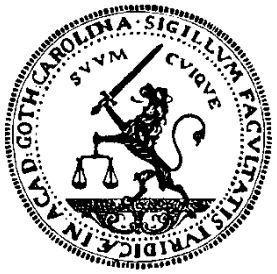

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Arbitration in China

Modern Dispute Resolution in Cultural Clothing

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Contents

Summary

Arbitration has for a long time been the common dispute resolution method used in commercial disputes relating to China. The Chinese arbitration system has developed from vastly different origins than its Western counterparts, and thus certain Chinese characteristics are prevalent in the system. This paper aims at identifying the cultural and historical roots for these characteristics and examine how they affect the modern arbitration practice in China today, specifically in regard to the recognition and enforcement of arbitral awards, as many legal practitioners allege that this is one of the greatest obstacles related to arbitration in China.

The most prominent unique features of the Chinese arbitration system are the separation of domestic and foreign-related disputes into dual tracks in the legislation and arbitration practice, the substantial administrative intervention and governmental influence, the non-recognition of ad hoc arbitration and the fondness and promotion of amicable dispute resolution. There are also some peculiar legislation features such as vagueness and ambiguity as well as inconsistency in the implementation.

The author identifies three main factors shaping the Chinese arbitration system: the Confucian heritage, influences from a communist era with planned economy, and a young modern arbitration system which is still in development. These factors explain virtually all the Chinese characteristics identified and addressed in this thesis. The author concludes that the Chinese characteristics in many ways limit several of the internationally recognised principles of arbitration, such as party autonomy and the independence of the proceedings. Due to the fondness of amicable dispute resolution, the practice of conciliation and mediation is much more widespread in China than in the West. As regards the recognition and enforcement of arbitral awards, the issue is not as severe as perceived by practitioners. The recognition and enforceability is, however, affected by the unique Chinese features in the arbitration system. The dual-track system comprises different regulations of and thus different conditions for the enforceability of an award, and the governmental intervention makes the possibility of recognition and enforcement vary depending on the attitude toward arbitration of the local government where the recognition or enforcement is sought.

Sammanfattning

Skiljeförfarande har länge varit den vanligaste tvistlösningsmetoden för kommersiella tvister relaterade till Kina. Den kinesiska skiljerätten härstammar från ett helt annat ursprung än den västerländska, och vissa typiska särdrag återfinns därför i den kinesiska skiljerätten. Denna uppsats avser identifiera det kulturella och historiska ursprunget till dessa särdrag och undersöka hur de påverkar den moderna skiljerätten i Kina idag, särskilt avseende erkännande och verkställighet av skiljedomar, då många jurister verksamma i Kina anser att det är ett av de mest problematiska områdena i den kinesiska skiljerätten.

De mest framträdande unika särdragen i den kinesiska skiljerätten är distinktionen mellan inhemska och utländskt relaterade tvister som indelas i två separata spår i lagstiftningen och förfarandet, det påtagliga administrativa och statliga inflytandet i processen, icke-erkännandet av ad hoc-förfaranden samt preferensen för och främjandet av vänskaplig tvistlösning. Lagstiftningen berörs också av vissa originella karaktärsdrag i form av oklarheter och inkonsekvent implementering i praktiken.

Författaren identifierar tre huvudsakliga faktorer som format den kinesiska skiljerätten: det konfucianska arvet, influenser från den kommunistiska eran med planekonomi, samt ett ungt modernt skiljerättssystem som fortfarande är under utveckling. Dessa faktorer förklarar i princip alla de särdrag som behandlas i denna uppsats. Författaren kommer till slutsatsen att de kinesiska särdragen på många sätt begränsar flera av de internationellt accepterade skiljerättsliga principerna, såsom partsautonomin och skiljeförfarandets oberoende. Vidare innebär preferensen för vänskaplig tvistlösning att medling och annan vänskaplig förhandling är mer utbredd i Kina än i väst. Vad gäller erkännande och verkställighet är problematiken inte lika allvarlig som de verksamma juristerna gör gällande. Dock påverkas erkännandet och verkställigheten i Kina av de typiska särdragen i skiljerätten. De separata spåren för inhemska och utländskt relaterade tvister innebär olika regleringar och därmed olika förutsättningar för verkställigheten av skiljedomar, och det statliga inflytandet gör att möjligheten till erkännande och verkställighet blir beroende av vilken inställning den lokala politiska ledningen där domen ska verkställas har till skiljeförfaranden.

