

AD HOC ARBITRATION IN CHINA

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Today arbitration is the dominant method for resolving international commercial disputes. The international commercial arbitration system based on the New York Convention effectively facilitates resolution of cross-border disputes and contributes to the world's continuing economic development. Ad hoc arbitration has many advantages over institutional arbitration that make it a preferred way to resolve commercial disputes in many contexts. China, an emerging economic superpower, is also an active player in the field of arbitration. The PRC Arbitration Law (Law), however, requires that parties appoint an arbitration institution in their arbitration agreement. Otherwise, their ad hoc arbitration agreement is invalid. Interestingly, this strict requirement does not mean Chinese courts will never enforce an ad hoc arbitration agreement or an ad hoc arbitration award. Given arbitration's "international" nature, parties can freely agree to arbitrate outside China where ad hoc arbitration is accepted, or they can carefully draft their arbitration agreement in a certain way so that they can arbitrate their dispute in China on an ad hoc basis. A comparative study of arbitration's legal transplant history in China as well as China's social and economic structures at the time of the Law's promulgation reveals the true reasons behind the Law's hostility towards ad hoc arbitration. As China participates more fully in globalization, this bizarre requirement will need to change. A systematic analysis shows this change would require a whole-scale rewriting of the Law and revision to many other relevant Chinese laws.

BIOGRAPHICAL SKETCH

Tietie Zhang earned a Juris Master degree from Peking University Law School in 2006. After graduation, he worked in a leading Chinese law firm in Beijing, practicing in the field of commercial dispute resolution. He successfully advised and represented various clients in scores of arbitration and litigation cases in China. Tietie Zhang also received an LL.M. degree from Cornell University Law School in 2010.

To Clare, Angie, Amy, and Audrey

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CHAPTER ONE:

INTRODUCTION

I BACKGROUND

Instead of being merely an alternative dispute resolution mechanism, today arbitration has become the dominant method to resolve international commercial disputes.¹ The international commercial arbitration system based on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) has evolved into a highly efficient and effective legal framework that greatly facilitates resolution of cross-border disputes and, therefore, contributes to the world's continuing economic development.²

There are multiple ways to categorize commercial arbitration. Depending on whether or not the arbitration proceeding is administered by an established organization, arbitration could be classified as either institutional, where “the proceedings are administered by an organization, usually in accordance with its own rules of arbitration,”³ or ad hoc, meaning that “there is no formal administration by any established arbitral agency; instead the parties have opted to create their own

¹ See, e.g., CHRISTIAN BÜHRING-UHLE, LARS KIRCHHOFF & GABRIELE SCHERER, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 27 (2d ed. 2006); Gerald Aksen, *Arbitration and Other Means of Dispute Settlement*, in INTERNATIONAL JOINT VENTURES: A PRACTICAL APPROACH TO WORKING WITH FOREIGN INVESTORS IN THE U.S. AND ABROAD 287, 287–288 (David N. Goldswieg & Roger H. Cummings eds., 1990) [hereinafter Aksen, *Arbitration*].

² See BÜHRING-UHLE ET AL., *supra* note 1, at 57–60; Kofi Annan, Sec'y Gen. of the U.N., Opening Address Commemorating the Successful Conclusion of the 1958 United Nations Conference on International Commercial Arbitration, in ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS, at 1–3, U.N. Sales No. E.99.V.2 (1999), available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>; Gloria Miccoli, *International Commercial Arbitration*, AM. SOC'Y INT'L L., <http://www.asil.org/erg/?page=arb#id.8000yf4mkmkr> (last updated Jan. 20, 2013).

procedures for a given arbitration.”⁴

Ad hoc arbitration undoubtedly preceded institutional arbitration. Long before the emergence of permanent organizations providing professional services that facilitate arbitration proceedings, ad hoc arbitration had been in existence for hundreds or even thousands of years.⁵ Institutional arbitration, however, remains popular among business entities.⁶ Due to the intrinsically decentralized nature of arbitration, as well as parties’ concerns about confidentiality, it is hard to compare accurately the numbers of cases resolved by ad hoc or institutional arbitration respectively. In general, however, these two forms of arbitration today operate side by side in most of the world. Although sharing most of the common characteristics and benefits of arbitration in general, each form has certain unique advantages.⁷

Generally speaking, ad hoc arbitration has at least the following advantages:

- (i) Flexibility. In ad hoc arbitration, parties have maximum freedom to make their own rules as to how their arbitration should be conducted. They may tailor the proceeding to their own needs, depending on the circumstances of their own case.
- (ii) Efficiency. Because parties enjoy maximum flexibility in the procedure, they can achieve maximum efficiency. They do not need to follow any unnecessary internal procedures of any arbitration institution, and thus may settle the dispute in the fastest possible way. Some cases could be settled within weeks, or even days.

³ Gerald Aksen, *Ad Hoc Versus Institutional Arbitration*, ICC INT'L CT. ARB. BULL., June 1991, at 8, 8 [hereinafter Aksen, *Ad Hoc*].

⁴ *Id.*

⁵ See discussion *infra* Chapter II.

⁶ In 2009, CIETAC decided 1,329 cases, and the ICC approved 415 awards. *2009 Statistical Report*, 21 ICC INT'L CT. ARB. BULL., 5, 15 (2010); Zhang Wei (张维), *Maozhong Shouan Shuliang Chixu Zengzhang* (贸仲受案数量持续增长) [*Number of Cases Accepted by CIETAC Continues to Increase*];

(iii) Cost-effectiveness. At least in some cases, particularly those having smaller amounts at stake, ad hoc arbitration is cheaper. Parties do not need to pay any administration fee to an arbitration institution. They may also be able to cut down costs regarding attorney fees and arbitrator's fees, because of the time saved from having flexible procedures.

(iv) Ad hoc arbitration is especially favored when one party to the arbitration is a sovereign state. Because state governments sometimes do not want to relinquish their sovereignty, they may be reluctant to submit their disputes to the control of an institution. Accordingly, ad hoc arbitration is preferred.

More importantly, the promulgation of the UNCITRAL Arbitration Rules in 1976 has greatly facilitated ad hoc arbitration in practice.⁸ Instead of having to draft detailed arbitration rules either in advance or after a dispute arises, parties can now easily incorporate this set of comprehensive and well-prepared rules by reference to their arbitration agreement.⁹ By doing so, parties gain the benefit of ad hoc arbitration, while at the same time avoiding risks caused by poor drafting or a failure to foresee possible pitfalls.

Institutional arbitration, on the other hand, also has several advantages:

(i) Arbitration institutions provide professional services and usually have a breadth of experience.¹⁰ By choosing institutional arbitration, parties may

⁷ FAZHI RIBAO (法制日报) [LEGAL DAILY], Feb. 5, 2010 (China).

⁸ See Asken, *Ad Hoc*, *supra* note 3, at 8.

⁹ The most recent version of the UNCITRAL Arbitration Rules was revised in 2010. UNCITRAL Arbitration Rules as Revised in 2010, G.A. Res. 65/22, U.N. Doc. A/65/465 (Dec. 6, 2010), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> [hereinafter UNCITRAL Arbitration Rules].

¹⁰ See Asken, *Ad Hoc*, *supra* note 3, at 9.

¹⁰ See *id.* at 10–11; see also OFFICE OF THE CHIEF COUNSEL FOR INT'L COMMERCE, U.S. DEP'T OF

conveniently acquire assistance regarding issues such as appointment of arbitrator(s), fixing arbitrator's fees, and arranging venue for hearing. Arbitration institutions' rich experience also makes them a great resource for advice when parties or even tribunals are dealing with complex issues concerning jurisdiction or other procedural matters.

(ii) The institutions' arbitration rules are usually well-drafted and are constantly amended to meet changes in practice.¹¹ Parties can also easily adopt an institution's standard arbitration clause as their arbitration agreement. By doing so, parties seldom need to worry about the arbitration agreement's validity, which is pivotal for a successful arbitration in the end.

(iii) In practice, arbitration institutions may receive more deference and respect from courts. Usually, because of their rich experience and good reputation, courts are more willing to give deference to decisions made by arbitration institutions or upon their advice, or to accept their opinion. This, in the end, may help to settle parties' dispute in a more efficient manner.

(iv) In cases where one party is absent, courts are usually more comfortable with enforcing a default institutional arbitration award, rather than an ad hoc award, because institutional rules usually have specific provisions as to how to proceed in such cases, and the institution's staff will usually supervise the process. As a result of the institution's involvement, courts are less worried about due process issues, because there is a neutral body to assure that the default party's rights have been well

COMMERCE, INTERNATIONAL ARBITRATION § I.E (last revised Mar., 2005),
<http://www.osec.doc.gov/ogc/occic/arb-98.html>.

¹¹ See Asken, *Ad Hoc*, *supra* note 3, at 9.

protected.¹²

In most of the world, parties have the freedom to choose either ad hoc arbitration or institutional arbitration to resolve their dispute, depending on what their needs are in a certain case. Due to ad hoc arbitration's inherent advantages, including its efficiency, flexibility, and cost effectiveness, many parties want to use ad hoc arbitration to resolve their disputes, particularly when that dispute is less complicated or does not involve a very large amount at stake. Almost all legal systems in the world recognize ad hoc arbitration's legitimacy, because it is a private dispute resolution mechanism based on private parties' contractual freedom.

II THE AD HOC PROBLEM UNDER CHINESE LAW

The People's Republic of China (PRC), as an emerging economic superpower, is an active player in the field of international commercial arbitration. As the economic ties between China and the rest of the world become stronger, it is only certain that the world will see a growing number of arbitration cases involving a Chinese party or actually taking place in China.

Yet, despite ad hoc arbitration's many advantages over institutional arbitration, which makes it a preferred way for parties to resolve their disputes in many circumstances, the Arbitration Law of the People's Republic of China (PRC Arbitration Law) requires that parties appoint an arbitration institution in their arbitration agreement.¹³ Accordingly, an ad hoc arbitration agreement is invalid per

¹² See *id.* at 12.

¹³ Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16 (China) (English translation provided by the National

se under the PRC Arbitration Law. This requirement clearly has profound legal significance in practice, since arbitration's consensual nature presupposes that the arbitration agreement is its foundation. A valid arbitration agreement is a necessary condition for a successful arbitration, as the agreement grants jurisdiction to the appointed arbitrator(s) and at the same time divests jurisdiction from the courts. The validity of an arbitration agreement will also affect the status of the ensuing arbitration award. If an award is based on an invalid arbitration agreement, the award may be set aside by the court at the seat of arbitration, or refused recognition and enforcement under the New York Convention by courts in other countries.¹⁴ As a result, for the purposes of successfully obtaining and enforcing an arbitration award, the importance of the arbitration agreement cannot be overstated.

It would obviously be difficult, if not impossible, for China unilaterally to delegitimize ad hoc arbitrations. As a contracting party to the New York Convention, China has the obligation to recognize and enforce arbitration awards made in other New York Convention countries, even though those awards are based on an ad hoc arbitration agreement. Therefore, enforcement of ad hoc arbitration agreements and ad hoc awards has become a complex, but important, issue under Chinese law.

Interestingly but quite understandably due to the New York Convention, the strict

People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm).

¹⁴ See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(a), June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention]; Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. Res. 61/33, U.N. Doc. A/61/453 (revising G.A. Res. 40/72), art. 34(2)(a)(i) (Dec. 4, 2006), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [hereinafter Model Law]; Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 58(1) (China) (English translation provided by the National People's Congress, available at

requirement that arbitration must be institutional under the PRC Arbitration Law does not mean Chinese courts will not enforce an ad hoc arbitration agreement. In practice, parties are free to place the seat of their arbitration outside China where ad hoc arbitration is accepted, to choose a law other than the PRC Arbitration Law to govern the validity of their arbitration agreement when arbitrating inside China, or both.¹⁵ Chinese courts respect such contractual freedom.¹⁶ Consequently, many ad hoc arbitration agreements have indeed been enforced by Chinese courts.¹⁷ It is nonetheless true that the rejection of ad hoc arbitration agreements under the PRC Arbitration Law has caused a great many complicated issues in arbitration practice in China. These relevant issues will be further explained and analyzed later in this dissertation.

Similarly, ad hoc awards may also be enforced under Chinese law. Chinese courts will apply the New York Convention and enforce an ad hoc award made outside China. Although Chinese courts will likely refuse to enforce an ad hoc award made in China by resorting to the PRC Arbitration Law, parties who adopt a special drafting strategy may be able to obtain an enforceable ad hoc award both inside and

http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm).

¹⁵ See discussion *infra* Chapter III, Section III.B.

¹⁶ See, e.g., Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Zhongcai Fa” Ruogan Wenti de Jieshi (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 on Certain Issues Concerning the Application of the “Arbitration Law of the People’s Republic of China”] (promulgated by the Sup. People’s Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 16 (China).

¹⁷ See, e.g., Zuigao Renmin Fayuan Guanyu Fujian Sheng Shengchan Ziliao Zong Gongsi yu Jinge Hangyun Youxian Gongsi Guoji Haiyun Jiufen Yi'an Zhong Tidan Zhongcai Tiaokuan Xiaoli Wenti de Fuhan (最高人民法院关于福建省生产资料总公司与金鸽航运有限公司国际海运纠纷一案中提单仲裁条款效力问题的复函) [Reply Letter Concerning the Validity of the Bill of Lading’s Arbitration Clause in the International Shipping Dispute Case Between Fujian Province Production Material Corporation and Jinge Shipping Co., Ltd.] (promulgated by the Sup. People’s Ct., Oct. 20, 1995, effective Oct. 20, 1995) (China).

outside China. Later chapters will further discuss these issues in detail.

This dissertation will, in its Chapter Two, start with a historical account of arbitration's legal transplant process in China. This history will provide a valuable background for understanding the origin of certain peculiar mechanisms under Chinese arbitration laws, including its hostility towards ad hoc arbitration. This legal transplant process may also shed light on certain theories that have been debated upon in comparative legal studies. This dissertation also aims at addressing complex and important issues that parties in practice currently face with ad hoc arbitration in China. Through a very careful analysis, Chapters Three and Four will identify the exact nature of these issues, and propose possible solutions for the parties to get around the institutional requirement under Chinese arbitration laws. Furthermore, building on the historical and practical analysis of the issues related to ad hoc arbitration in China, Chapter Five will examine why Chinese law has been hostile towards ad hoc arbitration. It will also make certain recommendations to the Chinese legislature and try to persuade them to fully legitimize ad hoc arbitration under Chinese law. Chapter Six will present a conclusion of this dissertation.

CHAPTER TWO:
THE LEGAL TRANSPLANT OF ARBITRATION IN CHINA

I INTRODUCTION

On August 31, 1994, the Ninth Session of the Standing Committee of the Eighth National People's Congress of the People's Republic of China enacted the PRC Arbitration Law. Taking effect on September 1, 1995, this law, together with a few other relevant laws,¹⁸ formed the legal framework of commercial arbitration in the PRC.

Apart from recognizing many important legal principles regarding commercial arbitration that are commonly respected in the world's community, such as the separability of arbitration agreements, independence of arbitrators, and party autonomy, the PRC Arbitration Law has set forth a number of rules that are not often seen elsewhere in the world. For example, it requires that parties appoint an arbitration institution in their arbitration agreement.¹⁹ Accordingly, ad hoc

¹⁸ See generally, Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended Aug. 31, 2012) (China); Zuigao Renmin Fayuan Guanyu Zhixing Woguo Jiaru de "Chengren ji Zhixing Waiguo Zhongcai Caijue Gongyu" de Tongzhi (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) [Notice on Executing the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" that Our Country has Acceded Into] (promulgated by the Sup. People's Ct., Apr. 10, 1987, effective Apr. 10, 1987) (China); Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Zhongcai Fa" Ruogan Wenti de Jieshi (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 on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China"] (promulgated by the Sup. People's Ct., Aug. 23, 2006, effective Sept. 8, 2006) (China); Di'erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Dec. 26, 2005) (China).

¹⁹ Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16 (China) (English translation provided by the National People's Congress, available at <http://www.npc.gov.cn/englishnpc/Law/2007->

arbitration agreements are invalid per se under the PRC Arbitration Law. Also, it has provided special and more favorable treatment for foreign-related arbitration, which Chinese law defines as domestic arbitration that involves a foreign element.²⁰ These special, or even unique, rules have created many important issues for legal practice, academic analysis, and possible legislative proposals.²¹

Some of these special rules in the PRC Arbitration Law, however, may appear puzzling for someone who is not familiar with the Chinese legal system. Truthfully speaking, many of them are indeed perplexing from a comparative point of view. Take the PRC Arbitration Law's hostility against ad hoc arbitration for an example. Why does the Law prohibit ad hoc arbitration, which is perfectly acceptable all over the world? What is different about China that justifies this strong stance? A thorough analysis of Chinese law only increases the perplexity, because it reveals that the prohibition is not absolute. Many ad hoc arbitration agreements are indeed enforced by Chinese courts.²² Similarly, ad hoc arbitration awards seated outside China are also enforceable before Chinese courts.²³ Furthermore, with some carefully crafted strategies, parties may even have successful ad hoc arbitration awards

¹²/12/content_1383756.htm).

²⁰ Possible foreign elements may include non-Chinese parties, properties located outside China, or legal facts occurring outside Chinese territory. *See Di'erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiayao* (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Dec. 26, 2005), art. 71 (China); *Zuogao Renmin Fayuan Guanyu Guanche Zhixing "Zhonghua Renmin Gongheguo Minfa Tongze" Ruogan Wenti de Yijian* (Shixing) (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(试行)) [Opinions on Certain Issues Concerning the Implementation of the "General Principles of Civil Law of the People's Republic of China" (Trial)] (promulgated by the Sup. People's Ct., Apr. 2, 1988, effective Apr. 2, 1988), art. 178 (China).

²¹ *See* discussion *infra* Chapter III and Chapter IV.

²² *See* discussion *infra* Chapter III.

²³ *See* discussion *infra* Chapter IV.

in China and then have the ensuing awards enforced both inside and outside China.²⁴

In order to understand the rationales behind these special rules under the PRC Arbitration Law, a mere reading of its text is far from enough. It may be essential to consider the law's social and economic contexts, including the rapid and drastic social and economic changes that China was experiencing at the time when the law was enacted in 1994. For that purpose, a thorough understanding of the PRC's social and economic reform process is also necessary. Furthermore, it might also be helpful to look back even further into the history of arbitration in China. These historical analyses may help one to understand how Chinese legislators and practitioners perceived arbitration as a legal institution when the PRC Arbitration Law was enacted.

Overall, these analyses will tell a legal transplant story. Although arbitration in China shares an equally ancient origin as its western counterpart, it remained in a primitive form for an excessively long time. It was not until the early twentieth century that the then Chinese government introduced, or transplanted, arbitration to China as a legal institution. This process of legal transplant reflected the mindset of the Chinese legislators at the time. Their perception of arbitration's function, together with China's practical needs at the moment, decided the way in which this legal transplant occurred. As a part of this process, Chinese legislators made changes to the arbitration legal framework model. Some of these changes resulted in many special rules in the law. As time went on, legal transplant of arbitration to China happened more than once, but the same story occurred again and again. Chinese legislators always added something new into the legal system to cope with their

²⁴ See discussion *infra* Chapter IV.

practical needs that were decided by the social, economic, or other contexts of China at the time. Although the current PRC Arbitration Law mostly adheres to the commonly accepted norms that most of the world follows nowadays, there are still many special rules in the Law today that survived multiple rounds of revising and redrafting. This phenomenon itself may also reflect legal transplant theories, particularly regarding the ways in which laws are transplanted from one place to another, as well as changes that occur in that process.

This chapter aims at explaining certain special rules embedded in the PRC Arbitration Law through a historical and comparative analysis of arbitration's history in China. It will also try to argue that the legal transplant of arbitration as a legal institution in China has met important social and cultural resistance, resulting in arbitration's adaptation to Chinese society and culture. Overall, this chapter intends to help those unfamiliar with the Chinese legal system to understand better the current Chinese arbitration legal framework.

Section II of this chapter will bring forward the legal transplant theories by introducing the major viewpoints of scholars in this field. Particularly, different theories on relationship between laws, social and economic conditions, and cultures will be discussed. Section III and Section IV will respectively lay out, in detail, arbitration's history in the western world and in China, describing their occurrence and evolution as a legal institution. Section V will first argue that the story of Chinese arbitration once again manifests the theory that law is closely connected to the social, economic, and cultural background of a place, and no law can be identically transplanted without taking these issues into consideration. Section V will go on to

reach the conclusion that the history of arbitration in China is decisive in shaping the current Chinese arbitration legal framework. Many complex and sometimes bizarre issues under the PRC Arbitration Law cannot be understood by legal scholars and practitioner unless and until such historical background has been thoroughly introduced.

II LEGAL TRANSPLANT THEORIES REVISITED

Arbitration as a legal institution is not a Chinese invention. Instead, it was borrowed, or transplanted, from the western world.²⁵ Regarding the borrowing or transplant of legal rules, laws, or legal institutions, many comparative law scholars have proposed and constantly debated theories of legal transplant. Among this rich body of ideas, there are many distinct viewpoints and opinions. Some of them go against one another, while others may be consistent. Generally speaking, these debates center around two main topics. On the one hand, early comparative law scholars debated upon whether legal transplant from one place to another is possible. More recently, on the other hand, the majority of scholars seem to agree that legal transplant is possible, and consequently they turn to discuss various issues relating to such transplants.

A. *Theories on the Possibility of Legal Transplant*

Debates in the field of legal transplant theories started with the idea of whether legal transplant is possible, or how much legal transplant is related to a country's

²⁵ See discussion *infra* Section IV.

social, economic, and political contexts. Nicholas Foster describes the debate as “between ‘culturalists’ and ‘transferists,’”²⁶ although some scholars find this description overly simplistic.²⁷ Theories respectively proposed by Alan Watson, or at least the “strong version” of Watson,²⁸ and Pierre Lagrand may be representative in this regard.

Alan Watson is a firm supporter of legal transplant. As a legal historian, he argues that the historical development of law shows that legal transplant is not only possible, but also highly successful in at least western legal history. According to him, “the transplanting of individual rules or of a large part of a legal system is extremely common,” which is “true both of early time . . . and the present day.”²⁹ He further proposes that “transplanting is, in fact, the most fertile source of development” and that “[m]ost changes in most systems are the result of borrowing.”³⁰ Watson thinks that “transplanting of legal rules is socially easy,” and that “legal rules move easily and are accepted into the system without too great difficulty.”³¹ In his opinion, “[t]his is so even when the rules come from a very different kind of system,” because “usually legal rules are not peculiarly devised for the particular society. . . .”³² For Watson, “law like technology is very much the fruit of human experience,”³³ and

²⁶ Nicholas Foster, *Transmigration and Transferability of Commercial law in a Globalized World*, in COMPARATIVE LAW IN THE 21ST CENTURY 55, 59 (Andrew Harding & Esin Rüçü eds., 2002).

²⁷ See Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 AM. J. OF COMP. L. 583, 587 (2010).

²⁸ See William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. OF COMP. L. 489 (1995).

²⁹ ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 95 (Second Edition, 1993) [hereinafter WATSON, *LEGAL TRANSPLANTS*].

³⁰ *Id.*

³¹ *Id.* at 95-96.

³² *Id.* at 96.

³³ *Id.* at 100.

“legal rules, in addition to being part of the social structure, also operate on the level of ideas.”³⁴ Therefore, “what is borrowed . . . is very often the idea,”³⁵ and it is nothing but a good “idea” that legal reformers need.³⁶ Watson also emphasizes the legal profession’s role in law-making as well as their habit of relying on precedents and authorities as an explanation of legal transplant’s popularity and success.³⁷ In his mind, law develops by transplanting, not because any certain rule is decided by the social structure, but because law-makers, or the legal elites, think a foreign rule can be beneficial.³⁸

The “strong version” of Watson goes on to argue that law is thus autonomous and insulated from social or other factors. As per William Ewald, Watson holds that largely due to the functions and characteristics of the legal elite, “law will tend to develop by transplantation rather than by creation *ex nihilo*, and will tend to reflect the legal tradition rather than anything extrinsic to the law.”³⁹ As a result, the main differences between legal systems are “primarily the result of purely legal history.”⁴⁰

Contrary to Watson’s view, Pierre Legrand maintains that legal transplant is impossible. In Legrand’s opinion, the meaning of “legal” or “law” is vital for this debate. He thinks those who argue that legal transplant is possible are understanding “law” in a formalistic way and thus reduce “law” to “rules,” which usually include

³⁴ Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 315 (1978) [hereinafter Watson, *Comparative Law and Legal Change*].

³⁵ *Id.*

³⁶ See Alan Watson, *Legal Transplants and Law Reform*, 92 L. Q. REV. 79, 79 (1976).

³⁷ See WATSON, *LEGAL TRANSPLANTS*, *supra* note 29, at 117-118.

³⁸ See Watson, *Comparative Law and Legal Change*, *supra* note 34, at 315.

³⁹ Ewald, *supra* note 28, at 501.

⁴⁰ ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 38 (1981).

statutes and judicial decisions.⁴¹ In his theory, however, “a rule is never completely self-explanatory.”⁴² Instead, Legrand proposes that because a rule needs to be interpreted, the meaning of a rule, as an essential component of the rule, is not entirely supplied by the rule itself, but is largely dependent on the interpreter’s historical and cultural background.⁴³ Therefore, he argues that “[a] rule is necessarily an incorporative cultural form,” which is “supported by impressive historical and ideological formations.”⁴⁴ As a result, even though a rule may be borrowed, “its meaning . . . does not survive the journey from one legal system to another.”⁴⁵ “So,” Legrand goes on to say, “the transplant does not, in effect, happen . . .”⁴⁶ In other words, the borrowed rule is no longer the same rule.⁴⁷

Between these two lines of “extreme” theories proposed by Legrand and the “strong version” of Watson, other theories exist.

The “weak version” of Watson, for example, acknowledges the relation between law and society,⁴⁸ but states that such relation is not “extremely close, natural, or inevitable.”⁴⁹ This version provides that “law possesses a life and vitality of its own,”⁵⁰ and it “by no means accurately reflect[s] the needs and desires of society and its ruling elite . . .”⁵¹ Therefore, law is not a “mirror” of society.⁵² The “weak

⁴¹ See Pierre Legrand, *The Impossibility of ‘Legal Transplants’*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 111-112 (1997).

⁴² *Id.* at 114.

⁴³ See *id.* at 114-115.

⁴⁴ *Id.* at 116.

⁴⁵ *Id.* at 117.

⁴⁶ *Id.* at 118.

⁴⁷ See *id.*

⁴⁸ See Watson, *Comparative Law and Legal Change*, *supra* note 34, at 321.

⁴⁹ *Id.* at 315.

⁵⁰ *Id.* at 314.

⁵¹ *Id.* at 321.

⁵² See Ewald, *supra* note 28.

version” of Watson also acknowledges that laws frequently, and maybe always, undergo transformations and modifications after being transplanted, and that these modifications can even be substantial.⁵³ That being said, Watson maintains that legal transplant is still possible.⁵⁴

Otto Kahn-Freund thinks that legal transplant is possible, but there are chances of rejection.⁵⁵ Kahn-Freund first distinguishes between a mechanical insertion type of “transfer” and a surgical operation type of “transplant.”⁵⁶ He then describes them as two terminal points on a continuum, on which the transplant of a particular legal rule or legal institution may be found at a certain point.⁵⁷ In order to determine different laws’ “degrees of transferability,” Kahn-Freund first relies on Montesquieu’s theory that law is dependent on geographical, climatic, economic, social, cultural, religious, and political factors, and thus the transplant of a law is more of an “organic” type rather than a “mechanical” one.⁵⁸ He then submits that 200 years after Montesquieu, political factors have become the most important factors for a law’s transplantability.⁵⁹ Therefore, “the degree to which any rule . . . or any institution . . . can be transplanted” depends on “how closely it is linked with the foreign power structure.”⁶⁰ Kahn-Freund’s conclusion is that the transplantability of rules or institutions should not be taken for granted, and, in practice, the use of legal transplant “requires a knowledge

⁵³ See WATSON, *LEGAL TRANSPLANTS*, *supra* note 29, at 116; Watson, *Comparative Law and Legal Change*, *supra* note 34, at 314.

⁵⁴. See Watson, *Comparative Law and Legal Change*, *supra* note 34, at 314.

⁵⁵ See Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 6 (1974).

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.* at 6-7.

⁵⁹ See *id.* at 8.

⁶⁰ *Id.* at 12-13.

not only of the foreign law, but also of its social, and above all its political, context.”⁶¹

B. Theories on Consequences of Legal Transplant, Types of Legal Transplant, and Factors for a Successful Legal Transplant

Many comparative law scholars reject the absolutist theories proposed in the “strong version” of Watson and by Legrand, but instead choose to build their theories’ foundations on middle grounds.⁶² Starting from the assumption that legal transplant is possible, recent scholars have discussed a variety of issues that will arise after a legal transplant has taken place, such as consequences of legal transplant, types of legal transplant, and factors for a successful legal transplant.

Gunther Teubner thinks that the transplant of a law or a legal institution is different from and more complicated than the transplant of an organ. In the transplant of an organ, only two kinds of outcome may happen: “repulsion or integration,”⁶³ “[h]owever, when a foreign rule is imposed on a domestic culture . . . it works as a fundamental irritation . . .”⁶⁴ Therefore, instead of “legal transplant,” Teubner uses the metaphor of “legal irritants.”⁶⁵ In his view, “[legal irritants] will unleash an evolutionary dynamic in which the external rule’s meaning will be reconstructed and the internal context will undergo fundamental change.”⁶⁶ Taking the legal transfer of the good faith principle, a European continental contract law concept, into English law as an example, Teubner holds that:

⁶¹ *Id.* at 27.

⁶² See Cohn, *supra* note 27, at 587.

⁶³ See Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998).

⁶⁴ *Id.*

[A]ttempts at institutional transfer seem to produce a double irritation in the new context. They irritate law's binding arrangements to society. Foreign rules are irritants not only in relation to the domestic legal discourse itself, but also in relation to the social discourse to which law is, under certain circumstances, closely coupled.⁶⁷

As a result, Teubner reaches the conclusion that “[t]he result of such a complex and turbulent process is rarely a convergence of the participating legal orders, but rather the creation of new cleavages in the interrelation of operationally closed social discourses.”⁶⁸

Máximo Langer believes when a law is transferred, the legal idea or practice “may . . . be transformed by the structure(s) of meaning, individual dispositions, institutional and power arrangements, systems of incentives, etc., present within the receiving legal system.”⁶⁹ Langer further argues that “the transference of legal rules, ideas and practices, may produce a deep transformation not only in the transferred practice itself but also in the receiving legal system as a whole.”⁷⁰ Therefore, Langer thinks that the metaphor of “legal transplant” cannot accurately capture the reality, so he proposes “legal translation” as a new metaphor for legal borrowing.⁷¹

Esin rüçü, to a certain extent, shares Langer’s view. Starting from the theory that movement of legal institutions and ideas across borders is “a natural phase in

⁶⁵ See *id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 31-32.

⁶⁸ *Id.* at 32.

⁶⁹ Máximo Langer, *From Legal Transplant to Legal Translation: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1, 31 (2004).

⁷⁰ *Id.* at 32.

⁷¹ *Id.* at 32-35.

legal development,” rüçü suggests that it is “a process of transposition, tuning and fitting.”⁷² rüçü believes “transposition,” as used in music, is more appropriate than “transplant” because it is “more apt in instances of massive change based on competing models” and is “made to suit the particular instrument or the voice-range of the singer.”⁷³ “Tuning,” in rüçü’s idea, refers to work conducted by “those who move the law and help in its internalisation.”⁷⁴ rüçü thinks that internal tuning is necessary, and the tuners should usually be domestic judges.⁷⁵ He also believes that tuning is necessary at all levels in order for the transposition to be successful.⁷⁶ According to rüçü, the consequence of a legal transplant depends on certain “conditions such as the size of the transmigration, the characteristics of legal movement, the success or otherwise of transpositions and ‘tuning,’ the element of force or choice inherent in the move and the social culture of the new environment.”⁷⁷ rüçü further concludes that transposition and tuning is an ongoing process, and there will always be new transposition and further tuning; thus, law is the outcome of a series of transpositions.⁷⁸

Using typology, a sociological methodology, Jonathan Miller describes all forms of legal transplants in four types: 1) the Cost-Saving Transplant, 2) the Externally-Dictated Transplant, 3) the Entrepreneurial Transplant, and 4) the Legitimacy-Generating Transplant.⁷⁹ According to Miller, each of these four types is related to

⁷² Esin rüçü, *Law as Transposition*, 51 INT'L & COMP. L.Q. 205, 205 (2002).

