracks.

Apart from the inequality in the grounds of review, the SPC has further introduced a "pre-reporting system" in the procedure of review, which exclusively caters to the enforcement of foreign and foreign-related arbitral awards.[28] This system requires that only after the SPC has confirmed that the foreign and foreign-related arbitral awards can be denied enforcementmay lower-level courts refuse recognition or enforcement of foreign-related and foreign arbitral agreements and awards in China.[29] Accordingly, a *negative* enforcement ruling made

31, 2012, effective Jan. 1, 2013), art. 237(2), < Order No. 59 of the President of the People's Republic of China >.

[26] *Id.* The two new grounds under the amended CPL are "the evidence on which an arbitration case is adjudicated is forged" and "the opposing party withholds any evidence from the arbitral institution, which suffices to affect the fairness of the awards."

[27] *Id.*

[28] Zui gao ren min fa yuan guan yu ren min fa yuan chu li yu she wai zhong cai ji wai guo zhong cai shi xiang you guan wen ti de tong zhi (fa fa (1995) 18 hao) (最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知（法发（1995）8 号) [SPC Notice on Some Issues Concerning Foreign Arbitration and Arbitration in Foreign Countries (Court Issuance No. 18 of 1995)] (promulgated by the Sup. People's Ct., Aug. 28, 1995, effective Aug. 28, 1995) <Court Issuance No. 18 of 1995>; Zui gao ren min fa yuan guan yu cheng ren he zhi xing wai guo zhong cai cai jue shou fei ji shen cha qi xian wen ti de gui ding (fa shi (1998) 28 hao) (最高人民法院关于承认和执行外国仲裁裁决收费及审查期限问题的规定（法释（1998）28 号) [SPC Notice on the Fee and Time Limit of Recognition and Enforcement of Foreign Arbitration Awards (Court Explanation No. 28 of 1998)] (promulgated by the Sup. People's Ct., Oct. 21, 1998, effective Nov. 21, 1998) < Court Explanation No. 28 of 1998>; Zui gao ren min fa yuan guan yu ren min fa yuan che xiao she wai zhong cai cai jue you guan shi xiang de tong zhi (fa (1998) 40 hao) (最高人民法院关于人民法院撤销涉外仲裁裁决有关事项的通知（法（1998）40 号) [SPC Notice on Some Issues Concerning Setting Aside Arbitration Awards Related to Foreign Elements by the People's Court (Court Issuance No. 40 of 1998)] (promulgated by the Sup. People's Ct., Apr. 23, 1998, effective Apr. 23, 1998) < Court Issuance No. 40 of 1998>.

[29] *See* sources cited *supra* note 28

by the courts at the lower level, but not a positive one, must be subject to "pyramidal scrutiny" by the higher level. The "negative ruling" by the mid-level judiciary will even be reported all the way to the highest judiciary (i.e. SPC). As such, a refusal or delay in handling enforcement matters of foreign-related or foreign arbitration would be deemed exceptional rather than usual. The "pre-reporting system" aims to prevent local protectionist influences over arbitration enforcement and to improve China's image in international arbitration where the SPC has the final control over non-domestic arbitration review.[30] On the other hand, the scheme has been criticized as having overlooked the interests of domestic arbitration and even aggravating the dual-track inequality.[31]

In terms of arbitration institutions, there were two different types of arbitration commissions catering to the two tracks. As discussed earlier, foreign-related arbitration cases used to be monopolized by the CIETAC and the CMAC until the jurisdiction was merged under the 1996 State Council Notice. Hence, there is no longer a jurisdictional bifurcation predicated on the two types of institutions. However, in practice, it is still difficult for local Chinese arbitration commissions to compete with the CIETAC, which has accumulated much experience and expertise over the years in handling sophisticated international commercial arbitration matters. The competition among various arbitration institutions in China will be further investigated in the following Part II.C.

B. The Arbitration Institution System

These "Chinese characteristics" also include the institution-monopolized framework, where only institutional arbitration is allowed in China.

1. Institution Arbitration Only

Articles 16 and 18 of the AL require that an arbitration agreement contain a designated arbitration institution, otherwise it is invalid.[32] As such, an arbitration agreement submitting disputes to ad hoc arbitration would not be valid in China. Relatedly, an award made through ad hoc arbitration would not be enforceable in China following an invalid arbitration agreement under articles 58, 63, 70, and 71 of the AL. In practice, aside from legal rigidities, there have been cases where the Chinese judiciary struck down arbitration agreements providing

[30] Wang Shengchang, "The Arbitration Agreement and Its Validity Determination" (*Zhongcai xieyi ji qi xiaoli queding*), in SYMPOSIUM ESSAYS ON ECONOMIC AND TRADE ARBITRATION BETWEEN THE TAIWAN STRAITS 39 (CIETAC ed., 2001). (China Law Press, 2001), pp. 3-40, at 39.

[31] Gu, *supra* note 1, at 118.

[32] Arbitration Law, Aug. 31, 1994, arts. 16, 18.

for ad hoc arbitration in China, for example, the SPC's ruling in *People's Insurance Company of China, Guangzhou v. Guanghope Power* in 2003.[33]

An issue worth noting is whether arbitrations conducted by foreign arbitration institutions seated in China are permitted or prohibited, as the Chinese legislature has not explicitly stated its stance on such practice in the AL.[34] In this respect, for the establishment of arbitration commissions in China, Chapter II of the AL makes it clear that commissions are required to be organized by local people's governments, registered with local departments of justice, conform to a number of constitutional requirements, and be subject to supervision by the China Arbitration Association.[35] Chapter VII of the AL also provides for foreign-related arbitration commissions in China to be established by the China Chamber of International Commerce, although their organization must also conform to the requirements set out in Chapter II referred to above.[36] Accordingly, it is difficult to see how foreign arbitral bodies can be squeezed comfortably, if at all, into the framework constructed by these provisions. The issue has been much debated, with the concentration on whether an arbitration following the Rules of International Chamber of Commerce Court of Arbitration (often referred to as "ICC arbitration") can be lawfully conducted within China and produce an enforceable award.[37] Practically speaking, arbitration agreements providing for ICC arbitration seated in China have been declared void by Chinese courts, for example, the Wuxi Intermediate People's Court's ruling in *Züblin International v. Wuxi Woco-Tongyong Rubber Engineering* in 2006.[38] Hence,

[33] Zhong guo ren min bao xian gong si guang dong sheng fen gong si yu guang dong guang he dian li you xian gong si deng bao xian he tong jiu fen an (中国人民保险公司广东省分公司与广东光合电力有限公司等保险合同纠纷案) [People's Ins. Co. of China, Guangzhou v. Guanghope Power et al.], <Min Si Zhong Zi] No. 29 of 2003 （民四仲字（2003）第 29 号）(Sup. People's Ct. Oct. 31, 2003); cited in Daniel R. Fung and Wang Sheng Cheng, Arbitration in China: A Practical Guide (Sweet & Maxwell, 2004), para. 2-18.

[34] "Conducting arbitration" in this context means to choose China as the seat of arbitration, regardless of whether the hearings take place in China.

[35] Arbitration Law, Aug. 31, 1994, art. 15.

[36] *Id.* art. 65.

[37] *See* discussions on "ICC Arbitration in China" in *Roundtable on Arbitration and Conciliation Concerning China*, *in* NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND: ICCA CONGRESS SERIES NO. 12, at 19 (Albert Jan van den Berg ed., 2005).

[38] De guo xu pu lin guo ji you xian ze ren gong si yu wu xi wo ke tong yong gong cheng xiang jiao you xian gong si shen qing que ren zhong cai xie yi xiao li an (德国旭普林国际有限责任公司与无锡沃可通用工程橡胶有限公司申请确认仲裁协议效力案) [Züblin International GmbH v. Wuxi Woco-Tongyong Rubber Engineering Co.], (Wuxi Intermediate People's Court, July 19, 2006), *cited in* Nadia Darwazeh & Friven Yeoh,

the requisite element of a "designated arbitration institution" under the AL was traditionally deemed to encompass only Chinese arbitration commissions until it was most recently relaxed through a couple of cases,[39] the significance of which will be discussed below in relation to the issue of foreign institutional arbitration seated in China.

2. Proliferation of Arbitration Commissions and the Quest for Their Independence

Another controversial issue in the Chinese arbitration system is the proliferation of local arbitration commissions and the associated quest for their independence. The promulgation of the AL has impacted the arbitration sector (and industry) in several ways, among which there are two most significant ways.

First, according to article 10(1) of the AL, arbitration commissions may be established in any Chinese city as long as the city can be divided into districts in an administrative sense. As a result, arbitration commissions mushroomed across the nation following the promulgation of the AL. For example, both the BAC and the Shanghai Arbitration Commission (SAC) were established in September 1995; the Hangzhou Arbitration Commission was established in August 1996, while the Wuhan Arbitration Commission was set up in 1997.[40] The list keeps expanding, and indeed, in tandem with the urbanization wave in China in the past two decades, accompanied by a growing competition among Chinese cities, there is a rising trend in the establishment of city-based local arbitration commissions, the total number of which is still growing in recent years. In 2012, there were a total of 219 arbitration commissions throughout China;[41] the number increased to 225 in 2013,[42] 235 in 2014,[43] and to as many as 244 in 2015.[44] The widespread local arbitration commissions face, however, a certain amount of criticism. Many of them actually cater to administrative needs instead of satisfying the actual market demand for commercial dispute resolution. Hence, these commissions may not

Recognition and Enforcement of Awards Under the New York Convention: China and Hong Kong Perspectives, 6 J. INT'L ARB. 837, 841–42 (2008).

[39] The query as to whether ICC arbitration seated in China can produce valid and enforceable awards in China has been revisited by some recent judgments. See discussion *infra* Part II.A.2.

[40] See the official websites of the Beijing, Shanghai, Hangzhou, and Wuhan Arbitration Commissions.

[41] Song Lianbin et al., *Annual Review of Commercial Arbitration*, *in* COMMERCIAL DISPUTE RESOLUTION IN CHINA: AN ANNUAL REVIEW AND PREVIEW 1, 2 (Beijing Arbitration Commission Institute of Advanced Legal Studies ed., 2013).

[42] Song Lianbin, Shen Hongyu & Xiao Fang, *supra* note 42, at 1, 1 (2014).

[43] Song Lianbin, Yang Ling & Chen Xijia, *supra* note 42, at 1, 1 (2015).

[44] Song Lianbin, Fu Panfeng & Chen Xijia, *supra* note 42, at 1, 1 (2016).

have a sufficient caseload to support their operation, facing the reality of "looking for rice to cook."[45] The insufficient caseload of quite a few local arbitration commissions negatively influences their independence and competitiveness, as will be further examined in this Article.