Abbreviations

BAC	Beijing Arbitration Commission
CCP	Chinese Communist Party
CIETAC	China International Economic and Trade Arbitration Commission
CMAC	China Maritime Arbitration Commission
FTAC	Foreign Trade Arbitration Commission
FTZ	Free Trade Zone
ICC	International Arbitration Commission
ICSID	International Centre for Settlement of Investment Disputes
LAC	Local Arbitration Commission
NPC	National People's Congress
PRC	People's Republic of China
SCC	Stockholm Chamber of Commerce
SCIA	Shenzhen Court of International Arbitration
SHIAC	Shanghai International Economic and Trade Arbitration Commission
SPC	Supreme People's Court
SPC Interpretation 2006	Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Arbitration Law of the People's Republic of China"

UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985 (as amended in 2006)

1 Introduction

1.1 Background

The idea for the subject of this thesis sparked from an internship I performed at a law firm in Shanghai in 2015, where many arbitration matters were dealt with. I have during several periods of time studied and worked in China and speak and write Mandarin Chinese. Due to this interest, experience and language skill, I have conducted my research with a broad knowledge base, and sources otherwise not available to foreigners in general have been obtained and referenced in this thesis. In the beginning of October 2017, I conducted a research trip to China and met with two Chinese law professors specialised in arbitration; professor Guo Yu (郭瑜) at Peking University, and professor Maggie Qin (覃华平) at China University of Political Science and Law. Professor Guo and Professor Qin have provided valuable knowledge and input, as well as access to Chinese sources not available in Sweden.

Arbitration has been the common choice of dispute resolution in international commercial disputes related to China for a long time. Due to historical events and cultural features, arbitration in China has had a different development and hence the view of arbitration and dispute resolution in general deviates to some extent from arbitration in the West.

Today China is a leading world economy and the home of roughly 20 percent of the world's population. The leading Chinese arbitration institution CIETAC has one of the largest amounts of cases submitted in the world. Still, the Chinese arbitration process is not completely consistent with modern international arbitration practice. I find it interesting to investigate why this is, and examine the possible links between the Chinese cultural and historical development and the unique features of the Chinese arbitration system. I believe that this analysis is useful for understanding the arbitration practice in China.

1.2 Purpose

The purpose of this thesis is to enhance the understanding of the legal culture in China in regard to arbitration. The thesis aims at providing a portrayal of Chinese arbitration and identify why certain Chinese arbitration

characteristics exist and what the effects of these particular features are. Many legal practitioners, for example, perceive that the recognition and enforcement of arbitral awards is a major issue pertaining to arbitration in China. The research questions which will be the focus of this paper are therefore the following:

In what ways have the Chinese culture and history influenced the Chinese arbitration system? What uniquely Chinese characteristics exist in the system, and how do they affect the arbitration practice in China, specifically in regard to the recognition and enforcement of arbitral awards?

1.3 Methodology

In the execution of this thesis, the author has applied a legal dogmatic method with comparative elements. This mixture was considered appropriate for addressing the research questions for the paper. It has been suggested that the legal dogmatic method should be referred to as 'legal analytical method', since that term more appropriately describes the application of the method. The legal dogmatic method entails the analysis of the different elements of the doctrine of the source of law, to describe how law and legal rules shall be perceived in a certain context, and how these should be applied. It is also an important task for the written doctrine, when applying the legal dogmatic method, to establish the legal position.[1] In reviewing the Chinese arbitration system, the author has analysed both national laws as well as other sources, such as judicial interpretations of the SPC and arbitration rules of Chinese arbitration commissions. Studies of these sources together with doctrine on Chinese arbitration have been conducted to determine how certain arbitration features are viewed and regulated in China.