⁷³ *Id.* at 207.

⁷⁴ *Id.* at 208.

⁷⁵ See *id.* at 208.

⁷⁶ See *id.* at 208.

⁷⁷ *Id.* at 212.

⁷⁸ See *id.* at 223.

⁷⁹ See Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and*

“a set of factors that can motivate a transplant,” and a transplant is usually “a mix of the four types” instead of a pure type of any single one.⁸⁰ He further proposes that “[d]ifferent types of transplants will tend to follow different courses and will respond differently to changes in their environment.”⁸¹ Adopting a similar methodology, Margit Cohn also introduces a number of typologies on legal transplants ordered by: 1) *De Facto* Sovereignty, 2) Outcome, 3) Type of Influence, 4) Type of Exporter, 5) Attitudes, 6) Types of Adopted Norms, and 7) Importer Motivations.⁸² According to Cohn, her endorsement of the typology system is motivated not only by its explanatory value, but also by its ability to reject binary, two-faceted distinctions and favor a multi-faceted analysis.⁸³

Richard Small “seeks to extend the [culturalists and transferists] debate in a new direction.”⁸⁴ Small first distinguishes “culture” from “context.”⁸⁵ According to him, “‘culture’ refers to a society’s entire background, one that might shape the form that the rules will take, whereas ‘context’ refers to those circumstances that specifically drive the development of a particular rule.”⁸⁶ Different from what other legal transplant scholars have studied, namely the mere transplant of a certain law, Small proposes a scenario where the “context,” rather than a law, is transplanted.⁸⁷ Taking Russia as an example, he explains that insider trading regulations are redundant in the

Argentine Examples to Explain the Transplant Process, 51 AM. J. OF COMP. L. 839, 842 (2003).

⁸⁰ See *id.*

⁸¹ *Id.* at 867.

⁸² See Cohn, *supra* note 27, at 590-596.

⁸³ See *id.* at 590.

⁸⁴ Richard G. Small, *Towards a Theory of Contextual Transplants*, 19 EMORY INT’L L. REV. 1431, 1438 (2005).

⁸⁵ See *id.* at 1437-1438.

⁸⁶ *Id.* at 1438.

⁸⁷ See *id.* at 1438.

former socialist country where the means of production are state-owned and no stock exchange exists.⁸⁸ After that context changes to a more capitalistic society, however, such regulations become relevant and even positively demanded.⁸⁹ Small thinks that “in certain situations, context drives the need for a law, whereas the broader culture determines the shape of that law.”⁹⁰ In other words, in certain situations, “the context itself is transplanted and the resulting law driven by that contextual transplant would be shaped by the culture particular to that jurisdiction.”⁹¹ In conclusion, he argues that law, as “a product of its context as well as its culture,” needs to “adapt to [the] contextual transplants, which . . . partially explains the development of certain laws.”⁹²

Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard approach the problem from the perspective of effectiveness of a legal transplant, or the “transplant effect.”⁹³ They propose that the “process” of transplant is more decisive on the transplant’s effectiveness than the contents of the transplanted legal rules.⁹⁴ In their conclusion, elements that may decide whether the legal transplant is successful include: whether the legal evolution is internal and thus the transplant is voluntary; whether the appropriateness of the transplanted rules has been considered so that modifications have been made in order for the rules to adapt to the receiving country; and whether the receiving country and its population are already familiar with the transplanted

⁸⁸ See *id.* at 1438-1439.

⁸⁹ See *id.* at 1438-1439.

⁹⁰ *Id.* at 1438.

⁹¹ *Id.* at 1438.

⁹² *Id.* at 1455.

⁹³ See Daniel Berkowitz, Katharina Pistor, Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. OF COMP. L. 163, 171 (2003).

⁹⁴ See *id.* at 189.

rules and the legal system from which they come.⁹⁵

III ARBITRATION'S HISTORY IN THE WESTERN WORLD

Arbitration obviously has a very long history in western cultures, which can be evidenced in various myths and legends.⁹⁶ It is doubtful that the exact origins of arbitration will ever be known, but one can naturally assume that it appeared when people in ancient times had a dispute, needed a resolution, and turned to a knowledgeable, dignified, and impartial person for a decision.⁹⁷ Evidence shows that arbitration was already used in Egypt as early as 1500 B.C.⁹⁸ Of course, the “arbitration” at this stage was likely to have been very primitive, and may be difficult to distinguish from mediation or even litigation.⁹⁹

Arbitration developed as society became more complex. In both Greece and Rome, arbitration became a common method of dispute resolution.¹⁰⁰ Some of the principles and theories that are commonly accepted in modern arbitration practice were already adopted during these early times.¹⁰¹ Even the arbitration proceedings

⁹⁵ See *id.* at 189-190.

⁹⁶ See generally LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 2:1 (3d ed. 2003, rev. ed. 2012); FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 3–8 (1948); William Catron Jones, *History of Commercial Arbitration in England and the United States: A Summary View*, in INTERNATIONAL TRADE ARBITRATION: A ROAD TO WORLD-WIDE COOPERATION 127, 127 (Martin Domke ed., 1958).

⁹⁷ See generally EDMONSON, *supra* note 96, § 2:1; KELLOR, *supra* note 96, at 3–8; Jones, *supra* note 96, at 127.

⁹⁸ See THOMAS OEHMKE, COMMERCIAL ARBITRATION 17 (1987).

⁹⁹ See Michael John Mustill, *Arbitration: History and Background*, 6 Journal of International Arbitration 43, 43 (1989); BÜHRING-UHLE ET AL., *supra* note 1, at 31; EDMONSON, *supra* note 96, § 2:1.

¹⁰⁰ See Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132 (1934-1935); J. Martin Hunter, *Arbitration Procedure in England: Past, Present and Future*, 1 ARB. INT'L 82, 82 (1985); Nicholas Geoffrey Lemprière Hammond, *Arbitration in Ancient Greece*, 1 ARB. INT'L 188, 188 (1985); OEHMKE *supra* note 98, at 17; EDMONSON, *supra* note 96, §§ 2:2-2:3.

¹⁰¹ See EDMONSON, *supra* note 96, §§ 2:2-2:3.

were similar to those of today.¹⁰² In Greece, for example, parties would choose a person considered wise and impartial to determine their case.¹⁰³ If there were more than one arbitrator, the case would be decided by the majority.¹⁰⁴ In Rome, it was established that an arbitrator's authority came from the contract between the parties and himself.¹⁰⁵ Moreover, arbitration during the Greek and Roman eras had two important developments. First, arbitration became international. In Greece, arbitration was not only used to resolve disputes between different cities, but also between citizens of different cities.¹⁰⁶ Later, because of Rome's vital position, arbitration spread to other parts of Europe.¹⁰⁷ Second, commercial arbitration arose. Greek merchants adopted arbitration in their business practice, and their Roman colleagues enjoyed sufficient autonomy by having their own arbitration procedure.¹⁰⁸

Arbitration later survived the medieval era. During the Dark Ages, arbitration was still in operation in Italy, France, Germany, and England.¹⁰⁹ Later, as international trading and other commercial activities developed, arbitration's advantages over litigation made it increasingly favored by merchants.¹¹⁰ With arbitration, merchants were able to avoid the costly intricacies of different national court systems and have their disputes resolved with maximum neutrality, efficiency, and commercial expertise.¹¹¹ As a result, arbitration became well established in

¹⁰² See *id.*

¹⁰³ See EDMONSON, *supra* note 96, § 2:2.

¹⁰⁴ See *id.*

¹⁰⁵ See ARTHUR ENGELMANN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE 259 (1927).

¹⁰⁶ See KELLOR, *supra* note 96 at 4; EDMONSON, *supra* note 96, § 2:2.

¹⁰⁷ See EDMONSON, *supra* note 96, § 2:3.

¹⁰⁸ See *id.* §§ 2:2-2:3.

¹⁰⁹ See *id.* § 2:4.

¹¹⁰ See *id.* § 2:4.

¹¹¹ See *id.* § 2:4.

commercial and maritime fields and spread to other corners of the world, including the United States.¹¹² In the meantime, arbitration practice developed into a very sophisticated procedure which, in most instances, survives to this day.¹¹³

The rest of the story is relatively well-known. For quite some time, courts were generally hostile towards arbitration.¹¹⁴ But as time went by, arbitration's advantages in privately resolving parties' disputes, particularly international commercial disputes, were greatly manifested. Nowadays, arbitration is widely respected and recognized in most of the world and has become the dominant method for resolving international commercial disputes.

Overall, arbitration's history in the western world shows that it arose and developed in a bottom-up way. Originating from parties' needs to have their dispute resolved by a third party in a amicable way, arbitration evolved to meet parties' desires to resolve their dispute outside a country's court system so that they could enjoy maximum neutrality, flexibility, efficiency, and confidentiality. Later, national laws and courts recognized and respected those parties' wishes and further conceptualized and implemented a legal framework to support and facilitate this private dispute resolution mechanism's operation.

IV ARBITRATION'S HISTORY IN CHINA

Generally speaking, arbitration's history in China went through two stages of development: the primitive stage and the modernization stage. The primitive stage

¹¹² See *id.* § 2:6.

¹¹³ See *id.* § 2:4.

¹¹⁴ See KELLOR, *supra* note 96 at 5-6; OEHMKE *supra* note 98, at 19.

started almost three thousand years ago, but had very few and insignificant changes along its way. The modernization stage, despite its relatively short duration, has seen many drastic changes, and can be further divided into three sub-stages.

A. Arbitration in Ancient and Imperial China

Although arbitration probably followed a different development path in China as compared with the one in the western word, the Chinese arbitration in its primitive form was not too much different from its western counterpart.

Similar to how arbitration originated in the western world. In ancient China, or even at the time before China emerged as a country, parties likely used a neutral third party to resolve disputes. Understandably, there might not have been a clear distinction between arbitration and litigation at that time, because concepts like “state” or “court” were still vague during such an early age. Another characteristic of arbitration in ancient China was its lack of clear distinction with mediation. At a time when there was no legal enforcement mechanism, it would be very difficult to distinguish arbitration and mediation from each other. In any sense, historical records show that the Chinese government adopted meditation as a legal institution as early as the Zhou Dynasty (1046–256 B.C.).¹¹⁵ In 587 B.C., it was recorded that two states in China submitted their dispute to a third party for determination.¹¹⁶

Unfortunately, however, arbitration in China remained in its primitive form for an

¹¹⁵ See Deng Ruiping (邓瑞平) & Sun Zhiyu (孙志煜), *Lun Guoji Shangshi Zhongcái de Lishi Yanjin* (论国际商事仲裁的历史演进) [*Historical Progress of International Commercial Arbitration*], 6 JINAN XUEBAO (ZHEXUE SHEHUI KEXUE BAN) (暨南学报(哲学社会科学版)) [JOURNAL OF JINAN UNIVERSITY (PHILOSOPHY AND SOCIAL SCIENCES)] 92, 93 (2009) (China).

¹¹⁶ See *id.* at 92-93.

excessively long time. Starting from 221 B.C. until at least 1840 A.D., China was an imperial state, comprising dozens of successive dynasties. During this long history, different governments, almost without exception, emphasized agriculture as a national policy and adopted measures oppressing commercial activities. Merchants were discriminated against and sometimes even persecuted. Because of these policies, commercial activities were not vibrant. Therefore, commercial disputes occurred much less frequently in China than in Europe. As a result, arbitration did not have much room to develop. Any disputes relating to property or economic interests, if any, were resolved by the state.¹¹⁷

Moreover, commercial activities between ancient China and other countries were also underdeveloped due to factors including distance, lack of efficient transportation, and national policies. This underdevelopment was also not in favor of arbitration's potential growth. To make matters worse, during the Ming Dynasty (1368–1644 A.D.) and the Qing Dynasty (1644–1912 A.D.), the Chinese government imposed strict control over foreign trade, which prevented a space from developing in which arbitration could grow.

B. Arbitration in the Late Qing Dynasty

China began to experience drastic social changes in the second half of the nineteenth century. After suffering grave losses in the two Opium Wars¹¹⁸, rulers of

¹¹⁷ In imperial China, there was no separation of power. As a result, there were no separate courts. The functions of courts were carried out by executive officials.

¹¹⁸ Wars between China and the British Empire after China sought to restrict illegal British opium trafficking, which consisted of the First Opium War (1839-1842) and the Second Opium War (1856-1860).

the Qing Dynasty¹¹⁹ were forced to open China to the world and allow Chinese parties to engage in commercial activities with business entities from foreign countries. In the meantime, having realized its own weakness and facing serious internal problems, the Qing government initiated various reforms for the purpose of self-salvation. Among them, promotion of commerce was an important initiative. Consequently, economic activities in China became much more vigorous than before, and conditions for arbitration to develop as a legal institution finally emerged.

Under the original legal regime of the Qing Dynasty, state governments, or courts, heard and resolved all commercial disputes, together with all other kinds of disputes that arose in Chinese society.¹²⁰ As commerce gradually developed, however, merchants became extremely reluctant to file their disputes to courts for a number of reasons. First, in imperial China, there was no distinction between commercial cases, civil cases, and criminal cases. The same set of procedural laws and body of substantive laws applied to all disputes. Chinese judges, or government officials, thus heard commercial cases in the same way as they heard criminal cases. As a result, torture, which was then common in criminal proceedings, may also have been used as a fact-finding method in commercial cases. This inappropriate measure was not only extremely humiliating for merchants, but may have adversely affected their reputation in business circles and making it difficult for parties to cooperate again in the future. Second, as a tradition and a national policy, Chinese imperial governments emphasized agriculture and oppressed commerce. Under this mindset,

¹¹⁹ The last ruling dynasty of China (1644-1912), also known as the Manchu Dynasty.

¹²⁰ In imperial China, there was no separation of power. As a result, there were no separate courts. The functions of courts were carried out by executive officials.

judges predominantly considered commercial disputes as trivial matters. Thus, commercial cases were usually severely delayed in courts, sometimes for over ten years. Merchants loathed this low efficiency. Third, at the time, judges seldom knew anything about business. It was very difficult for them to make a correct or even reasonable decision in a commercial case. All these reasons led to serious alienation and estrangement between merchants and courts.¹²¹

Aiming to solve these problems, and as a part of reform measures, the Qing rulers established the Department of Commerce as a new governmental body and endowed it with the authority to adjudicate commercial disputes. This, however, did not significantly resolve the merchants' practical difficulties. The Department of Commerce, at least at the beginning, was only willing to hire standby public officials¹²² instead of people with commercial knowledge or experience. As a result, the Department became no different from an ordinary court.¹²³

At the turn of the twentieth century, the Qing government had clearly realized the importance of commerce as well as China's underdevelopment in that aspect. At the same time, there was also a strong call for more substantial government support among Chinese merchants. In 1904, in order to further promote commerce and protect merchants' interests, the Qing government promulgated the Concise Chamber

¹²¹ See Ren Yunlan (任云兰), *Lun Jindai Zhongguo Shanghui de Shangshi Zhongcái Gongneng* (论近代中国商会的商事仲裁功能) [*Chambers of Commerce's Function of Commercial Arbitration in Modern China*], 4 ZHONGGUO JINGJI SHI YANJIU (中国经济史研究) [CHINESE ECON. HIST. RES.] 117, 117 (1995) (China); Ma Min (马敏), *Shangshi Caipan yu Shanghui Lun Wanqing Suzhou Shangshi Jiufen de Tiaochu* (商事裁判与商会——论晚清苏州商事纠纷的调处) [*Commercial Arbitration and Chamber of Commerce: Mediation of Commercial Disputes in Suzhou in Late Qing Dynasty*], 1 LISHI YANJIU (历史研究) [HISTORICAL RESEARCH] 30, 30 (1996) (China).

¹²² Qing Dynasty had a system under which a person might be admitted as a public official but needed to wait for a period of time in order to be placed at a certain position.

of Commerce Act. Through this legislation, the government encouraged chambers of commerce to be established all over China. At the same time, realizing government bodies' incompetence to resolve commercial disputes, Article 15 of the Concise Chamber of Commerce Act provided that:

Where disputes arise between Chinese merchants, the merchants may notify the chairman of the local chamber of commerce, who will invite members to justly debate over the case in due course, and arbitrate in public. If one of the two parties does not agree with the award, it may resort the case to the local government official.¹²⁴

Based on this provision, many local chambers of commerce, at the time of or shortly after their establishment, also set up a division or a department that was in charge of conducting arbitration.¹²⁵

Nevertheless, arbitration conducted under chambers of commerce in the late Qing Dynasty is not arbitration in the modern sense. Most importantly, as specified in the Concise Chamber of Commerce Act, an arbitration award issued by a chamber of commerce is only binding upon the parties if they both agree with it. One party may choose to file the already arbitrated case to court, in which case the arbitration award will not become binding.

Moreover, during this period, Chinese chambers of commerce frequently used mediation when hearing commercial cases. One of the reasons for its popularity was that mediation is a traditional dispute resolution method in Chinese society,

¹²³ See Ma, *supra* note 121, at 30.

¹²⁴ *Id.* at 31.

¹²⁵ See *id.* at 31.

particularly for internal disputes within a community. Because chambers of commerce were considered as organizations of merchants, businessmen favored mediation to promote harmony within their own community. Another reason for mediation's popularity was that at the time, China had very few commercial laws for arbitrators to apply in their decisions. As a result, they relied heavily on business customs and morality. Where arbitrators do not have enough laws and have to resort largely to customs and morality, mediation becomes a proper and reasonable option.¹²⁶

Another significant feature of the Concise Chamber of Commerce Act is that it contains a distinction between domestic and international arbitration. For example, Article 16 of the Act provided that:

Where disputes arise between Chinese and foreign merchants, the chamber of commerce shall order each of the two parties to respectively appoint one just person to hear and decide the case fairly and accordingly. If the two appointed people do not agree, they shall commonly appoint a respectful person to decide the case. The two parties may be allowed to submit the case to the local official or the foreign consul if they have already done so before the case is known by the chamber of commerce. If the local official or the foreign consul is not just, the wrongfully treated party is allowed to notify the chamber of commerce, which will appeal the case on its behalf. If the case is serious, the chairman shall report the case to the Department [of Commerce] and the Department will handle the case together with the

¹²⁶ See Ren, *supra* note 121; Ma, *supra* note 121.

Department of Foreign Affairs.¹²⁷

This is different from the usual arbitration procedure that applies in a case where both parties are Chinese, as explained above.

C. Arbitration in the Republic of China

October 1911 introduced a new era in Chinese history. The Qing rulers were overthrown, and the Republic of China was later founded in 1912. The new government made huge efforts to modernize China and promulgated a large number of new laws, replacing the old Qing laws.

In 1913, the Republic of China's Department of Justice and Department of Industry and Commerce jointly promulgated the Division of Commercial Arbitration Act. The General Provisions of the Act provided that "Divisions of commercial arbitration are affiliated with and attached to chambers of commerce. Divisions of commercial arbitration are in the position to arbitrate commercial disputes between merchants, with the main purpose of ending disputes and reaching settlement."¹²⁸

According to the Division of Commercial Arbitration Act, divisions of commercial arbitration may hear two kinds of cases. First, the two parties to a

¹²⁷ Feng Mingming (冯铭明), *Wanqing Shagnhui dui Shewai Shangshi Jiufen de Sifa Ganyu* (晚清商会对涉外商事纠纷的司法干预) [*Chambers of Commerce's Judicial Involvement in Foreign-related Commercial Disputes in Late Qing Dynasty*], 22 FAZHI YU SHEHUI (法制与社会) [LEGAL SYSTEM AND SOCIETY] 42, 42 (2006) (China).

¹²⁸ Ren, *supra* note 121, at 117; Fu Haiyan (付海晏), *Qingmo Minchu Shangshi Caipan Zuzhi de Yanbian* (清末民初商事裁判组织的演变) [*The Evolutionary Changes of Commercial Adjudication Organ During the Late Qing and Early Republic of China*], 41-2 HUAZHONG SHIFAN DAXUE XUEBAO (RENWEN SHEHUI KEXUE BAN) (华中师范大学学报(人文社会科学版)) [JOURNAL OF CENTRAL CHINA NORMAL UNIVERSITY (HUMANITIES AND SOCIAL SCIENCES)] 88, 91 (2002) (China); Zhang Song (张松), *Minchu Shangshi Gongduanchu Tanxi yi Jingshi Gongduanchu wei Zhongxin* (民初商事公断处探析——以京师商事公断处为中心) [*A Study of Divisions of Commercial Arbitration in Early Republic of*

dispute may voluntarily submit their case to a division of commercial arbitration before they file the case at court. Second, after a case is filed at court, the court may entrust the case to a division of commercial arbitration for mediation. As for enforcement of awards, according to the Act, arbitration awards are only legally binding if both parties agree to it. A party may still file the case to court if it does not agree with the award. The Act also contained some other detailed provisions related to a division of commercial arbitration's internal operation mechanism, number of personnel, and payment of arbitration fees.¹²⁹

During the Republic of China era, however, China experienced frequent regional and national wars. Therefore, during this period, China's social, economic, and legal orders were very unstable nationwide. Organizations of government also went through multiple and significant changes. Consequently, operation of divisions of commercial arbitration, later renamed as "commissions of commercial arbitration," and chambers of commerce were also constantly interrupted. As a result, although many commercial disputes were resolved by arbitration, arbitration as a legal institution was still largely immature overall.

D. Arbitration in the People's Republic of China

From the PRC's founding in 1949 to the present day, China has gone through drastic reforms in almost every aspect of its society. In accordance with changes in the country's economic structure, its legal system (including the arbitration legal

China: Centering Beijing Division of Commercial Arbitration], 28-3 ZHENGFA LUNTAN (政法论坛) [TRIBUNE OF POLITICAL SCIENCE AND LAW]31, 31 (2010) (China).

¹²⁹ See Zhang, *supra* note 121, at 31.

framework) has also undergone signification alterations.

Despite the radical changes, PRC law has always kept a distinction between domestic and foreign-related arbitration. Under PRC law, domestic arbitration means arbitration in Chinese territory between two Chinese parties. Foreign-related arbitration means although the seat of arbitration is in Chinese territory, one party to the dispute comes from somewhere outside China, or the dispute relates to properties located outside China. It is worth noting, however, that both of these two types of arbitration are considered domestic as per internationally accepted conceptions, because their seats are both within Chinese territory. In any event, while keeping the distinction intact, the PRC's legal regimes of arbitration went through significant changes during different periods throughout its history.

1. Domestic Arbitration in the PRC

Generally speaking, the development of domestic arbitration in the PRC may be categorized into to three historical stages.

(a) 1949–mid-1970s

After the founding of the PRC in 1949, the entirety of the “old” China’s legal system, including its arbitration system, was abolished. Particularly after 1957, the government nationalized essentially all business entities in China, and adopted a highly centralized planned economy system. Under this system, there was only a very limited and highly restricted market. Business entities no longer made independent decisions regarding their own business operations. Instead, they needed

to follow the government's orders to produce, supply, purchase, or sell. Under such circumstances, because there were no self-initiated transactions between business entities that would normally occur in a market economy, disputes between those business entities became rare. When disputes did arise, they would be resolved by administrative bodies of the government rather than through arbitration or litigation.

In 1961, the Central Committee of the Communist Party of China (CPC) promulgated and circulated the Regulation on State-run Industrial Enterprises. Article 46 of the Regulation provided that “disputes relating to economic contracts between enterprises or other entities shall be adjudicated and resolved by special departments established by economic committees at various levels.”¹³⁰ In 1962, the CPC Central Committee, together with the State Council, promulgated the Notice on Strictly Performing Basic Construction Procedure and Economic Contract, which provided that “any disputes arising from performing a contract shall be arbitrated by economic committees at various levels. Local People’s Banks or Construction Banks shall enforce decisions made by economic committees at various levels and further seize and make payment.”¹³¹

¹³⁰ QUANGUO RENDA CHANGWEIHUI FAZHI GONGZUO WEIYUANHUI (全国人大常委会法制工作委员会) [THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE’S CONGRESS], ZHONGHUA RENMIN GONGHEGUO ZHONGCAI FALÜ SHIPING (中华人民共和国仲裁法律释评) [COMMENTARIES ON ARBITRATION LAWS OF CHINA] 2 (1997) [hereinafter THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE’S CONGRESS, COMMENTARIES]; *See also* ARBITRATION LAWS OF CHINA 18 (The Legislative Affairs Commission of the Standing Committee of the National People’s Congress of the People’s Republic of China ed., 1997) (translation modified by author).

¹³¹ ZHONGHUA RENMIN GONGHEGUO ZHONGCAI FA QUANSHU (中华人民共和国仲裁法全书) [PANDECTS OF ARBITRATION LAWS OF THE PEOPLE’S REPUBLIC OF CHINA] 9 (Quanguo Renda Changweihui Fazhi Gongzuo Weiyuanhui Minfa Shi (全国人大常委会法制工作委员会民法室) [Civil Law Office of the Legislative Affairs Comm’n of the Standing Comm. of the Nat’l People’s Congress] & Zhongguo Guoji Jingji Maoyi Zhongcai Weiyuanhui Mishu Ju (中国国际经济贸易仲裁委员会秘书局) [Secretariat of China Int’l Econ. & Trade Arbitration Comm’n] eds, 1995).

The economic committees referred to in these two regulations were departments of the Chinese government's executive branch. These committess were responsible for planning the economy and further directing enterprises' operations. Moreover, the economic contracts referred to in these regulations were fundamentally different from commercial contracts in a market economy, or contracts under modern contract law principles.¹³² Under the then-existing Chinese law, economic contracts were based on governmental orders and functioned as methods to implement such orders.

Under the highly-centralized planned economy, the commercial dispute resolution mechanism in China was totally different from what market economy countries had. In practice, commercial disputes as understood in a market economy basically ceased to exist. Any disputes that occurred in the process of economic operations would be resolved by the administrative bodies of the PRC government.¹³³ Arbitration or litigation had been marginalized in this regard. Although some regulations occasionally used the word “arbitration,” it was obvious that the word was only borrowed to refer to certain administrative proceedings.

(b) late 1970s–1994

Starting in the late 1970s, China began to adopt a “reform and opening-up policy.”¹³⁴ The highly centralized planned economy was gradually dismantled, and a

¹³² See Shi Jichun (史际春) & Deng Feng (邓峰), *Hetong de Yihua yu Yihua de Hetong Guanyu Jingji Hetong de Chongxin Dingwei* (合同的异化与异化的合同——关于经济合同的重新定位) [*Dissimilation of Contracts and Dissimilated Contracts: On Repositioning Economic Contracts*], 3 FAXUE YANJIU (法学研究) [CASS JOURNAL OF LAW] 39, 46 (1997) (China).

¹³³ See THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS, COMMENTARIES, *supra* note 130, at 2.

¹³⁴ See Vai Io Lo, *Arbitration of Commercial Disputes in China*, MD. SERIES IN CONTEMP. ASIAN STUD.,

transition toward a market economy began. During this process, business entities were given more freedom to operate their own businesses, and therefore, they were able to enter into commercial contracts with other parties based on their free will. With this economic policy, commercial activities became vibrant. Understandably, commercial disputes also became frequent. As in the late Qing Dynasty, changing economic circumstances once again called for a new dispute resolution mechanism.

While undertaking numerous reforms in its judicial system, the Chinese government in the early 1980s established an arbitration system for resolution of domestic commercial disputes.¹³⁵ The government promulgated many laws and regulations that provided for arbitration as a mechanism to resolve a variety of disputes, including economic contract disputes, labor disputes, business contracting disputes, copyright disputes, real estate disputes, and consumer right disputes. But values, habits, and ways of thinking in the old planned economy era carried over, and these laws continued to enable the administrative bodies of the government to act as the authority under this arbitration system.¹³⁶ Various “arbitration” laws and regulations endowed certain government offices with the power to “arbitrate” disputes.¹³⁷ In addition, these laws established some “arbitration institutions” as subsidiaries of government bodies to hear commercial disputes.¹³⁸ Proceedings to be followed in these institutions were similar to those of either the administrative bodies

no. 5, 2001 at 1, 2-3, available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1165&context=mscas>.

¹³⁵ See ZHONGHUA RENMIN GONGHEGUO ZHONGCAI FA QUANSHU, *supra* note 131, at 9-10.

¹³⁶ See *id.*

¹³⁷ See, e.g., Jingji Hetong Fa (经济合同法) [Economic Contract Law] (promulgated by the Nat'l People's Cong., Dec. 13, 1981, effective July 1, 1982), art. 48 (China).

¹³⁸ See, e.g., Jingji Hetong Zhongcai Tiaoli (经济合同仲裁条例) [Regulation on Economic Contract Arbitration] (promulgated by the St. Council, Aug. 22, 1983, effective Aug. 22, 1983), art. 2 (China).

or the courts. Awards rendered by these institutions were usually not final, unless both parties agreed to it. A party might choose to challenge the award simply by filing the case to court.

For example, both the Economic Contract Law of the People's Republic of China and the Regulation on Economic Contract Arbitration of the People's Republic of China provided that any party to an economic contract may have two choices to have its dispute resolved. It may apply for arbitration at a local Economic Contract Arbitration Commission. This Commission is established by the local Administration for Industry and Commerce, a department in the executive branch of the local government. Alternatively, the party may choose to file a lawsuit at a court. The State Administration for Industry and Commerce specified that these arbitration commissions were “different from arbitration institutions in capitalist countries,”¹³⁹ because they were “executing authority to arbitrate on behalf the country,”¹⁴⁰ and “their awards represent[ed] the country’s will.”¹⁴¹ Moreover, after an arbitration commission renders an award, a party that does not agree with the award may file the case to court within fifteen days. If no such lawsuit is filed after fifteen days, the award becomes legally binding.¹⁴² Similar provisions can also be found in many other national and local laws and regulations.¹⁴³

As of 1994, in China, there were fourteen national laws, more than eighty

¹³⁹ See Guojia Gongshang Xingzheng Guanli Ju Jingji Hetong Si Guanyu Guanche Zhixing “Jingji Hetong Zhongcai Tiaoli” de Jidian Yijian (国家工商行政管理局经济合同司关于贯彻执行《经济合同仲裁条例》的几点意见) [Several Opinions on Implementing “Regulation on Economic Contract Arbitration”] (promulgated by the State Administration for Industry and Commerce, Office of Economic Contracts, Nov. 3, 1983, effective Nov. 3, 1983) art. 2 (China).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See ZHONGHUA RENMIN GONGHEGUO ZHONGCAI FA QUANSHU, *supra* note 131, at 9.

administrative regulations, and almost two hundred local regulations that contained provisions related to arbitration.¹⁴⁴ Many problems pertaining to this complex arbitration system made it hard to qualify as an arbitration system in the modern sense. Some major issues include:¹⁴⁵

1) The arbitration institutions.

Arbitration institutions in China during this period were highly administratively oriented. They were either established by the administrative bodies of the government, or in some cases, they were the administrative bodies of the government themselves. In any event, arbitration institutions were subordinate to the government. Staffs of the arbitration institutions were basically public officials, and many of them also worked in the government concurrently. As a result, arbitrations administered by these institutions were not privately organized, but were very similar to, if not essentially the same as, administrative proceedings.

2) The arbitration proceedings and the legal force of awards.

Parties were able to initiate arbitration without an arbitration agreement because of the official or quasi-official status that the arbitration institutions enjoyed under many then-existing laws and regulations. Arbitration proceedings were similar to court proceedings or administrative proceedings. Awards rendered by arbitration

¹⁴³ See *id.* at 9-11.

¹⁴⁴ See THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS, COMMENTARIES, *supra* note 130, at 4; ZHONGHUA RENMIN GONGHEGUO ZHONGCAI FA QUANSHU, *supra* note 131, at 12.

¹⁴⁵ See THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL

institutions were usually not final. A party might still file the case to court if it did not agree with the award's outcome.

There are at least two possible explanations for the popularity of this type of “arbitration” among government bodies. First, in a planned economy, government departments are in charge of all the economic operations in the society and the dispute resolution process. In the transition between a planned economy and a market economy, the old dispute resolution function of the government was simply carried over to these “arbitration institutions.” Second, some administrative bodies might have preferred this “arbitration” mechanism because it could reduce their chances of being sued in court as defendants in an administrative lawsuit. Under the PRC law, if a government body makes an administrative decision, the party bound by this decision may challenge the decision in court. By making a decision via “arbitration,” however, the government body may reach the same conclusion without bearing the risk of being sued. If a party does not agree with the award, it may choose to file the case in a court. The litigation, however, will center on the merits of the case, instead of the decision made by the government body. In this lawsuit, the government will not act as a defendant in the case.¹⁴⁶

Because of these problems, some scholars argue that the “arbitration” during this period of time was not true arbitration properly understood, but simply a kind of administrative proceeding. It was effectively an administrative body’s way to resolve disputes, and the word “arbitration” was only borrowed.