Second, while the AL intended to cultivate the independence of Chinese arbitration commissions, there remains a gap between the legislative objective and the practical reality. Prior to the promulgation of the AL, domestic arbitration in China was essentially a system of administration adjudication. Established within the administrative bodies and following organic administrative rules, the then domestic arbitration commissions were in fact administrative agencies affiliated with, and subordinate to, their relevant superiors in the administrative ranks.[46] The lack of independence of the domestic arbitration system not only reduced work efficiency, but also compromised the confidence of public and foreign investors in arbitration as a means of commercial dispute resolution. The Chinese legislature recognized the problem of administrative encroachment on domestic arbitration commissions, and, in addition to legislatively fostering the mushrooming of city-based local arbitration commissions in order to cater to the market economy and increase the commercial caseload, it promulgated the AL with the aim of boosting the independence of these commissions. Yet, recent in-depth investigations and empirical studies show that the reality does not always live up to the AL's objectives and expectations. The quest for independence of local arbitration commissions newly formed after the promulgation of the AL is therefore put into question.

Articles 8 and 14 of the AL state that arbitration in China should be conducted in accordance with laws and independently, without interference from government, social organizations, or individuals. Unfortunately, the lack of specific implementation rules in the legislation safeguarding the "independence" of arbitration commissions leaves room for ancillary rules which may carry opposite effects. In accordance with a State Council notice in 1995,[47] the establishment and the operation of local arbitration commissions in China are to be supervised by the local government's legislative affairs office where the commission is located and registered.[48] The local legislative affairs office, however, becomes the leading department,

[45] GU, *supra* note 2, at 107.

[46] *Id.* at 102–08.

[47] As previously discussed, State Council notices are deemed to be an importance source of regulation in the Chinese arbitration system.

[48] Guo wu yuan ban gong ting guan yu jin yi bu zuo hao chong xin zu jian zhong cai ji gou gong zuo de tong zhi (guo ban fa (1995) 38 hao) (国务院办公厅关于进一步做好重新组建仲裁机构工作的通知（国办发（1995）38 号) [Notice on Furthering the Work of Restructuring the Arbitration Institutions (State Council General Office Issuance No. 38 of 1995)] (promulgated by the General Office of the St. Council, May 22, 1995,

deciding on staffing and other important matters of development of the respective arbitration commission.[49] As a result, the majority of leading roles in local arbitration commissions is assumed by local government officials. In this respect, two national surveys and empirical studies were conducted by the BAC in 2006 and 2007. The 2006 survey showed that 73.9% of the personnel of the ninety-eight local arbitration commissions interviewed were hired by the administrative organ; and the 2007 survey, which targeted seventy-three local arbitration commissions, found that 69.3% of the staff were associated with the local government.[50] The AL requirement that legal and economic trade professionals should make up no less than two thirds of the members of an arbitration commission is seldom followed.[51] Against this backdrop, whether a local arbitral commission can operate independently is largely an issue of the local administrative attitude towards arbitration. In this respect, the BAC benefits greatly from the "non-interference" approach by the Beijing municipal government which puts forward the BAC as a rising star on the Chinese arbitration market.[52]

The source of finance is another important determinant of a commission's independence. Although under the present system not all arbitration commissions are financially sponsored by the local state treasury,[53] it does not necessarily follow that such commissions are financially independent. For those local arbitration commissions that can sustain themselves by making satisfactory profits from the collection of arbitral service fees, the profits earned may

effective May 22, 1995) < State Council General Office Issuance No. 38 of 1995>.

[49] Hongsong Wang, *Existing Problems of the Arbitration Law and Its Reform Suggestions*, 2 ARB. BEIJING 21 (2005) 52.

[50] Chen Fuyong (陈福勇), *Wo guo zhong cai ji gou xian zhuang shi zheng yan jiu* (我国仲裁机构现状实证研究) [*Empirical Studies into Arbitration Commissions in China*], 2 FA XUE YAN JIU (ER QI) (《法学研究》第二期) [LEGAL STUD.] 81 (2009), at 85-86.

[51] *Id.*

[52] Beijing Arbitration Commission (北京仲裁委员会), *Bei jing zhong cai wei yuan hui 2013 nian gong zuo zong jie* (北京仲裁委员会 2013 年工作总结) [*Working Report of the Beijing Arbitration Commissions in 2013*], http://www.bjac.org.cn/page/gybh/sznzj.html http://www.bjac.org.cn/page/gybh/2013zj.html (last visited Oct. 24, 2017).

[53] There are different ways of classifying institutions. For example, for-profit and nonprofit institutions, administrative and non-administrative institutions. *See* She hui tuan ti deng ji guan li tiao lie (社会团体登记管理条例) [Regulation on Registration and Administration of Social Organizations] (promulgated by the St. Council, Oct. 25, 1998, effective Oct. 25, 1998), art. 2, <Order No. 250 of the State Council of the People's Republic of China>. Arbitration commissions under the cap of "institutions (*shiye danwei*)" are financially sponsored by the state treasury.

still undergo administrative scrutiny. As for local commissions that are not self-sufficient but need to rely on the financial support of local governments for caseload and survival, administrative interference is more evident.[54]

The above discussion highlights two challenges faced by the local arbitration commissions in China in their quest for independence. On the one hand, the effect of the legislative reform is often limited by the lack of detailed implementing rules. On the other hand, in light of a long history of administrative encroachment in the arbitration industry (particularly domestic arbitration) prior to the AL, there is a limited extent to which legislative reforms may improve the way local arbitration commissions and stakeholders are accustomed to acting in practice. Nonetheless, it is encouraging to see that some better-developed local arbitral commissions have taken the initiative to address the problem, with the hope of winning the confidence and recognition of both national and international communities. As outlined above, thanks to the liberal attitude of the Beijing municipal government, the BAC had by and large achieved independence by 2006.[55] The BAC has further retained a professional and academic presence in its management committee. Even after several rounds of changes to the management committee, this feature is still well maintained.[56] The BAC's experience will be further discussed in the Part IV.B of the Article.

3. Panel Arbitrator System: Appointment, Qualifications, and Performance

As has been reiterated, a distinctive feature of the Chinese arbitration system is that it is institution based. In fact, not only is there a requirement of having a designated arbitration commission in the arbitration agreement, but the appointment of arbitrators in China is also closely tied in with this institutional distinction. Under the panel arbitrator system in China, instead of enjoying full freedom in deciding on the criteria and the rules of appointment of the prospective arbitrators (as international arbitration norms would prescribe),[57] parties in China are restricted to appointing arbitrators from a panel list maintained by the relevant arbitration commission which administers the case.[58]

[54] GU, *supra* note 2, at 106–07.

[55] Beijing Arbitration Commission, *supra* note 53.

[56] *Id.*

[57] Arthur L. Marriott, *Some Brief Observations on the Consultation of the Arbitral Tribunal*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, ICCA SERIES NO. 9, at 320, 324–25 (Albert Jan van den Berg ed., 1999).

[58] Though the panel system is not expressly provided for in the Arbitration Law, it may be inferred from articles 11 and 13 of the AL. *See* GU WEIXIA, ARBITRATION IN CHINA: REGULATION OF ARBITRATION AGREEMENTS

The panel system in arbitrator appointment has been criticized as seriously infringing upon party autonomy and denting confidence in the impartiality of Chinese arbitration. This is particularly detrimental given the resilience of personal relations and networks (*guanxi*) existing within the operation of the closed-panel arbitral tribunal.[59] As parties are obliged to choose arbitrators from the panel list, personal relations within the chosen tribunal may be delicate since most of the panel arbitrators are drawn from among internal staff members of the administering arbitration commission or government officials who are acquainted with one another and live in the same local community.[60] Staff and official arbitrators, afraid of breaking personal ties, tend to accommodate the "amicable" majority opinion within the tribunal.[61] The performance as well as the impartiality of the arbitrators under the panel system are therefore compromised under the panel arbitrator system.

As for the qualifications of arbitrators, there are requirements both at the legislative level (set by the AL) and the institutional level (set by each individual arbitration commission). At the legislative level, which applies universally across the nation, article 13 of the AL sets forth some general moral and professional prerequisites for becoming an arbitrator in China: (a) An arbitrator must be a morally unimpeachable person who is regarded as upright and impartial by the public; (b) He/she must have sufficient number of years of expertise in some special area such as law or trade and economics, with "expertise" meaning at least eight years of work experience as a staff member on an arbitration commission, as a lawyer or judge, or possessing a senior professional title in a law school or in the field of economics and trade.[62]

Comparative studies show that China is among the few jurisdictions in the world that set a high level of professional qualifications of arbitrators on behalf of the appointing parties.[63] On the other hand, the appointment of foreign arbitrators is not subject to article 13 restrictions on "expertise" and "established years," and there are no specific qualification required

AND PRACTICAL ISSUES 124–25 (2012).

[59] GU, *supra* note 2, at 131–33, 136–41.

[60] *Id*. at 142–48.

[61] *Id. See also* Gu, supra note 1, at 107.

[62] Zhong hua ren min gong he guo zhong cai fa (中华人民共和国仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 13, *reported in* 7 CHINA L. & PRAC. 23 (1994).

[63] For example, to be an arbitrator in Taiwan, candidates must practice as a lawyer, judge, or accountant for more than five years. Article 6 of the Taiwan Arbitration Act (1998), available at http://www.arbitration.org.tw/law01-en.php (accessed Oct. 24, 2017)

of foreigners (including permanent residents of Hong Kong, Macau, and Taiwan[64]) to serve as arbitrators in China.[65] Compared to domestic appointments, the criteria for appointment of foreign arbitrators are thus more relaxed. It is believed that, as in the case of the dual-track division where more favorable treatment is reserved to the foreign-related track, the qualifications of arbitrators on different tracks are also designed for the purpose of facilitating internationalization of China's foreign-related arbitrations.[66] At the institutional level, each individual arbitral commission, on the basis of the AL requirements, then further develops its own qualifications for appointing arbitrators. As such, there is no uniform standard for recruiting arbitrators among the hundreds of arbitration commissions across the country. Empirical studies show that the BAC's panel list is different from that of the CIETAC, which is in turn different from those of other leading local arbitration commissions in the country such as the Shanghai, Shenzhen, Guangzhou, and Wuhan Arbitration Commissions.[67] Echoing the institutional feature of the Chinese arbitration system, the AL requirements are just minimum standards, leaving the final criteria of appointment of arbitrators for the individual arbitration commissions to decide.

C. Relationship with the Court

While arbitration commissions have paramount importance due to the institution-based system of Chinese arbitration, the role that courts play in the Chinese arbitration system is far from negligible for the following reasons. First, as mentioned earlier, courts, in particular the SPC, have the power to issue judicial interpretations, which form an important source of arbitration regulations in China. The significance of these judicial interpretations in enhancing and reforming the Chinese arbitration system will be further discussed below in Part II.B. Second, courts play what some authors term a "supportive" role toward arbitration.[68] They possess the sole power to grant and enforce interim measures of protection to assist arbitral proceedings in China, which include property and evidence preservation orders upon party's and/or arbitral tribunal's request.[69] Last but not least, courts play a "supervisory" role in arbitration. They exercise a final check over arbitral jurisdiction through ruling on whether the ar-

[64] Hong Kong-, Macau-, and Taiwan-based arbitrators are considered foreign arbitrators, and cases involving elements from these three jurisdictions are considered foreign-related cases.

[65] Arbitration Law, Aug. 31, 1994, art. 67.

[66] Gu, *supra* note 1, at 104–05.

