Enforceability of Ad Hoc Arbitration Agreements in China: China's Incomplete Ad Hoc Arbitration System

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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 People's Republic of China 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. Given arbitration's "international" nature, parties can freely agree to arbitrate outside China where ad hoc arbitration is accepted and/or choose a different law to govern their arbitration agreement's validity when arbitrating inside China. The Supreme People's Court of China respects such contractual freedom and adopts a choice-of-law rule that enables Chinese courts to enforce many ad hoc arbitration agreements. A comparative study of arbitration's 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.

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Introduction

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 procedures for a given arbitration."[4]

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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, 287–88 (David N. Goldsweig & Roger H. Cummings eds., 1990) [hereinafter Aksen, *Arbitration*].

2. *See* BÜHRING-UHLE, KIRCHHOFF, & SCHERER, *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).

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.*

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] However, institutional arbitration 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 accurately compare 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.

Generally speaking, ad hoc arbitration is more flexible, more efficient, and usually more cost-effective.[7] More importantly, the promulgation of the UNCITRAL Arbitration Rules in 1976 greatly facilitated ad hoc arbitration in practice.[8] Instead of having to draft detailed rules either in advance or after a dispute arises, parties can now easily incorporate this set of comprehensive and well-prepared rules by reference in 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. Arbitration institutions provide professional services in connection with the arbitration and usually have a lot of experience.[10] The institutions' arbitration rules are usually well drafted and are constantly amended to meet changes in practice.[11] Parties can also easily adopt institutions' standard arbitration clauses as their arbitration agreement, and courts will typically defer to such clauses. 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 the institution, as a neutral third party, usually supervises the process and has specific rules that better preserve due process.[12]

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5. *See* discussion *infra* Part III.B.

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, *Maozhong Shouan Shuliang Chixu Zengzhang* (贸仲受案数量持续增长) [*Number of Cases Accepted by CIETAC Continues to Increase*]; Fazhi Ribao (法制日报) [Legal Daily], Feb. 5, 2010 (China).

7. For more on the advantages of ad hoc arbitration, see Asken, *Ad Hoc*, *supra* note 3, at 8.

8. 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.

9. *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 Commerce, International Arbitration § I.E (last revised Mar., 2005), http://www.osec.doc.gov/ogc/occic/arb-98.html.

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

12. *Id.* at 12.

The People's Republic of China (PRC), as an emerging economic superpower, is an active player in the field of international commercial arbitration. 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, ad hoc arbitration agreements are invalid per 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.

Interestingly, the strict 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 and/or to choose a law other than the PRC Arbitration Law to govern the validity of their arbitration agreement when arbitrating inside China.[15] Such contractual freedom is respected by Chinese courts.[16] Consequently, many ad hoc arbitration agreements have indeed been enforced

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

15. *See infra* Part I.B.2.

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).

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.

Part I of this Article will discuss in more detail when a Chinese court will, and when it will not, enforce an ad hoc arbitration agreement. Part II will analyze Chinese court practice in enforcing or rejecting ad hoc arbitration agreements and put forward a critique of that practice. Part III will, starting from a historical perspective, explore the reasons behind China's hostility towards ad hoc arbitration. Part IV will argue that China should incorporate a complete ad hoc arbitration system into its arbitration law and will suggest that making this change in Chinese law will not be easy because it calls for a whole-scale rewriting of the current PRC Arbitration Law, as well as for revisions of a broad range of related Chinese laws. The Article ends with a brief conclusion.

I. Rejection and Enforcement of Ad Hoc Arbitration Agreements in China

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 . . . ."[18]

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.[19] Accordingly, ad hoc arbitration agreements are invalid under PRC law. However, not all arbitration agreements enforced in China 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 enforced in China in a great many

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).

18. New York Convention, *supra* note 14, art. I.

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/2007-12/12/content_1383756.htm).

instances.[20] To achieve this result, however, 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.

A. Rejection of Ad Hoc Arbitration Agreements Under Chinese Law

1. *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*.[21]
>
> . . . .
>
> 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 shall be null and void.[22]

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.[23] 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.[24]

2. *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

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20. *See infra* Part I.B.2.