The late 1980s and early 1990s nevertheless witnessed the beginning of a deeper

PEOPLE’S CONGRESS, COMMENTARIES, *supra* note 130, at 4-5.

reform in China's arbitration field. Some laws and regulations provided that an arbitration award was final, which meant that the parties were bound by the award once it is rendered, and would not be able to later file the case to court to hear its merits. Unfortunately, these laws only applied to some very limited types of disputes. Despite these promising new rules, China's arbitration system during this period remained confusing, and even chaotic, in the aggregate.

(c) 1995–present

In 1994, the Chinese legislature promulgated the current Arbitration Law of the People's Republic of China in response to the problems of China's arbitration system. The Law, which took effect in 1995, aimed to establish a system that conformed to international standards, and to safeguard economic development and the smooth operation of a market economy.¹⁴⁷

Although far from being perfect, the PRC Arbitration Law has largely followed major internationally accepted principles of arbitration. Under the Law, a valid arbitration agreement will be enforced by a court. An arbitrator's jurisdiction is established via an arbitration agreement. An arbitration award is final and binding upon both parties. Arbitration institutions are independent from government. Parties are free to choose their arbitrators. In other words, the PRC Arbitration Law is China's first ever arbitration law in the modern sense.

¹⁴⁶ See ZHONGHUA RENMIN GONGHEGUO ZHONGCAI FA QUANSHU, *supra* note 131, at 13.

¹⁴⁷ See THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS, COMMENTARIES, *supra* note 130, at 1; ZHONGHUA RENMIN GONGHEGUO

2. Foreign-related Arbitration in the PRC

Compared to domestic arbitration, the PRC's legal framework for foreign-related arbitration remained much more stable. Not too soon after its founding, and following the footsteps of other socialist countries, the PRC established its own foreign-related arbitration institutions in the 1950s.

Aiming to "resolve disputes that may possibly arise in foreign trade contracts and transactions,"¹⁴⁸ the Foreign Trade Arbitration Commission was officially founded in April 1956 under the China Council for the Promotion of International Trade (CCPIT), upon approval by the Chinese central government.¹⁴⁹ After several changes, the Commission is now known as the China International Economic and Trade Arbitration Commission (CIETAC), or the Arbitration Court of the China Chamber of International Commerce (CCOIC). Through a similar process, the CCPIT Maritime Arbitration Commission was founded in 1958¹⁵⁰ and was later renamed as the China Maritime Arbitration Commission (CMAC).

The reason for establishing these institutions was obvious and practical. Even at the time when China was adopting a highly centralized planned economy, some Chinese enterprises, such as import and export companies, still needed to engage in business transactions with foreign enterprises. Although at the time there was almost

ZHONGCAI FA QUANSHU, *supra* note 131, at 13.

¹⁴⁸ Zhongyang Renmin Zhengfu Zhengwuyuan Guanyu Zai Zhongguo Guoji Maoyi Cujin Weiyuanhui Nei Sheli Duiwai Maoyi Zhongcail Weiyuanhui de Jueding (中央人民政府政务院关于在中国国际贸易促进委员会内设立对外贸易仲裁委员会的决定) [Decision to Establish Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade] (promulgated by the Government Administration Council of the Cent. People's Gov't, May 6, 1954, effective May 6, 1954) (China).

¹⁴⁹ *Id.*

¹⁵⁰ See Zhonghua Renmin Gongheguo Guowuyuan Guanyu Zai Zhongguo Guoji Maoyi Cujin Weiyuanhui Nei Sheli Haishi Zhongcail Weiyuanhui de Jueding (中华人民共和国国务院关于在中国国际贸易促进委员会内设立海事仲裁委员会的决定) [Decision to Establish Maritime Arbitration Commission within the China Council for

no market within China, these Chinese enterprises were still part of the international market. Commercial disputes between Chinese enterprises and foreign business entities still needed to be resolved. Arbitration was a logical option for that purpose. In 1950, for example, the PRC and the Soviet Union concluded the Protocol for General Conditions of Delivery of Goods. This bilateral treaty provided that any contractual disputes, in general, should not be filed in court, but should rather be resolved by arbitration. Such arbitration should take place either in China or the Soviet Union as determined by the nationality of the respondent.¹⁵¹

There are huge differences between the two Chinese foreign-related arbitration institutions and western international arbitration institutions in the 1950s. The most obvious difference is the institution's relationship with the government. Chinese institutions were under the leadership and supervision of the PRC government, whereas western institutions were independent and private business entities. Arbitrators in the Chinese institutions at the time were essentially all public officials, or public employees, of the PRC. Arbitrators who worked with those arbitration institutions in the west had nothing to do with a government and were independent. Despite the differences, the PRC's foreign-related arbitration legal framework tried to conform to international standard as much as possible.

In the late 1970s when China began to adopt the reform and opening-up policy, more and more foreign-related disputes arose. Many Chinese laws and regulations began to call for arbitration as a dispute resolution method in foreign-related

the Promotion of International Trade] (promulgated by the St. Council, Nov. 21, 1958, effective Nov. 21, 1958) (China).

¹⁵¹ See ZHONGHUA RENMIN GONGHEGUO ZHONGCAI FA QUANSHU, *supra* note 131, at 8; JINGZHOU TAO,

commercial activities. In fact, prior to the birth of the PRC Arbitration Law in 1994, provisions for foreign-related arbitration were often seen in Chinese laws. These provisions all tried to follow standard international practices in arbitration.¹⁵² In 1994, when the PRC Arbitration Law was promulgated, it included a separate chapter on foreign-related arbitration. This chapter provided a certain amount of special treatment for foreign-related arbitration in China, as compared with ordinary domestic arbitration, to ensure that foreign-related arbitration in China followed standard international practice.

Moreover, the Chinese government and court system have always shown much respect towards foreign awards, namely arbitration awards seated outside China. China acceded into New York Convention in 1987 and began to recognize and enforce foreign arbitration awards even before it had its own modern arbitration law. So far, Chinese courts recognize and enforce foreign awards rather liberally.

Through the above description, one can see that the occurrence and development of arbitration in China followed a very different path as compared with that of the western world. Although arbitration had a long history in China, it remained in a primitive stage for a very long time. Arbitration never had appropriate circumstances to grow among merchants in a private manner. It was later adopted by the Chinese government as an alternative dispute resolution mechanism to supplement and

ARBITRATION LAW AND PRACTICE IN CHINA 8 (2d ed. 2008).

¹⁵² See e.g. Minshi Susong Fa (Shixing) (民事诉讼法(试行)) [Civil Procedure Law (For Trial Implementation)] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 8, 1982, effective Oct. 1, 1982), arts. 192-195 (China); Shewai Jingji Hetong Fa (涉外经济合同法) [Foreign-related Economic Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 21, 1985,

compensate for the deficiency of its judicial system. This was the case in the beginning of the twentieth century, as well as the early 1980s. China did not have arbitration in the modern sense until 1994 when the current PRC Arbitration Law was promulgated.

As a result, in China, arbitration as a legal institution was not first used by merchants as a private dispute resolution mechanism, and then recognized by law in a bottom-up fashion. Instead, it was adopted by the government in a top-down manner as an alternative or substitute for the court system. For this purpose, it was reasonable for China to establish arbitration institutions to do the job, and an ad hoc arbitration system seemed unnecessary.

Before 1994, instead of being private, arbitration in China was:

[C]onducted by administrative authorities Arbitration institutions were administrative authorities themselves. Arbitrators were administrative personnel . . . Some [experts] think that these arbitrations were not the real arbitration, but were instead ways for administrative authorities to use their administrative power to resolve disputes under the name of arbitration.¹⁵³

V REFLECTIONS ON THE LEGAL TRANSPLANT OF ARBITRATION IN CHINA

A. *Reflections on Legal Transplant Theories*

Arbitration's history in China undoubtedly supplies another successful example of

effective July 1, 1985), arts. 31, 37 & 38 (China).

legal transplant. Borrowed from the western world, arbitration as a legal institution was transplanted to China. The fact that today's China has a fast-growing arbitration industry offers strong support for the possibility of legal transplant as argued by scholars like Alan Watson. It also supports a number of other legal transplant theories discussed in the previous chapter:

The legal transplant of arbitration in China first supports Otto Kahn-Freund's theory that the transplantability of a legal institution depends on a country's social, and above all, political context. Arbitration's legal transplant in China indeed depended heavily on China's social and political contexts at different times during the history. The political structure of China in the early 1990s had a direct impact on the content of the current PRC Arbitration Law. This legal transplant also attests and supports theories, as introduced previously in this chapter, respectively proposed by scholars including Gunther Teubner, Máximo Langer, Esin rüçü, and Richard Small.

Apart from supporting these scholarly opinions, the legal transplant of arbitration to China also suggests an interesting phenomenon that has not been emphasized by previous theories: legal transplant does not always happen all at once, and it may take place in multiple or gradual steps. In this process, the receiving country may choose to reshape the legal institution and tailor it to its needs, or social, political, and economic contexts, and implement the transplant in different phases. The Chinese government in the late 1970s, for example, borrowed institutional arbitration as a dispute resolution method to safeguard the operation of a transition economy. The government realized that ad hoc arbitration was not suitable for that purpose, nor

¹⁵³ ZHONGHUA RENMIN GONGHEGUO ZHONGCAI FA QUANSHU, *supra* note 131, at 13.

could it fit into the then existing political, social, or economical contexts of Chinese society. As a result, it chose to remove the ad hoc portion of an otherwise whole legal institution. That being said, the Chinese government is still potentially open to incorporating ad hoc arbitration into the Chinese system in the future.¹⁵⁴ This means that Chinese legislators are open to the idea of legitimizing ad hoc arbitration and are simply waiting for an appropriate time. Realizing that Chinese society and the Chinese economy are both in transition, legislators acknowledge that ad hoc arbitration may be incorporated once it becomes acceptable.

As a result, we can see that legal transplant does not have to happen all at once. Based on the borrower's strategy, the transplant process may be intentionally divided into different phases. Whether and exactly when the later phases will happen will depend on the borrower's perception of the first phase's effectiveness, and probably also on changes in the political, economic, and social contexts of the borrower's society that have yet to take place. This may happen particularly in transition economies in which a society's economic, social, and political structures undergo rapid and drastic changes throughout a certain period of time. China's experience with arbitration offers this exact example.

B. Impacts on the Chinese Arbitration Legal System

Arbitration's development in China followed a very different path as compared to arbitration in the western world. In the west, despite regional differences that can be stark in some cases, arbitration more or less originated and developed in a bottom-up

¹⁵⁴ See Hu Kangsheng (胡康生), *Zhongcái de Benzhi Shi Minjian Xing* (仲裁的本质是民间性) [The

fashion. Private parties, particularly merchants, were reluctant to resolve their disputes via litigation, either because the then-existing court system was incompetent, too expensive, or potentially prejudiced. Rather, they submitted the dispute to a third person, the arbitrator, for a decision. They found this arbitration process efficient, neutral, economical, and trustworthy. Later, laws and judges began to recognize this private dispute resolution mechanism as legally binding.

In China, however, arbitration had a completely different developmental path. Although arbitration might also have had a long history in China, it is safe to presume that such a dispute resolution mechanism stayed in a very primitive stage for a long time. Arbitration in China was never exposed to the appropriate circumstances that would allow it to grow among merchants in a private manner. The modern arbitration system in China was adopted by the government in a top-down manner. Multiple Chinese governments, at different times in the history, chose to establish arbitration institutions all around the country so that parties, particularly merchants, had a place to resolve their disputes when courts were proven incompetent for that purpose. Parties did not voluntarily choose arbitration out of concerns like efficiency, neutrality, or party autonomy. Instead, they chose arbitration largely because it was the only reasonable dispute resolution mechanism that fit their needs.

These historical differences have led to significant consequences. Many of the results of this evolution can still be seen in today's PRC Arbitration Law. For example, because of this top-down manner, Chinese arbitration has predominantly favored institutional arbitration over ad hoc arbitration. The PRC Arbitration Law

Nature of Arbitration is Private], FAZHI RIBAO (法制日报) [LEGAL DAILY], Sept. 8, 2004 (China).

still does not even allow ad hoc arbitration seated in Chinese territory. At the same time, party autonomy does not receive complete recognition in the Law. For example, a Chinese court will invalidate an ad hoc arbitration agreement even when there is clear indication of the parties' intention to arbitrate their dispute. The following chapters in this dissertation will focus on ad hoc arbitration issues under Chinese arbitration law. Although the discussions to be followed involve many subtle and intricate legal issues, the root of this ad hoc problem under Chinese law comes from the legal transplant history that played a vital role in shaping Chinese arbitration legal framework.

CHAPTER THREE:

ENFORCEABILITY OF AD HOC ARBITRATION AGREEMENTS IN CHINA

I INTRODUCTION

The distinction between ad hoc and institutional arbitration has little legal significance in most jurisdictions in the world. Whether an arbitration agreement calls for submission of the dispute to an ad hoc tribunal or to a tribunal working with an arbitration institution usually makes no difference as long as the agreement clearly demonstrates the parties' intent to arbitrate. Awards rendered by ad hoc tribunals and by tribunals working with arbitration institutions are equally binding upon the parties and equally enforceable by courts. In any case, ad hoc arbitration awards certainly fall under, and are supported by, Article I(2) of the New York Convention, which reads, "the term 'arbitral awards' shall include . . . awards made by arbitrators appointed for each case . . ."¹⁵⁵

In China, however, this distinction does make a difference. To be valid under the PRC Arbitration Law, an arbitration agreement must specify an arbitration institution to administer the arbitration.¹⁵⁶ Accordingly, ad hoc arbitration agreements are invalid under PRC law. Not all arbitration agreements enforced in China, however, are subject to PRC law. The Supreme People's Court of China (SPC) has adopted a choice-of-law rule that allows ad hoc arbitration agreements to be

¹⁵⁵ New York Convention, *supra* note 14, art. I(2).

¹⁵⁶ Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16 (China) (English translation provided by the National People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm).

enforced in China in a great many instances.¹⁵⁷ To achieve this result the parties must draft their agreement carefully, particularly the provisions concerning the arbitration seat or the law applicable to their arbitration agreement, as will be discussed below.

II REJECTION OF AD HOC ARBITRATION AGREEMENTS UNDER CHINESE LAW

A. *The PRC Arbitration Law's Requirement that Arbitration Be Institutional*

Relevant parts of Article 16 and Article 18 of the PRC Arbitration Law read as follows:

Article 16

....

An arbitration agreement shall contain the following particulars:

....

(3) *a designated arbitration commission.*¹⁵⁸

Article 18

If an arbitration agreement contains no or unclear provisions concerning . . .

the arbitration commission, the parties may reach a supplementary agreement.

If no such supplementary agreement can be reached, the arbitration agreement

¹⁵⁷ See *infra* Section II.B.

¹⁵⁸ Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16 (China) (English translation provided by the National People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm) (emphasis added).

shall be null and void.¹⁵⁹

As these provisions make clear, ad hoc arbitration agreements are invalid under the PRC Arbitration Law. Moreover, the SPC strictly interprets the institutional arbitration requirement. If, in an arbitration agreement, the parties only choose an institution's rules rather than the institution itself, the agreement may be held invalid.¹⁶⁰ Similarly, if the parties agree on two possible arbitration institutions in an arbitration agreement, that agreement is invalid unless they reach a valid supplementary agreement choosing one of the two institutions and eliminating the other.¹⁶¹

B. Consequences of the PRC Arbitration Law's Rejection of Ad Hoc Arbitration Agreements

As mentioned before, the PRC Arbitration Law's rejection of ad hoc arbitration agreements has grave consequences. Not only will no ad hoc arbitration agreement be enforced under the PRC Arbitration Law, but awards based upon ad hoc arbitration agreements may also be annulled under the PRC Arbitration Law for that reason alone.

This, however, is not a conclusion without qualifications. Because China is a contracting state to the New York Convention, under which ad hoc arbitration is undoubtedly supported, Chinese courts are obliged to enforce ad hoc awards made outside China.¹⁶² Of course, if the arbitration seat is in China, meaning the New York

¹⁵⁹ *Id.* art. 18 (emphasis added). Here, however, “invalid” may be a better translation than “null and void.”

¹⁶⁰ See *infra* Section III.B for a more detailed discussion.

¹⁶¹ *Id.*

¹⁶² See New York Convention, *supra* note 14, art. I(2); see also discussion *infra* chapter IV.

Convention does not apply, the prospect of having an ad hoc arbitration award enforced by Chinese courts, although not entirely absent, is slight. Moreover, because international commercial arbitration is a highly sophisticated system under which all contracting states to the New York Convention may potentially be involved and no single country can control the whole process, this extremely rare preclusion of ad hoc arbitration under the PRC Arbitration Law may also cause complicated consequences on the international level.¹⁶³ For example, if the parties place the seat in China and still choose ad hoc arbitration, will other contracting states to the New York Convention enforce the award?¹⁶⁴

With respect to enforcement of ad hoc arbitration agreements by Chinese courts, the picture is still rather complicated. When concluding an arbitration agreement in an international commercial transaction, parties are, of course, free to agree on the seat of arbitration as well as the law that will govern the validity of the arbitration agreement. The PRC Arbitration Law does not, therefore, apply to all the arbitration agreements presented before Chinese courts or entered into by Chinese parties. Therefore, it is important to know in what situations a Chinese court will apply the PRC Arbitration Law to strike down an ad hoc arbitration agreement.

III ENFORCEMENT OF AD HOC ARBITRATION AGREEMENTS IN CHINA UNDER NON-CHINESE LAW

Although under the PRC Arbitration Law an ad hoc arbitration agreement is

¹⁶³ As far as the author has been able to determine, China is one of the only countries requiring institutional arbitration.

¹⁶⁴ For a full analysis of the enforcement of ad hoc arbitration awards made in China, see discussion *infra* chapter IV .

invalid, in practice many ad hoc arbitration agreements are nevertheless enforced by Chinese courts. This outcome is achieved via a choice-of-law rule adopted by the SPC.¹⁶⁵

A. *Choice-of-Law Rules in International Commercial Arbitration Practice in General*

Choice-of-law issues play a very important role in international commercial arbitration. They are, however, also very complicated because there could be multiple applicable laws governing different legal issues within one arbitration case. Generally speaking, there are three fundamental issues calling for decisions on what law applies: (i) what law governs the substance or merits of the dispute; (ii) what law governs the validity of the arbitration agreement (treated as a separate agreement even when occurring in a clause of a larger agreement); and (iii) what law governs the arbitration proceeding (this law is also commonly known as the “curial law” or the “*lex arbitri*”).¹⁶⁶ As a result of such complication, it is necessary to carefully distinguish between different applicable laws within the same arbitration case, even if one law may be chosen by the parties or determined by the facts in the case, to govern all of these issues.

When it comes to determining the law governing the validity of an arbitration

¹⁶⁵ See, e.g., Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Zhongcái Fǎ” Ruogān Wèntí de Jieshi (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 on Certain Issues Concerning the Application of the “Arbitration Law of the People’s Republic of China”] (promulgated by the Sup. People’s Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 16 (China).

¹⁶⁶ See, e.g., TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 681–84 (5th ed. 2012); Luke Zadkovich, *Determining the Law of an Arbitration Agreement*, INT’L ARB. Q., (June 2012), <http://www.hfw.com/International-Arbitration-Quarterly-June-2012>.

agreement, in international practice, courts and arbitrators adopt different approaches. Some use traditional conflict-of-laws approaches, while others apply validity-preferring rules or adopt a special body of transnational rules on international arbitration agreements.¹⁶⁷ Usually, unless parties explicitly agree on the law governing the validity of their arbitration agreement, which is a rather rare occasion, a tribunal or a national court will choose a law from several alternatives; theoretically, these could include the following: (i) the law governing the merits of the dispute; (ii) the law at the seat of arbitration; or (iii) the law at the forum where judicial enforcement of the arbitration agreement is sought.¹⁶⁸ But, “[t]here is little uniformity among either arbitral tribunals or national courts in choosing between these alternatives.”¹⁶⁹ Tribunals and courts may choose the law governing the merits of the dispute by reasoning that the arbitration agreement, usually in the form of a clause within the larger contract (the container contract), should also be governed by the law that the parties chose to govern the whole contract.¹⁷⁰ Tribunals and courts also frequently choose the law at the seat of arbitration as the governing law, because they consider the seat of arbitration as the strongest connecting factor to this choice-of-law issue.¹⁷¹ Some courts may even validate the arbitration agreement by relying on forum law or by declaring that the existence and validity of an arbitration agreement

¹⁶⁷ See FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 218–40 (Emmanuel Gaillard & John Savage eds., 1999); JULIAN D. M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 118–27 (2003).

¹⁶⁸ See FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 30, at 218–40; JULIAN D. M. LEW ET AL., *supra* note 30, at 118–27.

¹⁶⁹ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 95 (2d ed. 2001).

¹⁷⁰ See FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 30, at 222–23; LEW ET AL., *supra* note 30, at 120.

¹⁷¹ See FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 30, at 225–27; LEW ET AL., *supra* note 30, at 122–25.

depend solely on the parties' intent and not on any national law.¹⁷²

B. Choice-of-Law Rule Adopted By the SPC When Determining an Arbitration Agreement's Validity

The choice-of-law rule adopted by the SPC to determine the law governing the validity of an arbitration agreement is clear and straightforward. The SPC has explicitly stated, in both cases and judicial interpretations, that if the parties have specifically agreed on a governing law for the validity of the arbitration agreement itself, as distinguished from the substantive law that the parties have chosen to govern the merits of the container contract,¹⁷³ then that chosen law shall apply.¹⁷⁴ If they fail to agree on any such law, but have agreed on the seat of arbitration, the law at the seat of arbitration shall apply.¹⁷⁵ If they fail to agree on both the governing law of the arbitration agreement's validity and the seat of arbitration, then the forum law (in

¹⁷² These two approaches are the ones that the Swiss and French courts adopted, respectively. See FOUCARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 30, at 228–30, 237–38; LEW ET AL., *supra* note 30, at 122–23.

¹⁷³ Di'erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Dec. 26, 2005), art. 58 (China) (providing that the substantive law chosen by parties to govern the merits of the container contract cannot be used to determine the validity of the arbitration clause within the container contract).

¹⁷⁴ Zuide Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Zhongcái Fǎ” Ruogu Wenti de Jieshi (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 on Certain Issues Concerning the Application of the “Arbitration Law of the People's Republic of China”] (promulgated by the Sup. People's Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 16 (China); Di'erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] art. 58; Zuide Renmin Fayuan Guanyu Sichuan Huahong Guoji Jingji Jishu Touzi Youxian Gongsi Su Hanguo Hanhua Zhushihuishe Maimai Hetong Jiufen Yi'an Zhongcái Tiaokuan Xiaoli Wenti de Qingshi de Fuhan (最高人民法院关于四川华宏国际经济技术投资有限公司诉韩国韩华株式会社买卖合同纠纷一案仲裁条款效力问题的请示的复函) [Reply Letter to the Request for Instructions Concerning the Validity of the Arbitration Clause in the Sales Contract Dispute Case Between Sichuan Huahong International Economic and Technical Investment Co., Ltd and Hanwha Corporation (Korea)] (promulgated by the Sup. People's Ct., Aug. 24, 2007, effective Aug. 24, 2007) (China).

¹⁷⁵ See sources cited *supra*, note 174.

this case Chinese law) shall apply.¹⁷⁶

In 2010, Chinese legislators adopted the SPC's choice-of-law rule in the Law on Application of Law in Foreign-related Civil Relations. The new statute allows parties to choose the law governing the validity of their arbitration agreement, and when parties fail to identify the governing law, the statute provides that the law of the place where the arbitration institution resides or the seat of arbitration shall govern.¹⁷⁷ Although the statute offers a choice-of-law rule that slightly differs from the SPC's in that it mentions "the law at the place where the arbitration institution resides,"¹⁷⁸ one can expect that the SPC's choice-of-law rule will continue to be the primary authority for Chinese courts when determining the validity of an arbitration agreement because the SPC's rule is not inconsistent with the new statute.

Accordingly, in a case where the validity of an arbitration agreement is being challenged before a Chinese court, the PRC Arbitration Law may not be applicable. The foregoing discussion demonstrates that the Law only applies where (i) the parties agree that Chinese law shall govern the validity of the arbitration agreement; (ii) the parties have not agreed on the law governing the validity of the arbitration agreement but nevertheless have agreed that the seat of arbitration is in China; or (iii) the parties fail to agree on either of these two issues. Therefore, it could be reasonably inferred that in many cases before Chinese courts in which the validity of an ad hoc arbitration agreement is being challenged, the ad hoc arbitration agreement will not be invalidated just because it does not call for institutional arbitration. Such an arbitration

¹⁷⁶ See *id.*

¹⁷⁷ Shewai Minshi Guanxi Falü Shiyong Fa (涉外民事关系法律适用法) [Law on Application of Law in Foreign-related Civil Relations] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28,

agreement will still be enforced by a Chinese court as long as the parties have either specifically chosen a law governing the arbitration agreement's validity that allows for ad hoc arbitration, or agreed to a seat of arbitration where ad hoc arbitration is allowed by the arbitration law of the seat.

C. The SPC's Historically Consistent Attitude Towards Enforcement of Ad Hoc Arbitration Agreements

Even before formulating the choice-of-law rule discussed above, the SPC was willing to enforce arbitration agreements calling for ad hoc arbitration outside of China. In October 1995, only two months after the PRC Arbitration Law took effect, the SPC enforced an arbitration agreement calling for ad hoc arbitration. In its Reply Letter¹⁷⁹ to the Higher People's Court of Guangdong Province, the SPC said the following, in literal translation:

In foreign-related cases where parties have agreed in the contract in advance or reached an agreement after the dispute occurs that the dispute should be arbitrated by a foreign ad hoc arbitration institution or non-permanent arbitration institution, the validity of such an arbitration agreement should be recognized in principle. The court shall not accept the case.¹⁸⁰

¹⁷⁸ *Id.*

¹⁷⁹ Reply Letters are a form of judicial interpretation issued by the SPC to interpret Chinese laws in judicial practice. The SPC usually uses Reply Letters to answer lower courts' questions of law in certain cases as to how Chinese law should be interpreted and followed under the particular circumstances in those cases.

¹⁸⁰ Zui gao Renmin Fayuan Guanyu Fujian Sheng Shengchan Ziliaozong Gongsi yu Jinge Hangyun Youxian Gongsi Guojihaiyun Jiufen Yi'an Zhong Tidian Zhongcailiaokuan Xiaoli Wenti de Fuhan

The language “ad hoc arbitration institution” is confusing because the SPC seems not to have used the correct terminology. Perhaps starting from the presumption under the PRC Arbitration Law that all arbitration is institutional, the SPC referred to the arbitration tribunal as the “arbitration institution.” In the above paragraph, however, the SPC presumably meant ad hoc arbitration “tribunals” when referring to ad hoc arbitration “institutions.” Furthermore, the SPC was not explicit on what it meant by a “foreign” tribunal. It seems that the SPC also presumed that if a dispute is submitted to an ad hoc tribunal composed of non-Chinese citizens, the seat of such arbitration would be located outside China. Since most places in the world allow ad hoc arbitration, the SPC stated that “the validity of such an arbitration agreement should be recognized in principle.”¹⁸¹

As a result, an alternative translation that better captures the SPC’s intended meaning would be as follows:

In foreign-related cases where parties have agreed in the contract in advance or reached an agreement after the dispute occurs that the dispute should be arbitrated by an ad hoc arbitration tribunal or non-permanent arbitration tribunal having its seat outside China, the validity of such an arbitration agreement should be recognized in principle. The court shall not hear the case on its merits.

(最高人民法院关于福建省生产资料总公司与金鸽航运有限公司国际海运纠纷一案中提单仲裁条款效力问题的复函) [Reply Letter Concerning the Validity of the Bill of Lading’s Arbitration Clause in the International Shipping Dispute Case Between Fujian Province Production Material Corporation and Jinge Shipping Co., Ltd.] (promulgated by the Sup. People’s Ct., Oct. 20, 1995, effective Oct. 20, 1995) (China) (translation by author).

IV CONCLUSION

Despite the PRC Arbitration Law's requirement that parties specify an institution in their arbitration agreement, the SPC has consistently interpreted the law in a way that renders this requirement applicable only to domestic arbitration. As shown above, the SPC has always been willing to enforce arbitration agreements calling for ad hoc arbitration outside China. Indeed, the choice-of-law rule later adopted by the SPC has further increased the range of ad hoc arbitration agreements that the SPC is willing to enforce; as long as the parties agree on a non-Chinese law to govern the validity of the arbitration agreement or specify the seat of arbitration outside China, a Chinese court will enforce the arbitration agreement. The Law on Application of Law in Foreign-related Civil Relations reinforced the SPC's choice-of-law rule.¹⁸²

¹⁸¹ *Id.*

¹⁸² See Shewai Minshi Guanxi Falü Shiyong Fa (涉外民事关系法律适用法) [Law on Application of Law in Foreign-related Civil Relations] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective Apr. 1, 2011), art. 18 (China).

CHAPTER FOUR:
ENFORCEABILITY OF AD HOC ARBITRATION AWARDS IN CHINA

I INTRODUCTION

The previous chapter discussed the PRC Arbitration Law's hostility against ad hoc arbitration. Under the Law, the parties to an arbitration agreement must designate an arbitration institution in the arbitration agreement; if they do not, the arbitration agreement is invalid.¹⁸³ As a result, an ad hoc arbitration agreement is invalid per se under the PRC Arbitration Law. Because a valid arbitration agreement is the cornerstone of an enforceable arbitration award, it appears that ad hoc arbitration has lost its legitimacy in China.

China obviously cannot unilaterally delegitimize ad hoc arbitrations. As a contracting party to the New York Convention, China has an obligation to recognize and enforce arbitration awards made in other New York Convention countries, even though those awards are ad hoc. Unsurprisingly, Chinese courts do enforce foreign ad hoc awards in practice. But what are the legal consequences if two parties want to arbitrate their dispute in China on an ad hoc basis? Will an ad hoc award made in China be enforceable under Chinese law? Will the PRC Arbitration Law's institutional arbitration requirement affect the award's enforcement outside China under the New York Convention?

These questions are becoming increasingly important. As China's market economy develops, Chinese business entities will be involved in more commercial

disputes. Parties to those disputes will surely look for the dispute resolution mechanisms that best suit their needs. Ad hoc arbitration's many intrinsic advantages—including flexibility, efficiency, and cost-effectiveness—often make it a preferred way to resolve commercial disputes. Consequently, in practice, some parties will want ad hoc arbitration in China. Also, as Chinese companies' bargaining power increases, the world will likely see a growing number of international arbitrations seated in China. For the above-mentioned reasons, many of these arbitrations may be ad hoc. Nevertheless, the PRC Arbitration Law's disfavoring of ad hoc arbitration may discourage those parties who wish to choose ad hoc arbitration in China. Under these circumstances, is ad hoc arbitration in China still a viable option for the parties? Thankfully, the answer is yes. Parties wanting ad hoc arbitration can not only place the seat of arbitration in a country or jurisdiction outside China (preferably one party to the New York Convention), but can also, after careful design and drafting, have ad hoc arbitration seated in China.

This chapter introduces and analyzes current Chinese law and practice regarding the enforcement of ad hoc arbitration awards and advises practitioners on ways to approach the barrier set by the PRC Arbitration Law. Section II will discuss enforcement by Chinese courts of foreign ad hoc arbitration awards (ad hoc arbitration awards made outside China). Section III will outline the problems faced by parties who want their disputes resolved by ad hoc arbitration seated in Chinese territory. Possible solutions to seemingly dire situations will be presented and analyzed in Section IV. Section V will conclude that if parties so wish, they can have successful

¹⁸³ See Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's

ad hoc arbitration in China and obtain an enforceable award. Such a result may be achieved through careful drafting. Although there are risks, ad hoc arbitration nonetheless remains a practical alternative to what would appear on the face of the PRC Arbitration Law to be the only option: institutional arbitration.

For the sake of convenience, in relevant parts of this chapter, ad hoc arbitrations seated in China will be referred to as “Chinese ad hoc arbitrations,” and awards rendered in such arbitrations will be referred to as “Chinese ad hoc arbitration awards” or “Chinese ad hoc awards.” Similarly, ad hoc arbitrations seated outside China will be referred to as “foreign ad hoc arbitrations,” and awards rendered in such arbitrations will be referred to as “foreign ad hoc arbitration awards” or “foreign ad hoc awards.”