[67] GU, *supra* note 2, at 126–31.

[68] For example, see JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA ¶¶ 98–99 (2d ed. 2008).

[69] Arbitration Law, Aug. 31, 1994, art. 68.

bitration agreement or clause is existent or valid.[70] More powerfully, courts scrutinize arbitral awards. The heavier standard of scrutiny applied by Chinese courts in reviewing domestic arbitral awards, as compared to foreign-related awards, has been highlighted previously in this Article.

II. RECENT REFORMS IN CONTEXT

For the past decade (2006–2016), reforms of the Chinese arbitration system have been carried out mainly through two channels: (a) judicial initiatives and (b) competition among arbitration commissions in the arbitration market. Furthermore, there is great need to reform the AL.

A. Model Law Impact and Legislative Reform

As previously mentioned, the Model Law has never been adopted in China, although the 1985 version of the Model Law served as a guiding reference during the drafting stage of the AL in 1994. As an apparent obstacle to the Chinese arbitration system and its development, the AL has proved unable to cope with practical needs. Legislative reforms have been proposed to remedy the regulatory defects. It is apparent that although the appeal for reform has been strong over the past decade (2006–2016), no definite timetable has been set in China's national legislative agenda for revisions.[71]

It seems that now the conditions are ripe for a legislative reform to take place. First, after more than two decades of practice under the AL, positive and negative lessons can been drawn from the experience of both the CIETAC and other leading local arbitration commissions such as the BAC.[72] Second, SPC judicial interpretations of the AL and the SPC's reforms of the judiciary over the past few decades have prepared the courts to embrace a more pro-arbitration approach.[73] Last but not the least, there has been a vigorous growth in arbitra-

[70] *Id.* arts. 20, 26.

[71] *See* Zui gao ren min fa yuan guan yu shi yong zhong hua ren min gong he guo zhong cai fa ruo gan wen ti de jie shi (最高人民法院关于适用《中华人民共和国仲裁法》若干问题的解释) [Interpretation of the SPC Concerning Some Issues on Application of the Arbitration Law of the People's Republic of China] (promulgated by the Sup. People's Ct., Aug. 23, 2006, effective Sep. 8, 2006) <Interpretation No. 7 [2006] of the Supreme People's Court> (embarking on a nation-wide appeal for the legislative reform of the arbitration law in China) (*see* Part II.B.1). Unfortunately, thus far, there have only been updates to the 2013 Civil Procedure Law with respect to judicial review over arbitral awards, as discussed above.

[72] See discussion *infra* Part II.C.

[73] The SPC judicial interpretations of the AL will be examined in Part II.B below.

tion talents, scholars, and professionals in China, culminating in the formation of a strong arbitration community.[74] Details of the legislative reform will be further analyzed in Part IV.A.

B. Judicial Support over the Past Decade

1. Judicial Interpretation of the Arbitration Law in 2006

One aspect of judicial initiatives on arbitration is the issuance of judicial interpretations by courts, most notably, the 2006 Interpretation on Certain Issues Concerning the Application of the Arbitration Law (the "2006 SPC Interpretation"). This judicial interpretation, issued on August 23, 2006, is the most recent, most comprehensive, and most systematic attempt by the SPC to codify its past judicial opinions on aspects of arbitral practice in China that are unmentioned or unclear in the AL.[75]

Most noticeably, parties are given greater drafting autonomy, where most of the drafting pathologies involving "ambiguous and multiple arbitration commissions" would be deemed remediable.[76] For example, the parties' choice of institutional arbitration rules is considered as their selection of the arbitral institution that is to administer those chosen arbitration rules.[77] As such, the new practice guides have enjoyed significant support by the highest Chinese judiciary to arbitration. It is worth noting, however, that, prior to the issuance of the 2006 SPC Interpretation, a more liberal interpretative technique had been proposed in its draft provisions (the "SPC Draft Provisions") in 2004.[78] Most "liberal" of all was its article 27,

[74] Since its inception in 2004, the China Academy for Arbitration Law has become the leading forum for bringing together arbitration talents and professionals throughout China. For more information, see Zhong guo zhong cai fa xue yan jiu hui (中国仲裁法学研究会) [China Academy of Arbitration Law], http://www.arbitration.org.cn/about/index.jhtml (last visited Oct 24. 2017).

[75] For a detailed overview of the 2006 SPC Interpretation, see GU, *supra* note 2, at 74–83.

[76] Zui gao ren min fa yuan guan yu shi yong zhong hua ren min gong he guo zhong cai fa ruo gan wen ti de jie shi (fa shi (2006) 7 hao) (最高人民法院关于适用《中华人民共和国仲裁法》若干问题的解释（法释（2006）7号) [SPC Interpretation on Certain Issues Concerning the Application of the Arbitration Law (Court Statement No. 7 of 2006)] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Sept. 8, 2006), arts. 1–9, <Interpretation No. 7 [2006] of the Supreme People's Court>.

[77] *Id*. art. 4.

[78] Guan yu shi yong zhong hua ren min gong he guo zhong cai fa ruo gan wen ti de jie shi (zheng qiu yi jian gao) (关于适用《中华人民共和国仲裁法》若干问题的解释（征求意见稿）) [Interpretations to Several Issues on the Application of the China Arbitration Law (Draft Provisions for Opinion Solicitation)] (promulgated by the Sup. People's Ct., July 22, 2004) available at http://old.chinacourt.org/public/detail.php?id=124300 (accessed Oct 24. 2017)

which allowed ad hoc arbitration agreements in China if both parties to the agreement are nationals of member states of the 1958 New York Convention, and neither country prohibits the practice of ad hoc arbitration.[79] The provision was considered restrictive in that ad hoc arbitration agreements between a Chinese party and a foreign party may still be excluded. However, the potential impact of the article would be far-reaching, that being the possible opening up of ad hoc arbitral practice in China. With partial recognition of ad hoc arbitration agreements in China, the SPC Draft Provisions, particularly article 27, had high expectation of being formally endorsed. This, however, did not happen, leaving the practice of ad hoc arbitration at the crossroads of the SPC-led arbitration reform. Moreover, the status of foreign institutional arbitration seated in China was not clarified in this significant SPC interpretative document, an issue which has been, instead, dealt with by lower-level Chinese judiciaries in a few recent cases, which I examine in Part II.B.2.

2. Most Recent Judgments Relaxing Foreign Institutional Arbitration Seated in China

Another impressive aspect of the judicial initiatives in reform is judgments rendered by the Chinese judiciary (both the SPC and lower level courts) on whether parties may validly select foreign institutional arbitrations seated in China. As mentioned above, the traditional position seemed to be that such arbitration agreements would be invalid, and the resulting arbitral awards would be unenforceable because the requirement of a "designated arbitration commission" under the AL was deemed to be limited only to Chinese arbitration institutions.[80] A couple of recent cases have however pushed the boundary of this knowledge.

In April 2009, in the much-quoted, controversial judgment in *Duferco SA v. Ningbo Art & Craft Import & Export Corp.*, the Ningbo Intermediate People's Court (in Zhejiang Province) confirmed and enforced an arbitral award under the ICC Arbitration Rules by an arbitral panel seated in Beijing. This was the first reported case of a Chinese court granting enforcement of an ICC award made in China.[81] The court confirmed the award and commented that it was not to be categorized as a domestic award, but as a "non-domestic award" under the New York Convention, and as such, it should be recognized and enforced pursuant to the Conven-

[79] *Id.* art. 27.

[80] See discussion *supra* Part I.B.1.

[81] De gao gang tie gong si yu ning bo shi gong yi pin jin chu kou you xian gong si (德高钢铁公司与宁波市工艺品进出口有限公司) [Duferco SA v. Ningbo Art & Craft Import & Export Corp.], [2008] Yong Zhong Jian Zi No.4 ([2008]甬仲监字第 4 号)> (Ningbo Intermediate People's Ct. Apr. 22, 2009).

tion.[82] However, it should be noted that in this case, the respondent had failed to raise its jurisdictional objection prior to the first hearing of the arbitral proceeding, and hence, had been deemed to have waived the chance to challenge the validity of the arbitral agreement in a timely manner.[83] In the judgment, the Ningbo Intermediate Court decided the case on the basis of the respondent's waiver, without any detailed discussion on the stance and validity of ICC arbitration seated in China.[84] Therefore, doubts and criticisms remain as to whether the results would have been different had the respondent raised the objection to the validity of the arbitration agreement in a timely manner, leaving room for challenges to the authority and impact of this judgment.

Most recently, in March 2013, the issue of arbitral awards rendered by foreign institutional arbitration seated in China came up again in the *Longlide Packaging Co. v. BP Agnati S.R.L.* case.[85] In this case, the disputed arbitration clause provided that any dispute shall be submitted to arbitration by the ICC Court of Arbitration and that the place of arbitration shall be in Shanghai. The claimant disputed the validity of the agreement on three bases: First, the ICC Court of Arbitration is not a "designated arbitration institution" in China. Second, allowing the ICC to arbitrate a case seated in China would violate China's public policy. Third, in any event, the award should be considered as a domestic award in China such that the New York Convention should not be applicable for its recognition and enforcement.[86] The case went before the Anhui Provincial Higher People's Court, which consulted the SPC for a reply on the three issues raised by the claimant. The SPC issued a reply, responding to the first issue and upholding the validity of the arbitration agreement; the implication of which is that the ICC Court of Arbitration, despite being a foreign arbitration institution, was accepted as a

[82] The ruling has been described as a "helpful step in the right direction." *See First Reported Case of a China ICC Award Being Enforced in China*, FRESHFIELDS BRUCKHAUS DERINGER (Oct. 2009), https://uk.practicallaw.thomsonreuters.com/9-500-3353?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 (accessed Oct. 24, 2017)

[83] There is a timing requirement under Article 20, para. 2 of the AL to raise jurisdictional challenge; that a court shall not accept a party's application to nullify an arbitration agreement where the party failed to raise its objection prior to the first hearing in the arbitration proceeding.

[84] *Supra* note 82.

[85] An hui long li de bao zhuang yin shua you xian gong si yu BP Agnati S.R.L. (安徽龙利得包装印刷有限公司与被申请人 BP Agnati S.R.L.) [BP Agnati S.R.L Longlide Packaging Co. v. BP Agnati S.R.L.] [2013] Wan Min Er Ta Zi No. 00001 ([2013] 皖民二他字第 00001 号)> (Anhui Higher People's Ct. Jan. 30, 2013).

[86] *Id*, para 2.

valid "designated arbitration institution."[87] The SPC, however, did not go on to address the second and third issues, such that the question of whether the current jurisprudence now extends to allow foreign arbitration institutions to administer arbitration in China is still unclear.

To sum up, the Chinese judiciary now seems to be more liberal with regard to foreign institutional arbitration seated in China. From the initial refusal by the Wuxi Intermediate Court to recognize ICC arbitration in the *Züblin* case in 2006,[88] to the Ningbo Intermediate Court's categorization of this type of arbitration as "non-domestic arbitration" in *Duferco* in 2009, to the SPC's acceptance in *Longlide* case of an ICC arbitration seated in China as a valid arbitration agreement in 2013, the Chinese judiciary has been broadening the institutional requirement stipulated by articles 16 and 18 of the AL such that the requirement is not restricted to Chinese domestic arbitration commissions only.