21. 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).

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

23. *See infra* Part II.B for a more detailed discussion.

24. *Id.*

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.[25] Of course, if the arbitration seat is in China, meaning the New York 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.[26] 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?[27]

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.

B. Enforcement of Ad Hoc Arbitration Agreements in China Under Non-Chinese Law

Although under the PRC Arbitration Law an ad hoc arbitration agreement is 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.[28]

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25. *See* New York Convention, *supra* note 14, art. I(2); Tietie Zhang, *Enforcing Ad Hoc Arbitration Awards Under Chinese Law* (unpublished manuscript) (on file with author).

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

27. For a full analysis of the enforcement of ad hoc arbitration awards made in China, see Zhang, *supra* note 25.

28. *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).

1. 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*").[29] 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 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.[30] 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.[31] However, "[t]here is little uniformity among either arbitral tribunals or national courts in choosing between these alternatives."[32] 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.[33] 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

29. *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.

30. *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).

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

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

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

factor to this choice-of-law issue.[34] 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 depends solely on the parties' intent and not on any national law.[35]

2. *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,[36] then that chosen law shall apply.[37] 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.[38] 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, i.e. Chinese law, shall apply.[39]

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 arbi-

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

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

36. 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).

37. 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]; art. 58; Zuigao Renmin Fayuan Guanyu Sichuan Huahong Guoji Jingji Jishu Touzi Youxian Gongsi Su Hanguo Hanhua Zhushihuishe Maimai Hetong Jiufen Yi'an 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, effective Aug. 24, 2007) (China).

38. *See* sources cited *supra* note 37.

39. *See id.*

tration 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.[40] 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,"[41] 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 it 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 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.

3. *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 Letter[42] 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

40. 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).

41. *Id.*

42. 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.

should be recognized in principle. The court shall not accept the case.[43]

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." However, in the above paragraph, 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."[44]

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.

In 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.[45]

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43. 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) (translation by author).

44. *Id.*

45. *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).

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 the SPC adopted 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 (i.e., 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 Article, 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*.[46] 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 action absent explicit statutory authorization.[47] 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.[48]

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.[49]

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. However, choosing a foreign *lex arbitri* itself is a highly complex issue that may cause other potential risks and therefore is a rare choice for parties in practice.[50] 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 disastrous for the claimant if the defendant chooses to obstruct arbitration. On the 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.

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46. For a more detailed analysis of possible outcomes of ad hoc arbitrations with their seats in Chinese territory, see Zhang, *supra* note 25.

47. *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).

48. *See* Zhang, *supra* note 25.

49. *Id.*

50. *See* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 292 (1981); Peter Sherwin et al., *The Decision to Arbitrate*, PROSKAUER ON INT'L LITIG. & ARB., ch. 19, pt. V, § A, http://www.proskauerguide.com/arbitration/19/V (last visited Mar. 8, 2013).

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 applying 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.[51] 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, i.e., 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 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 valid-

51. *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 23, 2007, effective Aug. 8, 2007), art. 8 (China).

ity 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 arbitration agreement's validity rather than the substance of the container contract.[52] 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*.[53] Of course, such practice "is not to be recommended as it may lead to inextricable complications,"[54] 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. However, if parties, 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 (i.e., Chinese law) will determine the validity of the ad hoc arbitration agreement.[55] 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 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.

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52. *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).

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

54. VAN DEN BERG, *supra* note 50, at 292.

55. *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) (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).

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, a Chinese court will enforce such an arbitration agreement because parties' specific choice takes priority over the seat law under the SPC's rule.[56]

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.[57] 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.[58] In any case, at least in theory, ad hoc arbitration with the seat in Chinese territory is permitted by the SPC's own rule.[59]

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

56. *Id.*

57. *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 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).

58. *See* Zhang, *supra* note 25.