II ENFORCEMENT OF FOREIGN AD HOC ARBITRATION AWARDS IN CHINA

As can be expected, enforcement of arbitration awards made outside China by Chinese courts follows the procedure of recognition and enforcement. Although the PRC Arbitration Law itself does not include any provisions for recognition and enforcement of foreign awards, the SPC has formulated rules filling this gap via a number of judicial interpretations.¹⁸⁴ These rules have incorporated grounds contained in Articles IV and V of the New York Convention as substantive standards

Cong., Aug. 31, 1994, effective Sept. 1, 1995), arts. 16-18 (China).

¹⁸⁴ Judicial interpretations are directive documents formulated by the SPC to interpret Chinese laws in the process of adjudication. These documents can take a variety of forms in style. Some are free-standing documents that serve as gap-filers for certain statutes, and others are related to certain detailed legal issues in actual cases. In practice, lower level Chinese courts rely heavily on the SPC’s judicial interpretations in adjudication.

for recognition and enforcement of foreign awards in China.¹⁸⁵

A. *Treatment of Hong Kong and Macau as Distinct Jurisdictions under Chinese Law*

Under the current Chinese legal system, Hong Kong and Macau are treated as separate jurisdictions from mainland China. Consequently, Chinese law treats awards made in Hong Kong and Macau differently from domestic awards made in mainland China. This differential treatment is largely due to China's lack of sovereignty over Hong Kong or Macau until 1997 and 1999, respectively. To accommodate the handover of these territories, the Chinese central government designed and implemented a legal regime commonly known as “One Country, Two Systems.” Under this regime, Hong Kong and Macau are given special treatment under Chinese law and, above all, a “quasi-foreign” status, although they are nonetheless treated as Chinese territories.

“One Country, Two Systems” essentially means that mainland China’s socialist system is not implemented in Hong Kong or Macau, and previous systems effective in Hong Kong and Macau before their handover will generally be kept intact.¹⁸⁶ The constitutional basis of this legal framework has its roots in Article 31 of the

¹⁸⁵ See Zuigao Renmin Fayuan Guanyu Zhixing Woguo Jiaru de “Chengren ji Zhixing Waiguozhongcailajue Gongyue” de Tongzhi (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) [Notice on Executing the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards” that Our Country has Acceded Into] (promulgated by the Sup. People’s Ct., Apr. 10, 1987, effective Apr. 10, 1987), art. 4 (China).

¹⁸⁶ See generally Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, Dec. 19, 1984, P.R.C and U.K., available at <http://www.cmab.gov.hk/en/issues/joint3.htm>; Joint Declaration of the Government of the People’s Republic of China and the Government of the Portuguese Republic on the question of Macao, Mar. 26, 1987, P.R.C and Port., available at

Constitution of the People’s Republic of China (PRC Constitution), which provides that “[t]he State may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of specific conditions.”¹⁸⁷ Pursuant to this constitutional provision, the National People’s Congress of China (NPC) enacted the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Hong Kong Basic Law) and the Basic Law of the Macau Special Administrative Region of the People’s Republic of China (Macau Basic Law). Under this legal framework, PRC laws, with very few exceptions, generally do not apply in Hong Kong or Macau.¹⁸⁸ Instead, Hong Kong and Macau, besides keeping in force the majority of the laws in place before the change in sovereignty,¹⁸⁹ enjoy independent executive power, legislative power, and judicial power.¹⁹⁰ The fact that Hong Kong and Macau each have their own distinct legal and judicial systems is clear evidence that they are two separate jurisdictions within China.

Under this legal framework, the PRC Arbitration Law does not apply in Hong

<http://bo.io.gov.mo/bo/i/88/23/dc/en/>.

¹⁸⁷ XIANFA art. 31 (1982) (China).

¹⁸⁸ See Xianggang Tebie Xingzhengqu Jiben Fa (香港特別行政区基本法) [The Basic Law of the Hong Kong Special Administrative Region] (promulgated by the Nat'l People's Cong., Apr. 4, 1990, effective July 1, 1997), art. 18, para. 2 (China); Aomen Tebie Xingzhengqu Jiben Fa (澳门特别行政区基本法) [The Basic Law of the Macau Special Administrative Region] (promulgated by the Nat'l People's Cong., Mar. 31, 1993, effective Dec. 20, 1999), art. 18, para. 2 (China).

¹⁸⁹ See Xianggang Tebie Xingzhengqu Jiben Fa (香港特別行政区基本法) [The Basic Law of the Hong Kong Special Administrative Region] (promulgated by the Nat'l People's Cong., Apr. 4, 1990, effective July 1, 1997), art. 8 (China); Aomen Tebie Xingzhengqu Jiben Fa (澳门特别行政区基本法) [The Basic Law of the Macau Special Administrative Region] (promulgated by the Nat'l People's Cong., Mar. 31, 1993, effective Dec. 20, 1999), art. 8 (China).

¹⁹⁰ See Xianggang Tebie Xingzhengqu Jiben Fa (香港特別行政区基本法) [The Basic Law of the Hong Kong Special Administrative Region] (promulgated by the Nat'l People's Cong., Apr. 4, 1990, effective July 1, 1997), arts. 16, 17, 19 (China); Aomen Tebie Xingzhengqu Jiben Fa (澳门特别行政区基本法) [The Basic Law of the Macau Special Administrative Region] (promulgated by the Nat'l

Kong or Macau. Accordingly, arbitration awards seated in Hong Kong and Macau are not made under the PRC Arbitration Law. Consequently, Hong Kong and Macau awards are enforced in mainland China by way of recognition and enforcement. What is special about Hong Kong and Macau awards is that, because Hong Kong and Macau are indeed Chinese territories, which means these awards are not considered foreign under Chinese law, the New York Convention does not apply. Instead, the SPC has formulated special rules for their enforcement.¹⁹¹ These special rules contain a set of standards and procedures for enforcement that are virtually identical to those designed by the SPC for the recognition and enforcement of foreign awards subject to the New York Convention.¹⁹²

People's Cong., Mar. 31, 1993, effective Dec. 20, 1999), arts. 16, 17, 19 (China).

¹⁹¹ See Zuigao Renmin Fayuan Guanyu Neidi yu Xianggang Tebie Xingzhengqu Xianghu Zhixing Zhongcai Caijue de Anpai (最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排) [Arrangement on Mutual Enforcement of Arbitration Awards Between Mainland and Hong Kong Special Administrative Region] (promulgated by the Sup. People's Ct., Jan. 24, 2000, effective Feb. 1, 2000) (China); Zuigao Renmin Fayuan Guanyu Neidi yu Aomen Tebie Xingzhengqu Xianghu Renke he Zhixing Zhongcai Caijue de Anpai (最高人民法院关于内地与澳门特别行政区相互认可和执行仲裁裁决的安排) [Arrangement on Mutual Recognition and Enforcement of Arbitration Awards Between Mainland and Macau Special Administrative Region] (promulgated by the Sup. People's Ct., Dec. 12, 2007, effective Jan. 1, 2008) (China).

¹⁹² Differences between relevant contents of these judicial interpretations and those of the New York Convention are merely matters of language, because the Chinese version of the New York Convention was written in classical Chinese, while the two judicial interpretations are written in modern Chinese. These differences, however, do not result in major differences in meaning. Compare Zuigao Renmin Fayuan Guanyu Neidi yu Xianggang Tebie Xingzhengqu Xianghu Zhixing Zhongcai Caijue de Anpai (最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排) [Arrangement on Mutual Enforcement of Arbitration Awards Between Mainland and Hong Kong Special Administrative Region] (promulgated by the Sup. People's Ct., Jan. 24, 2000, effective Feb. 1, 2000) (China), and Zuigao Renmin Fayuan Guanyu Neidi yu Aomen Tebie Xingzhengqu Xianghu Renke he Zhixing Zhongcai Caijue de Anpai (最高人民法院关于内地与澳门特别行政区相互认可和执行仲裁裁决的安排) [Arrangement on Mutual Recognition and Enforcement of Arbitration Awards Between Mainland and Macau Special Administrative Region] (promulgated by the Sup. People's Ct., Dec. 12, 2007, effective Jan. 1, 2008) (China), with Zuigao Renmin Fayuan Guanyu Zhixing Woguo Jiaru de "Chengren ji Zhixing Waiguo Zhongcai Caijue Gongyue" de Tongzhi (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) [Notice on Executing the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" that Our Country has Acceded Into] (promulgated by the Sup.

B. The Special Case of Taiwan

Taiwan's legal status is unique under Chinese law. As a political issue, the PRC Constitution maintains that Taiwan is an integral part of Chinese territory.¹⁹³ Because the Chinese central government does not exercise any actual control over Taiwan, however, Taiwan remains a separate jurisdiction from mainland China. Taiwan has its own laws and judicial system, while laws in mainland China are not applicable in Taiwan. Not surprisingly, arbitration awards seated in Taiwan are not considered domestic under the PRC Arbitration Law. When it comes to recognition and enforcement of these awards, similar to the situation for Hong Kong and Macau awards, although the New York Convention does not apply, the SPC has formulated special procedures for this purpose. In the past, the standards and procedures for the recognition and enforcement in mainland China of Taiwanese arbitration awards were the same as those for Taiwanese court judgments, and the grounds for refusing enforcement were different from those under the New York Convention.¹⁹⁴ Quite recently, however, the SPC promulgated a new judicial interpretation that specifically applies to recognition and enforcement of arbitration awards made in Taiwan.¹⁹⁵ This new set of rules is more pro-arbitration than the old rules. The current standards and procedures of enforcing a Taiwanese award as well as the grounds for rejection of

People's Ct., Apr. 10, 1987, effective Apr. 10, 1987) (China).

¹⁹³ See XIANFA preamble (1982) (China).

¹⁹⁴ See Zuide Renmin Fayuan Guanyu Renmin Fayuan Renke Taiwan Diqu Youguan Fayuan Minshi Panjue de Guiding (最高人民法院关于人民法院认可台湾地区有关法院民事判决的规定) [Regulation on the People's Courts' Recognition of Civil Judgments Made by Relevant Courts in Taiwan] (promulgated by the Sup. People's Ct., May 22, 1998, effective May 26, 1998) (China).

¹⁹⁵ See Zuide Renmin Fayuan Guanyu Renke he Zhixing Taiwan Diqu Zhongcái Caijue de Guiding (最高人民法院关于认可和执行台湾地区仲裁裁决的规定) [Regulation on the Recognition and Enforcement of Arbitration Awards Made in Taiwan] (promulgated by the Sup. People's Ct., June 29, 2015, effective July 1, 2015) (China).

that award are quite similar to those contained in the New York Convention and to those set forth in the judicial interpretations, formulated by the SPC, applicable for Hong Kong and Macau awards.¹⁹⁶

Due to the existence of different jurisdictions in China, in this paper, when Chinese laws or PRC laws are mentioned, they refer to national laws applicable to mainland China, while laws of Hong Kong, Macau, and Taiwan are excluded. Similarly, when China or Chinese territory is mentioned in relevant parts of this paper, the reference is to mainland China only, not including Hong Kong, Macau, or Taiwan.

C. Foreign Ad Hoc Awards Are Enforceable by Chinese Courts

Although the PRC Civil Procedure Law only mentions enforcement of awards made by foreign arbitration institutions and keeps silent on foreign ad hoc awards,¹⁹⁷ in China a foreign ad hoc award is as enforceable as a foreign institutional award. As long as the foreign ad hoc award meets the standards set forth by the New York Convention or other applicable laws, the Chinese court will not hesitate to enforce it. Various authorities provide support for this conclusion, including the text of the New York Convention, commentary from the Chinese legislature, and case decisions and authoritative pronouncements by the SPC.

1 The New York Convention

¹⁹⁶ See Zuigao Renmin Fayuan Guanyu Renke he Zhixing Taiwan Diqu Zhongcai Caijue de Guiding (最高人民法院关于认可和执行台湾地区仲裁裁决的规定) [Regulation on the Recognition and Enforcement of Arbitration Awards Made in Taiwan] (promulgated by the Sup. People's Ct., June 29, 2015, effective July 1, 2015), art. 14 (China).

¹⁹⁷ See Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Nat'l People's

The New York Convention itself makes no distinction between ad hoc awards and institutional awards for the purpose of enforcement. According to Article I(2), “[t]he term ‘arbitral awards’ shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.”¹⁹⁸ Because ad hoc arbitration awards are indeed made by arbitrators appointed for each case, they clearly fall within the scope of Article I(2). The New York Convention therefore supports enforcement of foreign ad hoc awards. As a result, a Chinese court should not refuse to recognize or enforce a foreign arbitration award under the New York Convention solely on the ground that it is ad hoc. In other words, when a foreign ad hoc arbitration award satisfies the conditions set forth by the New York Convention, a Chinese court is obligated to recognize and enforce it, even though it will not enforce a similar Chinese ad hoc award.

2 The Chinese Legislature

In its Commentaries on Arbitration Laws of China, the Legislative Affairs Commission of the Standing Committee of the National People’s Congress (NPC)¹⁹⁹ confirms that foreign ad hoc arbitration awards will be recognized and enforced in China under the New York Convention:

In the course of drafting the PRC Arbitration Law, the issue of ad hoc arbitration has been studied. The basic opinion was that ad hoc arbitration

Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended Aug. 31, 2012), art. 283 (China).

¹⁹⁸ New York Convention, *supra* note 14, art. I(2).

¹⁹⁹ The National People’s Congress of the People’s Republic of China is the highest organ of state power in PRC. The National People’s Congress and its permanent body, i.e., Standing Committee, exercise the legislative power of PRC, see XIANFA arts. 58–59 (1982) (China).

would be allowed in international economic and trade disputes, but would not be approved of in domestic economic and trade disputes. . . . [T]he PRC Arbitration Law does not provide for ad hoc arbitration . . . [but] the issue of recognition and enforcement of foreign ad hoc arbitration awards has been solved under the New York Convention. China is a party to the New York Convention, so issues relating to ad hoc arbitration awards made in other countries will be resolved according to the Convention.²⁰⁰

When enacting the PRC Arbitration Law, the NPC was assuming that foreign ad hoc arbitration awards would be recognized and enforced in China according to the New York Convention. The NPC's Commentaries also clearly indicate that those awards should be recognized and enforced in China as long as they can satisfy the conditions set by the New York Convention.

3 The SPC's View

On several occasions, the SPC has echoed the NPC's view. One of its judicial interpretations contains the following language:

Where parties apply to a people's court for enforcement of an ad hoc arbitration award . . . made in the Hong Kong Special Administrative Region, the people's court shall review the case according to the Arrangement [on Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region]. If no situation provided for in

²⁰⁰ THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS, COMMENTARIES, *supra* note 130, at 38.

Article 7 of the Arrangement exists²⁰¹, such an arbitration award can be enforced in mainland China.²⁰²

As discussed earlier, Chinese law gives awards made in Hong Kong and Macau a quasi-foreign status. Enforcement of these awards by Chinese courts follows the procedure of recognition and enforcement.²⁰³ Although the New York Convention is not applicable to these awards, the Chinese central government and the governments of Hong Kong and Macau have jointly promulgated special regulations to govern proceedings relating to recognition and enforcement of arbitration awards made in each other's jurisdictions. These special regulations include provisions that are virtually the same as those in the New York Convention.²⁰⁴ As a result, the SPC's attitude towards ad hoc awards seated in Hong Kong or Macau is indicative of its position on other foreign ad hoc awards. The SPC's willingness to recognize and

²⁰¹ Grounds for a Chinese court to rely on to refuse to enforce a Hong Kong award are virtually identical to those for foreign awards, see *Zuigao Renmin Fayuan Guanyu Neidi yu Xianggang Tebie Xingzhengqu Xianghu Zhixing Zhongcai Caijue de Anpai* (最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排) [Arrangement on Mutual Enforcement of Arbitration Awards Between Mainland and Hong Kong Special Administrative Region] (promulgated by the Sup. People's Ct., Jan. 24, 2000, effective Feb. 1, 2000), art. 7 (China); New York Convention, *supra* note 14, art. V.

²⁰² *Zuigao Renmin Fayuan Guanyu Xianggang Zhongcai Caijue Zai Neidi Zhixing de Youguan Wenti de Tongzhi* (最高人民法院关于香港仲裁裁决在内地执行的有关问题的通知) [Notice on Relevant Issues Concerning the Enforcement of Hong Kong Arbitral Awards in Mainland China] (promulgated by the Sup. People's Ct., Dec. 30, 2009, effective Dec. 30, 2009) (China).

²⁰³ See *supra* Section II(A).

²⁰⁴ See *Zuigao Renmin Fayuan Guanyu Neidi yu Xianggang Tebie Xingzhengqu Xianghu Zhixing Zhongcai Caijue de Anpai* (最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排) [Arrangement on Mutual Enforcement of Arbitration Awards Between Mainland and Hong Kong Special Administrative Region] (promulgated by the Sup. People's Ct., Jan. 24, 2000, effective Feb. 1, 2000) (China); *Zuigao Renmin Fayuan Guanyu Neidi yu Aomen Tebie Xingzhengqu Xianghu Renke he Zhixing Zhongcai Caijue de Anpai* (最高人民法院关于内地与澳门特别行政区相互认可和执行仲裁裁决的安排) [Arrangement on Mutual Recognition and Enforcement of Arbitration Awards Between Mainland and Macau Special Administrative Region] (promulgated by the Sup. People's Ct., Dec. 12, 2007, effective Jan. 1, 2008) (China). Differences between relevant contents of these judicial interpretations and those of the New York Convention are merely matters of language, because the Chinese version of the New York Convention was written in classical Chinese, while the two judicial interpretations are written in modern Chinese. These differences, however, do not result in major differences in meaning.

enforce Hong Kong ad hoc awards is indicative of its friendliness towards foreign ad hoc arbitration awards in general.

During an interview in 2007, a former vice-president of the SPC explicitly confirmed that foreign ad hoc arbitration awards can be enforced in China:

Question: Does the Arrangement [on Mutual Enforcement of Arbitration Awards in the Mainland and the Macau Special Administrative Region] recognize ad hoc arbitration?

Answer: According to the laws of the Macau Special Administrative Region, Macau has an ad hoc arbitration system. It is known that in Macau SAR, more ad hoc arbitration awards are made than institutional arbitration awards. At present, current laws in Mainland [China] do not provide for ad hoc arbitration, but according to the New York Convention, arbitration awards that are to be mutually recognized and enforced by the contracting states shall include ad hoc arbitration awards. Since *China*, as a contracting state, *recognizes ad hoc arbitration awards made in other contracting states*, it shall, of course, recognize and enforce ad hoc arbitration awards made in other jurisdictions within the same country.²⁰⁵

4 The SPC's Decisions in Actual Cases

Cases involving recognition and enforcement of foreign ad hoc awards are common before Chinese courts. For example, in 1997, the Guangzhou Maritime

²⁰⁵ Supreme People's Court, *Person in Charge Answering Questions Regarding Concluding the Arrangement on Mutual Enforcement of Arbitration Awards between Mainland and Macau Special Administrative Region* (Oct. 30, 2007), available at

Court recognized and enforced a London ad hoc arbitration award.²⁰⁶ In 2006, the Wuhan Maritime Court recognized and enforced another London ad hoc arbitration award.²⁰⁷ In fact, according to one scholar, the first foreign arbitration award ever recognized and enforced by a Chinese court under the New York Convention was an ad hoc award.²⁰⁸ There are many other court decisions proving that China will not refuse to recognize or enforce a foreign ad hoc arbitration award solely on the ground that it is ad hoc.

III SEEMINGLY DIRE PROSPECTS FOR AD HOC ARBITRATIONS SEATED IN CHINA

Compared with foreign ad hoc awards that enjoy warm hospitality from Chinese lawmakers and courts, Chinese ad hoc arbitration is far less favored. Although there is no straightforward prohibition on ad hoc arbitration under Chinese law, ad hoc arbitration agreements are invalid under the PRC Arbitration Law. Because a valid arbitration agreement is the only source of an arbitrators' jurisdiction, it is difficult to imagine a successful arbitration proceeding based on an invalid arbitration agreement. Moreover, because the invalidity of an arbitration agreement is a ground for setting aside an award under the PRC Arbitration Law, even if two parties were willing to

<http://vip.chinalawinfo.com/newlaw2002/slcl/slc.asp?db=lfbj&gid=1090521153> (emphasis added).

²⁰⁶ See Caipulusi Sikangtesida Hangyun Youxian Gongsi Shenqing Chengren he Zhixing Lundun Zhongcai Caijue An (塞浦路斯康特斯达航运有限公司申请承认和执行伦敦仲裁裁决案) [Contestar Shipping Company Limited of Cyprus v. Sinotrans Guangdong Zhanjiang Company], (Guangzhou Maritime Court, July 15, 1998) (Lawinfochina).

²⁰⁷ See Zhibuluotuo Baixiong Youxian Zeren Gongsi yu Zhongguo Jiangdu Yahai Zaocuan Youxian Gongsi Shenqing Chengren Guowai Zhongcai Caijue Xiaoli Jiufen An (直布罗陀白熊有限责任公司与中国江都亚海造船有限公司申请承认国外仲裁裁决效力纠纷案) [White Bear Limited of Gibraltar v. China Jiangdu Yahai Shipbuilding Co., Ltd.], (Wuhan Maritime Court, June 16, 2006) (Lawinfochina).

²⁰⁸ See Jian Zhou, *Arbitration Agreements in China: Battles on Designation of Arbitral Institution and Ad Hoc Arbitration*, 23 JOURNAL OF INTERNATIONAL ARBITRATION 145, 163 (2006).

cooperate in a Chinese ad hoc arbitration proceeding, it would seem that the resulting award still could not be enforced. On the other hand, as later sections will discuss, that assumption may not be entirely correct.

In practice, the situation is more complicated. A closer look at the PRC Arbitration Law reveals that while providing rules and mechanisms for institutional arbitration, the law is silent on essentially all issues relating to ad hoc arbitration except for the requirement that an arbitration commission should be appointed in an arbitration agreement. It seems that the PRC Arbitration Law is based on a presumption that all arbitrations in China are and will be institutional. A similar presumption can also be inferred in other Chinese laws that relate to arbitration.²⁰⁹ This seems to suggest that Chinese lawmakers never anticipated that ad hoc arbitration would take place in China. In this sense, it can be said that ad hoc arbitration is not included in the Chinese legal framework of arbitration. Under these circumstances, to overcome the barrier set by Chinese law and have successful ad hoc arbitration in China as well as an enforceable award, one needs to analyze carefully how ad hoc arbitration is excluded from the Chinese arbitration system and how relevant issues are dealt with under Chinese law.

A. Successful Operation of Ad Hoc Arbitrations Seated in China Seems Impractical under the Current Chinese Law

Besides the invalidity of an ad hoc arbitration agreement described above, another major obstacle to the successful operation of a Chinese ad hoc arbitration under

Chinese law is the lack of any legal support mechanisms. These two problems have made Chinese ad hoc arbitrations impractical. This subsection will analyze exactly where in the course of the arbitration proceeding the parties to a Chinese ad hoc arbitration will run into difficulties, as well as what the consequences of these difficulties are. For the purpose of analysis, this subsection assumes that two parties voluntarily agree to arbitrate in China on an ad hoc basis, failing to specify the *lex arbitri* or the law governing the validity of the arbitration agreement, and that the tribunal is willing to take jurisdiction and proceed in the case. This subsection will discuss several questions arising out of this scenario: Can the proceeding go on if one party regrets its decision to arbitrate and decides to obstruct arbitration? How and when can one party obstruct arbitration? What are the consequences of such obstruction?

1 Possible Obstructions Within the Arbitration Proceeding

In an ad hoc arbitration, parties sometimes request court involvement. Subject to different national arbitration laws, parties may turn to the courts for assistance if there are issues in the arbitration proceeding that cannot be resolved by the parties or the tribunal. Two common issues are the appointment and challenge of the arbitrators.

In a Chinese ad hoc arbitration proceeding, however, the parties cannot expect Chinese courts to assist with or decide any issues. The PRC Arbitration Law authorizes arbitration institutions to make a decision when a party fails to appoint an

²⁰⁹ See e.g., Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended Aug. 31, 2012) (China).

arbitrator in time, or when a party challenges an arbitrator.²¹⁰ This implies that the PRC Arbitration Law intends for these relevant provisions to apply in institutional arbitration settings only. Therefore, the law is silent on similar issues in ad hoc arbitration and offers no support to those ad hoc proceedings. Under these circumstances, despite the parties' request, Chinese courts will likely not interfere in any procedural matters in a Chinese ad hoc arbitration, because they will probably hold that they have no authority to do so. As a result, in a Chinese ad hoc arbitration proceeding, if the rules that the parties agree upon are incomplete or unclear on an issue that requires both parties' cooperation for the arbitration to proceed, or if the agreed upon rules point to a Chinese court for assistance, either of the parties may easily obstruct arbitration simply by refusing to cooperate. This refusal to cooperate will lead to a deadlock in the Chinese ad hoc arbitration proceeding.

2 Possible Obstructions Outside the Arbitration Proceeding

Apart from blocking the arbitration proceeding itself, a party may also choose to obstruct the arbitration from outside its proceeding. This goal is usually achieved by resorting to judicial authority. If a party no longer wants to participate in the ongoing ad hoc arbitration proceeding, it has at least two options: it can request that a Chinese court declare the ad hoc arbitration agreement invalid, or it can file the case with a proper Chinese court to hear the dispute's merits. Because Chinese courts will most likely refuse to enforce an arbitration agreement calling for a Chinese ad hoc arbitration as long as the PRC Arbitration Law is applicable, if the party chooses the

²¹⁰ Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's

first option, the court will strike down the arbitration agreement. If the party chooses the second option, the court will hear the merits of the dispute, even over the other party's objection, as it will consider the ad hoc arbitration agreement invalid. No matter which option the resisting party chooses, it may proceed with confidence that any resulting award will have no meaning or effect.²¹¹ This is because, according to the PRC Arbitration Law, Chinese courts are the final arbiters on arbitrability issues;²¹² their ruling not to enforce an ad hoc arbitration agreement will be final.

In fact, because Chinese ad hoc awards are not enforceable under Chinese law,²¹³ a resisting party may even withdraw from the arbitration proceeding without challenging the ad hoc arbitration agreement, and simply refuse to honor the award later on. The consequences of such a strategy will be discussed in detail in the next subsection, but generally speaking, the resisting party will, at least in China, likely not be bound by the award.

3 Timing of Possible Obstruction

The stage at which a resisting party may choose to obstruct arbitration is also important. Successful operation of a Chinese ad hoc arbitration will be impossible if the resisting party is able to obstruct arbitration at virtually any time during the

Cong., Aug. 31, 1994, effective Sept. 1, 1995), arts. 32, 36 (China).

²¹¹ Of course, the other party may still want to proceed with the arbitration proceeding, and if it wins the case in the end, it may try to enforce the award outside China under the New York Convention. Although the losing party may challenge the recognition and enforcement by relying on Art. V(1)(a) or even Art. V(1)(e) of the New York Convention, courts in pro-arbitration countries, e.g. France, may nonetheless choose to enforce the award.

²¹² See Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 20, para. 1 (China). For a more detailed discussion, see *infra* Section III.A.3.

²¹³ For a more detailed discussion, see *infra* Section III.B.1.

proceeding.

a The Resisting Party May Still Obstruct the Arbitration Even After Arguing the Merits of the Dispute Before the Tribunal

i The Waiver Rule under Chinese Law

Although the PRC Arbitration Law, together with the New York Convention and many other national laws, requires that an arbitration agreement be in written form, it nonetheless recognizes a party's intent to accept arbitration by way of conduct.²¹⁴ Such intent is usually manifested by the party's substantial participation in the arbitration proceeding. Under the PRC Arbitration Law, one party may be deemed as having waived its right to challenge the validity of the arbitration agreement if that party does not object to arbitration before the first hearing in the proceeding.²¹⁵ The SPC has also promulgated a waiver rule, according to which Chinese courts will hold that a party has accepted arbitration if it has appointed an arbitrator in accordance with

²¹⁴ See Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16 (China); New York Convention, *supra* note 14, art. II(2); but cf. Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 20, para. 2 (China); Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Zhongcai Fa" Ruogan Wenti de Jieshi (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 on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China"] (promulgated by the Sup. People's Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 13, para. 1 (China); Di'erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiayao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Dec. 26, 2005), art. 67 (China).

²¹⁵ See Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 20, para. 2 (China); Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Zhongcai Fa" Ruogan Wenti de Jieshi (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 on Certain Issues Concerning the

the arbitration rules and argued the case's merits.²¹⁶ Therefore, under Chinese law, after substantially participating in an arbitration proceeding, a party will be estopped from later arguing that no valid arbitration agreement exists.

ii The Waiver Rule under Chinese Law May Not Be Applicable to Chinese Ad Hoc Arbitration

Despite this generally applicable waiver rule, substantial participation in a Chinese ad hoc arbitration proceeding will not necessarily endow the ad hoc tribunal with jurisdiction under Chinese law. A reasonable interpretation of the waiver rule is that it only governs institutional arbitration seated within China and ad hoc arbitration seated outside China.

First, the context of the waiver rule in the PRC Arbitration Law indicates that the rule only applies to Chinese institutional arbitration. The waiver rule in the PRC Arbitration Law is stipulated in Article 20 Paragraph 2 of the Law, preceded, in that same article, by the paragraph which discusses situations where a party intends to challenge the validity of an arbitration agreement.²¹⁷ This preceding paragraph, by providing that the party can request either the arbitration commission or the people's court to make a decision, contemplates a situation in a Chinese institutional arbitration

Application of the "Arbitration Law of the People's Republic of China"] (promulgated by the Sup. People's Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 13, para. 1 (China).

²¹⁶ See Di'erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Dec. 26, 2005), art. 67 (China).

²¹⁷ See Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 20 (China).

setting.²¹⁸ The PRC Arbitration Law's overall presumption of institutional arbitration also supports this conclusion.²¹⁹

Second, the context of the SPC's waiver rule suggests that it only applies to ad hoc arbitration seated outside China. The SPC's waiver rule is embedded among rules discussing how Chinese courts should review the validity of a foreign-related arbitration agreement.²²⁰ Having contemplated that arbitration proceedings seated outside China may be on an ad hoc basis, in promulgating the waiver rule, the SPC mentioned both arbitration proceedings under institutions and before tribunals (presumably ad hoc tribunals).²²¹ Also bearing in mind the PRC Arbitration Law's overall presumption of institutional arbitration,²²² it is reasonable to interpret the SPC's waiver rule as applicable only to ad hoc arbitration seated outside China.

The absence of a waiver rule in Chinese ad hoc arbitration may cause some unreasonable and undesirable results. For example, lack of waiver gives the respondent in the proceeding an unfair advantage. When the applicant is willing to cooperate in the arbitration proceeding and have the dispute resolved by a final decision, the respondent may participate in the arbitration with the knowledge that it can choose to accept or reject the ensuing award based on whether it finds the award favorable. In a mature legal system, rules or principles like estoppel or good faith are

²¹⁸ See *id.* art. 20, para. 1 (China).

²¹⁹ See *supra* Section III, second opening paragraph.

²²⁰ Di'erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Dec. 26, 2005), §6.1 (China).

²²¹ See Di'erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Dec. 26, 2005), art. 67 (China).

designed to avoid such outcomes. Under Chinese law, however, there does not seem to be a clear rule or principle that would bring about an estoppel effect in this context. Although there is a good faith principle in Chinese Civil Procedure Law,²²³ it is relatively abstract and rarely applied by Chinese courts in a particular case.²²⁴ Most importantly, the mentality of Chinese judges, namely the strong tendency to distinguish between foreign and domestic ad hoc arbitration, might cause them to decide that domestic (Chinese) ad hoc arbitrations are illegal *per se*, no matter what the parties have agreed to or how they have conducted themselves.

As a result, under current Chinese law, the PRC Arbitration Law's requirement of institutional arbitration seems mandatory; it cannot be overcome by party agreement and probably not by conduct either. When two parties put the seat of their arbitration in China, even though both of them have manifested their intent to resolve their dispute by ad hoc arbitration, either by concluding an arbitration agreement in writing or by arguing the merits of the dispute before the tribunal, their ad hoc arbitration agreement is still invalid under Chinese law.

b Tribunals Not Having the Authority to Decide Arbitrability Issues May Make Chinese Courts More Comfortable Striking Down a Chinese Ad Hoc Arbitration Agreement Even When the Arbitration Proceeding is Ongoing

²²² See *supra* Section III, second opening paragraph.

²²³ Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended August 31, 2012), art. 13 (China) (emphasis added). Official translation by the National People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html.

²²⁴ To the author's best knowledge, there is no published case in which a Chinese court applied the good faith principle to estop a party from acting inconsistently in the litigation proceeding.