While the two more recent cases, *Duferco* and *Longlide*, exhibit judicial leniency towards foreign institutional arbitration seated in China, uncertainty still looms over the highest Chinese judiciary as to the official legality of foreign institutional arbitration seated in China. On a separate note, the application of the New York Convention is limited to recognition and enforcement of arbitral awards from a "foreign" state.[89] Although China made a "reciprocity" reservation in its accession to the New York Convention,[90] this reservation does not affect the nature of the enforceable award in China under the Convention as entirely "foreign."[91] It is

[87] Zui gao ren min fa yuan guan yu shen qing ren an hui sheng long li de bao zhuang yin shua you xian gong si yu bei shen qing ren BP Agnati S.R.L. shen qing que ren zhong cai xie yi xiao li an de qing shi de fu han (最高人民法院关于申请人安徽省龙利得包装印刷有限公司与被申请人 BP Agnati S.R.L.申请确认仲裁协议效力案的请示的复函) [Reply of the Supreme People's Court to the Request for Instructions on Application for Confirming the Validity of an Arbitration Agreement in the Case of Anhui Long Li De Packaging and Printing Co. v. BP Agnati S.R.L.] [2013] Min Si Ta Zi No. 13 ([2013] 民四他字第 13 号)> (Sup. People's Ct. Mar. 25, 2013).

[88] *See* discussion *supra* Part I.B.1.

[89] The New York Convention, *supra* note 17, art. 1, para. 1, provides that "[t]he member State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State." *See Status—Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Oct. 24 2017).

[90] *See* sources cited *supra* note 18, on the "reciprocity" reservation that China made during accession.

[91] *See* Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China (Dec. 31, 1986), *available at* http://www.cietac.org/index.php?m=Article&a=show&id=2413&l=en. Article 1 of the Circular provides that "[i]n accordance with the reciprocity reservation statement made by China when entering the Convention, this Convention shall apply to the

therefore confusing and somewhat disappointing that the SPC failed to address or clarify the issue of whether ICC arbitral awards rendered in China should be categorized as "non-domestic awards," and hence failed to address the proper scope and application of the New York Convention in China.

C. The Competitive Arbitration Market

In addition to the judicial support of arbitration, the latest developments in the Chinese arbitration system are also pushed by the wave of increasing competition among different Chinese arbitration commissions, which I have referred to as the "competitive arbitration market."

As outlined previously, the landscape of arbitration institutions in China is mainly constituted by two forces. On the one hand, despite the jurisdictional merging after the 1996 State Council Notice, the CIETAC still dominates the foreign-related arbitration market. On the other hand, hundreds of local arbitration commissions have quickly proliferated after the promulgation of the AL. As one will have noticed from the multiple times the CIETAC is mentioned in this Article, as the most established arbitration institution in China, the CIETAC plays an irreplaceable role in the Chinese arbitration system though its role was recently challenged. The dramatic episode of the CIETAC split in 2013, one of the most important events in changing the current dynamics of the Chinese arbitration landscape, shows that the Chinese arbitration market is in fact not necessarily of a monopolistic nature. Local arbitration commissions have also been behaving in an increasingly proactive and competitive manner in recent years. They have been consistently updating their arbitration rules and pursuing other innovative marketing initiatives to generate a new force of reform of the Chinese arbitration system.

1. The CIETAC Split in 2013

a. Relationship Between the CIETAC and Its Two Sub-commissions in Shenzhen and Shanghai

The key players in the episode of the CIETAC split are the CIETAC South China Sub-commission (located in Shenzhen) and the Shanghai Sub-commission (located in Shanghai). The two sub-commissions were established against the backdrop of China's market economy whereby Shenzhen had become the first "special economic zone" (*jingji tequ*) in China since 1980, and Shanghai was the Chinese city with the fastest economic growth and the largest

recognition and enforcement of an arbitral award made in the territory of another contracting State." *Id.*

portion of foreign investment in the 1980s. At the forefront of the Chinese economy, both cities had an urgent need to set up specialized institutions catering to the resolution of Sino-foreign commercial disputes. As such, in response to the respective requests of the Shenzhen and Shanghai municipal governments and their local Party committees to make use of the then existing resources in China, the two CIETAC sub-commissions were approved to be set up in 1983 and 1988, respectively, by the State Council, through the assistance of application by the CIETAC's organizer, the China Council for Promotion of International Trade (CCPIT), attached to the State Council.[92]

Studies show that the two CIETAC sub-commissions were historically managed under their respective local governments and hence, were financially independent of the CIETAC since their establishment; the name "sub-commission" was largely a professional label.[93] Nevertheless, the CIETAC attempted to strengthen its influence by appointing secretary generals and deputy secretary generals for and applying its rules to the two sub-commissions from 2002 until August 1, 2012.[94] However, the impact of such actions was limited. Not only was there a power struggle within management because the two sub-commissions were financially independent, but the CIETAC and the two sub-commissions were natural competitors in the arbitration business for arbitration fees.[95] This competition reached its zenith in 2012 when the CIETAC finally revised its rules, excluding the jurisdiction of the two sub-commissions.

b. The CIETAC Split

On February 3, 2012, the CIETAC promulgated its revised Arbitration Rules (the "2012 Rules") and announced their effectiveness on May 3, 2012. The taking into effect of the 2012 Rules was immediately followed by announcements from the Shenzhen and Shanghai sub-commissions claiming independence from the CIETAC (referred to as the "CIETAC split" in

[92] The CIETAC South China Sub-commission was set up in 1984 and the CIETAC Shanghai Sub-commission was set up in 1990. The CIETAC South China Sub-commission bore the name of the CIETAC Shenzhen office at its establishment in 1984. It was upgraded to the CIETAC Shenzhen Sub-commission in 1989 and had its name changed to the current one in 2004. For a history of their establishment, see Gao Fei (高菲), *Mao zhong wei shang hai, hua nan liang fen hui yu mao zhong wei zhi zheng de fa lu wen ti yan jiu (san): mao zhong wei shang hai, hua nan liang fen hui wei fa du li de yuan yin yu jie jue* (贸仲委上海华南两分后与贸仲委之争的法律问题研究（三）：贸仲委上海,华南两分会违法独立的原因与解决') [*Research on the Legal Issues of the Disputes Between the CIETAC Shanghai and Huanan Two Sub-commissions and the CIETAC (3): Reasons and Solution of the Illegal Independence of CIETAC Shanghai and Huanan Sub-commissions*], 11 SHI DAI FA XUE (时代法学) [PRESENT-DAY L. & SCI.] 3, 6–11 (2013).

[93] *Id.* at 6–7.

[94] *Id.*

[95] *Id.*

the literature).[96] The split is believed to have been triggered by the CIETAC's 2012 Rules, particularly article 2, which concerns the structure and jurisdictional power division between the CIETAC headquarters in Beijing and its two sub-commissions.[97]

Grouped under the heading "General Provisions," article 2 of the 2012 Rules stipulates that "CIETAC sub-commissions or arbitration centers are branches of CIETAC. They accept arbitration applications and administer arbitration cases with CIETAC's authorization."[98] For cases submitted to CIETAC, there are three common types of jurisdiction clauses:

(a) The parties elect to submit the dispute to the CIETAC in Beijing (referred to as the "Headquarter Clause" in this Article);

(b) The parties elect to submit the dispute to a specified CIETAC sub-commission (referred to as the "Sub-commission Clause");

(c) The parties elect to submit the dispute to the "CIETAC, at the place of a specified sub-commission, or where the agreement on the sub-commission is ambiguous" (referred to as the "Mixed Clause").[99]

Prior to May 1, 2012, the CIETAC and its two sub-commissions used the same set of arbitration rules. Under the 2005 and 2000 versions of the CIETAC Rules, where a Headquarter Clause or a Mixed Clause is used, parties have the right to submit their cases to either the CIETAC headquarters in Beijing or the sub-commissions in Shenzhen/Shanghai, with the jurisdiction finally determined upon the claimant's first choice.[100] As for the sub-commission

[96] *See, e.g.*, Meng Chen, *Is CIETAC Breaking Apart? An Analysis of the Split in the CIETAC System*, 6 CONTEMP. ASIA ARB. J. 107 (2013).

[97] Article 2 is entitled "The Structure and Duties." *See* China International Economic and Trade Arbitration Commission Arbitration Rules, art. 2 (rev'd Feb. 3, 2014, effective May 1, 2012) (on file with author) [hereinafter 2012 CIETAC Rules].

[98] *Id.* art. 2(3).

[99] *Id.* art. 2(6).

[100] *See* Arbitration Rules of China International Economic and Trade Arbitration Commission (CIETAC), art. 12 (revised and adopted by the China Council for the Promotion of Int'l Trade and China Chamber of International Commerce, Sep. 5, 2000, effective Oct. 1, 2000) (on file with author) [hereinafter 2000 CIETAC Rules]; Arbitration Rules of China International Economic and Trade Arbitration Commission (CIETAC), art. 2(8) (revised and adopted by the China Council for the Promotion of Int'l Trade and China Chamber of International Commerce, Jan. 11, 2005, effective May 1, 2005), *available at* http://www1.lawinfochina.com/display.aspx?lib=law&id=4216 [hereinafter 2005 CIETAC Rules].

clause, the specified sub-commission will handle the particular case.[101] However, under the 2012 Rules, cases with the Headquarter Clause and the Mixed Clause would both be taken up by the CIETAC headquarters in Beijing, whereas the two sub-commissions may only handle cases with a clearly written Sub-commission Clause.[102]

Years of competition among the three institutions, catalyzed by changes to the jurisdictional power division and associated impact on the sub-commissions' income from case-filing fees – coupled with CIETAC's declaration of effective control over the sub-commissions – led to the announcement of independence by the sub-commissions.[103] On August 1, 2012, the CIETAC made a public announcement that it would terminate its authorization of the Shanghai and South-China Sub-commissions' jurisdictional power to accept and administrate CIETAC-related arbitration cases; cases with a sub-commission clause would now all be accepted by the CIETAC headquarter in Beijing.[104] In response, in addition to claiming independence, the two sub-commissions also renamed themselves to the South China International Economic and Trade Arbitration Commission (SCIETAC) in October 2012 and the Shanghai International Economic and Trade Arbitration Commission (SIETAC) in April 2013.[105] In May 2013, the SIETAC and the SCIETAC each announced a complete new set of

[101] Article 12 of the 2000 CIETAC Rules; Article 2(8) of the 2005 CIETAC Rules.

[102] 2012 CIETAC Rules, *supra* note 98, art. 2(6).

[103] China's leading economic news media, Yicai.com, reported on the "CIETAC split episode." *See* Xiao Yao, Lu Litao & Guo Liqin (萧遥，卢丽涛，郭丽琴), *She wai zhong cai nao "fen zhi": zheng yi bei hou shen fen cheng mi* (涉外仲裁闹"分治"：争议背后身份成谜) [*Foreign Arbitration "Divided": Identities Behind the Controversy Remain a Mystery*], YICAI.COM (May 4, 2012), http://www.yicai.com/news/2012/05/1691426.html.