59. *See id.*

apply."[60] In its reply letter regarding this case, the SPC instructed the lower court to hold the arbitration agreement invalid.[61] First, the SPC found that the parties did not specifically choose any law to govern the validity of the arbitration agreement, but they did choose Shanghai as the seat of arbitration.[62] 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.[63] Since no arbitration institution was chosen, the arbitration agreement was held invalid in accordance with the PRC Arbitration Law.[64]

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"[65] 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 of arbitrators, and scrutiny of the award, which unequivocally indicates that application of the ICC Rules means that the ICC should administer the arbitration.[66] 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 inten-

60. Deguo Xupulin Guoji Youxian Zeren Gongsi yu Wuxi Woke Tongyong Gongcheng Xiangjiao Youxian Gongsi Shenqing 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).

61. Zuigao Renmin Fayuan Guanyu Deguo Xupulin Guoji Youxian Zeren Gongsi yu Wuxi Woke Tongyong Gongcheng Xiangjiao Youxian Gongsi Shenqing 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 Concerning the Case in Which Züblin International GmbH and Wuxi Woco Gen. Engineering 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).

62. *Id.*

63. *Id.*

64. *Id.*

65. *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).

66. *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.

tion is to choose the ICC as the arbitration institution. Of course, an exception would be 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.[67]

In 2006, two years after *Züblin*, 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 SPC Arbitration Law Interpretation reads, "[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*."[68] This language appears favorable for arbitration agreements similar to the one in *Züblin*.[69] 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.[70] 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.

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67. *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).

68. 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).

69. Deguo Xupulin Guoji Youxian Zeren Gongsi yu Wuxi Woke Tongyong Gongcheng Xiangjiao Youxian Gongsi Shenqing 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).

70. *See generally* 1998 ICC Rules of Arbitration, *supra* note 66.

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.[71] In this case, the SPC focused on the fact that the parties did not draft their arbitration agreement using the language of the ICC's special standard clause for arbitration in mainland China.[72] 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.[73] As a result, the arbitration agreement was held invalid.[74] 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."[75] 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.[76] This is apparent from the standard arbitration clauses drafted by various arbitration institutions, including the ICC.[77] These standard arbitration clauses are accepted by most of the world's jurisdictions as valid arbitration agreements.[78] Moreover, not all institutions' rules use the same clear

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

72. *Id.*

73. *Id.*

74. *Id.*

75. 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.

76. 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.

77. *See Standard ICC Arbitration Clauses*, *supra* note 65.

78. 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.

wording as CIETAC's rules with respect to ascertaining the administering body.[79] 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,[80] then a court could reasonably conclude that no arbitration institution could be ascertained according to the agreed arbitration rules. However, if such agreed rules clearly refer to an institution to administer the arbitration, 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 ICC] is the only body authorized to administer arbitrations under the Rules . . . ."[81] Although not as explicit as the wording in the CIETAC Rules, this language strongly supports a holding that the ICC, as an arbitration institution, could be ascertained according to its own Rules. However, it is overly optimistic 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.[82] Chinese courts, however, do not permit the parties to implement such a

See YVES DERAINS & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 388 (2d ed. 2005).

79. CIETAC Arbitration Rules, *supra* note 75, art. 4.4.

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

81. 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/.

82. *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).

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."[83] Accordingly, a resisting party in 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 blindly invalidate 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.[84] By requiring that parties 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 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,

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83. 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. 5 (China).

84. 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).

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 National People's Congress of the People's Republic of China (the NPC)[85] 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.[86]

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. Further-

85. The NPC is the highest organ of state power in the PRC. The NPC and its permanent body, the Standing Committee, exercise the legislative power of the PRC. *See* XIANFA arts. 58-59 (1982) (China).

86. QUANGUO RENDA CHANGWEIHUI FAZHI GONGZUO WEIYUANHUI (全国人大常委会法制工作委员会) [THE LEGISLATIVE AFFAIRS COMM'N OF THE STANDING COMM. OF THE NAT'L PEOPLE'S CONG. OF THE PEOPLE'S REPUBLIC OF CHINA], 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] 38 (1997).

more, there is no indication that the use of ad hoc arbitration is declining. Due to their distinctive characteristics, ad hoc and institutional arbitration complement each other and coexist in the international commercial field.[87] 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.[88] 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 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.[89] 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 obviously has a very long history in Western cultures, which can be evidenced even in various myths and legends.[90] It is doubt-

87. *See* discussion *supra* Part I.