The PRC Arbitration Law empowers arbitration institutions, rather than tribunals, to decide arbitrability issues.²²⁵ Accordingly, the arbitration rules of Chinese arbitration institutions usually specify that the institutions themselves have the authority to decide arbitrability issues, although they may choose to delegate such authority to the tribunal.²²⁶

Chinese law also stipulates that Chinese courts are the final arbiters on arbitrability issues. Article 20 of the PRC Arbitration Law provides:

If a party challenges the validity of the arbitration agreement, he may request the arbitration commission to make a decision or apply to the people's court for a ruling. If one party requests the arbitration commission to make a decision and the other party applies to the people's court for a ruling, the people's court shall give a ruling.²²⁷

Moreover, according to the SPC's judicial interpretation, the court will decide arbitrability issues upon one party's request unless the arbitration commission has already decided the issue.²²⁸ Because there is no institution potentially involved in an ad hoc arbitration and the court does not need to consider any decision on arbitrability made by an arbitration institution, the mechanism described above will

²²⁵ See Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 20, para. 1 (China).

²²⁶ See e.g., 2012 China International Economic and Trade Arbitration Commission Arbitration Rules, art. 6(1); 2004 China Maritime Arbitration Commission Arbitration Rules, art. 4(1); 2008 Beijing Arbitration Commission Arbitration Rules, art. 6(4).

²²⁷ Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 20, para. 1 (China). Official translation by the National People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html.

²²⁸ Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Zhongcai Fa" Ruogan Wenti de Jieshi (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 on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China"] (promulgated by the Sup. People's Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 13, para. 2

likely make a Chinese court comfortable with nullifying an ad hoc arbitration agreement whenever one party requests that it do so, no matter how far the arbitration proceeding has progressed.

As a result, based upon a contextual interpretation of the PRC Arbitration Law, the resisting party to a Chinese ad hoc arbitration may resist arbitration at virtually all stages of the proceeding, even though it has already argued the merits of the dispute before the tribunal. Moreover, Chinese courts will probably strike down a Chinese ad hoc arbitration agreement whenever they are requested to do so, no matter which stage the arbitration proceeding has reached.

B. Enforceability of Chinese Ad Hoc Arbitration Awards is Not Recognized under Chinese Law and Remains Uncertain under the New York Convention

An even more significant problem for the parties to a Chinese ad hoc arbitration is the ensuing award's enforceability. This subsection will carefully analyze a Chinese ad hoc arbitration award's enforceability under both Chinese law and the New York Convention. For the purpose of analysis, this subsection assumes that two parties voluntarily agree to arbitrate in China on an ad hoc basis, failing to specify the *lex arbitri* or the law governing the validity of the arbitration agreement; that the tribunal is willing to take jurisdiction and proceed in the case; that the parties cooperate through the proceeding; and that the tribunal renders an award. This subsection will discuss several questions arising out of this scenario: Will a Chinese court enforce the

(China).

award? Can a Chinese court set aside the award? Can the award be recognized and enforced outside China under the New York Convention?

1 Unenforceability of Chinese Ad Hoc Arbitration Awards under Chinese Law

The biggest problem facing the parties to a Chinese ad hoc arbitration is the award's lack of enforceability under Chinese law. A Chinese court's authority to enforce an arbitration award seated in China comes from Article 62 of the PRC Arbitration Law, which provides:

The parties shall perform the arbitration award. If a party fails to perform the arbitration award, the other party may apply to the people's court for *enforcement in accordance with the relevant provisions of the Civil Procedure Law.* The people's court to which the application has been made shall enforce the award.²²⁹

The provision referred to in this quote, Article 237, Paragraph 1 of the PRC Civil Procedure Law further provides, “[i]f a party fails to comply with *an award of an arbitral organ*²³⁰ established according to the law, the other party may apply for execution²³¹ to the people's court which has jurisdiction over the case. The people's court applied to shall enforce the award.”²³²

²²⁹ Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 62 (China) (emphasis added). Official translation by the National People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html.

²³⁰ Here, although the official translation uses “arbitral organ”, “arbitration institution” may be a better translation.

²³¹ Here, although the official translation uses “execution”, “enforcement” may be a better translation.

²³² Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended August 31, 2012), art. 237, para. 1 (China) (emphasis added). Official translation by the National People's Congress, available at

This provision limits Chinese court enforcement of arbitration awards seated in China to those rendered by arbitration institutions.²³³ Chinese ad hoc awards are therefore not legally enforceable under Chinese law. As a result, after an ad hoc tribunal renders an award, the prevailing party can only hope that the losing party will honor the award voluntarily. If not, the prevailing party cannot have the award enforced by a Chinese court.

2 Problems Relating to the Potential Set-aside Proceeding of a Chinese Ad Hoc Award under Chinese Law

The set-aside proceeding is closely related to an arbitration award's enforceability under a national law. Due to ad hoc awards' unique status under Chinese law, however, set-aside proceedings are not obviously available for such awards, which may cause some obstacles in practice.

a A Formal Set-aside Proceeding May Not Be Available

An ad hoc arbitration award will usually be subject to review and challenge in its seat country's national court in a set-aside proceeding. In China, however, because ad hoc arbitration is not included in the PRC Arbitration Law's framework, a formal set-aside proceeding may be unavailable for such an award.

The PRC Arbitration Law classifies an award made in China as either domestic or

http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html.

²³³ PRC laws treat arbitration awards rendered by tribunals under Chinese arbitration institutions as rendered by those institutions.

foreign-related.²³⁴ The distinction depends on a number of factors, including, but not limited to, the parties' nationalities, where the disputed property is located, and where any relevant transactions took place in the case.²³⁵ Chinese law contains two separate lists of grounds upon which a domestic or a foreign-related award, respectively, may be set aside.

Article 58 of the PRC Arbitration Law lays out the grounds upon which a domestic award may be set aside:

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

- (1) *there is no arbitration agreement;*

²³⁶
. . .

Relevant to this provision, Article 18 of the SPC Arbitration Law Interpretation provides as follows:

The phrase “there is no arbitration agreement” provided in Article 58,

²³⁴ See Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), chap. VII (China).

²³⁵ See Di'erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Dec. 26, 2005), art. 71 (China); Zuogao Renmin Fayuan Guanyu Guanche Zhixing “Zhonghua Renmin Gongheguo Minfa Tongze” Ruogan Wenti de Yijian (Shixing) (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(试行)) [Opinions on Certain Issues Concerning the Implementation of the “General Principles of Civil Law of the People's Republic of China” (Trial)] (promulgated by the Sup. People's Ct., Apr. 2, 1988, effective Apr. 2, 1988), art. 178 (China).

²³⁶ Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 58 (China) (emphasis added). Official translation by the National People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html.

Paragraph 1, Item (1) of the Arbitration Law refers to the situation where the parties did not reach an arbitration agreement. *Where an arbitration agreement is found to be invalid or cancelled, it shall be treated as if there is no arbitration agreement.*²³⁷

Article 70 of the PRC Arbitration Law sets forth the grounds upon which a foreign-related award may be set aside:

If a party presents evidence which proves that a foreign-related arbitration award involves one of the circumstances set forth in the first paragraph of Article [274] of the Civil Procedure Law, the people's court shall, after examination and verification by a collegial panel formed by the people's court, rule to set aside the award.²³⁸

Relevant to this provision, Article 274 of the PRC Civil Procedure Law provides as follows:

A people's court shall, after examination and verification by a collegial panel of the court, make a written order not to allow the enforcement of *the award rendered by an arbitral organ*²³⁹ of the People's Republic of China handling cases *involving foreign element*, if the party against whom the application for enforcement is made furnishes proof that:

²³⁷ Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Zhongcai Fa” Ruogan Wenti de Jieshi (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 on Certain Issues Concerning the Application of the “Arbitration Law of the People's Republic of China”] (promulgated by the Sup. People's Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 18 (China) (emphasis added).

²³⁸ Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 70 (China). Official translation by the National People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html.

²³⁹ Here, although the official translation uses “arbitral organ”, “arbitration institution” may be a better translation.

(1) *the parties have not had an arbitration clause in the contract or have not subsequently reached a written arbitration agreement;*

....²⁴⁰

The above provisions appear to offer a ground for a party to challenge a Chinese ad hoc award via a set-aside proceeding. The challenging party can first argue that the ad hoc arbitration agreement is invalid under Chinese law. Then, if the ad hoc award is a domestic award, the challenging party may rely on Article 18 of the SPC Arbitration Law Interpretation to argue that an invalid arbitration agreement means that “there is no arbitration agreement.” If the award is a foreign-related award, although Article 274 of the PRC Civil Procedure Law does not incorporate a situation where an arbitration agreement concluded by the parties is invalid, this argument will likely be successful because it is consistent with a reasonable interpretation of the relevant Chinese laws.

On the other hand, one could argue that the Chinese statutes quoted above have endowed the courts with set-aside jurisdiction only for institutional arbitration awards but not for ad hoc awards. Both the PRC Arbitration Law and the PRC Civil Procedure Law refer to arbitration commissions or institutions (literally translated as “arbitration organs” in the statute’s official translation) when they lay out grounds to set aside arbitration awards. The statutes thus seem to exclude ad hoc awards. Taking into account the general framework of the PRC Arbitration Law, which does not at all provide for ad hoc arbitration, this interpretation is persuasive. If the

²⁴⁰ Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended August 31, 2012), art. 274 (China) (emphasis added). Official translation by the National People's Congress, available at

Chinese courts adopt this interpretation, there will probably be no formal set-aside proceeding available for Chinese ad hoc awards.

Alternatively, even though the above-cited provisions in the relevant Chinese statutes are interpreted as applicable to ad hoc awards, it is difficult to determine the specific court in which the challenging party should file its request for set-aside. Article 58 of the PRC Arbitration Law provides that a case pertaining to the set-aside of a domestic award should be filed with the intermediate people's court at the place where the arbitration commission resides.²⁴¹ Although there is no specific statutory provision setting forth a specific court in which the request to set aside a foreign-related award should be filed, a general provision in the PRC Arbitration Law provides that when there is no specific rule for foreign-related awards, the rules applicable to domestic awards shall also apply to foreign-related awards.²⁴² As a result, the challenging party wishing to set aside a foreign-related award in China should also file its request with the intermediate people's court in the place where the arbitration commission is located. This mechanism will cause a practical obstacle for a party wishing to have a Chinese ad hoc arbitration award set aside, because there is no arbitration commission involved in an ad hoc arbitration at all.

Although under the general venue provision in the PRC Civil Procedure Law, the people's court at a defendant's domicile has jurisdiction over cases filed against that defendant,²⁴³ it may be difficult for a challenging party to convince such a court to

http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html.

²⁴¹ See Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 58 (China).

²⁴² See *id.* art. 65.

²⁴³ See Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Nat'l People's

take jurisdiction to hear a set-aside petition against a Chinese ad hoc arbitration award. The venue choice rules of the PRC Civil Procedure Law provide various exceptions to the general venue rule.²⁴⁴ Under these exceptions, various specific venue rules apply, thus making the general venue provision inapplicable.²⁴⁵ A set-aside petition against a Chinese ad hoc arbitration award can pose a very difficult question for a Chinese court, because it fits into an exception provided in the PRC Arbitration Law specifying that the intermediate people's court at the place where the arbitration commission resides shall have jurisdiction over the case, but no such court can be ascertained under this exception. In other words, there is an exception to the general rule, which excludes application of the general rule, but the specific venue rule cannot point to any court to hear the case. There is no clear rule on how this dilemma should be resolved under Chinese law. In practice, however, because a set-aside proceeding in China is heard by a court where the arbitration institution resides, it is likely that the court at the defendant's domicile will refuse to hear the set-aside case because it does not consider itself the proper forum.

In summation, setting aside a Chinese ad hoc award is difficult in that relevant Chinese laws governing set-aside proceedings of arbitration awards may be reasonably interpreted to encompass institutional awards only, while no such formal proceeding is available for ad hoc awards. Alternatively, even if the laws were interpreted to be applicable to ad hoc awards, from a practical perspective, it would be likely that no Chinese court will be willing to take jurisdiction to hear the set-aside petition against a

Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended Aug. 31, 2012), art. 21, para. 1 (China).

²⁴⁴ See *id.* arts. 22-34.

²⁴⁵ See *id.* arts. 23-34.

Chinese ad hoc award.

b An Alternative to a Formal Set-aside Proceeding

Lack of a formal set-aside proceeding does not mean a losing or unsatisfied party to a Chinese ad hoc arbitration completely lacks the ability to challenge the award. The challenging party can still file the case with a proper Chinese court to hear the dispute's merits. The other party would likely argue that the case is *res judicata*—that the case should be dismissed because its merits have already been decided by the tribunal in the ad hoc arbitration. The challenging party, in response, will most likely request that the court disregard the ad hoc arbitration award because the award is based on an invalid arbitration agreement and thus is not legally enforceable. Due to the relevant provisions of Chinese law discussed in the previous subsections, the Chinese court will likely agree with the challenging party and proceed to hear the merits of the dispute. When the case has to be relitigated, one can argue that the Chinese court has *de facto* set aside the ad hoc award.

In fact, it seems that the current Chinese legal framework of arbitration does not need a formal set-aside proceeding for Chinese ad hoc awards. This is largely because there is little practical need for this proceeding, and the alternative approach just described may to a large extent satisfy that need.

As analyzed earlier, because a Chinese ad hoc arbitration award is not legally enforceable in China, if the losing party does not want to honor the award, it may simply ignore it. The prevailing party cannot have the award enforced by Chinese courts. As a result, there is no practical need for the losing party to initiate a formal

set-aside proceeding to negate the award's legal force within China. The losing party may, however, want to have the award set aside if that party has assets outside of China and is concerned about the prevailing party filing an enforcement action where the assets are located. In this case, if the losing party can successfully have the award set aside by a Chinese court, that party may have a stronger case when the prevailing party seeks recognition and enforcement of the award outside of China. The losing party may argue before the foreign court that recognition and enforcement of the award should be refused, basing the argument not only on Article V(1)(a) (invalidity of the arbitration agreement),²⁴⁶ but also on Article V(1)(e) (set aside in the home jurisdiction)²⁴⁷ of the New York Convention. In practice, however, the same objective may be achieved by the alternative approach just discussed, namely, arguing that a Chinese court has *de facto* set aside the award by relitigating the case. As a result, there is probably no practical need to include a formal set-aside proceeding against a Chinese ad hoc arbitration award in the current Chinese legal framework of arbitration.

²⁴⁶ Article V1(a) of *New York Convention* reads,

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that,

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or *the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*; [emphasis added]

²⁴⁷ Article V1(e) of *New York Convention* reads,

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that,

- (e) *The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*. [emphasis added]

3 Enforceability of Chinese Ad Hoc Arbitration Awards Outside China Remains Uncertain

Although a Chinese ad hoc arbitration award is not enforceable under Chinese law, if the losing party has assets in another contracting party to the New York Convention, the prevailing party would likely try to have the award enforced in that country. The question thus becomes whether a Chinese ad hoc award is enforceable under the New York Convention. Of course, as previously mentioned, the mere fact that the award is ad hoc will not affect its enforceability under the New York Convention, but there may be some other possible grounds under the Convention upon which the award's enforceability can be challenged. Among them, the most likely ones are Article V(1)(a) (invalidity of the arbitration agreement) and Article V(1)(e) (set aside in the home jurisdiction).²⁴⁸

Before discussing the details of Article V of the New York Convention, it may be helpful to bear in mind a national court's discretion under that article. The first paragraph of Article V(1) of the New York Convention reads, “[r]ecognition and enforcement of the award *may* be refused, at the request of the party against whom it is invoked, *only if* that party furnishes to the competent authority where the recognition and enforcement is sought, proof . . .”²⁴⁹ Accordingly, at least in the English version of the New York Convention, the words “may” and “only if” indicate that, even though there exist certain grounds for rejecting the recognition and enforcement

²⁴⁸ Of course, these do not preclude any other possible ground to refuse recognition and enforcement.

²⁴⁹ New York Convention, *supra* note 14, art. V(1) (emphasis added).

of an award, a national court may nonetheless choose to recognize and enforce it.²⁵⁰

In practice, courts in different countries, or even within the same country, may well have different views and make contradictory decisions on the same or a similar issue. As a result, notwithstanding the analysis of whether a Chinese ad hoc arbitration award will be recognized and enforced outside China, it must be readily anticipated that different courts will likely reach different results.

a Uncertain Prospects under Article V(1)(a) of the New York Convention

Under Article V(1)(a) of the New York Convention, recognition and enforcement of an arbitration award may be rejected if the arbitration agreement on which the award is based is invalid under the applicable law.²⁵¹ In practice, however, parties seeking rejection of an award rarely invoke this ground.²⁵² Most of the issues that can affect the validity of an arbitration agreement are separately governed by other articles of the New York Convention, such as Article II(2) for formal writing requirement, Article V(2) for non-arbitrability issues, and Article V(1)(d) for composition of tribunal and other procedural issues.²⁵³ As a result, the only issues potentially governed by Article V(1)(a) are lack of consent (misrepresentation, duress, fraud, or undue influence) in the formation of an arbitration agreement and specific

²⁵⁰ The word “may” as used in the English version of the New York Convention does not necessarily exist in its other four official language versions. The analysis in this section of the paper will, however, be based on a somewhat liberal interpretation of the relevant parts of the New York Convention.

²⁵¹ See New York Convention, *supra* note 14, art. V(1)(a).

²⁵² See ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 282 (1981); Pieter Sanders, *Consolidated Commentary Volumes III and IV*, 4 YEARBOOK COMMERCIAL ARBITRATION 231, 247 (1979).

²⁵³ See VAN DEN BERG, *supra* note 252, at 287-291.

requirements as to the contents of the agreement set by the governing law.²⁵⁴ The formal writing requirement set forth in Article II(2) of the New York Convention, however, has significantly reduced the possibility that a party can successfully invoke lack of consent to invalidate the agreement, because if an arbitration clause in a contract or an arbitration agreement is signed by both parties or is contained in an exchange of letters or telegrams between the parties, it will be difficult for a party to argue later that such a clause or agreement is concluded without consent.²⁵⁵ As to any specific requirements of the governing law, according to Albert Jan Van Den Berg, this “has not come up in practice.”²⁵⁶ An arbitration agreement calling for a Chinese ad hoc arbitration may, however, be one of those rare cases. The PRC Arbitration Law’s unique requirement of institutional arbitration may be a specific requirement that enables a challenging party to invoke Article V(1)(a). If the party does so, will a foreign court refuse to recognize and enforce a Chinese ad hoc award just because the PRC Arbitration Law invalidates ad hoc arbitration agreements?

This remains an open question. Because of the rarity and complexity of the issues involved, if a Chinese ad hoc award is presented before a foreign court, different national courts could reach different conclusions when exercising their discretion. What may be relevant in those courts’ decision-making processes is that, as discussed above, national arbitration laws seldom have any specific requirements as to the content of an arbitration agreement. More importantly, foreign courts may have difficulty understanding the logic and reasons behind the PRC Arbitration Law’s

²⁵⁴ See *id.* at 287-291.

²⁵⁵ See *id.* at 287.

²⁵⁶ At least this was the case as of 1981, see *id.* at 291.

requirement of institutional arbitration.²⁵⁷ As a result, courts in pro-arbitration countries will likely disregard this idiosyncratic requirement and will not refuse recognition and enforcement of an otherwise enforceable award solely on the ground that it is ad hoc. For example, when determining the validity and the correct interpretation of an arbitration agreement, French courts rely on “transnational law” instead of the law of any single country. Under this approach, French courts will focus on the “common intent of the parties.”²⁵⁸ Thus, if a French court is deciding whether it should recognize and enforce a Chinese ad hoc award, it will likely disregard the PRC Arbitration Law’s requirement of institutional arbitration, because in the French court’s mind, such a requirement does not exist in the “transnational law” that governs the arbitration agreement’s validity, and the parties have clearly demonstrated a “common intent” to arbitrate in China. Courts in some other pro-arbitration countries may adopt a validity-preferring choice-of-law rule and apply a non-Chinese law to govern the validity of the arbitration agreement. Upon doing so, these courts may also avoid the PRC Arbitration Law’s idiosyncratic requirement and enforce the ad hoc award.²⁵⁹ Of course, it is also likely that courts in some other countries that are less pro-arbitration may refuse to recognize and enforce a Chinese ad hoc award by reasoning that they will follow the law at the seat of arbitration. In any event, in this scenario, it would be advantageous for the challenging party to rely on Article V(1)(a), as long as the parties have not chosen another law to govern the

²⁵⁷ For reasons behind PRC Arbitration Law’s bizarre institutional arbitration requirement, see discussion *infra* Chapter V, Section III.

²⁵⁸ See Dallah Real Estate & Tourism Holding Co., v. The Ministry of Religious Affairs, Government of Pakistan, [2010] UKSC 46; The Ministry of Religious Affairs, Government of Pakistan v. Dallah Real Estate & Tourism Holding Co., (Court of Appeal of Paris, 2011) (Fr.).

validity of their ad hoc arbitration agreement.

b Possible Results under Article V(1)(e) of the New York Convention

The New York Convention Article V(1)(e) offers a ground for rejecting recognition and enforcement of an award if it has been annulled by another competent authority. As previously discussed, although a formal set-aside proceeding is not available for a Chinese ad hoc award under Chinese law, a challenging party may request a Chinese court to hear the merits of the dispute and then reasonably argue that the award has been annulled by that court in a *de facto* way. As a result, whether a Chinese ad hoc award will be recognized and enforced by a foreign court depends on the court's attitude towards annulled awards.

Emmanuel Gaillard categorizes three kinds of representations of international arbitration, according to which international arbitration is considered: (i) as a component of a single national legal order (the Monolocal Approach); (ii) as anchored in a plurality of national legal orders (the Westphalian Approach); or (iii) as an autonomous legal order itself (the Transnational Approach).²⁶⁰

According to Gaillard, the first representation will treat an international arbitration's legal force as deriving from the law of its seat country, and largely assumes that arbitrators are acting as judges in that legal order.²⁶¹ The second representation does not consider an international arbitration's legal force as deriving from any single country in the world, including the seat, but instead as deriving from

²⁵⁹ See discussion *supra* Chapter III, Section III.A.

²⁶⁰ See EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION*, (2010).

²⁶¹ See *id.* at 15.

all the countries that are willing to recognize the force of the award. An award's "international" nature makes it independent of any single country.²⁶² The third representation, while agreeing with the second one that an international arbitration's legal force does not derive from any single country's legal order, takes arbitration itself as a distinct and transnational legal order independent from any country's legal system. Under this representation, arbitrators are not administering justice on behalf of any country, but instead, are doing so for the benefit of the international community.²⁶³

According to Gaillard's representation theory of international arbitration, if a country adopts the first representation (the Monolocal Approach), then it will probably not recognize and enforce an award once it has been set aside or deemed unenforceable in its seat country. Under the Monolocal Approach, once set aside or deemed unenforceable at the seat, the award has lost its legal force and thus cannot be enforced anywhere else. A country adopting the second (the Westphalian Approach) or the third representation (the Transnational Approach), however, will not be bound by the decision made in the seat country. This country may still recognize and enforce the award even though it has been set aside or deemed unenforceable in its seat country. Under these two approaches, either the country should determine whether an award is valid based on its own conceptions and standards, or it is free to recognize and enforce an award according to the international arbitral legal order, and does not need to obey the legal order of any single jurisdiction at all.²⁶⁴

²⁶² See *id.* at 24.

²⁶³ See *id.* at 35.

²⁶⁴ See *id.* at 135-136.

Therefore, whether a Chinese ad hoc award will be recognized and enforced by a foreign court, to a large extent, depends on that country's conception of international commercial arbitration in general. In countries that adopt the second or third approach, and therefore have a more liberal attitude towards international commercial arbitration (such as France), local courts will likely enforce a Chinese ad hoc arbitration award even though it has been disregarded by a Chinese court or deemed unenforceable under Chinese law. That court will believe that the award's lack of enforceability in China cannot affect its legal force, which originates from the international arbitral legal order; or the court will believe that China, despite being the seat, is no more important than any other country in this multinational framework and that courts in other countries are free to recognize the legal force of the award based on their own standards. Moreover, the foreign court may also find that the PRC Arbitration Law's idiosyncratic requirement of institutional arbitration is not sensible, and therefore refuse to follow the Chinese court's "wrongful" decision.

On the other hand, it would not be surprising if a court in a country adopting the first approach would refuse to recognize and enforce a Chinese ad hoc arbitration award. That court could reason that the award derives its legal force from the legal order of China, the seat of arbitration. By being disregarded in China, the award has lost its legal force and therefore cannot be enforced anywhere else. It could also reason that because a Chinese ad hoc arbitration award is not legally enforceable under Chinese law, the parties, by putting the seat of arbitration in China, accepted the possible consequence that the award could not be enforced by any Chinese court if the losing party refused to honor the award; therefore the court should also accept that a

foreign court will not enforce such an award by virtue of Article V(1)(e) of the New York Convention. Of course, a strong counter-argument may be that the parties' accepting that the award is not enforceable in China does not necessarily mean they did not intend the award to be enforced elsewhere. A national court adopting the first approach may well support the seat court's exclusive judicial power over the award and refuse to enforce the award after it has been set aside at the seat, especially when the New York Convention authorizes it to do so.

Enforceability of Chinese ad hoc awards outside China will remain uncertain, as the outcome may vary from jurisdiction to jurisdiction, both on an international scale and even within one country.²⁶⁵ The outcome will most likely depend on different national courts' practice and their own interpretation of the New York Convention, as well as their conception of international commercial arbitration as a whole. In any event, a Chinese ad hoc arbitration award may still be enforceable outside of China.

IV POSSIBLE SOLUTIONS FOR HAVING A SUCCESSFUL CHINESE-SEATED AD HOC ARBITRATION AND HAVING THE ENSUING AWARD SUCCESSFULLY ENFORCED

As discussed in the previous section, successful operation of a Chinese ad hoc arbitration seems impractical unless the parties readily cooperate during all steps of the proceeding. At the same time, the enforceability of the ensuing award, if any, remains in doubt. If this were the only possible outcome, parties would be strongly

²⁶⁵ E.g., different U.S. courts hold different opinions when an annulled award is sought for recognition and enforcement, and no decision has yet been made by the U.S. Supreme Court. See Chromalloy Aeroservices v. Arab Republic, 939 F. Supp. 907 (D.D.C 1996); but cf. Baker Marine, Ltd. v. Chevron, Ltd., 191 F.3d 194 (2d Cir. 1999), and Termorio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928 (D.C. Cir. 2007).

discouraged from putting the seat of their ad hoc arbitration in China. Fortunately, however, these seemingly dire prospects may be cured, or at least significantly improved, by careful design.

A. *Successful Operation of a Chinese Ad Hoc Arbitration May Be Achieved Through Careful Design*

To have a successful Chinese ad hoc arbitration, the parties first need to choose a non-Chinese law to govern the validity of the arbitration agreement, so that a Chinese court will not nullify the arbitration agreement. The parties then need to agree on a set of sophisticated arbitration rules, which will help minimize possible loopholes in the arbitration proceeding that may give the resisting party chances to block arbitration. Moreover, the parties should also choose a non-Chinese law as the *lex arbitri*, which will further facilitate the successful operation of the Chinese ad hoc arbitration. The non-Chinese *lex arbitri* would provide the arbitration with assistance and support mechanisms, preventing the resisting party from frustrating the arbitration proceeding by simply refusing to cooperate.

1. Choice-of-law Issues In General

Choice-of-law issues play an important role in an arbitration case. Therefore, these issues need to be carefully analyzed, particularly in a Chinese ad hoc arbitration. Generally speaking, in an arbitration case there are three fundamental issues calling for decisions on what law applies: (i) which law governs the substance of the underlying contract of which the arbitration agreement is a part, (ii) which law

governs the validity of the arbitration agreement, and (iii) which law governs the arbitration proceedings, usually known as the “*lex arbitri*.” These different applicable laws need to be carefully distinguished within the same arbitration case, even though one law may be chosen by the parties, or determined by the facts in the case, to govern all of these issues. Here, the parties should explicitly choose both the law governing the arbitration proceeding (the *lex arbitri*) and the law governing the validity of the arbitration agreement. Importantly, neither of these two sets of laws should be Chinese law.

As far as the author has been able to determine, no other country except for China requires institutional arbitration in its national law. As a result, for the purpose of analysis, it is hereby assumed in relevant parts of this paper that no non-Chinese law will invalidate an ad hoc arbitration agreement for the sole reason that it is ad hoc.

2. Choosing a Non-Chinese Law to Govern the Validity of the Ad Hoc Arbitration Agreement

As analyzed in Chapter III of this dissertation, an ad hoc arbitration agreement is invalid under the PRC Arbitration Law, and a resisting party in a Chinese ad hoc arbitration may request that a Chinese court strike down the agreement at any time. This can only happen, however, if the Chinese court applies the PRC Arbitration Law to govern the validity of the ad hoc arbitration agreement. Therefore, the parties may avoid this problem by precluding the application of the PRC Arbitration Law.

As per the choice-of-law rule adopted by the SPC, if the parties have explicitly agreed on a law governing the validity of the arbitration agreement itself (which

should be distinguished from the substantive law chosen by parties to govern the merits of the larger contract in which the arbitration agreement is embedded as a clause),²⁶⁶ then that chosen law shall apply.²⁶⁷ This means that if the parties explicitly choose a non-Chinese law as the law governing the validity of their ad hoc arbitration agreement, Chinese courts will not apply PRC Arbitration Law to review the validity of ad hoc arbitration agreement. Accordingly, instead of striking down the ad hoc arbitration agreement, a Chinese court will actually enforce it.²⁶⁸

As a result, the parties' explicit choice of a non-Chinese law, under which ad hoc arbitration is presumably allowed, to govern the validity of their ad hoc arbitration agreement will ensure that neither party can obstruct the Chinese ad hoc arbitration from outside the arbitration proceeding.

3. Choosing a Set of Sophisticated Arbitration Rules and Choosing a Non-

²⁶⁶ See, e.g., Di'erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Dec. 26, 2005), art. 58 (China) (providing that the substantive law chosen by parties to govern the merits of the container contract cannot be used to determine the validity of the arbitration clause within the container contract).

²⁶⁷ Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Zhongcái Fǎ" Ruogan Wenti de Jieshi (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 on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China"] (promulgated by the Sup. People's Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 16 (China); Di'erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Dec. 26, 2005), art. 58 (China); Zuigao Renmin fayuan Guanyu Sichuan Huahong Guoji Jingji Jishu Touzi Youxian Gongsi Su Hanguo Hanhua Zhushihuishe Maimai Hetong Jiufen Yian zhong Zhongcái Tiaokuan Xiaoli Wenti de Qingshi de Fuhan (最高人民法院关于四川华宏国际经济技术投资有限公司诉韩国韩华株式会社买卖合同纠纷一案仲裁条款效力问题的请示的复函) [Reply Letter to the Request for Instructions Concerning the Validity of the Arbitration Clause in the Sales Contract Dispute Case Between Sichuan Huahong International Economic and Technical Investment Co., Ltd and Hanwha Corporation (Korea)] (promulgated by the Sup. People's Ct., Aug. 24, 2007, effective Aug. 24, 2007) (China).

Chinese Law as the *Lex Arbitri*

Apart from preventing a party from obstructing the Chinese ad hoc arbitration from outside the arbitration proceeding, the parties also need to make sure that neither party can obstruct from within the arbitration proceeding. As previously analyzed in Chapter III of this dissertation, a resisting party may obstruct a Chinese ad hoc arbitration from within the proceeding by refusing to cooperate on certain vital issues, because neither Chinese laws nor Chinese courts will provide any assistance regarding those issues. To solve this problem, the parties need to ensure that they can avoid loopholes in the proceedings as much as possible, and that they can resort to a set of support mechanisms in case of deadlock.

For those purposes, the parties to a Chinese ad hoc arbitration first need to agree on a set of established, sophisticated, and complete arbitration rules. The parties should then choose a non-Chinese law as the *lex arbitri*. Having made these choices, if one party tries to block arbitration by refusing to cooperate on vital issues during the arbitration proceeding (such as refusing to appoint an arbitrator), the other party may first rely on relevant procedures specified in the arbitration rules agreed upon between the parties. Sophisticated and mature arbitration rules like the UNCITRAL Arbitration Rules usually contain detailed provisions that may provide a solution to the situation (such as having the arbitrator appointed by the appointing authority). If, unfortunately, the issue cannot be solved by relying on the chosen arbitration rules, the party seeking arbitration may still turn to the party-chosen *lex arbitri*. The non-Chinese *lex arbitri* will usually contain gap-filling provisions and support mechanisms

²⁶⁸ For a fuller discussion on situations where Chinese courts will or will not enforce an ad hoc

that will prevent the arbitration proceeding from reaching an impasse.