[104] Zhong guo guo ji jing ji mao yi zhong cai wei yuan hui guan yu yue ding you zhong guo guo ji jing ji mao yi zhong cai we yuan hui shang hai fen hui, zhong guo guo ji jing ji mao yi zhong cai wei yuan hui hua nan fen hui zhong cai de an jian de guan li gong gao (中国国际经济贸易仲裁委员会关于约定由中国国际经济贸易仲裁委员会上海分会，中国国际经济贸易仲裁委员会华南分会仲裁的案件的管理公告) [Administrative Announcement by the CIETAC Regarding Arbitral Cases Submitted to the CIETAC Shanghai and South-China Sub-commissions], CHINA INT'L ECON. & TRADE ARB. COMM'N (Aug. 1, 2012) https://www.globalchinalaw.com/zh/documents/884ea283-5469-bba1-2054-c369b023054e/bilingual (accessed Oct. 25, 2017).

[105] SIETAC and SCIETAC also use the new names of Shanghai International Arbitration Centre (SIAC) and Shenzhen Court of International Arbitration (SCIA), respectively. For reports by China's leading economic news media, Yicai.com, on the aftermath of the "CIETAC split," see Lu Litao (卢丽涛), *Hua nan guo zhong, shang hai mao zhong: Du li zhong cai ji gou bu cun zai shou quan zhi shuo* (华南国仲，上海贸仲：独立仲裁机构不存在授权之说) [*South China, Shanghai Sub-commission: Authorization Implications for Independent Arbitral Bodies?*], YICAI.COM (Jan. 31, 2013), http://www.yicai.com/news/2013/01/2463616.html; Lu Litao

arbitration rules, which stated that they would no longer accept cases with a headquarter clause, but would as usual accept cases with a sub-commission clause.[106]

c. Consequence and Implications

As a result, two conflicting positions on jurisdiction emerged. An immediate question was whether previous agreements with a Subcommission Clause which had been submitted to, and accepted by, the subcommissions prior to the split were still valid. It was therefore open to the respondent to make such a challenge to the court at either the jurisdictional or enforcement phase by making use of the confusion to argue that the original subcommissions had no jurisdiction to arbitrate by virtue of the CIETAC announcement on August 1, 2012. When faced with such applications, the courts mostly refused them in order to maintain stability in the arbitration regime.

The uncertainty remained and the dispute was not resolved until the SPC issued its official stance on September 4, 2013 (the "2013 Notice").[107] The 2013 Notice requested all cases arising out of the jurisdictional dispute to be reported to the SPC and could only be decided after a reply from the SPC has been obtained. There were at least two cases after the publication of the SPC's 2013 Notice. The first case concerned the effect of the arbitral award following an arbitration agreement selecting the "CIETAC Shanghai Sub-commission" as the arbitration institution. The Shanghai No. 2 Intermediate People's Court issued its judgment on December 31, 2014, holding that since the Shanghai Sub-commission had changed its name to SIETAC, the case should, and would be deemed to, have been accepted by the SIETAC, and therefore the arbitration decision was effective.[108] In a similar vein, the judgment

(卢丽涛), *Shang hai mao zhong geng ming xia yue qi yong xin gui ze xin ming ce* (上海贸仲更名：下月启用新规则新名册) [*Shanghai CIETAC Changed Name: New Rules and Lists to Be Adopted Next Month*], YiCai.com (Apr. 12, 2013), http://www.yicai.com/news/2013/04/2621445.html.

[106] See Lu Litao (卢丽涛), *Shang hai mao zhong geng ming xia yue qi yong xin gui ze xin ming ce* (上海贸仲更名：下月启用新规则新名册) [*Shanghai CIETAC Changed Name: New Rules and Lists to Be Adopted Next Month*], YiCai.com (Apr. 12, 2013), http://www.yicai.com/news/2013/04/2621445.html.

[107] Zui gao ren min fa yuan guan yu zheng que shen li zhong cai si fa shen cha an jian you guan wen ti de tong zhi (fa fa (2013) 194 hao) (最高人民法院关于正确审理仲裁司法审查案件有关问题的通知 （法发（2013）194 号）) [SPC Notice on Certain Issues Relating to Correct Handling of Judicial Review of Arbitration Matters (Court Issuance No. 194 of 2013)] (promulgated by the Sup. Ct., Sep. 4, 2013, effective Sep.4, 2013).

[108] Hu er zhong min ren (zhong xie) zi di 5 hao cai ding shu (沪二中民认（仲协）字第 5 号民事裁定书) [Ruling No. 5 on Civil Jurisdiction Arising out of Arbitration Agreement] < Civil Ruling No. 5 > (Shanghai No. 2

rendered by the Beijing No. 2 Intermediate People's Court on January 13, 2015, also confirmed the jurisdiction of the SCIETAC.[109] Both judgments were confirmed by the SPC. The 2013 SPC Notice, while praiseworthy for ensuring judicial oversight of such jurisdictional conflicts, fell short of articulating the principle by which the appropriate forum would be determined for arbitration pursuant to an affected clause.

More recently, on July 15, 2015, the SPC issued a further judicial interpretation on the matter in the form of a reply to the Shanghai Higher People's Court, the Jiangsu Higher People's Court, and the Guangdong Higher People's Court (the "2015 Reply").[110] The 2015 Reply offers guidance as to which institution should exercise jurisdiction and under what circumstances. This reply, effective as of July 17, 2015, splits the timeline into three time periods:

(1) before the renaming of the sub-commission as a result of the split (the "pre-renaming period");

(2) on the date or after the renaming but before the effective date of the 2015 Reply (the "transition period"); and

(3) after the effective date (the "new period").

Hence, for arbitration agreements made in the pre-renaming period and submitted to either of the sub-commissions, the SIETAC and the SCIETAC would have jurisdiction over the case.[111] If, however, the arbitration agreement was entered into in the transitional or the new period, the CIETAC would have jurisdiction.[112] All of these rules sent the same signal that arbitration agreements should be given effect as far as possible where parties have acted reasonably in their designation of arbitration institutions. Commentators have noted that, by do-

Intermediate People's Ct., Dec. 31, 2014).

[109] Jing er zhong te zi di 08088 hao min shi cai ding shu (京二中特字第 08088 号民事裁定书) [Civil Ruling No. 08088] <Civil Ruling No. 08088> (Beijing No. 2 Intermediate People's Ct., Apr. 4, 2014). The Beijing Court recognized that the CIETAC South China Sub-commission was established in 1984 in accordance with law and had its name changed to SCIETAC, and the parties in the case had made a clear designation of the arbitration institution. Therefore the arbitration application shall be made to SCIETAC in accordance with law.

[110] *The Supreme People's Court Released Reply on the Judicial Supervision and Review of the Jurisdiction and Arbitral Awards in Cases Involving Arbitration Agreements for Arbitration at the CIETAC South China Sub-Commission and the CIETAL Shanghai Sub-Commission*, CHINA INT'L ECON. & TRADE ARB. COMM'N (Jul. 17, 2015), http://www.cietac.org/index.php?m=Article&a=show&id=2517&l=en.

[111] *Id.* art. 1(1).

[112] *Id.* art. 1(2)– (3).

ing so, the SPC has mitigated the side effects of the CIETAC split and maintained stability and clarity in the arbitration market.[113] Together with the aforementioned cases, which were tactically handled pursuant to the 2013 Notice, the SPC guidelines confirmed the jurisdiction of the SIETAC and the SCIETAC, and the jurisdictional battle following the CIETAC split has finally been resolved.

The CIETAC jurisdictional battle indicates that the unrivaled position held by the CIETAC in the Chinese arbitration system is also susceptible to challenges. As discussed earlier in this Article, the CIETAC has, to a certain extent, been monopolizing the foreign-related arbitration market in China despite the proliferation of local arbitration committees and the effect of the 1996 Notice which removed the jurisdictional bifurcation. The SCIETAC's and the SIETAC's declaration of independence posed new challenges to the CIETAC, particularly because, by promulgating new arbitration rules, the SCIETAC and the SIETAC have quickened their pace to match international standards. They utilized various advantages and features that are unique to themselves, such as being located in the Shanghai Free Trade Zone and the Guangdong Free Trade Zone, respectively, and since the "split episode," have created fierce competition for the CIETAC. For example, the SCIETAC has made full use of its advantageous location "next door" to Hong Kong and Macau. Out of the thirty-four foreign arbitration awards enforced by Hong Kong courts in 2014, five of them were awards rendered by the SCIETAC, just slightly lower than the number of awards determined by the Hong Kong International Arbitration Center, which was eight.[114] This new dynamic of arbitration commissions using their niche to compete with each other has also extended to local arbitration commissions as will be discussed in the following subsection.

2. Rising Competition Among Local Arbitration Commissions

Multiple factors determine how the market of Chinese local arbitration commissions has formed, expanded, matured, complicated, and become increasingly competitive over the past decade. These factors include the proliferation of local arbitration commissions following the promulgation of the 1994 AL, their capacity to arbitrate non-domestic arbitral cases pursuant to the 1996 State Council Notice, the desire to attract foreign cases in the "shadow" of the CI-

[113] For an example, see comments by foreign law firms such as Norton Rose: *China Arbitration: New Judicial Guidance on the CIETAC Split*, NORTON ROSE FULBRIGHT (Aug. 2015), http://www.nortonrosefulbright.com/knowledge/publications/131227/china-arbitration-new-judicial-guidance-on-the-cietac-split.

[114] *The Enforcement of SCIA Arbitration Awards Ranked as Highest in Hong Kong*, S. CHINA INT'L ECON. & TRADE ARB. COMM'N/SHENZHEN CT. INT'L ARB. (Jan. 30, 2015), http://www.sccietac.org/web/news/detail/1518.html.

ETAC, and moreover, their continuing efforts to foster institutional independence, integrity, and competitiveness. Some better-developed local arbitration commissions now have the incentive, the potential, and even the capacity to compete against the traditional giants in the field such as the CIETAC, as well as among themselves.

One strategy adopted by the local arbitration commissions to enhance their competitiveness is to regularly update their arbitration rules. Three main features usually accompany rule amendments. First, to attract overseas cases and to compete with the CIETAC, local arbitral commissions have the incentive to internationalize their arbitration rules, i.e., to amend their rules to bring them in line with international arbitration norms and standards. In this respect, the amendments have focused on enhancing the transparency and efficiency of the arbitration processes, as well as paying greater respect to parties' procedural autonomy and flexibility. For example, the most recently updated BAC Arbitration Rules of 2015 specifically include a chapter on "Special Provisions for International Commercial Arbitration" (Chapter VIII), which introduces certain rules with regard to the interim measures of protection[115] and emergency arbitrators,[116] in addition to specifying increased scope and general flexibility of procedural measures.[117] Similar efforts have been observed in local arbitration commissions in comparatively economically better-developed Chinese cities such as Guangzhou.[118]

Second, to enhance their competitive edge, some local commissions seek to achieve a higher degree of professionalism. Privileged by its location in Beijing—the capital of China, as well as the crown of the country's tertiary education and research—the BAC is particularly well known for reaching out to and recruiting new talents in law, economics, technology, and trade. I showed earlier in the Article in relation to the discussion on the commissions' quest for independence, the BAC's arbitrators are mainly renowned scholars and leading professionals in the field. The BAC's founding Chairman is Professor Jiang Ping, former President of the China University of Political Science and Law and one of the most renowned jurists in contemporary China since the foundation of the People's Republic of China in 1949. The BAC's current Chairman is Professor Liang Huixing, another influential jurist in civil and commercial law in China today.[119] Moreover, the BAC has maintained a tradition of high

[115] BAC ARBITRATION RULES, *supra* note 15, art. 62.