The comparative method is a form of legal dogmatism.[2] It does not only regard the study of foreign law. The comparative method includes a comparison with the intention of determining certain similarities and differences between legal systems. The method also generates a deeper understanding of law in the social context, as it discovers varieties in law due to the different cultures of different legal systems.[3] This thesis has not been conducted as a complete comparative analysis. Nevertheless, in order to define certain Chinese characteristics of Chinese arbitration, reference

[1] Korling and Zamboni (2013) p. 24, 26, 35.
[2] Ibid. p. 40.
[3] Ibid. p. 141–142.

must be made to other arbitration practices different from the Chinese to see if the features also exist elsewhere. The author has chosen to refer to transnational standards, see further Section 1.4.3 below. The comparative features mainly involve references to and comparison with rules in international arbitration laws, namely the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985 with Amendments as Adopted in 2006 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).

Associated with the comparative method is the concept of legal culture. All legal systems are related to the political, economic, social and cultural context of the society in which it exists.[4] Law in the broad context is both a set of rules as well as a social practice created by people in a society. There are numerous factors influencing the role law has in a specific society, and the law can thus not be understood without also understanding the historical, ideological and socio-economic background of said society. Hence, scholars have begun adopting the view of law as culture, as opposed to law as rules.[5]

Legal culture is a wide concept of which definition scholars have not yet unanimously agreed upon.[6] Professor Lawrence M. Friedman has identified three main parts of the legal system. Firstly, the legal and social forces that creates a legal system. Secondly, the structures and rules which constitutes the actual law, and finally, the impact law has on the behaviour of people in the society.[7] Professor Friedman further describes legal culture as "an essential intervening variable in the process of producing legal stasis or change".[8] Other definitions entails ideas, values and attitudes towards law of the public, as well as legal tradition.[9]

The term 'legal culture' is not unproblematic, and has received much criticism. The term is however useful in understanding foreign legal systems and is considered to become an important factor affecting the development of international arbitration in the future.[10] It is however a sensitive subject trying to describe another legal society different from the one in which the author and/or the target audience exists. Therefore, it is of great importance to be cautious with the reference to terms such as legal culture and legal tradition, and to be aware of the pitfalls associated with such terminology.

[4] Fan (2013) p. 181.
[5] Van Hoecke and Warrington (1998) p. 495.
[6] See for instance Roger Cotterrell in Reimann and Zimmermann (2006) p. 718–721.
[7] Friedman (1975) p. 3.
[8] Lawrence M. Friedman in Nelken (1997) p. 34.
[9] Zhang (2014) p. 313.
[10] Ibid. p. 311–312.

One should not jump to conclusions about a foreign legal system based on the legal culture and tradition of that society, and not draw conclusions based only on one's own cultural experience.[11]

Moreover, due to different concepts and viewpoints, Western ideas of law such as the rule of law cannot be used to correctly describe and understand Chinese legal culture. This is superbly described by professor Fan Kun: "If we dip a Western spoon into the river of Chinese history, we have already prejudged the shape of the water".[12] It is therefore important to try to understand a specific cultural phenomenon in its own terms. The author has done her best in trying to unbiasedly explain the Chinese legal system.

1.4 Materials

Much is written about arbitration in China from a practical and "hands-on" point of view, merely pointing out how very different arbitration in China is from the Western viewpoint, without attempting to understand or explain why. Understanding cultural differences and the historical and political background is crucial to comprehend the nature of the Chinese arbitration system.

There are several doctrinal sources which cover a wide spectrum of the topics addressed in this paper, e.g. *Arbitration in China* by Fan Kun, *Arbitration in China* by Sun Wei and Melanie Willems, and *Arbitration Law and Practice in China* by Jingzhou Tao. They all comprise a comprehensive review of the Chinese arbitration system, however more focused on the legal climate than on the legal culture and the link between the origins and effects of the Chinese characteristics in the arbitration system, which is the focus of this thesis. Fan Kun is an Associate Professor of Law at McGill University in Canada, and has extensive academic and professional experience from both North America and Europe, as well as China and Hong Kong.[13] Sun Wei, Melanie Willems and Jingzhou Tao are all lawyers practicing arbitration in China. The sources referenced in this thesis are thus from both academic professors as well as legal practitioners in China, which provides a broad picture of the subject and includes arguments and analysis from different viewpoints. Furthermore, the vast majority of the doctrine used in this paper is written by Chinese authors, in

[11] Roger Cotterrell in Reimann and Zimmermann (2006) p. 723.
[12] Fan (2013) p. 185.
[13] "Kun Fan", McGill University Faculty of Law, <https://www.mcgill.ca/law/about/profs/fan-kun>. Accessed 11 December 2017.

order to avoid only providing the perspective of Chinese arbitration through "Western glasses".