That being said, in order to achieve the desired outcome anticipated above, the parties need to choose a non-Chinese *lex arbitri* prudently. A country's national arbitration law may not permit this law to be chosen as the *lex arbitri* in arbitration seated outside that country. This, for example, will be the case for a country that has adopted the UNCITRAL Model Law on International Commercial Arbitration (Model Law) word for word. The Model Law clearly states that it applies "only" if the place of arbitration is in the territory of the adopting country.²⁶⁹ Some other countries' arbitration laws may not be as explicit as the Model Law on this issue. It then depends on whether national courts in those countries will respect the parties' choice and apply their own arbitration law on awards seated outside their territories. Accordingly, the parties must be careful when they choose a non-Chinese *lex arbitri* and must make sure that such a choice will be supported by that country's legal system.

As a result, the choice of a set of sophisticated arbitration rules and a non-Chinese *lex arbitri* will likely ensure that neither party can obstruct the Chinese ad hoc arbitration from within the arbitration proceeding.

B. Prospects for Enforcement of a Chinese Ad Hoc Arbitration Award Will Be Significantly Improved by the Same Design

Choosing a non-Chinese law as the *lex arbitri* and a non-Chinese law to govern the validity of their arbitration agreement will not only ensure the successful operation of a Chinese ad hoc arbitration, but will also significantly improve the ensuing

arbitration agreement, see discussion *supra* chapter III.

award's prospects for being enforced, both inside and outside China.

1. The Likelihood of the Chinese Ad Hoc Arbitration Award Being Enforced within China Will Increase

As previously discussed, a Chinese ad hoc arbitration award is not enforceable in China because only awards rendered by an arbitration institution are enforceable under Chinese law.²⁷⁰ Choosing a non-Chinese *lex arbitri*, however, may qualify a Chinese ad hoc arbitration award as “non-domestic” under Article I of the New York Convention. If so, such an award may become enforceable in China by virtue of the New York Convention.

a. A “Non-domestic” Award and Its Legal Significance

Classifying an arbitration award is a threshold question when that award is brought before a national court for enforcement. Based on how it classifies the award, the court will apply different laws when reviewing the award’s enforceability. If the award is a domestic award, the court will apply its own national law. If it is a foreign award, the court will apply the New York Convention, either directly or indirectly via its implementation in the national law.

There is, moreover, a third type of award, namely a non-domestic award. According to the New York Convention, the Convention “shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and

²⁶⁹ See Model Law, *supra* note 14, art. 1(2).

²⁷⁰ See Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, amended Aug. 31, 2012, 2007), art. 237, para. 1 (China).

enforcement are sought.”²⁷¹ Therefore, if the court considers an award as non-domestic, it shall apply the New York Convention even though the award is made in its own country.

The New York Convention, however, offers no definition of what qualifies as a non-domestic award, but instead leaves this question to the national laws.²⁷² As a result, a national court needs to decide, according to its national law, whether it should apply Article I as well as other relevant parts of the New York Convention to an award made in its own territory.²⁷³

b. Chinese Courts Have Good Reasons to Treat the Chinese Ad Hoc Award as “Non-domestic”

When a Chinese ad hoc arbitration award in which the parties choose a non-Chinese *lex arbitri* is brought before a Chinese court for enforcement, because it is seated in China and thus is obviously not a foreign award, the court not only has the authority to treat the award as either domestic or non-domestic, but must decide this issue as a threshold question. Unfortunately, the PRC Arbitration Law is silent on when an award should fall into the category of non-domestic award under Article I of the New York Convention. The SPC has not articulated any guidelines on this issue either. Under these circumstances, although different Chinese courts may reach different results, there are good reasons why a Chinese court should treat a Chinese ad hoc award as non-domestic.

²⁷¹ New York Convention, *supra* note 14, art. I (emphasis added).

²⁷² See VAN DEN BERG, *supra* note 252, at 22-27.

²⁷³ See *id.* at 25-27.

First, treating the award as non-domestic is consistent with a structural interpretation of the PRC Arbitration Law. In fact, the PRC Arbitration Law is not even explicit on the definitions of domestic arbitration and domestic awards. Because the PRC Arbitration Law assumes that there can only be institutional arbitration in China, based upon the context of the Law, the definition of domestic arbitration can be reasonably interpreted as arbitration administered by arbitration commissions established under the PRC Arbitration Law in Chinese territory.²⁷⁴ If this were the correct definition of domestic awards in China, a Chinese ad hoc arbitration award should obviously not be considered domestic.

In *Züblin International GmbH v. Wuxi Woco General Engineering Rubber Co. Ltd.*, the Intermediate People's Court of Wuxi City treated an ICC award made in China as non-domestic.²⁷⁵ In its decision, the court reasoned that the award does not fall into the definition of a domestic award, even though it was made in Chinese territory, because the arbitration was administered by a foreign arbitration institution. The court further reasoned that the award should be held as non-domestic because it was made in accordance with a foreign law (*lex arbitri*).²⁷⁶ If Chinese courts adhere

²⁷⁴ See Zhao Xiuwen (赵秀文), *Feineiguo Caijue de Falü Xingzhi Bianxi* (非内国裁决的法律性质辨析) [Analysis on the Legal Nature of Non-domestic Awards], 10 FA XUE (法学) [LAW SCIENCE] 16, 19 (2007) (China).

²⁷⁵ See Deguo Xupulin Guoji Youxian Zeren Gongsi Shenqing Chengren he Zhixing Guowai Zhongcai Caijue An (德国旭普林国际有限责任公司申请承认和执行国外仲裁裁决案) [*Züblin International GmbH v. Wuxi Woco General Engineering Rubber Co. Ltd.*], (Wuxi Interm. People's Ct., July 19, 2006) (Lawinfochina).

²⁷⁶ The court's decision that the award was made in accordance with a foreign law seems erroneous, because the court seemed to reach this conclusion based on the fact that the award was made according to the ICC Arbitration Rules. As a result, the court did not specify what it meant for "foreign law", i.e. whether it meant for a foreign substantive law, a foreign *lex arbitri*, or a foreign law governing the validity of the arbitration agreement. Based on a common understanding of relevant choice-of-law issues involved in an arbitration case, it is reasonable to interpret that the court should be referring to a foreign *lex arbitri*. See Deguo Xupulin Guoji Youxian Zeren Gongsi Shenqing Chengren he Zhixing

to the same reasoning, a Chinese ad hoc award should also be treated as non-domestic provided that the parties choose a foreign *lex arbitri*. This is because it does not fall within any reasonable interpretation of domestic awards under the PRC Arbitration Law, and it is indeed made in accordance with a foreign *lex arbitri*.

Second, practical concerns may make it easier for a Chinese court to treat the award as non-domestic rather than domestic. Treating the award as domestic will lead to an unwanted outcome that creates a difficult dilemma for the court. On the one hand, for domestic awards, only institutional awards are enforceable under Chinese law, so if the award is considered domestic, the court will not enforce it. On the other hand, according to the SPC's rule regarding the validity of arbitration agreements, the ad hoc arbitration agreement in this case is indeed enforceable.²⁷⁷ This has created a paradoxical situation in which an arbitration agreement is enforceable but the ensuing award is not. Obviously, no law should be reasonably interpreted to create such a self-contradictory result. Thus, to make a practical and logically sound decision, the Chinese court should treat the award as non-domestic.

Third, the parties' explicit choice of a foreign *lex arbitri* is at least not inconsistent with current Chinese law. Although the PRC Arbitration Law is silent on whether parties can choose a non-Chinese *lex arbitri* when arbitrating in Chinese territory, it does not forbid such an arrangement. At the same time, the SPC supports the parties' explicit choice of a non-Chinese law to govern the validity of their arbitration

Guowai Zhongcai Caijue An (德国旭普林国际有限责任公司申请承认和执行国外仲裁裁决案) [Züblin International GmbH v. Wuxi Woco General Engineering Rubber Co. Ltd.], (Wuxi Interm. People's Ct., July 19, 2006) (LawinfoChina).

²⁷⁷ See discussion *supra* Section IV.A.2.

agreement.²⁷⁸ The parties' choice of non-Chinese governing laws adds a foreign or non-domestic element to the award. As compared with an ordinary domestic award, which is usually completely localized in China, having a foreign element may increase the likelihood of a Chinese court treating the award as non-domestic.

As a result, if, in a Chinese ad hoc arbitration, the parties explicitly choose a non-Chinese law as the *lex arbitri* and a non-Chinese law to govern the validity of their arbitration agreement, a Chinese court may, more likely than not, treat the ensuing award as non-domestic. If so, the award could then be enforced in China under the New York Convention.

2. The Likelihood of the Chinese Ad Hoc Arbitration Award Being Enforced Outside China Will Also Increase

The choice of a non-Chinese *lex arbitri* and a non-Chinese law to govern the ad hoc arbitration agreement will also greatly increase the Chinese ad hoc award's chances of being enforced outside of China under the New York Convention. Specifically, the risks of the award being rejected under Article V(1)(a) (invalidity of

²⁷⁸ See Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Zhongcai Fa” Ruogan Wenti de Jieshi (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 on Certain Issues Concerning the Application of the “Arbitration Law of the People’s Republic of China”] (promulgated by the Sup. People’s Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 16 (China); Di’erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People’s Ct., Dec. 26, 2005, effective Dec. 26, 2005), art. 58 (China); Zuigao Renmin fayuan Guanyu Sichuan Huahong Guoji Jingji Jishu Touzi Youxian Gongsi Su Hanguo Hanhua Zhushihuishe Maimai Hetong Jiufen Yian zhong Zhongcai Tiaokuan Xiaoli Wenti de Qingshi de Fuhan (最高人民法院关于四川华宏国际经济技术投资有限公司诉韩国韩华株式会社买卖合同纠纷一案仲裁条款效力问题的请示的复函) [Reply Letter to the Request for Instructions Concerning the Validity of the Arbitration Clause in the Sales Contract Dispute Case Between Sichuan Huahong International Economic and Technical Investment Co., Ltd and Hanwha Corporation (Korea)] (promulgated by the Sup. People’s Ct., Aug. 24, 2007,

the arbitration agreement) and Article V(1)(e) (set aside in the home jurisdiction) of the New York Convention will be either eliminated or significantly reduced.

a. Potential Problems under Article V(1)(a) of the New York Convention Will Be Resolved

As previously discussed, under Article V(1)(a) of the New York Convention, an award may be rejected for recognition and enforcement if the arbitration agreement between the parties “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.”²⁷⁹ This language manifests that party-chosen law takes priority over seat law when a court is determining whether the arbitration agreement is valid. Accordingly, if the parties to the Chinese ad hoc arbitration explicitly choose a non-Chinese law, which presumably allows ad hoc arbitration, to govern the validity of their ad hoc arbitration agreement, even though the agreement is invalid under the PRC Arbitration Law (the seat law), a foreign court before which the award is brought cannot reject recognition and enforcement by relying on Article V(1)(a) of the New York Convention.

b. Potential Problems Under Article V(1)(e) of the New York Convention Will Be Significantly Alleviated

i. Potential Set-aside Procedures in China Remain Essential

effective Aug. 24, 2007) (China).

Article V(1)(e) of the New York Convention authorizes a national court to reject a foreign award's recognition and enforcement if that award has been set aside or suspended by a court in the country where the award is made, or by a court in the country whose law has been chosen by the parties as the *lex arbitri*.²⁸⁰ If the parties choose a non-Chinese *lex arbitri* in their Chinese ad hoc arbitration, then the award is potentially subject to set-aside proceedings in both China and the country whose law has been chosen as the *lex arbitri*. Although in Article V(1)(e) of the New York Convention, “the law under which” the award is made is put after the seat country, this sequence rarely makes a difference.²⁸¹ A national court in a third country, before which recognition and enforcement of an award is sought, will usually treat the two governing authorities equally. If the award is indeed set aside in either of these two countries, Article V(1)(e) of the New York Convention offers the court in the third country a good reason to reject recognition and enforcement.

Because ad hoc arbitration is presumably allowed under the chosen *lex arbitri*, there is no need to worry about the award being set-aside in the country whose law has been chosen solely because it is ad hoc. Therefore, whether the award will still be set aside by a Chinese court is central to its prospect for enforceability in a third country under the New York Convention.

ii. The Alternative *De Facto* Set-aside Procedure under Chinese Law May Be Unavailable to the Challenging Party

²⁷⁹ New York Convention, *supra* note 14, art. V(1)(a).

²⁸⁰ See *id.* art. V(1)(e).

²⁸¹ See VAN DEN BERG, *supra* note 252, at 350.

Although there may not be a formal set-aside procedure under Chinese law for Chinese ad hoc awards, there is a practical alternative available to the challenging party: requesting that a Chinese court disregard the award and hear the merits of the dispute. If the Chinese court does so, one can see the award as having been *de facto* set aside.²⁸² But if the parties explicitly choose a non-Chinese *lex arbitri* and a non-Chinese law to govern the validity of their arbitration agreement, the challenging party may not be able to take advantage of the alternative *de facto* set-aside procedure for several reasons.

First, the SPC recognizes parties' freedom to choose the law to govern the validity of their arbitration agreements and will enforce this choice.²⁸³ Thus, if the parties explicitly choose a non-Chinese law as the law governing the validity of their ad hoc arbitration agreement, Chinese courts will enforce the arbitration agreement.²⁸⁴ Under these circumstances, when the challenging party files its request with a Chinese court to hear the merits of the dispute, the court may refuse to do so because there is an enforceable arbitration agreement between the parties. As a result, the

²⁸² See discussion *supra* Section III.B.2.

²⁸³ See discussion *supra* Section IV.A.2.

²⁸⁴ See Zuijiao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Zhongcái Fǎ” Ruogān Wèntí de Jieshi (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 on Certain Issues Concerning the Application of the “Arbitration Law of the People’s Republic of China”] (promulgated by the Sup. People’s Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 16 (China); Di’erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People’s Ct., Dec. 26, 2005, effective Dec. 26, 2005), art. 58 (China); Zuijiao Renmin fayuan Guanyu Sichuan Huahong Guoji Jingji Jishu Touzi Youxian Gongsi Su Hanguo Hanhua Zhushihuishe Maimai Hetong Jiufen Yian zhong Zhongcái Tiaokuan Xiaoli Wenti de Qingshi de Fuhan (最高人民法院关于四川华宏国际经济技术投资有限公司诉韩国韩华株式会社买卖合同纠纷一案仲裁条款效力问题的请示的复函) [Reply Letter to the Request for Instructions Concerning the Validity of the Arbitration Clause in the Sales Contract Dispute Case Between Sichuan Huahong International Economic and Technical Investment Co., Ltd and Hanwha Corporation (Korea)] (promulgated by the Sup. People’s Ct., Aug. 24, 2007, effective Aug. 24, 2007) (China).

challenging party cannot relitigate the case before a Chinese court in disregard of the award.

A potential controversy regarding this analysis is that the SPC's choice-of-law rule appears to apply to foreign-related arbitration agreements only.²⁸⁵ Unfortunately Chinese law is not crystal clear on the definition of a "foreign-related arbitration agreement." Therefore, the above analysis only applies if one of the parties to the Chinese ad hoc arbitration is a foreign entity or there is a significant foreign element involved in the dispute. If, however, both parties are Chinese entities, and there is no foreign element in the dispute whatsoever, the outcome will then depend on whether the Chinese court is willing to take jurisdiction to hear the merits of the dispute.

Second, even though the Chinese court is willing to take jurisdiction over the merits of the dispute, it may still refuse to relitigate the case in disregard of the award. As previously discussed, when parties choose a non-Chinese *lex arbitri* in their Chinese ad hoc arbitration, Chinese courts have the discretion to treat the award as either domestic or non-domestic. If a Chinese court treats the award as non-domestic, it will not only refuse to set aside the award in a formal set-aside proceeding, but

²⁸⁵ See Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Zhongcai Fa" Ruogan Wenti de Jieshi (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 on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China"] (promulgated by the Sup. People's Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 16 (China); Di'erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People's Ct., Dec. 26, 2005, effective Dec. 26, 2005), art. 58 (China); Zuigao Renmin fayuan Guanyu Sichuan Huahong Guoji Jingji Jishu Touzi Youxian Gongsi Su Hanguo Hanhua Zhushihuishe Maimai Hetong Jiufen Yian zhong Zhongcai Tiaokuan Xiaoli Wenti de Qingshi de Fuhan (最高人民法院关于四川华宏国际经济技术投资有限公司诉韩国韩华株式会社买卖合同纠纷一案仲裁条款效力问题的请示的复函) [Reply Letter to the Request for Instructions Concerning the Validity of the Arbitration Clause in the Sales Contract Dispute Case Between Sichuan Huahong International Economic and Technical Investment Co., Ltd and Hanwha Corporation (Korea)] (promulgated by the Sup. People's Ct., Aug. 24, 2007,

because this non-domestic award is enforceable under the New York Convention, the court will not disregard the award when requested by the challenging party to hear the dispute's merits because this non-domestic award is enforceable under the New York Convention. Once the court has recognized and enforced the award, the challenging party's request for the court to hear the dispute's merits will be rejected on a *res judicata* basis. Therefore, if the Chinese court treats the award as non-domestic, there is no Article V(1)(e) problem when it comes to recognition and enforcement in a third country.

iii. Courts in Other Countries May Not Respect a Chinese Court's Decision to Set Aside the Award

If a Chinese court treats the award as domestic, and hears the merits of the dispute in disregard of the award, the challenging party may argue before a court in a third country that the award has been *de facto* annulled by the Chinese court. Of course, how much influence this *de facto* set-aside decision will have on the court in the third country, before which recognition and enforcement of the award is sought, will depend on whether courts in this country are pro-arbitration, and if so, how pro-arbitration they are.

It is more likely than not that the third country court would recognize and enforce the award. Not only has the Chinese court *de facto* set aside the award for a bizarre reason—that the award is ad hoc—but also the parties have explicitly chosen laws under which the ad hoc award is enforceable. Under these circumstances, it is clear

effective Aug. 24, 2007) (China).

that the parties' intent in choosing a non-Chinese law as the *lex arbitri* in their Chinese ad hoc arbitration and choosing a non-Chinese law to govern the validity of their ad hoc arbitration agreement was to circumvent Chinese law's idiosyncratic requirement of institutional arbitration. Taking into consideration that the PRC Arbitration Law's hostility towards ad hoc arbitration is not widely accepted in the international community, a reasonable court in a third country will likely respect and support the parties' strategy, and recognize and enforce the award as long as courts in that country are not strongly anti-arbitration.

Or, perhaps, the court in the third country can treat this award as non-domestic under Chinese law. It can then interpret the Chinese court's holding as not setting aside the award by disregarding it, but merely as refusing to recognize and enforce the award under the New York Convention. If so, the court in the third country will undoubtedly feel comfortable disregarding the Chinese court's decision and recognizing and enforcing the award, because courts in different countries can make contradicting decisions regarding the recognition and enforcement of the same award.

In summation, if, in a Chinese ad hoc arbitration, the parties explicitly choose a non-Chinese law as the *lex arbitri* and a non-Chinese law to govern the validity of their arbitration agreement, the ensuing award's chances of being enforced outside China will increase significantly. The award will not face difficulties under Article V(1)(a) (invalidity of the arbitration agreement) and, despite some risks, will have optimistic prospects under Article V(1)(e) (set aside in the home jurisdiction) of the New York Convention.

C. Some Concerns With Choosing a Non-Chinese Lex Arbitri

Although choosing a non-Chinese *lex arbitri* in a Chinese ad hoc arbitration may prove to be fruitful for the parties, there are nonetheless some concerns that parties should pay special attention to when adopting this strategy. First, generally speaking, it is not advisable to put the seat of arbitration in one country and choose another country's law as the *lex arbitri*. This arrangement will likely lead to highly complicated situations and possibly unexpected outcomes.²⁸⁶ One example is that the award rendered in the arbitration may be subject to set-aside challenge in two countries. If this happens and the challenge succeeds in one country and fails in the other, when the award is brought to a third country for enforcement, the court in that country will have to decide whether it wants to enforce an award that has been confirmed in one jurisdiction and vacated in another, both in an arguably legitimate way. Thus, this scenario entails significant uncertainty.

Despite these potential difficulties, the suggested approach would nevertheless seem advisable on balance. Without this recommended drafting strategy, a Chinese ad hoc arbitration award will not be enforceable in China and there will also be a high risk that courts outside China will also reject the award. Under the suggested approach, however, the risks of choosing a non-Chinese *lex arbitri* would seem to be outweighed by the chances of success, including favorable prospects for having a successful Chinese ad hoc arbitration and having the ensuing award enforced both inside and outside China. Having said that, if a Chinese court treats the award as domestic and *de facto* sets the award aside, then the parties will likely encounter the

²⁸⁶ See VAN DEN BERG, *supra* note 252, at 292.

problems described above relating to having two set-aside jurisdictions.

Second, as previously discussed, a country's arbitration law may not permit parties to an arbitration seated outside that country to choose its law as the *lex arbitri*.²⁸⁷ As a result, when choosing a non-Chinese *lex arbitri*, the parties should ensure that such a choice will be supported by that country's legal system.

V CONCLUSION

The PRC Arbitration Law's institutional arbitration requirement has given rise to serious doubts about the enforceability of an ad hoc award made in China. Although Chinese courts in general are friendly towards foreign ad hoc awards, ad hoc awards seated in China are not enforceable under Chinese law. Because of this and the PRC Arbitration Law's negative attitude towards ad hoc arbitration agreements, these awards' enforceability outside China may also be seriously undermined. In spite of this pessimistic outlook, successful operation of ad hoc arbitration seated in China may still be achievable through careful design. By choosing both a non-Chinese law (under which ad hoc arbitration is allowed) to govern the validity of the ad hoc arbitration agreement as well as a non-Chinese law (under which ad hoc arbitration is also allowed) as the *lex arbitri*, parties may have a successful ad hoc arbitration in China and maximize the possibility for the ensuing award to be enforced both inside and outside China. Such a design may provide an alternative for parties who want ad hoc arbitration and, at the same time, want to arbitrate their disputes in China.

²⁸⁷ See discussion *supra* Section IV.A.3.

CHAPTER FIVE:
PROSPECTS OF AD HOC ARBITRATION'S LEGITIMACY IN CHINA

I INTRODUCTION

The previous two chapters have discussed the ad hoc problem under Chinese arbitration laws. Because of Chinese law's hostility toward ad hoc arbitration, parties in practice must be very careful if they want to choose ad hoc arbitration to resolve their disputes related to China. The potential pitfalls can be costly.

But, why does Chinese law want to prohibit ad hoc arbitration in the first place? It appears puzzling, because ad hoc arbitration is the original form of arbitration, and has been in use by parties in most of the world from the very beginning. What is it that the Chinese legislature feels so strongly against? What is the Chinese Supreme People's Court's stance on that issue? Moreover, is prohibiting ad hoc arbitration the right thing for China to do? This chapter will try to answer these questions.

II ANALYSIS AND CRITIQUE OF THE SPC'S APPROACHES TO THE PRC

ARBITRATION LAW'S REQUIREMENT THAT ARBITRATION BE INSTITUTIONAL

A. *Analysis of the SPC's Choice-of-Law Rule*

1. A Generally Validity-Preferring and Pro-Arbitration Rule

Undoubtedly, by limiting the situations in which the PRC Arbitration Law applies and expanding the number of situations in which non-Chinese law applies, the SPC

has demonstrated its pro-arbitration stance. A careful analysis will show that the choice-of-law rule adopted by the SPC may, in effect, ensure that ad hoc arbitration agreements are enforced by Chinese courts to the largest extent allowable by the statute. Therefore, the rule should be characterized as validity-preferring and pro-arbitration.

In theory, as previously mentioned, when an arbitration agreement's validity is being challenged before a Chinese court, the possible options for applicable laws that the court may choose from include: (i) the law explicitly chosen by the parties to govern the validity of their arbitration agreement; (ii) the law governing the substance of the container contract; (iii) the seat law; or (iv) the forum law. First, the consensual nature of arbitration requires that a court should initially consider the law explicitly chosen by the parties. Second, because of the PRC Arbitration Law's bizarre requirement that arbitration must be institutional, if a Chinese court wants to adopt a validity-preferring approach to ad hoc arbitration agreements, then the law of the forum (Chinese law) should be avoided to the extent possible. Consequently, the forum law should be the last to be considered. Accordingly, if the court should find that the law chosen by the parties does not apply, the more difficult choice is between (ii) and (iii)—the law governing the container contract and the law of the seat.

There are four possible scenarios based on different combinations of the location of the seat of arbitration and the governing law of the container contract:

- (a) the seat of arbitration is China, and the governing law of the container contract is also Chinese law;
- (b) the seat of arbitration is China, and the governing law of the container contract

is a non-Chinese law;

(c) the seat of arbitration is outside China, and the governing law of the container contract is Chinese law; and

(d) the seat of arbitration is outside China, and the governing law of the container contract is a non-Chinese law.

As far as the author has been able to determine, no other country's domestic law mandates institutional arbitration. Thus, for the purposes of the analysis in this paper, we shall assume that no non-Chinese law will invalidate an ad hoc arbitration agreement simply because it is ad hoc. In scenarios (a) and (d), the choice between the governing law of the container contract and the seat law makes no difference in terms of validating an ad hoc arbitration agreement, because they both point to the same law. It is only in scenarios (b) and (c) where a choice between the law governing the contract and the law of the seat will lead to a different result.

Because the hypothetical ad hoc arbitration in scenario (b) will take place in China, even if the arbitration agreement was valid under the non-Chinese law, the ad hoc arbitration would likely still be inoperative unless the parties were able to reach an explicit and complete agreement on almost every detail of the arbitration proceeding, or they chose a non-Chinese law as *lex arbitri*.²⁸⁸ Because the PRC Arbitration Law is silent on ad hoc arbitration, it contains no provision authorizing Chinese courts to assist parties in an ad hoc arbitration proceeding. Partly due to the civil law tradition, Chinese courts usually interpret their authority narrowly and are reluctant to take

²⁸⁸ See discussion *supra* Chapter IV.

action absent explicit statutory authorization.²⁸⁹ As a result, an ad hoc arbitration seated in China would not be able to get support from either the PRC Arbitration Law or a Chinese court regarding important issues throughout the arbitration proceeding.²⁹⁰

For example, provided that the parties have failed to reach a specific agreement on how to appoint the arbitrator(s), if one party wants to obstruct arbitration it may simply refuse to appoint the arbitrator(s) or cooperate with the other party regarding the appointment. If one party does so, the arbitration proceeding will be at an impasse because no Chinese court will assume jurisdiction over the case and assist the other party in appointment of the arbitrator(s). Because of the ease with which a party could obstruct the arbitration proceeding, successful operation of an ad hoc arbitration in China could potentially be very difficult.²⁹¹

Of course, the parties may choose a non-Chinese arbitration law as *lex arbitri* in order to solve the problem, because most national arbitration laws worldwide do allow ad hoc arbitration and do provide some gap-filling provisions to help the parties overcome problems in the arbitration proceeding. Choosing a foreign *lex arbitri* itself, however, is a highly complex issue that may cause other potential risks and therefore is a rare choice for parties in practice.²⁹² Therefore, for this analysis, the author presumes that the parties have made no such choice. If a Chinese court does enforce the ad hoc arbitration agreement in this scenario, the results could be

²⁸⁹ See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 34–38 (3d ed. 2007); *Key Features of Common Law or Civil Law Systems*, WORLD BANK, <http://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law> (last visited Mar. 8, 2013).

²⁹⁰ See discussion *supra* Chapter IV.

²⁹¹ See discussion *supra* Chapter IV.

²⁹² See VAN DEN BERG, *supra* note 252, at 292; Peter Sherwin et al., *The Decision to Arbitrate*, PROSKAUER ON INT'L LITIG. & ARB., ch. 19, pt. V, § A,

disastrous for the claimant if the respondent chooses to obstruct arbitration. On one hand, the court will not hear the case on its merits as the arbitration agreement between the parties has been enforced, while on the other hand, the arbitration will likely end up in a deadlock, as discussed above.

In scenario (c), however, because arbitration will take place outside of China where ad hoc arbitration is allowed, it would be validity-preferring for Chinese courts to apply the seat law rather than the governing law of the container contract (Chinese law).

Moreover, it is worth noting that application of Chinese law is mandatory for some types of contracts that are to be performed within Chinese territory; these include, among others, Sino-foreign joint-venture contracts and Sino-foreign joint-exploration of natural resources contracts.²⁹³ These contracts concern areas where a vast quantity of business activities occur between Chinese and foreign entities. If the parties to a contract of the types mentioned above do not specifically agree on the law governing the validity of the arbitration agreement, such arbitration agreements could be invalidated if the law governing the container contract (Chinese law) is interpreted as the law governing the validity of the arbitration agreement, even when the parties have agreed to put the seat of arbitration outside China. This result will obviously be against the parties' intent, as manifested by their decision to place the seat of

<http://www.proskauerguide.com/arbitration/19/V> (last visited Mar. 8, 2013).

²⁹³ See Shewai Minshi Guanxi Falü Shiyong Fa (涉外民事关系法律适用法) [Law on Application of Law in Foreign-related Civil Relations] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective Apr. 1, 2011), art. 4 (China); Hetong Fa (合同法) [Contract Law] (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), art. 126, para. 2 (China); Zuigao Renmin Fayuan Guanyu Shenli Shewai Minshi Huo Shangshi Hetong Jiufen Anjian Falü Shiyong Ruogan Wenti de Guiding (最高人民法院关于审理涉外民事或商事合同纠纷案件法律适用若干问题的规定) [Provisions on Relevant Issues Concerning the Application of Law in Hearing Foreign-related Civil and Commercial Contractual Disputes Cases] (promulgated by the Sup. People's Ct., July

arbitration in a country under the law of which ad hoc arbitration is allowed. As a result, taking into consideration the above Chinese mandatory rule, it is also validity-preferring to apply the seat law instead of the governing law of the container contract under such circumstances.

Based on the analysis above, if Chinese courts, as a general rule, apply the seat law rather than the governing law of the container contract, the courts will enforce ad hoc arbitration agreements more often than not. As such, this rule remains validity-preferring and pro-arbitration because it ensures that, once an ad hoc arbitration agreement is enforced, the dispute will be sent to a jurisdiction where the ad hoc arbitration will be operable.

2. Complicated Issues Potentially Arising From the Choice-of-Law Rule

Despite being validity-preferring and pro-arbitration, the SPC's choice-of-law rule is by no means perfect. Some complicated issues may potentially arise pursuant to this rule.

a. Choosing a Non-Chinese *Lex Arbitri* Instead of Specifying a Non-Chinese Law to Govern the Validity of the Arbitration Agreement

One of the issues that the SPC appears to have neglected is that when concluding a contract, parties seldom specify the law governing the validity of the arbitration agreement; according to the SPC's rule, in order for courts to rely on the law specified by the parties, the parties must explicitly state that their chosen law governs the

23, 2007, effective Aug. 8, 2007), art. 8 (China).

arbitration agreement's validity rather than the substance of the container contract.²⁹⁴

Parties sometimes, however, choose a law different from the seat law to govern the whole arbitration, which is usually interpreted as a choice of *lex arbitri*.²⁹⁵ Of course, such practice “is not to be recommended as it may lead to inextricable complications,”²⁹⁶ but it is nonetheless a possibility. When parties do choose a *lex arbitri* other than the seat law, the SPC’s choice-of-law rule may lead to problems of uncertainty.

Of course, as to an ad hoc arbitration agreement’s validity, it would not make any difference if both the *lex arbitri* chosen by the parties and the seat law allow or disallow ad hoc arbitration. If parties, however, instead of explicitly choosing a law governing the validity of the arbitration agreement, choose a non-Chinese arbitration law as *lex arbitri* while putting the seat of arbitration in China, the SPC’s rule mandates that the seat law (Chinese law) will determine the validity of the ad hoc arbitration agreement.²⁹⁷ Accordingly, the ad hoc arbitration agreement will be nullified. Such a result, however, is clearly against the parties’ will if the parties’ intention is interpreted as an attempt to validate the ad hoc arbitration agreement by choosing a *lex arbitri* under which ad hoc arbitration is allowed.

To the author’s knowledge, the SPC has not yet decided a case with facts similar

²⁹⁴ See Di’erci Quanguo Shewai Shangshi Haishi Shenpan Gongzuo Huiyi Jiyao (第二次全国涉外商事海事审判工作会议纪要) [Minutes of the Second National Working Conference on Adjudication of Foreign-related Commercial and Maritime Cases] (promulgated by the Sup. People’s Ct., Dec. 26, 2005, effective Dec. 26, 2005), art. 58 (China).