[116] *Id.* art. 63.

[117] *Id.* art. 35.

[118] The Guangzhou Arbitration Commission (GAC) also started the process of amending its arbitration rules in 2015 for the enhancement of parties' procedural autonomy and flexibility.

[119] Zhang Wei (张维), *Jing wai zhong cai ji gou jin zhu zhong guo shi change jia ju jing zheng, Zhuang jia xu fei xing zheng hua* (境外仲裁机构进驻中国市场家具竞争，专家吁非行政化) [*Foreign Arbitration Institu-*

elimination rate in the ranks of its arbitrators who have not taken up any cases in the past several years (i.e., nonpracticing arbitrators). This elimination practice of the BAC is unprecedented in other arbitration institutions in China, such as the CIETAC or other leading local arbitration commissions. By 2006, ten years after the establishment of the BAC, 586 arbitrators had ceased to be employed, which reflects the intense competition among the BAC panel arbitrators.[120] In the meantime, the BAC has strongly encouraged arbitrators to utilize their professional talents and skills to compete for the opportunity of handling cases. In 2013, 267 out of the 391 BAC panel arbitrators were involved in handling arbitration cases; just one out of the fifty-seven arbitrators newly appointed that year did not have a chance to handle a single case.[121] Additionally, the BAC places strict ethical restrictions on its arbitrators to act as counsel in other cases submitted to the BAC; it is the only arbitration institution in China that has such a prohibition.[122] This prohibition seeks to ensure the ethical conduct and integrity of BAC arbitrators, in order to offset the side-effects of personal relations and networks (*guanxi*), prevalent and/or latent in the context of arbitral tribunals in China.[123]

Third, local arbitration commissions pursue various initiatives to make use of their best local features to attract cases in a competitive arbitration market. While the BAC focuses on attracting talent and building professionalism to gain recognition both at home and abroad, city-based arbitration commissions elsewhere also work hard to look for a competitive edge by developing their own attributes. In June 2015, at the capital city of South China's Guangdong Province and one of China's richest cities, Guangzhou, the Guangzhou Arbitration Commission (GAC) published its Internet Arbitration Rules, as part of an attempt to promote

tions Enter The Chinese Market Increasing Competition, Experts Calling for Removal of Administrative Interference], Fa zhi ri bao (《法制日报》) (Sept. 29, 2015), available at (中新网-财经) CHINANEWS.COM http://www.chinanews.com/m/cj/2015/09-29/7549384.shtml.

[120] *Bei zhong shi zhou nian gong zuo zong jie* (北仲十周年工作总结) [*Beijing Arbitration Commission Ten-Year Anniversary Work Summary*], Bei jing zhong cai wei yuan hui (北京仲裁委员会) [BEIJING ARB. COMM'N] (SEP. 30. 2005), http://www.bjac.org.cn/page/gybh/sznzj.html.

[121] *Bei zhong 2013 nian gong zuo zong jie* (北仲 2013 年工作总结) [*Beijing Arbitration Commission Work Summary 2013*], Bei jing zhong cai wei yuan hui (北京仲裁委员会) [BEIJING ARB. COMM'N] (JAN. 24, 2014), http://www.bjac.org.cn/page/gybh/2013zj.html.

[122] *Bei zhong zhong cai yuan shou ze* (北仲仲裁员守则) [*Beijing Arb. Comm'n Code for Arbitrators*] (rev'd Aug. 14, 2006, effective Sept. 1, 2006), http://www.bjac.org.cn/page/zc/zcygf.html.

[123] *See* discussion *supra* Part I.B.3.

online arbitration as a selling point for parties to choose the GAC.[124] In another provincial capital and an important hub in Central China, the city of Wuhan of the Hubei Province, the Wuhan Arbitration Commission (WAC) claims that its successful mediation (settlement) rate for arbitration cases submitted to the WAC reached as high as 97.13% between 2002 and 2012, and that its arbitration caseload had been consistently ranked the highest among all Chinese arbitration institutions within that decade.[125] In Southeast China, in the city of Wenzhou of the Zhejiang Province—the hometown of private enterprises and the birthplace of private financing in China—the Wenzhou Arbitration Commission (WEAC) has been focusing on the promotion of financial arbitration services since local financial activities are active and there is a large number of financial disputes in Wenzhou.[126] In effect as of May 2015, the newly promulgated WEAC Financial Arbitration Rules feature flexibility in application of financial laws, norms, customs, and rules in the financial profession, as well as principles of equity and fairness in the financial market, all of which are deemed to be admissible governing regulations in arbitrating financial disputes at WEAC.[127] The Rules also aim to achieve a maximum degree of convenience in arbitrating cross-border financial disputes.[128] As such, the Rules contain a special chapter governing international and foreign financial arbitration services.[129] All these initiatives are a manifestation of the increasingly intense competition among local commissions in the Chinese arbitration market; these institutional competitions in turn push the Chinese arbitration system in the direction of qualitative advancement.

III. REFORM PATTERNS AND DEVELOPMENT DISCOURSE

[124] *See Guang zhou zhong cai we yuan hui wang luo zhong cai gui ze* (广州仲裁委员会网络仲裁规则) [*2015 Guangzhou Internet Arbitration Rules*] (promulgated by the Guangzhou Arb. Comm'n, June 6, 2015, effective Oct. 1, 2015), http://www.gzac.org/WEB_CN/AboutInfo.aspx?AboutType=4&KeyID=100b1ae3-9f15-4bfc-bf59-a90273778fa5.

[125] *See Wu han zhong cai wei shou an shu lian xu shi nian wei ju quan guo di yi* (武汉仲裁委受案数连续十年位居全国第一) [*Wuhan Arbitration Commission's Arbitration Caseload Highest Among All Chinese Arbitration Institutions in Ten Continuous Years*], CHANG JIANG RI BAO [长江日报] [YANGTZE RIVER DAILY] (Feb. 7, 2013), *reprinted in* NEWS.IFENG.COM (Feb. 7, 2013), http://news.ifeng.com/gundong/detail_2013_02/07/22024260_0.shtml.

[126] *See Wen zhou zhong cai wei yuan hui jin rong zhong cai gui ze* (温州仲裁委员会金融仲裁规则) [*2015 Wenzhou Financial Arbitration Rules*] (promulgated by the Wenzhou Arb. Comm'n, May 8, 2015, effective May 8, 2015), http://www.wzac.org/News_Detail.aspx?CateID=18&ID=397.

[127] *Id*. art. 12.

[128] *Id.* ch. 3.

[129] *Id.* ch. 4.

One very distinctive feature of the reform patterns of the Chinese arbitration system in the past decade is that there has been little legislative development. Instead, courts and arbitration commissions have been active in pushing forward judicial and institutional reforms, which have been identified and analyzed in the foregoing subsections.

A. Judicial and Institutional Efforts

On the one hand, there have been important judicial interpretations and arbitral judgments that fill the gaps in the AL and clarify ambivalent aspects of arbitral practice. On the other hand, an arbitration market in China has emerged and competition among Chinese arbitration commissions has become even fiercer, pushing for the independence, professionalism, and internationalization of the institution-based Chinese arbitration system. Both judicial and institutional developments are commendable efforts at reform, as they tend to address the defects of the different aspects of the Chinese arbitration system.

As I outlined earlier, in China, the SPC serves a dual function as the highest court as well as a de facto rulemaking power-holder through the issuance of judicial interpretations. Whether it is the adjudication of individual cases or the issuance of more general judicial interpretations, the SPC helps clarify controversial legal issues where existing legislation fails to provide clear or satisfactory solutions. In turn, judicial efforts help ensure a smooth and stable operation of the arbitration system in China from a macro regulatory and supervisory perspective. For example, the 2006 SPC Interpretation clarifies what amounts to an "unclear yet curable designation of arbitration commissions" as required by articles 16 and 18 of the AL. On the adjudication side, the *Longlide* judgment, together with the *Duferco* judgment, give effect to the possibility and the potential of foreign institutional arbitration seated in China, an issue which is omitted from the legislation but much debated in arbitral practice. The power of the judiciary to clarify and supplement legislation, or even to "make laws," is particularly significant to the reform of the fast-developing world of arbitration in China, as laws usually lag behind the pace of economic development. Moreover, because legislative reforms, such as promulgation of a new law or amendment to existing laws, require rigid procedure and usually take a long time, the judiciary is in the position to respond to and resolve legal issues arising out of the day-to-day changing circumstances of the stakeholders quicker than the legislature is able to. As a result, the judiciary, in particular the SPC, has been able to contribute to legal aspects of the reform of the Chinese arbitration system both on a case-by-case and issue-by-issue basis and in more generic terms of wider application.

In comparison, the institutional efforts by arbitration commissions to reform the Chinese arbitration system have a very different focus. Unlike the judiciary, which is a public power-holder performing a dual regulatory and supervisory role, arbitration commissions are "private institutions" (民间机构, *minjian jigou*) in China, or at least intend to be private (民间性, *minjianxing*). As such, they are competitors in the arbitration market. Indeed, the driving force behind the reform initiatives by these arbitration commissions is their desire to enhance institutional competitiveness, which is intensified by their aim to attain self-independence and self-sufficiency. With market competition as the underlying incentive for reform, institutional initiatives generally revolve around measures and actions taken by each individual Chinese arbitration commission to improve its internal quality and external image. As observed, institutional competitions in the Chinese arbitration market are generally twofold. First, there are aggressive competitions among Chinese city-based local arbitration commissions, particularly in economically better-developed cities. Second, city-based arbitration commissions, including the former CIETAC subcommissions (in Shenzhen and Shanghai) and other fast-developing local arbitration commission (such as the BAC), have all become potent rivals to the CIETAC. Correspondingly, there is the aforementioned phenomenon of local arbitration commissions engaging in the proactive amendment of their arbitration rules with the aim of professionalization and internationalization, as well as of building on their local advantages in terms of talent, economy, technology, geographic advantages, etc. In a similar vein, the actions taken by the SIETAC and the SCIETAC following the CIETAC split is another manifestation of how previous CIETAC commonwealth partners now strive to compete for a larger share of the CIETAC legacy in the arbitration market. To sum up, institutional initiatives by each individual arbitration commission can be described, or collectively understood, as improving the culture dynamics of the Chinese arbitration regime in the direction of achieving integrity and competitiveness, and eventually, reforming the Chinese arbitration system macroscopically in terms of its qualitative rather than quantitative development.[130]

B. Bottom-Up Versus Top-Down Reforms

The impact of the judicial and institutional reforms is examined and compared above in terms of the different focuses in addressing defects of the existing Chinese arbitration system. In fact, another feature distinguishing the judiciary from institutional initiatives is the way in

[130] The Chinese arbitration regime has been criticized as overdeveloped in terms of number of arbitration institutions. The establishment of over 230 arbitration commissions across Chinese cities has been criticized as excessive and catering to administrative needs rather than real market demand. *See* discussion *supra* Part I.B.2.

which they hold sway over the other stakeholders in the arbitration system, as well as the extent of their influence, the former being top-down while the latter bottom-up.