88. *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.

89. For a much fuller discussion on the history of arbitration in both the western world and China, see Tietie Zhang, *Legal Transplant of Arbitration in China* (unpublished manuscript) (on file with author).

90. *See generally* LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 2:1 (3d ed. 2003, rev. ed. 2012); FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS

ful 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.[91] 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 way of dispute resolution in both Greece and Rome.[92] From Rome, arbitration was carried to the whole of Europe.[93] In many European countries during medieval times, arbitration became well established in commercial and maritime fields.[94] As time went on, arbitration's advantages over litigation made it increasingly favored by 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.[95]

There was a period when courts were hostile towards arbitration in general,[96] 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.[97]

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 origins as ancient as those in the West,[98] arbitration in China had

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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).

91. *See* THOMAS OEHMKE, COMMERCIAL ARBITRATION 17 (1987).

92. *See* EDMONSON, *supra* note 90, §§ 2:2–2:3.

93. *See id.* § 2:3.

94. *See generally id.* § 2:4.

95. *See id.* § 2:4.

96. *See* KELLOR, *supra* note 90, at 5–6; OEHMKE, *supra* note 91, at 19.

97. For example, 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).

98. *See* Deng Ruiping (邓瑞平) & Sun Zhiyu (孙志煜), *Lun Guoji Shangshi Zhongcai de Lishi Yanjin* (论国际商事仲裁的历史演进) [*Historical Progress of International Com-*

remained in its primitive form for an excessively long time, up until the beginning of the twentieth century.[99] 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.[100] 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.[101]

In the wake of the Opium Wars[102] of the mid-nineteenth century, rulers of the Qing Dynasty[103] were forced to open China to the world and allow Chinese parties to engage in commercial activities with business entities from foreign countries.[104] 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.[105] As commercial activity boomed, the number of commercial disputes also increased. It turned out, however, that the 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.[106] Attempting to solve the problem, the Qing

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mercial 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).

99. *See id.* at 94.

100. *See id.*

101. 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).

102. 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*, ENCLYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/430163/Opium-Wars (last visited Mar. 8, 2013).

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

104. *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.

105. *See* Ren Yunlan (任云兰), *Lun Jindai Zhongguo Shanghui de Shangshi Zhongcai 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).

106. *See* Ren, *supra* note 105, at 117; Zheng Chenglin (郑成林), *Jindai Zhongguo Shangshi Zhongcai 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, 123–25 (2002) (China).

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.[107]

A similar system was kept in place by the Republic of China after the rulers of the Qing Dynasty were overthrown in 1911.[108] At that time, chambers of commerce created divisions of commercial arbitration as subsidiary organizations where commercial cases would be "arbitrated."[109] 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.[110]

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.[111] Under this system, business entities no longer made independent decisions regarding their own business 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.[112] Arbitration in China during this historical period was limited to foreign-related economic disputes, namely commercial disputes between Chinese parties and foreign parties.[113] 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.[114]

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

108. *See* JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 1 (2d ed. 2008); *Qing Dynasty*, *supra* note 103.

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

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

111. 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).

112. *See* Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 250 (1991); Vai Io Lo, *Arbitration of Commercial Disputes in China*, MD. SERIES IN CONTEMP. ASIAN STUD., no. 5, 2001 at 1, 4, *available at* http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1165&context=mscas.

113. *See* TAO, *supra* note 108, at 8–9.

114. *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)

Yet, starting in the late 1970s, China began to adopt a "reform and opening-up policy."[115] The highly centralized planned economy was gradually dismantled, and a transition toward a market economy began.[116] 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.[117] 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.[118] Various laws and regulations endowed certain government offices with the power to "arbitrate" disputes.[119] In addition, these laws established, as subsidiaries of government bodies, some "arbitration institutions" to hear

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[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, effective June 21, 1988) (China).

115. *See* Lo, *supra* note 112, at 2–3.

116. *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.

117. 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] 9–10 (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 Cong.] & 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).