²⁹⁵ See VÁRADY ET AL., *supra* note 29, at 683.

²⁹⁶ VAN DEN BERG, *supra* note 252, at 292.

²⁹⁷ See, e.g., Zuidao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Zhongcái Fǎ” Ruogān Wèntí de Jieshi (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 on Certain Issues Concerning the Application of the “Arbitration Law of the People’s Republic of China”] (promulgated by the Sup. People’s Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 16 (China) (stating that if the parties do not specify a law governing the arbitration agreement, the court must then look to the law of the seat to determine the agreement’s validity).

to the hypothetical above, and thus this remains an open question in practice. Nevertheless, if the SPC adheres to its validity-preferring principle, it should validate the ad hoc arbitration agreement in such a situation because doing so will be consistent with a more reasonable interpretation of the parties' agreement: that their choice of a foreign *lex arbitri* also means a choice of the *lex arbitri* country's law for determining the validity of the arbitration agreement.

b. Specifying a Non-Chinese Law to Govern the Validity of the Arbitration Agreement While Placing the Seat of Arbitration in China

Another possible outcome of the SPC's rule is that it may, in effect, cause a Chinese court to enforce an arbitration agreement calling for ad hoc arbitration within Chinese territory. If parties specifically choose a non-Chinese law, under which ad hoc arbitration is allowed, as the law governing the validity of their ad hoc arbitration agreement, while placing the seat of arbitration in China, such an arbitration agreement will be enforced by a Chinese court because parties' specific choice takes priority over the seat law under the SPC's rule.²⁹⁸

For the successful operation of an ad hoc arbitration in China, however, an enforceable ad hoc arbitration agreement alone is far from sufficient. Because neither the PRC Arbitration Law nor the SPC's Interpretation of the law contains provisions permitting Chinese courts to assist in an ad hoc arbitration, parties cannot rely on Chinese courts for any assistance with regards to certain procedural matters.²⁹⁹

²⁹⁸ *Id.*

²⁹⁹ See generally Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995) (China) (English translation provided by the National People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm); Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo

As such, the parties need to carefully design a complete mechanism to ensure the arbitration's operation. In practice, this will surely be very difficult, albeit not entirely impossible.³⁰⁰ In any case, at least in theory, ad hoc arbitration with the seat in Chinese territory is permitted by the SPC's own rule.³⁰¹

B. The SPC's Overly Strict Interpretation of the PRC Arbitration Law's Requirement that Arbitration be Institutional

It is unfortunate that Chinese courts will invalidate ad hoc arbitration agreements when the PRC Arbitration Law applies. This problem is compounded when the SPC too strictly interprets and applies the PRC Arbitration Law.

1. When Parties Choose Institutional Rules Instead of Institutions Themselves in Their Arbitration Agreement

In *Züblin International GmbH v. Wuxi Woco General Rubber Engineering Co. Ltd.*, a local Chinese court, following the SPC's instruction, struck down an arbitration agreement that read, "ICC Rules, Shanghai shall apply."³⁰² In its reply letter regarding this case, the SPC instructed the lower court to hold the arbitration agreement invalid.³⁰³ First, the SPC found that the parties did not specifically choose

Zhongcai Fa" Ruogan Wenti de Jieshi (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 on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China"] (promulgated by the Sup. People's Ct., Aug. 23, 2006, effective Sept. 8, 2006) (China).

³⁰⁰ See discussion *supra* Chapter IV.

³⁰¹ See discussion *supra* Chapter IV.

³⁰² Deguo Xupulin Guoji Youxian Zeren Gongsi yu Wuxi Woke Tongyong Gongcheng Xiangjiao Youxian Gongsi Shengqing Queren Zhongcai Xieyi Xiaoli 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 Int'l GmbH v. Wuxi Woco Gen. Rubber Eng'g Co. Ltd.*] (People's Ct. of Wuxi High-tech Indus. Dev. Dist., Sept. 2, 2004) para. 2 (China).

³⁰³ Zuigao Renmin Fayuan Guanyu Deguo Xupulin Guoji Youxian Zeren Gongsi yu Wuxi Woke Tongyong Gongcheng Xiangjiao Youxian Gongsi Shengqing Queren Zhongcai Xieyi Xiaoli Yi'an de Qingshi de Fuhan (最高人民法院关于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一案的请示的复函) [Reply Letter to the Request for Instructions

any law to govern the validity of the arbitration agreement, but they did choose Shanghai as the seat of arbitration.³⁰⁴ Therefore, according to the SPC's choice-of-law rule, the PRC Arbitration Law, as the seat law, applied. Second, the SPC reasoned that the parties only specified the arbitration rules to be applied, but they did not explicitly appoint an arbitration institution.³⁰⁵ Because no arbitration institution was chosen, the arbitration agreement was held invalid in accordance with the PRC Arbitration Law.³⁰⁶

The SPC's interpretation of the PRC Arbitration Law as discussed above seems too rigid. The standard arbitration clause recommended by the ICC International Court of Arbitration (ICC) reads: “[a]ll disputes arising out of or in connection with the present contract shall be finally settled under the *Rules of Arbitration of the International Chamber of Commerce* by one or more arbitrators appointed in accordance with the said Rules.”³⁰⁷ Similar to the standard clause, the wording of the contract in *Züblin* (“ICC Rules . . . apply”) also refers to the ICC Rules. Thus, it is reasonable to interpret this wording as the parties’ intention to submit their dispute to ICC arbitration. Because the ICC is undoubtedly an arbitration institution, this should satisfy the PRC Arbitration Law’s requirement for arbitration to be institutional. Furthermore, the ICC Rules contain provisions stipulating that the ICC shall administer procedural matters such as communication, appointment and confirmation

Concerning the Case in Which Züblin International GmbH and Wuxi Woco Gen. Eng’g Rubber Co. Ltd. Request for Determination of the Validity of the Arbitration Agreement] (promulgated by the Sup. People’s Ct., July 8, 2004, effective July 8, 2004) (China).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Standard ICC Arbitration Clauses*, INT’L CHAMBER COM., <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/> (last visited Mar. 8, 2013) (emphasis added).

of arbitrators, and scrutiny of the award, which unequivocally indicates that application of the ICC Rules means that the ICC should administer the arbitration.³⁰⁸ At a minimum, it is reasonable for the SPC to find that the parties' choice of the ICC Rules, even without further specification, justifies a presumption that their intention is to choose the ICC as the arbitration institution. Of course, an exception would exist if the parties specify clearly that their arbitration should be ad hoc or governed by the ICC Rules but administered by an institution other than the ICC. The SPC's simplistic reasoning that choosing institutional rules does not mean choosing an arbitration institution is not persuasive.

Probably as a result of the SPC's rigid interpretation of the PRC Arbitration Law's institutional arbitration requirement, the ICC has adopted a special standard clause for arbitration in mainland China, which reads:

All disputes arising out of or in connection with the present contract *shall be submitted to the International Court of Arbitration of the International Chamber of Commerce* and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.³⁰⁹

In 2006, two years after *Ziiblin*, the SPC promulgated the Interpretation on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China" (SPC Arbitration Law Interpretation). Article 4 of the Interpretation reads,

³⁰⁸ See generally Int'l Chamber of Commerce, *ICC Rules of Arbitration* (Jan. 1, 1998) [hereinafter 1998 ICC Rules of Arbitration], http://www.icc.se/skiljedom/rules_arb_english.pdf.

³⁰⁹ Standard ICC Arbitration Clauses—Adaptation of the Clauses to Particular Circumstances, INT'L CHAMBER COM., <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Standard-ICC-Arbitration-Clauses/> (last visited Mar. 8, 2013) (emphasis added).

“[w]here the arbitration agreement only agrees on the applicable arbitration rules for the dispute, it shall be deemed that no arbitration institution has been agreed, *except that* the parties reach a supplementary agreement or *the arbitration institution could be ascertained according to the agreed arbitration rules.*”³¹⁰ This language appears favorable for arbitration agreements similar to the one in *Züblin*.³¹¹ As discussed above, because of the administration and supervisory roles that the ICC plays under the ICC Rules, there is no doubt that the ICC is the institution to administer an arbitration under the Rules.³¹² As a result, it would be reasonable to hold that the ICC could be ascertained as the arbitration institution according to the ICC Rules. According to Article 4 of the SPC Arbitration Law Interpretation, therefore, the arbitration agreement containing the language “ICC Rules apply” should be deemed to have chosen the ICC as the arbitration institution, and thus should be valid.

As promising as the principle articulated in the SPC Arbitration Law Interpretation may sound, unfortunately in 2009 the SPC once again instructed a local court to nullify an arbitration agreement that called for arbitration under the ICC Rules.³¹³ In this case, the SPC focused on the fact that the parties did not draft their

³¹⁰ Zuigao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Zhongcai Fa” Ruogan Wenti de Jieshi (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 on Certain Issues Concerning the Application of the “Arbitration Law of the People’s Republic of China”] (promulgated by the Sup. People’s Ct., Aug. 23, 2006, effective Sept. 8, 2006), art. 4 (China) (emphasis added).

³¹¹ Deguo Xupulin Guoji Youxian Zeren Gongsi yu Wuxi Woke Tongyong Gongcheng Xiangjiao Youxian Gongsi Shengqing Queren Zhongcai Xieyi Xiaoli 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 Int’l GmbH v. Wuxi Woco Gen. Rubber Eng’g Co. Ltd.*] (People’s Ct. of Wuxi High-tech Industry Development District, Sept. 2, 2004) (China).

³¹² See generally 1998 ICC Rules of Arbitration, *supra* note 308.

³¹³ The arbitration clause in this case reads: “[A]ll disputes arising from this contract shall be finally settled by arbitration according to ‘ICC Arbitration Rules’” (author’s translation). See Zuigao Renmin Fayuan Guanyu Xiaxin Dianzi Gufen Youxian Gongsi yu Bilishi Chanpin Youxian Gongsi Queren Jingxiao Xieyi Zhongcai Tiaokuan Xiaoli de Qingshi de Fuhan (最高人民法院关于夏新电子股份有限公司与比利时产品有限公司确认经销协议仲裁条款效力的请示的复函) [Reply Letter to the Request for Instructions Concerning Determination of the Validity of the Distribution Agreement’s Arbitration Clause in the Case Between Amoi Tech. Co., Ltd and Société de Production Belge AG]

arbitration agreement using the language of the ICC's special standard clause for arbitration in mainland China.³¹⁴ Based solely on the parties' failure to use this special clause, the SPC held that no arbitration institution could be ascertained according to the ICC Rules.³¹⁵ As a result, the arbitration agreement was held invalid.³¹⁶ Consequently, it remains unclear what would qualify under the SPC's interpretation as a situation in which the arbitration institution could be ascertained according to the parties' choice of applicable arbitration rules.

A possible example may be found in the Arbitration Rules of the China International Economic and Trade Arbitration Commission (CIETAC). Article 4.4 of the 2012 CIETAC Arbitration Rules reads, “[w]here the parties agree to refer their dispute to arbitration under these Rules without providing the name of the arbitration institution, they shall be deemed to have agreed to refer the dispute to arbitration by CIETAC.”³¹⁷ This language ensures that the arbitration institution can be ascertained according to the agreed arbitration rules.

In international practice, it is common for the arbitration agreement to refer to an arbitration institution's rules instead of the institution itself.³¹⁸ This is apparent from the standard arbitration clauses drafted by various arbitration institutions, including the ICC.³¹⁹ These standard arbitration clauses are accepted by most of the world's

(promulgated by the Sup. People's Ct., Mar. 20, 2009, effective Mar. 20, 2009) (China).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ 2012 China International Economic and Trade Arbitration Commission Arbitration Rules, art. 4.4, CIETAC (effective as of May 1, 2012) [hereinafter CIETAC Arbitration Rules], available at <http://cn.cietac.org/rules/rules.pdf>.

³¹⁸ To conduct an institutional arbitration, parties “incorporate the rules of the selected institution . . . by reference.” In contrast, parties desiring ad hoc arbitration will refer to rules designed for non-institutional arbitration, such as those developed by UNCITRAL. ASHURST LLP, INTERNATIONAL ARBITRATION CLAUSES 2–3 (2011), available at http://www.ashurst.com/doc.aspx?id_Resource=4724.

³¹⁹ See Standard ICC Arbitration Clauses, *supra* note 307.

jurisdictions as valid arbitration agreements.³²⁰ Moreover, not all institutions' rules use the same clear wording as CIETAC's rules with respect to ascertaining the administering body.³²¹ In light of the foregoing, the SPC's position that institutions cannot be ascertained solely by an agreement's reference to the institution's arbitration rules is contrary to the parties' intention, as well as international practice. A more reasonable approach to Article 4 of the SPC Arbitration Law Interpretation would be that the arbitration agreement's validity should depend on whether the arbitration rules the parties agreed upon clearly refer to which arbitration institution would administer the arbitration. If the parties agree on rules like the UNCITRAL Arbitration Rules, in which no arbitration institution is referred to as the body to administer the arbitration,³²² then a court could reasonably conclude that no arbitration institution could be ascertained according to the agreed arbitration rules. If such agreed rules clearly refer to an institution to administer the arbitration, however, a Chinese court should recognize it as the ascertained institution.

On this issue, the new 2012 ICC Rules look promising. Article 1 of the new Rules states that, “[t]he [International] Court [of Arbitration of the International Chamber of Commerce] is the only body authorized to administer arbitrations under the Rules . . .”³²³ Although not as explicit as the wording in the CIETAC Rules, this language strongly supports a holding that the ICC, as an arbitration institution,

³²⁰ For instance, in discussing the use of the ICC's standard arbitration clause, the authors identify China as a notable exception to the general practice that an arbitration agreement will be valid even if the standard clause refers only to the institution's rules. See YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 388 (2d ed. 2005).

³²¹ CIETAC Arbitration Rules, *supra* note 317, art. 4.4.

³²² See UNCITRAL Arbitration Rules, *supra* note 8.

³²³ Int'l Chamber of Commerce, *ICC Rules of Arbitration*, art. 1(2) (Jan. 1, 2012) [hereinafter 2012 ICC Rules of Arbitration], available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>.

could be ascertained according to its own Rules. It is overly optimistic, however, to conclude that the new language will aid the parties to an arbitration agreement choosing the ICC Rules. The cases above seem to suggest that the issue will not be clarified until the SPC decides to enforce a similar arbitration agreement.

In any event, for arbitration agreements only choosing an institution's rules instead of clearly stating an intention to submit the dispute to an institution's administration, relevant wording in the chosen arbitration rules play a pivotal role in the SPC's decision on whether such arbitration agreements shall be held valid under the PRC Arbitration Law.

2. When Parties Choose Two Institutions in Their Arbitration Agreement

Parties sometimes choose two arbitration institutions and further agree that any future dispute may be submitted to either one of them. Courts usually allow such an arrangement and will generally give the claimant the right to choose from one of the two agreed institutions.³²⁴ Chinese courts, however, do not permit the parties to implement such a mechanism. According to the SPC Arbitration Law Interpretation, “[w]here two or more arbitration institutions are agreed in an arbitration agreement, the parties may agree to choose one of the arbitration institutions and apply for arbitration; where the parties cannot reach an agreement on the choice of arbitration institution, the arbitration agreement is invalid.”³²⁵ Accordingly, a resisting party in

³²⁴ See Weixia Gu, *The Changing Landscape of Arbitration Agreements in China: Has the SPC-Led Pro-Arbitration Move Gone Far Enough?*, 22 N.Y. INT'L L. REV. 1, 38 (2009); Norbert Horn, *The Arbitration Agreement in Light of Case Law of the UNCITRAL Model Law (Arts 7 and 8)*, 5 INT'L ARB. L. REV. 146, 149 (2005).

³²⁵ Zügao Renmin Fayuan Guanyu Shiyong “Zhonghua Renmin Gongheguo Zhongcái Fa” Ruogan Wenti de Jieshi (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 on Certain Issues Concerning the Application of the “Arbitration Law of the People’s Republic of China”] (promulgated by the Sup. People’s Ct., Aug. 23, 2006, effective Sept. 8, 2006), art.

such a situation may easily block arbitration by refusing to reach a supplementary agreement to eliminate one of the two agreed institutions.

It is true that a choice of two institutions within one arbitration agreement may cause some problems in practice, but logically such a choice does not conflict with the PRC Arbitration Law's requirement that arbitration must be institutional. By choosing two acceptable institutions, parties have clearly demonstrated their intent to arbitrate and their willingness to have their arbitration administered by an institution, which satisfies the law's institutional arbitration requirement. Additionally, any problems caused by naming two institutions in one arbitration agreement may be resolved by other mechanisms, such as giving the first claimant the right to choose which institution will have jurisdiction. In any event, Chinese courts do not need to invalidate blindly an arbitration agreement that names two institutions. In fact, the SPC's negative attitude towards parties' choice of two or more arbitration institutions has gone beyond the PRC Arbitration Law's requirement that arbitration must be institutional.³²⁶ By requiring that parties must agree to eliminate one of the two institutions after a dispute arises, the SPC has essentially redefined the law's requirement from "an institution" to "only one institution." Such an interpretation is clearly contrary to the SPC's other validity-preferring and pro-arbitration approaches.

In summary, although ad hoc arbitration agreements are invalid under the PRC Arbitration Law, the SPC has adopted a choice-of-law rule that will validate an ad hoc

5 (China).

³²⁶ Nothing in the PRC Arbitration Law provides that parties must select only one particular institution in their arbitration agreement. *See generally* Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995) (China) (English translation provided by the National People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm).

arbitration agreement in most circumstances where there is a possibility to apply a non-Chinese law. Overall, the SPC's choice-of-law rule ensures that Chinese courts will enforce most arbitration agreements calling for ad hoc arbitration outside China. For this reason, the SPC approach can be seen as validity-preferring and pro-arbitration. Despite such a validity-preferring choice-of-law rule, the SPC is not entirely consistent with its pro-arbitration strategy in other contexts. For example, it is excessively strict when determining whether parties have properly agreed to institutional arbitration when the agreement refers to an arbitration institution's rules rather than specifically choosing the institution itself, or when parties have agreed on two possible institutions to resolve their dispute. The SPC needs to move towards a more coherent pro-arbitration stance in the future.

III REASONS BEHIND CHINESE LAW'S APPARENT HOSTILITY TOWARDS AD HOC ARBITRATION

The foregoing discussion shows that the PRC Arbitration Law's institutional arbitration requirement has created many complications for the resolution of international commercial disputes in China or related to Chinese parties. In light of these complications, it is important to ask why this unique and strange requirement exists under Chinese law in the first place. Obviously, this requirement does not in any general way encourage arbitration in China or with Chinese entities, and, in fact, it is hard to see how it could reasonably benefit any entity or group. So, what is the rationale behind the rule? What were legislators' concerns when the rule was put into force?

A. Reasons Given By the Chinese Legislature

The Legislative Affairs Commission of the Standing Committee of the NPC³²⁷ gave two reasons why the PRC Arbitration Law only provides for institutional arbitration:

In the course of drafting the PRC Arbitration Law, the issue of ad hoc arbitration has been studied. The basic opinion was that ad hoc arbitration would be allowed in international economic and trade disputes, but would not be approved in domestic economic and trade disputes. There are two main reasons why the PRC Arbitration Law does not provide for ad hoc arbitration. First, in the history of the development of arbitration as a legal institution, ad hoc arbitration appeared before institutional arbitration. Ad hoc arbitration is on the decline from the perspective of future development. Second, China only has a short history of arbitration, during which there has only been institutional arbitration, but no ad hoc arbitration.³²⁸

From any perspective, the two reasons offered by the Chinese legislature are rather insubstantial and far from persuasive. First, although it is true that ad hoc arbitration precedes institutional arbitration in time, this should not serve as a justification to abandon ad hoc arbitration. Furthermore, there is no indication that the use of ad hoc arbitration is declining. Due to their distinctive characteristics, ad

³²⁷ The National People's Congress of the People's Republic of China is the highest organ of state power in the PRC. The National People's Congress and its permanent body, the Standing Committee, exercise the legislative power of the PRC. See XIANFA arts. 58–59 (1982) (China).

³²⁸ THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS, COMMENTARIES, *supra* note 130, at 38.

hoc and institutional arbitration complement each other and coexist in the international commercial field.³²⁹ Because contracting parties have distinct practical needs in different disputes, each of the two types of arbitration has certain advantages over the other that make it a better choice for resolving a particular dispute. Indeed, in some fields such as admiralty and maritime law, ad hoc arbitration's flexibility and efficiency have made it the preferred method of dispute resolution.³³⁰ Therefore, ad hoc arbitration and institutional arbitration are both essential to a complete arbitration system in the sense that each provides parties with a dispute resolution mechanism to fit their distinct practical needs.

Second, it is not sensible to preclude ad hoc arbitration on the ground that China only has a short history of arbitration and has never had a system of ad hoc arbitration before. It is hard to see why China's short history of arbitration can work as a justification for the exclusion of ad hoc arbitration under the PRC Arbitration Law, because the flexible and largely self-sufficient nature of ad hoc arbitration may in fact make it easier to establish as a legal institution. Also, logically speaking, never having something in the past should not justify refusing to have it in the future. As a result, why China chooses to have institutional arbitration but not ad hoc arbitration cannot reasonably be explained by a short history or lack of experience.

B. A Historical Analysis

Why did the Chinese legislature offer such unpersuasive reasons? The author

³²⁹ See discussion *supra* Chapter I.

³³⁰ See SOC'Y OF MAR. ARBITRATORS, INC., GUIDE TO MARITIME ARBITRATION IN NEW YORK: ANSWERS TO FREQUENTLY-ASKED QUESTIONS ABOUT ARBITRATION UNDER THE RULES OF THE SOCIETY OF MARITIME ARBITRATORS, INC., Question 9 (1997), available at <http://www.smany.org/sma/maritimefaq.html>.

certainly finds it unlikely that the NPC was deliberately concealing its real reasons for adopting such a policy. Instead, there might be some reasons that the NPC did not explicitly express or maybe even did not clearly realize itself. In order to discover the implicit reasons behind the policy, a comparison between arbitration's history in the western world and that in China is necessary.³³¹ This comparison intends to shed light on some Chinese attitudes and ideas surrounding arbitration that might have subconsciously influenced the policy-making process.

1. The History of Arbitration in the Western World

Arbitration has a very long history in western cultures, which can be evidenced even in various myths and legends.³³² It is doubtful that the exact origins of arbitration will ever be known, but one can naturally assume that it appeared when people had disputes and needed a neutral resolution. As early as 1500 B.C., arbitration was already used in ancient Egypt.³³³ Of course, "arbitration" at this stage was presumably very primitive and different from what it is today. But as societies became more complex, so did arbitration. It later became a common method of dispute resolution in both Greece and Rome.³³⁴ From Rome, arbitration was carried to the whole of Europe.³³⁵ In many European countries during medieval times, arbitration became well established in commercial and maritime fields.³³⁶ As time went on, arbitration's advantages over litigation made it increasingly favored by

³³¹ See discussion *supra* Chapter II.

³³² See generally EDMONSON, *supra* note 96, § 2:1; KELLOR, *supra* note 96 at 3-8; Jones, *supra* note 96, at 127.

³³³ See OEHMKE *supra* note 98, at 17.

³³⁴ See EDMONSON, *supra* note 96, §§ 2:2-2:3.

³³⁵ See *id.* § 2:3.

³³⁶ See generally *id.* § 2:4.

merchants, as they were able to avoid the intricacies of different national court systems and have their disputes resolved with maximum neutrality, efficiency, and commercial expertise.³³⁷

There was a period when courts were hostile towards arbitration in general,³³⁸ but over time arbitration's advantages in privately solving parties' disputes, especially international commercial disputes, became manifest. Arbitration achieved widespread respectability and legal recognition in jurisdictions worldwide. In modern times, professional arbitration institutions were established to provide services to parties and arbitrators so as to facilitate the dispute resolution process.³³⁹

Therefore, it can be said that arbitration in the western world developed in a bottom-up way. Originating from parties' needs to have their disputes resolved by a third party in an amicable way, arbitration evolved to meet parties' desires to resolve their dispute outside a national court system so as to enjoy maximum neutrality, flexibility, efficiency, and confidentiality. Later, national laws and courts recognized and respected parties' wishes and designed a system to support or facilitate the operation of this private dispute resolution mechanism. Following this path, ad hoc arbitration occurred first, from which institutional arbitration later evolved.

2. The History of Arbitration in China

Arbitration's development in China is somewhat different. Despite having

³³⁷ See *id.* § 2:4.

³³⁸ See KELLOR, *supra* note 96, at 5–6; OEHMKE, *supra* note 98, at 19.

³³⁹ E.g., the ICC International Court of Arbitration was established in 1923. For a brief introduction to its history and development, see *Arbitration*, INT'L CHAMBER COM., <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/> (last visited Mar. 8, 2013).

origins as ancient as those in the west,³⁴⁰ arbitration in China had remained in its primitive form for an excessively long time, up until the beginning of the twentieth century.³⁴¹ This is largely due to the fact that China, throughout its history and especially from 221 B.C. until at least 1840 A.D., had been an imperial state in which agriculture was emphasized and commerce was suppressed.³⁴² Because of such state policies, economic activity was not vibrant; therefore, economic disputes were relatively rare. As a result, arbitration did not have much room to develop. Any disputes relating to property or economic interests were resolved by the state.³⁴³

In the wake of the Opium Wars³⁴⁴ of the mid-nineteenth century, rulers of the Qing Dynasty³⁴⁵ were forced to open China to the world and allow Chinese parties to engage in commercial activities with business entities from foreign countries.³⁴⁶ In the meantime, also realizing its own weakness and facing serious internal problems, the Qing government initiated various reforms for the purpose of self-preservation. At the turn of the century, promotion of commerce became an important initiative.³⁴⁷ As commercial activity boomed, the number of commercial disputes also increased.

³⁴⁰ See Deng & Sun, *supra* note 115, at 93.

³⁴¹ See *id.* at 94.

³⁴² See *id.*

³⁴³ In imperial China, there was no separation of powers. As a result, there were no separate courts. The functions of courts were carried out by executive officials. See ESTHER LAM, CHINA AND THE WTO: A LONG MARCH TOWARDS THE RULE OF LAW 13 (2009); Hayden Windrow, *A Short History of Law, Norms, and Social Control in Imperial China*, 7 ASIAN-PAC. L. & POL'Y J. 244, 246 (2006) (referring to the absence of a separation of powers tradition).

³⁴⁴ Wars between China and the British Empire after China sought to restrict illegal British opium trafficking, which consisted of the First Opium War (1839–1842) and the Second Opium War (1856–1860). *Opium Wars*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/430163/Opium-Wars> (last visited Mar. 8, 2013).

³⁴⁵ The last ruling imperial dynasty of China (1644–1911/12), also known as the Manchu Dynasty. *Qing Dynasty*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/112846/Qing-dynasty> (last visited Mar. 8, 2013).

³⁴⁶ See, e.g., *Opium Wars*, *supra* note 102; Wolfgang Keller et al., *Shanghai's Trade, China's Growth: Continuity, Recovery, and Change Since the Opium War* 6 (Nat'l Bureau of Econ. Research, Working Paper No. 17754, 2012), available at http://www.nber.org.proxy.library.cornell.edu/papers/w17754.pdf?new_window=1.

³⁴⁷ See Ren, *supra* note 121, at 117.

It turned out, however, that state bodies were incompetent in resolving commercial disputes, both due to lack of experience hearing such cases and also because there were no available procedural rules or substantive laws in place.³⁴⁸ Attempting to solve the problem, the Qing government encouraged the establishment of chambers of commerce across China and endowed these private organizations with the power to “arbitrate” commercial cases—this is considered the beginning of China’s arbitration system.³⁴⁹

A similar system was kept in place by the Republic of China after the rulers of the Qing Dynasty were overthrown in 1911.³⁵⁰ At that time, chambers of commerce created divisions of commercial arbitration as subsidiary organizations where commercial cases would be “arbitrated.”³⁵¹ Unfortunately, however, due to the unstable social conditions wrought by continuous war during the Republic of China era, although a fair number of cases were resolved by way of arbitration, arbitration as a legal institution remained largely underdeveloped.³⁵²

After the founding of the People’s Republic of China in 1949, the entirety of “old” China’s legal system, including the arbitration system, was abolished. From 1957 on, China adopted a highly centralized planned economy system.³⁵³ Under this system, business entities no longer made independent decisions regarding their own business

³⁴⁸ See Ren, *supra* note 121, at 117; Zheng Chenglin (郑成林), *Jindai Zhongguo Shangshi Zhongcái Zhidu Yanbian de Lishi Guiji* (近代中国商事仲裁制度演变的历史轨迹) [*The Historical Track of the Evolution of the Commercial Arbitration System in Modern China*], 6 ZHONGZHOU XUEKAN (中州学刊) [ACAD. J. ZHONGZHOU] 122, 123-125 (2002) (China).

³⁴⁹ See Ren, *supra* note 105, at 117; Zheng, *supra* note 106, at 123.

³⁵⁰ See TAO, *supra* note 151, at 1; *Qing Dynasty*, *supra* note 103.

³⁵¹ Ren, *supra* note 105, at 119; Zheng *supra* note 106, at 123.

³⁵² See Ren, *supra* note 105, at 119; Zheng *supra* note 106, at 124.

³⁵³ For an overview of the planned economy and its impact on various economic sectors, see Rumy Hasan, *Reflections on the Impact Upon China’s Polity From the Retreat of State Capitalism*, 34 CRITICAL SOC. 575 (2008).

operations. Instead, they only needed to follow the government's orders to produce, supply, purchase, or sell. Under such circumstances, disputes between business entities became rare. When disputes did arise, they would be dealt with by administrative bodies of the government rather than through arbitration or litigation.³⁵⁴

Arbitration in China during this historical period was limited to foreign-related economic disputes, namely commercial disputes between Chinese parties and foreign parties.³⁵⁵ To resolve disputes that might arise in foreign trade and in contractual relationships between foreign and Chinese business entities, the Chinese central government established two foreign-related arbitration institutions under the China Council for the Promotion of International Trade: the Foreign Trade Arbitration Commission and the Maritime Arbitration Commission.³⁵⁶

Yet, starting in the late 1970s, China began to adopt a “reform and opening-up

³⁵⁴ See Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 250 (1991); Lo, *supra* note 134, at 4.

³⁵⁵ See TAO, *supra* note 151, at 8–9.

³⁵⁶ See Zhongyang Renmin Zhengfu Zhengwuyuan Guanyu Zai Zhongguo Guoji Maoyi Cujin Weiyuanhui Nei Sheli Duiwai Maoyi Zhongcai Weiyuanhui de Jueding (中央人民政府政务院关于在中国国际贸易促进委员会内设立对外贸易仲裁委员会的决定) [Decision to Establish Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade] (promulgated by the Government Administration Council of the Cent. People's Gov't, May 6, 1954, effective May 6, 1954) art. 1 (China); Zhonghua Renmin Gongheguo Guowuyuan Guanyu Zai Zhongguo Guoji Maoyi Cujin Weiyuanhui Nei Sheli Haishi Zhongcai Weiyuanhui de Jueding (中华人民共和国国务院关于在中国国际贸易促进委员会内设立海事仲裁委员会的决定) [Decision to Establish Maritime Arbitration Commission within the China Council for the Promotion of International Trade] (promulgated by the St. Council, Nov. 21, 1958, effective Nov. 21, 1958) art. 1 (China). The two institutions were later respectively renamed China International Economic and Trade Arbitration Commission (CIETAC) and China Maritime Arbitration Commission (CMAC). See Guowuyuan Guanyu Jiang Duiwai Maoyi Zhongcai Weiyuanhui Gaicheng Wei Duiwai Jingji Maoyi Zhongcai Weiyuanhui de Tongzhi (国务院关于将对外贸易仲裁委员会改称为对外经济贸易仲裁委员会的通知) [Notice to Rename Foreign Trade Arbitration Commission as Foreign Economic and Trade Arbitration Commission] (promulgated by the St. Council, Feb. 26, 1980, effective Feb. 26, 1980) (China); Guowuyuan Guanyu Jiang Duiwai Jingji Maoyi Zhongcai Weiyuanhui Gaiming Wei Zhongguo Guoji Maoyi Zhongcai Weiyuanhui he Xiuding Zhongcai Guize de Pifu (国务院关于将对外经济贸易仲裁委员会改名为中国国际经济贸易仲裁委员会和修订仲裁规则的批复) [Approval and Reply on Renaming Foreign Economic and Trade Arbitration Commission as China International Economic and Trade Arbitration Commission and Amending the Arbitration Rules] (promulgated by the St. Council, June 21, 1988, effective June 21, 1988) (China); Guowuyuan Guanyu Jiang Haishi Zhongcai Weiyuanhui Gaiming Wei Zhongguo Haishi Zhongcai Weiyuanhui he Xiuding Zhongcai Guize de Pifu (国务院关于将海事仲裁委员会改名为中国海事仲裁委员会和修订仲裁规则的批复) [Approval and Reply on Renaming Maritime Arbitration Commission as China Maritime Arbitration Commission and Amending the Arbitration Rules] (promulgated by the St. Council, June 21, 1988,

policy.”³⁵⁷ The highly centralized planned economy was gradually dismantled, and a transition toward a market economy began.³⁵⁸ With this policy in place, commercial activities once again became vibrant. As in the late Qing Dynasty, the changing economic circumstances called for a new dispute resolution mechanism. In the early 1980s, besides undertaking numerous reforms in the judicial system, the Chinese government established an arbitration system under which domestic commercial disputes might be resolved.³⁵⁹ Yet, following customs and ways of thinking inherited from the old planned economy era, administrative bodies of the government continued to be the authority under this arbitration system.³⁶⁰ Various laws and regulations endowed certain government offices with the power to “arbitrate” disputes.³⁶¹ In addition, these laws established, as subsidiaries of government bodies, some “arbitration institutions” to hear commercial disputes.³⁶²

Such institutions, however, were not arbitration institutions in the modern sense. Indeed, the government explicitly stated that these institutions were “different from arbitration institutions in capitalist countries,”³⁶³ because they were “executing the authority to arbitrate on behalf the country”³⁶⁴ and their “awards represent[ed] the

effective June 21, 1988) (China).