A top-down approach has a wide and direct scope of application in the sense that interpretations or judgments rendered by the SPC would be binding (or highly influential)[131] on future arbitration practices pertaining to the same (or similar) types of issues in China. In contrast, any changes made by a bottom-up initiative, such as those taken by individual arbitration commissions, are prima facie limited to that specific institution. For instance, an arbitration rule amendment by the BAC would only be applicable to the BAC itself, but not to any other local arbitration commission; nor would it impact Chinese arbitration institutions at large or Chinese arbitral practice in general. Hence, while top-down measures have a direct impact on the reform, bottom-up initiatives may only influence the arbitration system through indirect means, such as changing the landscape of the arbitration market and its culture, dynamics in competition. Despite their indirect influence, bottom-up initiatives by individual arbitration commissions are by no means less important to the reform of the Chinese arbitration system. An evident advantage is that these commissions are at the forefront of Chinese arbitral practice and, hence, they are more sensitive to the market needs of both domestic and international arbitration businesses (disputes) and users (disputants). Likewise, they have the flexibility and capacity to respond to issues arising out of the changing circumstances of the arbitration business much more quickly than the legislature or the judiciary. This feature of the bottom-up commission-by-commission reform pattern is significant, as China is still at the fledging level of its arbitration development, and local arbitration commissions are able to identify the limitations and defects of the system more aptly, follow recent legal and commercial trends more closely, and align themselves with international norms and standards more flexibly.

The most expected top-down reform is the revision of the 1994 AL. Without revamping the legislation, even the SPC is sometimes at a loss when it comes to pushing the boundaries of the practice. For example, in the aforementioned *Longlide* case, although the SPC recognized the validity of the disputed arbitration clause, the court did not go on to address the issue of the scope of application of the New York Convention in China in controversial

[131] China is a civil law jurisdiction, in which judicial decisions are not binding precedents (stare decisis), unlike in common law jurisdictions. However, it has been a general practice in China that SPC judgments are considered highly influential (or highly persuasive) on subsequent rulings of the same (or similar) issues; lower-court adjudicators are reluctant to deviate from SPC precedents due to the appellate system.

cases.[132] Unsurprisingly, the judgment met with some criticism. It remains unclear whether arbitral awards rendered by foreign institutional arbitration seated in China should be categorized as "non-domestic" awards in China, and moreover, whether such awards can be enforced by Chinese courts pursuant to the New York Convention (or whether the New York Convention could be extended to enforcement of "non-domestic" awards rendered in China), particularly in light of the reservations China made in acceding to the Convention. It seems that the SPC "intentionally" chose to be hands-off on the issue even though it had the opportunity to get involved, since the issue was raised by the applicant's counsel in *Longlide*. This deliberate reluctance to touch the red line may stem from the SPC's hesitancy in blatantly creating new laws in areas where the legislation (i.e., the AL) is silent and where the impact would be huge. In this particular case, to legally recognize the outcome of foreign institutional arbitration seated in China would have a huge impact on the Chinese arbitration market, as well as the Chinese legal market, including the extent of market freedom and the openness in allowing market accession of quasi-judicial overseas service providers. Therefore, even though the SPC inclines toward recognizing the growing phenomena in arbitral practice and towards granting the parties more autonomy in drafting, it is cautious about bringing changes and reforms too radically and swiftly. As previously concluded, in the case of *Longlide*, the SPC displayed a sympathetic and liberal attitude by recognizing the validity of the disputed arbitration clause, yet played safe, and chose not to deal with the more controversial issues such as the nature, categorization, and enforceability of arbitral awards flowing from foreign institutional arbitration seated in China, as well as associated questions regarding the proper approach and scope of application of the New York Convention in unconventional cases.

Lastly but importantly, given the different mechanisms whereby top-down and bottom-up initiatives work and impact on the arbitration regime, these initiatives play complementary roles in the development of the arbitration system in China. How the two types of reform patterns interact with each other can in fact be observed in some of the examples upon closer examination. To illustrate, the issuance of the 2013 and 2015 SPC Notices in response to the question of the validity of arbitration agreements and awards affected by the CIETAC split is one manifestation of bottom-up initiatives by arbitration commissions to push forward top-

[132] An hui long li de bao zhuang yin shua you xian gong si yu BP Agnati S.R.L. (安徽龙利得包装印刷有限公司与被申请人 BP Agnati S.R.L.) [BP Agnati S.R.L Longlide Packaging Co. v. BP Agnati S.R.L.] [2013] Wan Min Er Ta Zi No. 00001 ([2013] 皖民二他字第 00001 号)> (Anhui Higher People's Ct. Jan. 30, 2013). *See* also *Supra note* 86.

down judicial actions at the central level. It is encouraging to note that the top-down and bottom-up initiatives have been working together and responding to each other, such that they can complementarily bring about holistic measures to remedy practical defects of the Chinese arbitration system. Hence, to respond to the bottom-up, market-driven jurisdictional diversification post the CIETAC split incident, the 2015 SPC Notice gives effect to all reasonably drafted arbitration agreements from a top-down and regulatory perspective. More fundamentally, it is expected that the most important top-down reform, i.e., the 1994 AL, will be revisited. As noted above, it is very likely that legislative changes will take place in the not-too-distant future.

C. Penetrating Factors in Arbitration Development

A comparative analysis of Asia-Pacific arbitration development that focuses on the penetrating factors of arbitration development – rather than the influence of legal system (i.e. civil law versus common law) or legal jurisdiction (i.e. unitary versus federal)[133] – shows that the most relevant aspects of the development path of Chinese arbitration are China's transitional but fast-developing economy and a comparatively weaker rule of law from its administrative-governance system rooted in history.

On the one hand, as outlined above, Chinese arbitration commissions, in particular city-based local commissions, have been tolerated so far by administrative controls of the local government, and have been expecting legislative reform to embrace the real "private and market" nature of their institutional foundation and development.[134] The desire has become particularly strong since the SPC published its important judicial interpretations and arbitral judgments in the past decade (the so-called "judicial efforts" at reform referred to in this Article). On the other hand, as there has been no definite timetable set in the national legislative agenda for the revision of the AL, some more developed frontline arbitration commissions have made the best of their strengths (such as talent, economy, technology, locality) to modernize the rules (the so-called "institutional efforts" at reform referred to in this Article). De-

[133] For example, among the wave of arbitration reform and development in Asia Pacific jurisdictions, Australia's case shows the most prevalent aspect of the reform as inherited through the influence of the common law legal tradition and strong rule of law tradition. Australia owes its success in arbitration reform (in particular, the amendment of the International Arbitration Act in 2010) to its response to the federal system of jurisdiction. *See* Leon Trakman, Australia's Contribution to International Commercial Arbitration in Asia (paper presented at the "Developing World of Arbitration: A Comparative Study of the Arbitration Reform in Asia Pacific Conference," University of Hong Kong, Oct. 27, 2015) (on file with author).

[134] *See* discussions, *supra* Part I.B.2.

spite the fact that arbitration commission rules do not carry the force of law and cannot overcome deficiencies in the legal framework which are based on China's socioeconomic and administrative-governance situation, they do promote the practice of arbitration, facilitate the legislative progress, and foster the development trend.

In the interim period, where the AL has not been officially revamped, a significant feature of the patterns of China's arbitration reform has been a mixture of the interim top-down judicial (from the SPC) and bottom-up institutional efforts (from the Chinese arbitration commissions). Between the two, due to the rapidly developing economy and the associated demand for dispute resolution arising out of the growing number and sophistication of commercial disputes, the market-driven, bottom-up institutional initiatives have become a persuasive force of the Chinese arbitration development patterns, to push forward top-down reforms, either from the central judiciary or the legislature. The judicial efforts at the central level and institutional efforts at the local level are then seen to collectively push forward positive responses from state legislation, i.e., the AL revision. As revealed by the *Longlide* case, without legislative recognition, any reform efforts, whether top-down or bottom-up, judicial or institutional, would be "transitional" and "informal" and ineffective in bringing systematic breakthroughs.

IV. PROGNOSIS AND PROSPECTIVE REFORMS

Echoing the reform patterns and the discussion of development evoked above, this Part puts forward detailed proposals for reforming the Chinese arbitration system in a holistic manner. It further identifies "essential" and "highly recommended" ingredients in arbitration modernization and applies those to the Chinese context in suggesting specific reform proposals in the arbitration system and development.

A. Legislative Revision and Pro-Arbitration Judiciary

As an "essential" ingredient of the modern arbitration reform, the current AL (1994 AL) should be revisited, as it has been proven to be outdated, creating obstacles to the Chinese arbitration system and its general development. The Chinese legislative reform should reach two dimensions of objectives: externally, to align with international arbitration norms, and internally, to achieve consistency with other sources of arbitral regulations in China.

At an international level, the Chinese legislature should take advantage of the 2006 amended version of the Model Law,[135] which is widely considereda reflection of international best practices in arbitration and the adoption of which is considered a primary gateway to the international arbitration market.[136] The very reason for taking advantage of these best practices is because it is this author's firm belief that the Chinese arbitration legislation has the capability to grow to an international level, as has already happened in the case of the regime of intellectual property laws.[137] Arbitration is important to the commercial sector and it serves the nation's trade and investment interests.

At the domestic level, the Chinese legislature should review the various sources of arbitration regulations to ensure consistency. As has been discussed previously, there are a number of evident inconsistencies between the AL and other types of arbitral regulation in China. For example, the lack of detail in guiding the creation of local arbitration commissions has allowed State Council regulations to intervene, producing contrary effects and hindering the quest for independence of China's city-based local arbitration commissions. Additionally, the concept of "foreign-related arbitration commission" in the AL has become obsolete by virtue of the 1996 State Council Notice bridging the jurisdictional bifurcation. As there are no longer any jurisdictional divisions predicated on the characterization of arbitration commissions, the concept of "foreign-related commission" should be discarded to prevent any practical confusion. Only the concept of "foreign-related arbitration"[138] should be retained, and bi-

[135] The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration was adopted in June 1985, and was comprehensively amended in July 2006*; See* UNICTRAL MODEL LAW ON INT'L COMMERCIAL ARBITRATION (2006), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[136] For example, Australia is one of the first to adopt the 2006 amendments to the Model Law, as a reflection of embracing international best practice. *See generally* DOUG JONES, COMMERCIAL ARBITRATION IN AUSTRALIA (2d ed. 2012); RICHARD GARNETT & LUKE NOTTAGE, INTERNATIONAL ARBITRATION IN AUSTRALIA (2010).