118. *See id.*

119. *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).

commercial disputes.[120]

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,"[121] because they were "executing the authority to arbitrate on behalf the country"[122] and their "awards represent[ed] the country's will."[123] 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.[124] 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.[125]

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.[126] Institutional arbitration appeared much later and aimed to provide professional services to parties and arbi-

120. *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).

121. 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).

122. *Id.*

123. *Id.*

124. *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).

125. 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 4–5.

126. *See* discussion *supra* Part III.B.1.

trators as commercial disputes became much more frequent.[127] 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.[128] 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, i.e., a dispute resolution mechanism that was urgently needed to resolve commercial disputes in an environment of rapidly increasing commercial activities. For this purpose, the Chinese government would probably satisfy 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.

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 the law was enacted. As described earlier, China instituted a planned economy system until 1978, when a shift towards a market economy began.[129] 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.[130] Dispute settlement processes are no exception.[131] 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

127. *Id.*

128. *See* discussion *supra* Part III.B.2.

129. 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.

130. *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).

131. *See* Clarke, supra note 112, at 250–51.

possible and to resolve their disputes in a private manner.[132] Furthermore, the very nature of ad hoc arbitration, namely its flexibility and efficiency, makes it extremely difficult to closely govern or control.[133] From the perspective of government control, therefore, a planned economy and ad hoc arbitration are naturally at odds.

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.[134] 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."[135] 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.[136] 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 develop experience and expertise with the new system in the interim. 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, 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."[137] The author earnestly hopes this

132. 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* Part III.B.1.

133. Wei-Jen Chen, *Separate but Equal in Arbitration? –An Analysis on* Ad Hoc *Arbitration of Taiwan and East Asia*, 5 CONTEMP. ASIA ARB. J. 107, 120–21 (2012).

134. 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).

135. Hu Kangsheng, *Zhongcai de Benzhi Shi Minjian Xing* (仲裁的本质是民间性) [*The Nature of Arbitration is Private*], FAZHI RIBAO (法制日报) [LEGAL DAILY], Sept. 8, 2004 (China.).

136. *Id.*

137. *Id.*

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 Article,[138] the standard used to distinguish ad hoc arbitration from institutional arbitration is whether a professional 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.[139] Additionally, CIETAC affixes its official seal to the awards to indicate its authority.[140] 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.[141] Usually, awards are not issued under the institutions' names, either. The London Maritime Arbitrators Association (LMAA) offers a typical example of such an institution.

138. *See supra* Part I, para. 2.

139. *See generally* 2012 ICC Rules of Arbitration, *supra* note 81; CIETAC Arbitration Rules, *supra* note 75.

140. CIETAC Arbitration Rules, *supra* note 75, art. 47.4.

141. "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-a6e2-02812ed6b093/Presentation/PublicationAttachment/969db08e-5cc1-4f3f-a72e-034ca2c8e9b2/oid6181.PDF.

On its official website, the LMAA describes itself as ". . . not administer[ing] or 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."[142] 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.[143] 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.[144] However, if the parties so wished, the institution might affix its seal to the award as proof that the arbitration award was rendered by arbitrator(s) appointed by the HKIAC.[145]

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

142. *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).

143. Li Jianqiang (李剑强), *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 BEJING ZHONGCAI (北京仲裁) [ARB. IN BEIJING] 82, 85, 93 (2006).

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

145. Li, *supra* note 143, at 85.

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 the 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.[146] 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, 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 promulgation in 1994.[147] Today, however, most, if not all, of these reasons are no longer relevant.

First, the planned economy has basically been dismantled.[148] Today, the Chinese government no longer plans all of the nation's economic

146. For enforcement of ad hoc arbitration agreements, see *supra* Part II; for enforcement of ad hoc arbitration awards, see Zhang, *supra* note 25 (forthcoming).

147. *See* discussion *supra* Part III.B.3.

148. *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).

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.[149]

Second, government centralization is declining.[150] 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.[151] For dispute resolution mechanisms, parties are free to choose negotiation, mediation, (institutional) arbitration, or litigation.[152] 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.[153]

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.[154]

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149. *See id.*

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

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

152. *See, e.g.*, Lo, *supra* note 112, at 1.