³⁵⁷ See Lo, *supra* note 134, at 2–3.

³⁵⁸ See THE LEGISLATIVE AFFAIRS COMM’N OF THE STANDING COMM. OF THE NAT’L PEOPLE’S CONG. OF THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 86, at 1-2; Hasan, *supra* note 111, at 579.

³⁵⁹ ZHONGHUA RENMIN GONGHEGUO ZHONGCAI FA QUANSHU, *supra* note 131, at 9-10

³⁶⁰ See *id.*

³⁶¹ See, e.g., Jingji Hetong Fa (经济合同法) [Economic Contract Law] (promulgated by the Nat’l People’s Cong., Dec. 13, 1981, effective July 1, 1982), art. 48 (China).

³⁶² See, e.g., Jingji Hetong Zhongcai Tiaoli (经济合同仲裁条例) [Regulation on Economic Contract Arbitration] (promulgated by the St. Council, Aug. 22, 1983, effective Aug. 22, 1983), art. 2 (China).

³⁶³ Guojia Gongshang Xingzheng Guanli Ju Jingji Hetong Si Guanyu Guanche Zhixing “Jingji Hetong Zhongcai Tiaoli” de Jidian Yijian (国家工商行政管理局经济合同司关于贯彻执行《经济合同仲裁条例》的几点意见) [Several Opinions on Implementing “Regulation on Economic Contract Arbitration”] (promulgated by the State Administration for Industry and Commerce, Office of Economic Contracts, Nov. 3, 1983, effective Nov. 3, 1983) art. 2 (China).

³⁶⁴ *Id.*

country's will.”³⁶⁵ In fact, the “arbitration” system at this stage lacked many salient features of arbitration as practiced today. For example, the “arbitration award” was not final because any unsatisfied party had the option to file the case in court after receiving the award.³⁶⁶ Realizing the problems these features created as China became more integrated in the global economy, the NPC promulgated the current Arbitration Law of the People’s Republic of China in 1994 in an attempt to bring China’s arbitration system closer to modern principles and practices.³⁶⁷

As a result, it can be said that arbitration in China developed in a top-down way. In both the early twentieth century and early 1980s, the Chinese government tried to promote commerce in order to develop the Chinese economy. Then, to fit the changing economy’s practical needs, the Chinese government established arbitration institutions so that business entities might have their commercial disputes resolved. In both of these periods, only institutional arbitration was established, never ad hoc arbitration.

3. What the Comparison Tells Us

The forgoing discussion shows that arbitration has followed a different developmental path in China as compared to the one in the Western world. In the West, arbitration as a legal institution developed in a bottom-up pattern. It originated in the form of ad hoc arbitration, as that method best suited merchants’ needs for a neutral third party, other than a court, to make a quick and just decision.³⁶⁸

³⁶⁵ *Id.*

³⁶⁶ See Jingji Hetong Fa (经济合同法) [Economic Contract Law] (promulgated by the Nat'l People's Cong., Dec. 13, 1981, effective July 1, 1982) art. 49 (China); Jingji Hetong Zhongcai Tiaoli (经济合同仲裁条例) [Regulation on Economic Contract Arbitration] (promulgated by the St. Council, Aug. 22, 1983, effective Aug. 22, 1983) art. 33 (China).

³⁶⁷ See THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS, COMMENTARIES, *supra* note 130, at 4-5.

³⁶⁸ See discussion *supra* Section IV.B.1.

Institutional arbitration appeared much later and aimed to provide professional services to parties and arbitrators as commercial disputes became much more frequent.³⁶⁹ In China, however, development of arbitration followed a top-down pattern. Largely due to the prolonged underdevelopment of commercial activities, in China there never existed a practical need for arbitration until drastic social and economic reforms arose at the beginning of the twentieth century as well as in the late 1970s.³⁷⁰ When arbitration was finally established as a legal institution, ad hoc arbitration was never adopted in the system.

It appears from this comparison that, unlike the “natural” growth pattern in the West, the Chinese arbitration system has been largely “government-made.” When Chinese policy makers decided to take on reforms and set up an arbitration system, they probably did not feel obliged to follow arbitration’s classic model, which indisputably includes ad hoc arbitration. Instead, one can assume they simply wanted something that best fit the needs of the time: a dispute resolution mechanism to resolve commercial disputes in an environment of rapidly increasing commercial activities. For this purpose, the Chinese government satisfied those needs by instituting a curtailed arbitration system containing only institutional arbitration, which could be efficiently organized, provide standard and uniform practices, and operate in a user-friendly manner for parties and legal practitioners who had never participated in, or even heard of, arbitration before. In this sense, the Chinese government probably had no interest in ad hoc arbitration at all.

³⁶⁹ *Id.*

³⁷⁰ See discussion *supra* Section IV.B.2.

4. Particular Social Background to the Current PRC Arbitration Law at Its Time of Enactment

In order to better understand the rationale behind the PRC Arbitration Law's strict requirement that arbitration must be institutional, one needs to appreciate the Chinese political, social, and economic context at the time when the law was enacted. As described earlier, China instituted a planned economy system until 1978, when a shift towards a market economy began.³⁷¹ This transition, which is by no means an easy task and is still in progress even today, has had such a profound influence on China's society that it cannot be neglected in the study of China's legal system, including the arbitration system.

As noted earlier, in a planned economy, economic activity is strictly controlled by the government.³⁷² Dispute settlement processes are no exception.³⁷³ In contrast, this is exactly what arbitration, especially ad hoc arbitration, tries to avoid. One of the main reasons for business entities choosing ad hoc arbitration is to avoid government control as much as possible and to resolve their disputes in a private manner.³⁷⁴ Furthermore, the very nature of ad hoc arbitration, namely its flexibility and efficiency, makes it extremely difficult to govern or control closely.³⁷⁵ From the perspective of government control, therefore, a planned economy and ad hoc arbitration are naturally at odds.

³⁷¹ See THE LEGISLATIVE AFFAIRS COMMISSION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS, COMMENTARIES, *supra* note 130, at 1–2.

³⁷² See Donald C. Clarke, *What's Law Got to Do with It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 5 (1991).

³⁷³ See Clarke, *supra* note 354, at 250–251.

³⁷⁴ The development of arbitration in the western world evidences parties' desires to resolve disputes swiftly and equitably, drawing on the commercial expertise of guilds and other business entities without the involvement of courts. See discussion *supra* Section IV.B.1.

³⁷⁵ Wei-Jen Chen, *Separate but Equal in Arbitration? –An Analysis on Ad Hoc Arbitration of Taiwan*

The transition from a planned economy to a market economy is a journey from one extreme to another. At first, the Chinese government was rather cautious with reforms, as officials preferred small and steady progress to massive and drastic changes.³⁷⁶ In fact, the concept of arbitration itself was so new in China when the PRC Arbitration Law was enacted that, in one NPC official's mind, the law itself represented the "spirit of reform."³⁷⁷ As an example, for the PRC Arbitration Law to establish that arbitration commissions are independent of and not subordinate to any administrative authorities was an extremely decentralized move at that time.³⁷⁸ In this context, it is understandable that the Chinese legislature wanted to implement the reform slowly. A slower transition could allow the government enough time to gradually loosen its control over private business entities, and private business entities would in the interim develop experience and expertise with the new system. As compared with ad hoc arbitration, institutional arbitration undoubtedly serves this purpose better. It is much easier for the government to exercise some measure of control over the institutions, which, in turn, may exercise some measure of control over the arbitration cases. As a result, from the government's standpoint, it was much more acceptable to start the reform with institutional arbitration first, as a trial, before deciding whether to develop an ad hoc arbitration system as well.

Hence, when enacting the PRC Arbitration Law in 1994, the Chinese legislature did not necessarily intend to implement a flawless arbitration system. Instead, the legislators were only trying to establish a transitional, and admittedly imperfect,

and East Asia, 5 CONTEMP. ASIA ARB. J. 107, 120–121 (2012).

³⁷⁶ Osman Suliman, *Reform and Macroeconomic Stability in China: An Overview*, in CHINA'S TRANSITION TO A SOCIALIST MARKET ECONOMY 23, 24 (Osman Suliman ed., 1998).

arbitration system that better fit the then-existing social and economic background.

There have been encouraging signs that the Chinese government's view towards ad hoc arbitration may become more lenient. An NPC official has proposed that issues relating to ad hoc arbitration could be further studied in practice, and the PRC Arbitration Law could be perfected "after common ground has been reached."³⁷⁹ The author earnestly hopes this promising amity toward ad hoc arbitration becomes widely accepted, so that ad hoc arbitration will gain complete legitimacy under Chinese law.

IV REFLECTIONS ON AND SUGGESTIONS FOR CHINESE ARBITRATION LAW

A. *Chinese Law Should Not Use the Distinction Between Ad Hoc and Institutional Arbitration as a Standard to Determine Arbitration Agreements' Validity*

From a pragmatic standpoint, it may be unwise to base an arbitration agreement's validity on the distinction between ad hoc and institutional arbitration. Because the dividing line between these two types of arbitration is not always clear, sole reliance on this distinction may lead to complexity and uncertainty in practice.

1. The Distinction Between Ad Hoc and Institutional Arbitration May Be Vague in Some Cases

According to the definition given earlier in this dissertation,³⁸⁰ the standard used to distinguish ad hoc arbitration from institutional arbitration is whether a professional

³⁷⁷ See Hu, *supra* note 154.

³⁷⁸ See *id.*

³⁷⁹ *Id.*

³⁸⁰ See *supra* Chapter I, para. 2.

institution is involved in the process of arbitration. Upon closer examination, however, the issue may be more complicated.

The complication primarily results from arbitration institutions' different structures, working styles, and functions in arbitration proceedings. Some institutions, such as the ICC and CIETAC, adopt relatively "intrusive" approaches when administering arbitrations. These institutions tend to supervise arbitration proceedings more closely. For example, both the ICC and CIETAC provide frequent advice to tribunals on procedural matters and scrutinize draft awards before the tribunal renders a final decision.³⁸¹ Additionally, CIETAC affixes its official seal to the awards to indicate its authority.³⁸² These features make it fairly clear that arbitrations administered by such organizations are undoubtedly institutional.

There are, however, other institutions that do not administer arbitration proceedings in the ways that the ICC and CIETAC do. Instead, they work as organizing bodies providing services to arbitrators and parties to facilitate arbitrations that in every other respect would be considered ad hoc. Institutions of this kind may provide services such as appointing arbitrators and providing a venue for hearings, but they basically leave arbitration proceedings to the tribunals themselves.³⁸³ Usually, awards are not issued under the institutions' names either. The London Maritime Arbitrators Association (LMAA) offers a typical example of such an institution. On its official website, the LMAA describes itself as "... not administer[ing] or

³⁸¹ See generally 2012 ICC Rules of Arbitration, *supra* note 323; CIETAC Arbitration Rules, *supra* note 317.

³⁸² CIETAC Arbitration Rules, *supra* note 317, art. 47.4.

³⁸³ "Unlike the ICC, the AAA and CPR do not closely supervise their arbitrations." *A Primer on International Arbitration*, COVINGTON & BURLING, 6 (May 1998), <http://www.cov.com/files/Publication/f394b11c-381d-4838-a6e2>

supervis[ing] the conduct of arbitrations (unlike, for example, the Chambre Arbitrale Maritime in Paris, or the ICC International Court of Arbitration): the arbitrations [the LMAA's] members conduct remain ad hoc and are administered by the tribunals involved.”³⁸⁴ In light of this structure, it may be incorrect to classify arbitration under the LMAA as institutional even though an institution is technically involved.

Further, it is possible that other institutions could operate somewhere between the two extremes represented by the ICC and CIETAC at one end and the LMAA at the other. The foregoing discussion demonstrates the difficulty of clearly classifying arbitrations conducted by such institutions according to the dichotomy of ad hoc and institutional arbitration.

2. This Vagueness Will Likely Lead to Uncertain Results Under Chinese Law

Although the sometimes vague distinction between ad hoc and institutional arbitration usually does not bear any legal significance, as discussed earlier, such a delicate difference may pose difficult legal issues under the PRC Arbitration Law. For example, according to Li Jianqiang, before the Hong Kong International Arbitration Centre (HKIAC) changed its arbitration rules in 2005, that institution’s arbitrations were essentially ad hoc.³⁸⁵ Indeed, the awards, when rendered, only needed to be signed by the arbitrator(s); the HKIAC would not ordinarily affix its own seal to the awards.³⁸⁶ If the parties so wished, however, the institution might affix its

02812ed6b093/Presentation/PublicationAttachment/969db08e-5cc1-4f3f-a72e-034ca2c8e9b2/oid6181.PDF.

³⁸⁴ *What is the LMAA and What Does it Do?*, LONDON MAR. ARB. ASSOC., <http://www.lmaa.org.uk/faq.aspx> (last visited Mar. 8, 2013).

³⁸⁵ Li Jianqiang (李劍強), *Xianggang Zhongcai Jigou de Linshi Zhongcai ji Qi Qishi* (香港仲裁机构的临时仲裁及其启示) [*Ad Hoc Arbitrations at Hong Kong Arbitration Institutions and Their Indications*], 3 BEIJING ZHONGCAI (北京仲裁) [ARB. IN BEIJING] 82, 85, 93 (2006).

³⁸⁶ This can be different today. Article 30.5 of the current *Hong Kong International Arbitration*

seal to the award as proof that the arbitration award was rendered by arbitrator(s) appointed by the HKIAC.³⁸⁷

In this scenario, one might expect that an award affixed with the HKIAC's seal might give rise to some controversy before a Chinese court. On the one hand, it could be claimed that such an award is still ad hoc, since the mere fact that an arbitration is conducted by arbitrator(s) appointed by an institution does not necessarily make it institutional. On the other hand, it could also be argued that such an award should be treated as issued by an arbitration institution because an institution was involved in the process of arbitration. Particularly in China, where all arbitration institutions are heavily involved in arbitration proceedings, like the ICC and CIETAC, it would not be surprising if courts customarily presume that an arbitration is institutional as long as an institution's name appears on the award.

This analysis, however, may not always be relevant under Chinese law. On one hand, arbitration awards seated outside China will be enforced by Chinese courts according to the New York Convention, regardless of whether they are ad hoc or institutional.³⁸⁸ On the other hand, Chinese arbitration institutions are all of the intrusive type and no ad hoc arbitration is allowed under the PRC Arbitration Law, so all arbitrations seated in China and administered by Chinese arbitration institutions are indeed institutional.

If, however, parties place the seat of their arbitration in China while adopting the rules of a non-Chinese arbitration institution that takes a relatively hands-off approach,

Centre Administered Arbitration Rules reads, “[a]n award shall be affixed with the seal of the HKIAC.” See Hong Kong International Arbitration Centre Administered Arbitration Rules, art. 30.5, available at <http://www.hkiac.org/images/stories/arbitration/AA%20Rules.pdf>.

such as those of the LMAA, it remains undecided whether Chinese courts will treat this arbitration as ad hoc or institutional. The author has not yet found any case on point, but courts will likely have a large degree of discretion on this issue. Although a Chinese court may hold that the arbitration is non-domestic and that the PRC Arbitration Law therefore does not apply, if a court holds otherwise, the SPC will likely need to give direction on how to resolve the difficult issues presented by such a case.

As shown above, the distinction between ad hoc and institutional arbitration is sometimes vague and the difficulty in clearly defining this distinction may add considerable complexity and uncertainty to the determination of an arbitration agreement's validity. For that reason alone, such a distinction is counterproductive. As a result, the distinction between ad hoc and institutional arbitration should not be a proper ground on which to base the validity of an arbitration agreement. Thus, because the concept of institutional arbitration as such is not always clearly defined, the PRC Arbitration Law should not require that arbitration be institutional.

B. Historical Reasons for the Preclusion of Ad Hoc Arbitration in China No Longer Exist

As previously discussed, the real reasons why China refused to have ad hoc arbitration in the PRC Arbitration Law were essentially all related to China's historical social, economic, and political context, particularly at the time of the law's

³⁸⁷ Li, *supra* note 385, at 85.

³⁸⁸ See discussion *supra* Chapters III & IV.

promulgation in 1994.³⁸⁹ Today, however, most, if not all, of these reasons are no longer relevant.

First, the planned economy has basically been dismantled.³⁹⁰ Today, the Chinese government no longer plans all of the nation's economic affairs, and Chinese business entities do not receive directions on how to run their business operations. Instead, China is home to a growing, if imperfect, market economy.³⁹¹

Second, government centralization is declining.³⁹² The Chinese government no longer controls every aspect of society as it used to. Especially in the context of commercial activities, Chinese laws respect party autonomy as a principle.³⁹³ For dispute resolution mechanisms, parties are free to choose negotiation, mediation, (institutional) arbitration, or litigation.³⁹⁴ As such, the government does not become directly involved unless the parties so intend.

Third, it stands to reason that since 1994 Chinese business entities and legal practitioners have gained sufficient experience with arbitration. Arbitration is no longer a novel dispute resolution mechanism. Moreover, a large number of professional lawyers are helping their clients resolve commercial disputes. China now has many lawyers and arbitrators with extensive experience in arbitration.³⁹⁵

³⁸⁹ See discussion *supra* Section IV.B.3.

³⁹⁰ See XIANFA art. 15 (1982) (China) (stating that China practices a socialist market economy); Albert H.Y. Chen, *The Developing Theory of Law and Market Economy in Contemporary China*, in *LEGAL DEVELOPMENTS IN CHINA: MARKET ECONOMY & LAW* 3, 3-5 (Wang Guiguo & Wei Zhenying eds., 1996).

³⁹¹ See *id.*

³⁹² BIN LIANG, *THE CHANGING CHINESE LEGAL SYSTEM, 1978-PRESENT: CENTRALIZATION OF POWER AND RATIONALIZATION OF THE LEGAL SYSTEM* 70 (2008).

³⁹³ See, e.g., BING LING, *CONTRACT LAW IN CHINA* 40-41 (2002) (stating that the PRC Contract Law adopts freedom of contract as a basic principle).

³⁹⁴ See, e.g., Lo, *supra* note 134, at 1.

³⁹⁵ See generally *China Lawyer's Role in Domestic Arbitration and International Arbitration*, CHINA LAW. BLOG (Mar. 4, 2012, 2:04 PM), <http://www.chinalawblog.org/law-topics/legal-counsel/148-china-lawyers-role-in-domestic-arbitration-and-international-arbitration>.

C. China Needs Ad Hoc Arbitration

As discussed above, China should not maintain the distinction between ad hoc and institutional arbitration as a legal standard to determine the validity of an arbitration agreement. The historical analysis demonstrates that the current PRC Arbitration Law represents a tentative or interim legal framework that came into existence during the transition period from a planned to market economy. Because China's social context has radically changed and the major reasons for China's preclusion of ad hoc arbitration have disappeared, there exists no compelling argument against the full recognition of ad hoc arbitration in China's legal system if the country continues moving towards a market economy, remains active in the globalization process, and becomes more involved in the world's international commercial arbitration system.³⁹⁶

On the contrary, there are a number of reasons why China should adopt a complete ad hoc arbitration system. On a larger scale, having a good arbitration system may contribute to a country's economic development.³⁹⁷ Foreign investors

³⁹⁶ Complete legitimization of ad hoc arbitration in China has been discussed and supported by many Chinese scholars, despite some different opinions. See, e.g., Wang Yan (王岩) & Song Lianbin (宋连斌), *Shilun Linshi Zhongcai ji Qi Zai Woguo de Xianzhuang* (试论临时仲裁及其在我国的现状) [*Ad Hoc Arbitration and Its Current Status in China*], 1 BEIJING ZHONGCAI (北京仲裁) [ARB. BEIJING] 1 (2005) (China); Chen Fang (陈芳), *Woguo Chengren Linshi Zhongcai de Yingran Xing Fenxi* (我国承认临时仲裁的应然性分析) [*Analysis on Why China Should Recognize Ad Hoc Arbitration*], 4 LILUN GUANCHA (理论观察) [THEORETIC OBSERVATION] 128 (2006) (China); Huang Shan (黄珊), *Woguo Jianli Linshi Zhongcai Zhidu de Sikao* (我国建立临时仲裁制度的思考) [*On the Establishment of China's Adhockery [sic] Arbitration System*], 12 HA'ERBIN XUEYUAN XUEBAO (哈尔滨学院学报) [J. HARBIN U.] 52 (2006) (China); Hao Haiqing (郝海青), *Zai Woguo Jianli Linshi Zhongcai Zhidu de Falü Sikao* (在我国建立临时仲裁制度的法律思考) [*Legal Thinking on Establishing Ad Hoc Arbitration System in China*], 2 ZHONGGUO HAIYANG DAXUE XUEBAO (SHEHUI KEXUE BAN) (中国海洋大学学报(社会科学版)) [J. OCEAN UNIV. CHINA (SOC. SCI.)] 95 (2003) (China) (for opinions supporting such legitimization). But see, e.g., Liu Maoliang (刘茂亮), *Linshi Zhongcai Yingdang Huanxing* (临时仲裁应当缓行) [*Ad Hoc Arbitration Should be on Hold*], 1 (北京仲裁) BEIJING ZHONGCAI [ARB. BEIJING] 8 (2005) (China); Ye Xiaochun (叶晓春), *Lun Zhongguo Dui Linshi Zhongcai Zhidu Yingyou de Lixing yu Taidu* (论中国对临时仲裁制度应有的理性与态度) [*China's Proper Rationality and Attitude Towards Ad Hoc Arbitration System*], 5 YUNNAN CAIMAO XUEYUAN XUEBAO (SHEHUI KEXUE BAN) (云南财贸学院学报(社会科学版)) [J. YUNNAN FIN. & ECON. U.] 116 (2006) (China); Gong Xiaoning (宫晓凝), *Qianxi Linshi Zhongcai Zhidu Zai Woguo de Goujian* (浅析临时仲裁制度在我国的构建) [*Analysis on the Construction of Ad Hoc Arbitration System in China*], 30 FAZHI YU SHEHUI (法制与社会) [LEGAL SYS. & SOC'Y] 53 (2008) (China) (for opinions against such legitimization).

³⁹⁷ See generally, Eric A. Schwartz, *The Role of International Arbitration in Economic Development*,

and merchants are generally concerned about how future disputes will be resolved when making international investments or conducting international transactions.³⁹⁸ In order for foreign parties to be assured that their rights and interests will be protected, an efficient and just dispute resolution mechanism is essential.³⁹⁹ Because arbitration serves as the dominant dispute resolution mechanism for international commercial disputes,⁴⁰⁰ having a complete, efficient, and effective arbitration system may help attract foreign investments and transactions. By limiting the scope of ad hoc arbitration, the current Chinese arbitration system surely has, at least to some extent, deterrent effects for foreign business entities.⁴⁰¹ As a result, adopting a complete ad hoc arbitration system will help attract foreign business as much as possible, and will thus benefit China's further economic development.

When designing a good arbitration system, it is hard to see why ad hoc arbitration should not be part of it. The consensual nature of arbitration is most consistent with allowing the parties to decide what kind of arbitration procedure they want. Because of its obvious advantages, there will always be parties who want to choose ad hoc arbitration. Therefore, a complete and efficient arbitration system should allow parties to choose ad hoc arbitration when it best fits their needs, especially if there is no reasonable policy reason for precluding that option. Moreover, in the field of international commercial arbitration, the world is closely connected. A national

¹² INT'L TRADE & BUS. L. REV. 127 (2009).

³⁹⁸ See *id.* at 127–128.

³⁹⁹ See *id.* at 128.

⁴⁰⁰ See BÜHRING-UHLE ET AL., *supra* note 1, at 27; Aksen, *Arbitration*, *supra* note 1, at 287–288.

⁴⁰¹ At the very least, the PRC Arbitration Law has prompted numerous international law firms to write guides to advise their clients on the potential pitfalls of arbitration in China. While undoubtedly impossible to calculate the added cost of these undertakings, one can reasonably assume that such efforts have consumed significant energy and resources solely because of China's unusual position against ad hoc arbitration. See generally, e.g., CHINESE ARBITRATION: A SELECTION OF PITFALLS

law's special or bizarre provisions and practices, like the preclusion of ad hoc arbitration under Chinese law, may create complex scenarios and produce unexpected outcomes through its dissonance with the international system. In order to have a stable and efficient arbitration system, China needs to bring its law into line with international practice so that China may integrate more fully into the international commercial arbitration system.

Last but not least, if China fully endorses ad hoc arbitration, especially by allowing ad hoc arbitration seated in China, one can naturally assume this will bring more business for Chinese arbitration practitioners and those in related industries. Such business opportunities will certainly be beneficial for China's economic growth.

D. How Should China Construct a Complete Ad Hoc Arbitration System?

The next question for China is how to fit ad hoc arbitration into its current legal framework. Unsurprisingly, the first step should be to eliminate the requirement that parties must appoint an arbitration institution in their arbitration agreement. An arbitration agreement should be valid irrespective of whether parties agree to submit their dispute to an arbitration institution or an ad hoc tribunal. Completely legitimizing ad hoc arbitration under Chinese law, however, involves more than simply getting rid of this requirement.

The second step would be to provide support mechanisms for ad hoc arbitration in the law. Issues that need to be addressed include, among others, who will be the appointing authority absent parties' specific agreement, who will have authority to decide challenges of arbitrators, and what provisional measures are available.

(Ass'n for Int'l Arbitration ed. 2009); Sherwin, *supra* note 292; Tao, *supra* note 151.

Moreover, Chinese legislators may want to add detailed provisions to the PRC Arbitration Law regarding certain procedural matters in ad hoc arbitration proceedings. This will be a consistent approach, because the PRC Arbitration Law currently has a chapter regarding procedural matters in institutional arbitration proceedings.⁴⁰² Possible procedural matters that the legislators may want to add include the time period for and method of serving notice, arbitrator's fees, and default awards. Because these matters are usually provided for in the arbitration rules that parties agree on,⁴⁰³ it would be preferable for the Chinese legislature to provide that the rules to be added in the PRC Arbitration Law will apply as a minimum standard for due process, while giving parties the right to override them as long as due process is respected.

Third, the law needs to ensure that ad hoc arbitration is guaranteed the same safeguard mechanisms as institutional arbitration. For example, an ad hoc tribunal's decision to take interim measures should receive the same prompt and effective support from courts as those made in institutional arbitration. Moreover, courts should treat ad hoc arbitration as equal to institutional arbitration. They should not be prejudiced against institutional arbitration in cases where, among others, a party challenges an arbitral tribunal's jurisdiction, requests to set an award aside, or petitions to enforce an award.

Finally, one cannot overlook the fact that because the PRC Arbitration Law is premised on arbitration in China only being institutional, many of the statute's rules

⁴⁰² See Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), ch. 4 (China) (English translation provided by the National People's Congress, available at <http://www.npc.gov.cn/englishnpc/Law/2007->

are designed accordingly. For example, under the PRC Arbitration Law, the jurisdiction of a court in a set-aside procedure is decided by the residence of the arbitration commission;⁴⁰⁴ the arbitrability issue is decided by the arbitration commission rather than the tribunal;⁴⁰⁵ and the official seal of the arbitration commission must be affixed to the award.⁴⁰⁶ As a result, incorporation of ad hoc arbitration entails a complete and systematic revision of the PRC Arbitration Law. This is before even considering the fact that many other related Chinese laws, such as the PRC Civil Procedure Law, all share this same presumption that arbitration is institutional.⁴⁰⁷ As such, whenever a Chinese law involves arbitration agreements or awards, it invariably presumes that they are institutional. Accordingly, completely legitimizing ad hoc arbitration under Chinese law requires a complete review and revision of not only the PRC Arbitration Law, but also of all other relevant laws.

12/12/content_1383756.htm).

⁴⁰³ See generally UNCITRAL Arbitration Rules, *supra* note 8.

⁴⁰⁴ Zhongcái Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 58 (China) (English translation provided by the National People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm).

⁴⁰⁵ *Id.* art. 20.

⁴⁰⁶ *Id.* art. 54.

⁴⁰⁷ Minshí Susòng Fa (民事诉讼法) [Civil Procedure Law] (promulgated by Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, revised Aug. 31, 2012) art. 257 (China) (English translation provided by the National People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383880.htm).

CHAPTER SIX:

CONCLUSION

Arbitration plays a very important role in today's world. It is the preferred method for resolving international commercial disputes. Nevertheless, it has a very long history. It even predates concepts such as the state, government, or courts. It originated when two people had a dispute, and wanted to find a third person to make a decision who was neutral, respectable, knowledgeable, and wise. In both the western world and in China, this primitive form of dispute resolution was the origin of arbitration.

That being said, arbitration in China followed a very different development path compared to that of the western world. In the west, arbitration developed in a bottom-up fashion. Private parties, particularly merchants, were not willing to go to court to resolve their disputes. This was either because the then existing court system was incompetent, too expensive, or not neutral enough. Rather, they found arbitration as a neutral, efficient, economical, and trustworthy dispute resolution mechanism. Later, laws and judges began to recognize this private method of dispute resolution as legally binding.

In China, however, arbitration had a different development story. It was adopted by the Chinese government in a top-down manner. Different Chinese governments, at different times throughout history, chose to establish arbitration institutions to resolve commercial disputes when courts were not competent enough to do so. Party autonomy was not the prominent reason why Chinese parties chose arbitration. They

chose arbitration largely because it was the only viable option.

These historical differences have significant consequences. For example, because of its top-down manner, Chinese arbitration has predominantly favored institutional arbitration to ad hoc arbitration. The PRC Arbitration Law does not even allow ad hoc arbitration. The Law does not pay enough attention to party autonomy either. For example, a Chinese court will invalidate an ad hoc arbitration agreement, even when there is clear indication of the parties' intention to arbitrate their dispute.

Many comparative law scholars have proposed legal transplant theories to study the borrowing of legal rules and institutions across national borders. Arbitration, as a legal institution, was indeed borrowed from the western world and transplanted into China. Arbitration's history in China proves that legal transplant is indeed possible. Legal transplant, however, is much more complicated than a simple insertion of a foreign legal concept. It requires much more work by the legal elites in the receiving country. Arbitration's history in China also shows that legislators in the receiving country may borrow a law or a legal institution and use it for a slightly different purpose. They may actively tailor the law or the legal institution to fit their practical needs. Borrowers should be very careful with this tailoring, because changes that seem small and insignificant at first may end up creating complicated legal issues after the legal transplant is completed. Sometimes, the special rules that result from this tailoring may be difficult for those who do not know the original concept's background to understand fully the rationale behind a certain special rule.

This historical background has led to many important present day issues. The

preclusion of ad hoc arbitration under Chinese law has resulted in many complex and uncertain issues in legal practice. Parties need to be mindful of these issues to avoid possible pitfalls, which certainly stand in their way when they think about how to efficiently and effectively resolve their disputes both inside and outside of China. Because the social, political, and economic contexts that historically shaped this peculiar, and even bizarre, rule do not exist in today's China anymore, and because having ad hoc arbitration will benefit China on the whole, Chinese legislators should fully legitimize ad hoc arbitration under Chinese law.

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