[137] The most recent laws have been aligned with various international conventions on the protection of intellectual property rights. *See* Zhong hua ren min gong he guo zhu zuo quan fa (中华人民共和国著作权法) [Copyright Law] (adopted by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, rev'd Feb. 26, 2010; effective as from Apr. 1, 2010) <Order No.26 of the President> (China); Zhong hua ren min gong he guo zhuan li fa (中华人民共和国专利法) [Patent Law] (adopted by the Standing Comm. Nat'l People's Cong., Apr. 1, 1985, rev'd Dec. 27, 2008; effective as from Oct. 1, 2009) <Order No. 8 of the President> (China); Zhong hua ren min gong he guo shang biao fa (中华人民共和国商标法) [Trademark Law] (adopted by the Standing Comm. Nat'l People's Cong., Mar. 1, 1983, rev'd Aug. 30, 2013; effective as from May 1, 2014) <Order No. 6 of the President> (China).

[138] The concept as in accordance with judicial interpretations of both the General Principles of Civil Law and Civil Procedure Law.

furcations should only be maintained to the extent that different treatment of judicial review over arbitral awards may result from the two types of disputes; and grounds for reviewing domestic awards should be narrowed only to procedural aspects.

Equally important in the revamping of the Chinese arbitration system and another "essential" ingredient to a successful arbitration reform is to have a pro-arbitration judiciary, which is critical to ensuring the success of the goals of legislative reforms. It is encouraging to note that, over the past decade, in addition to issuing the very impressive and consolidated Interpretation on the Arbitration Law in 2006, the SPC has been generally supportive of arbitration in concrete practice as well. For example, in the most recent case on foreign institutional arbitration seated in China, *Longlide* (2013), as well as in treating the jurisdictional mess post the CIETAC split episode (2015), the central-level judiciary has exhibited judicial leniency and made great efforts to give effect to arbitration agreements as much as possible. Lower-level Chinese judiciaries are expected to learn from the SPC's pro-arbitration jurisprudence and to well implement it in their day-to-day practice.

B. Institutional Reform for Independence and Competitiveness

Measures to achieve institutional independence and competitiveness of Chinese arbitration commissions are aspects of "near" ingredients of the modern arbitration system, but will be of particular significance and relevance to China as an institution-arbitration-dominated jurisdiction. The institutional reform aims to comprehensively restructure the players of the Chinese arbitration market and by doing so, Chinese arbitration commissions will develop on basis of market demand rather than administrative needs.

Structurally, arbitration commissions must be decoupled from local governments and be independent and self-sufficient. This purports to eliminate the external intervention by political and administrative powers into arbitration commissions. The personnel composition within a commission, particularly that of its leadership, should be selected from legal professionals rather than representatives of administrative departments. In financial matters, arbitration commissions should rely on their arbitration fees charged for operation and development, rather than remaining under the protection of local governments.

Self-sufficiency is necessary not just for the sake of establishing the independence of large numbers of city-based local arbitration commissions in China; it will also push them to strive for quality development under healthy market competition. The local government should be prohibited from forcing local enterprises to use local arbitration commissions to play upon localization sentiment. In this regard, it is refreshing to see that the BAC has suc-

cessfully restructured itself in terms of both integrity and quality; it has further won rising repute in professionalism in the arbitration market. In the meantime, it should be noted that the success of the BAC has not been easy; it would be wrong to assume that all other city-based arbitration commissions could follow suit without the benefit of a demanding market. In fact, as highlighted previously, many city-based local arbitration commissions were established on the basis of administrative needs rather than market demand, meaning that the proposed restructuring, aimed at fostering independence and market competitiveness, might hinder their long-term survival. Without arbitration cases or parties willing to opt for an arbitration commission, any institutional reform endeavors are doomed to fail. One must also admit that the active competition in the Chinese arbitration market is an inevitable trend and will become even more intense in markets where only the fittest arbitral service providers will survive. Hence, less developed local arbitration commissions, which have very small caseloads to support their operations, will likely be eliminated from the market.

C. Marching Toward Arbitrator Professionalism

A last aspect of the prospective reforms concerns the quality of arbitrators. "An arbitration is only as good as the arbitrator."[139] In association with the modernization of Chinese arbitration commissions, the gradual evolution toward arbitrator professionalism in China should be treated as another aspect of the "highly recommended" ingredient and an integral part of the success of the reform.

This would require that first, arbitrators must hold high standards of professional ability and moral integrity; and second, China must establish an environment for the arbitrators to work impartially. For the former, the AL does set out professional requirements that are no lower than any other jurisdictions, but the accreditation is controlled by each individual arbitration commission. As such, a change in the accreditation scheme is necessary to put forward incentives to attract arbitral talents. It is desirable that the accreditation scheme be managed by a self-regulatory body. In this respect, the China Arbitration Association (CAA) is the most appropriate authority for qualifying arbitrators, given its legal status allowing it to coordinate all Chinese arbitration commissions.[140] Because China has not had a tradition of arbi-

[139] Every arbitration aficionado knows this expression: "An arbitration is only as good as the arbitrator" ("Tant vaut l'arbitre, tant vaut l'arbitrage"). The expression is widely referred to in the arbitration industry, see, e.g., Stephen R. Bond, *The International Arbitrator: From the Perspective of the ICC International Court of Arbitration*, 12 NW. J. INT'L L. & BUS. 1, 1 (1991).

[140] Zhong hua ren min gong he guo zhong cai fa (中华人民共和国仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 15(2), *reported in* 7

trator professionalism, further experience can be drawn from self-regulatory international arbitral bodies such as the Chartered Institute of Arbitrators (CIArb) with respect to examining and training Chinese and foreign nationals and helping them become accredited and remain competent.[141]

For the latter requirement regarding the supportive environment for arbitrators to work professionally and impartially, one deciding factor is whether the arbitration commission itself is independent of administrative and other interference; the issue ties in the above discussion on reform for institutional independence and integrity of Chinese arbitration commissions. It would also require a strong set of arbitration rules, both professional and ethical, to regulate and supervise the practice of arbitrators to ensure they act impartially. The repute and popularity of the BAC in arbitrator professionalism is built particularly built on its success in achieving institutional independence in the first place. The BAC's experience is research-oriented and may be used as an important example for other city-based local arbitration commissions to follow suit. With the CAA taking the lead in accreditation (in order to attract talents), and individual arbitration commissions ensuring institutional independence and competitiveness (in order to keep the talent), it is expected that arbitrator professionalism can be established in China in the not too distant future.

CONCLUSION

While every jurisdiction has a story to tell in arbitral studies, particularly because the field is fast changing and closely connected with economic development, the arbitration arrangements established by China stand out as the most distinctive among major trading nations—in theory, law, institutions, practice, and moreover, reform patterns and development discourse.

In the Western world, where arbitration is widely favored by the international business community, arbitration laws culminate from the jurisprudence of the UNCITRAL Model Law on International Commercial Arbitration. Independent and competitive arbitration institutions are created by chambers of commerce to facilitate business dispute resolution following the norms and principles designated by the arbitration laws. In order to catch up with the Western trend and to transform into favorable forums for international business dispute resolution, Asian jurisdictions started to reform their arbitration systems on basis of the Model Law and

CHINA L. & PRAC. 23, 23–27 (1994).

[141] CIArb is a world recognized self-regulatory institutional leader in providing accreditation and training to arbitrators and mediators. For more information on the institute, see CHARTERED INSTITUTE OF ARBITRATORS, http://www.ciarb.org/ (last visited Oct. 25, 2017).

modern arbitration institutions during the 1990s. Since the Chinese Arbitration Law was promulgated in 1994, the Chinese experiment in arbitration modernization has met varied problems. As a developing rule of law jurisdiction, the administrative governance system of arbitration originally practiced in China clashes with the autonomous and independent principle of international arbitration; moreover, China's regulatory system of arbitration is very much scattered and still developing.

As argued, the "essential" ingredient for the arbitration reform in China is its readiness to formally revamp the most important regulatory framework, i.e., the 1994 Arbitration Law, which has proved to be "Chinese characteristically localized" and unable to cope with the rapidly deepening marketization and evolving rule of law conditions in China. The Model Law provides and facilitates access to an international arbitration market and serves China's trade and investment interests. As a jurisdiction which has never incorporated the Model Law (neither the 1985 version nor the 2006 amended version), legislative reform in line with the Model Law standards should be taken place in China's arbitral regime soon. The lack of official legislative support has left the judicial and institutional initiatives (the informal patterns of reform and more piecemeal developments) with many uncertainties. Relatedly, China may lose its competitive value in the international arbitration market because of its overly slow progress in macro-legislative development, despite its strong vigor in economic competitiveness.

Fortunately, the situation is not without dynamic development. Though distinctive in its reform patterns, the Chinese arbitration regime has been most vibrant over the past decade in some "highly recommended" ingredients needed for arbitration modernization such as having the "pro-arbitration judiciary" and "arbitration market with institutional reforms for competitiveness". As this Article has pointed out, the seeds of reform can be discerned from both bottom-up and top-down perspectives, with judicial and institutional initiatives combined as a major driving force of development. The judiciary is now paying more deference to arbitration in China. Commendably, the SPC has issued the consolidated 2006 Judicial Interpretation on Arbitration Law, which carries the effect of injecting more certainty into the defective regulatory framework. Moreover, in recent years, the Chinese courts (both at the central and local levels) have been relaxing their conditions and becoming increasingly receptive to foreign institutional arbitration seated in China. All these judicial efforts share the common themes of fostering a more pro-arbitration attitude in the Chinese judiciary as well as aligning Chinese arbitration norms and practices with international standards. On the other hand, two decades following the promulgation of the Arbitration Law, the Chinese arbitration market is

well-established and developed. The ever intensifying competition among city-based local arbitration commissions and between these commissions and the CIETAC has formed another important force behind arbitration reform in China, fostering institutional independence, integrity, professionalism, and competitiveness of the Chinese arbitration market players, namely the arbitration commissions. In this respect, the BAC has become a national leader in institutional reform, with other developed city-based Chinese arbitration commissions following suit and pursuing innovation. The CIETAC itself has also been taking a more active role in bolstering trust following the dramatic split episode and the SPC's actions giving effect to post-split jurisdictions.

This Article has further attempted, in many ways, to contextualize the Chinese distinctions (in the arbitration system and its reform) in light of the wider social and economic reality in China. By identifying the most recent homegrown Chinese experiences in arbitration reform (patterns and discourse), in prospect, the road ahead is for these judicial and institutional initiatives to push for formal legislative breakthrough to confirm the informal initiatives. In the meantime, the legislative reform should incorporate international "best standards" of arbitration norms and practices so that the Chinese arbitration regime can truly mature and reach a global level. The formation of a modern and liberal arbitration environment is still critical to China's trade and investment interests. Given China's rapidly expanding economic prominence and ever-closer cooperation with global corporations, both at home and abroad, the number of international disagreements involving Chinese entities is expected to continue to grow. In view of the lack of competence of Chinese courts and the reluctance of Chinese firms to put their fate in the hands of foreign courts, arbitration is still the best choice. The Chinese government should make a serious and continued commitment to the development of China toward becoming a favorable international arbitration forum.