153. *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.

154. 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); 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); 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] *Arbitra-*

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.[155] Foreign investors and merchants are generally concerned about how future disputes will be resolved when making international investments or conducting international transactions.[156] 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.[157] Because arbitration serves as the dominant dispute resolution mechanism for international commercial disputes,[158] 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.[159] 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

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tion System], 12 Ha'erbin Xueyuan Xuebao (哈尔滨学院学报) [J. Harbin U.] 52 (2006); 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 an 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) (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); 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); 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 an Ad Hoc Arbitration System in China*], 30 Fazhi yu Shehui (法制与社会) [Legal Sys. & Soc'y] 53 (2008) (for opinions against such legitimization).

155. *See generally,* Eric A. Schwartz, *The Role of International Arbitration in Economic Development*, 12 Int'l Trade & Bus. L. Rev. 127 (2009).

156. *See id.* at 127–28.

157. *See id.* at 128.

158. *See* Bühring-Uhle, Kirchhoff, Scherer, *supra* note 1, at 27; Aksen, *Arbitration*, *supra* note 1, at 287–88.

159. 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 (Ass'n for Int'l Arbitration ed. 2009); Sherwin et al., *supra* note 50; Tao, *supra* note 108.

policy reason for precluding that option. Moreover, in the field of international commercial arbitration, the world is closely connected. A national 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. Moreover, the 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.[160] Possible procedural matters that the legislators may want to add include the time period for and method of serving notice, arbitrator's fees, default awards, and so on. Because these matters are usually provided for in the arbitration rules that parties agree on,[161] 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.

160. *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/2007-12/12/content_1383756.htm).

161. *See generally* UNCITRAL Arbitration Rules, *supra* note 8.

Third, the law needs to ensure that ad hoc arbitration will obtain 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 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;[162] the arbitrability issue is decided by the arbitration commission rather than the tribunal;[163] the official seal of the arbitration commission must be affixed to the award[164] and so on. 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.[165] 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 all other relevant laws.

Conclusion

The PRC Arbitration Law requires that parties appoint an arbitration institution in their arbitration agreement.[166] Ad hoc arbitration agreements, therefore, are invalid under this law. In practice, however, the Chinese Supreme People's Court has adopted a choice-of-law rule ensuring that ad hoc arbitration agreements will be enforced by Chinese courts if the parties have explicitly chosen a non-Chinese law to govern the arbitration agreement's validity or place the seat of the ad hoc arbitration outside

162. 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) (English translation provided by the National People's Congress, *available at* http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm).

163. *Id.* art. 20.

164. *Id.* art. 54.

165. Minshi Susong 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).

166. 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).

Chinese territory.[167] Although not perfect, this validity-preferring and pro-arbitration approach should be encouraged.

The real reasons behind the PRC Arbitration Law's hostility toward ad hoc arbitration seem closely related to arbitration's historical development in China, as well as to China's social and economic structures at the time of the law's promulgation, particularly China's transition from a planned economy to a market economy.[168] At present however, all those reasons essentially no longer exist. As China actively participates in the globalization process, it is becoming more closely connected with the international community. Because having a good arbitration system contributes to a country's economic development and because the international commercial arbitration system based on the New York Convention is highly interconnected, the existence of this unreasonable requirement in the PRC Arbitration Law is surely counterproductive for the further development of the Chinese arbitration field and China's continued economic development. As a result, changing this unusual requirement is necessary for China.

Complete incorporation of ad hoc arbitration into Chinese law, however, requires much more than the simple elimination of the PRC Arbitration Law's requirement that all arbitration agreements must be institutional. Because of Chinese law's presumption that all arbitrations seated in China are institutional, the complete incorporation of ad hoc arbitration requires a systematic and perhaps even whole-scale rewriting of the PRC Arbitration Law, as well as the revision of many other related Chinese laws.

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167. *See* discussion *supra* Parts I.B.2., II.A.1.
168. *See* discussion *supra* Part III.B.4.