A pitfall worth noticing is that some statistics referenced in this paper come from second hand sources. The author is aware of this weakness, and notes that this is due to much information such as statistics and other data not being available to the public in China or at least not available online. It is even harder for a foreigner to access such information, even without the language barrier. However, the information is attained from sources otherwise deemed trustworthy as references for this paper, such as *Chinese Arbitration: a Selection of Pitfalls* edited by the Association for International Arbitration and *Arbitration in China* by Fan Kun, and the author thus trusts the statistics to be accurate. Furthermore, the statistics used in this thesis are referred to solely for the purpose of illustrating an approximate of the scope of certain events or factors, and no conclusions are based on this data.

1.5 Delimitations

Due to the scope of this thesis, certain delimitations have been made throughout the writing process. The author has focused on the different parts constituting the frame of arbitration, such as the arbitration agreement, the arbitral tribunal and the arbitration institution. The procedural process as such will not be studied in detail.

The focus in this paper will also be on Mainland China and foreign countries, i.e. excluding issues related to Hong Kong, Macau and Taiwan which are often subject to special regulations and constitutes a particular third track due to these regions being historically disputed as not being neither completely Chinese nor foreign entities.

Lastly, a delimitation is made as regards the general court system in China. This thesis discusses arbitration, and there will thus not be provided an in-depth overview of the general court system. The only necessary knowledge for the reader to possess is that the Chinese general courts are the People's Courts, which are divided into four levels where the Supreme People's Court (the SPC) is the highest. The other instances are the local People's Courts, comprising basic, intermediate and high People's Courts. Additionally, there are special courts, such as the Military Courts.[14]

[14] Chapter 7 of the Constitution of the People's Republic of China.

1.6 Terminology

1.6.1 China

When reference in this paper is made to 'China' or to 'the PRC', the terms refers to the unofficial, however well-recognised, term 'Mainland China', excluding Hong Kong, Macau and Taiwan. When referring to China in a historical context, reference is made to what was considered as being part of the empire in each dynasty of imperial China.

1.6.2 West or Western

When targeting readers from different cultures and parts of the world, and as in this case, describing Chinese concepts from the author's cultural point of view, as well as most importantly conducting some form of comparative study, the term "Western" may be a suitable term to use for the opposite system. The term does not usually entail explicitly specified areas or jurisdictions, however it commonly includes western Europe and North America, as well as the countries sharing political and historical tradition and development with these parts of the world. The three denominators identified by scholars are the heritage and influences from ancient Greece and Rome, the religion of Christianity, and the Enlightenment of the modern era.[15]

The term "West" or "Western" is used by virtually all scholars whose research is referred to in this thesis, Chinese and foreign alike. Whether appropriate or not, it appears to be the norm in this field of study, which is why the author has chosen to use this terminology also in this paper.

1.6.3 Transnational Standards

This essay does not provide for a comparison between the Chinese arbitration system and another specified system. It aims at describing the Chinese system as is, and present certain unique features. These features are unique because they are found especially in Chinese arbitration, and thus deviates from the arbitration practice in other jurisdictions. To collectively subsume the generally accepted standards for arbitration internationally, the terms 'transnational arbitration', 'transnational rules' and 'transnational

[15] Kurth (2003) p. 5.

standards' are often used. These terms comprise internationally recognised rules, principles and practice for arbitration.[16]

1.7 Outline

This thesis begins in Chapter 2 with a historical and cultural background of the Chinese arbitration system as well as the legal system in general, to provide the reader with an understanding of how the Chinese concept of arbitration was generated and what influences it has been exposed to throughout its evolution. The historical chapter is followed by a review of the current contemporary arbitration system in China in Chapter 3. The chapter targets all principal parts of the arbitration system. In Chapter 4, the Chinese characteristics identified in the previous chapter are discussed more in-depth, and are e.g. linked to the historical events and developments which have brought them about. Some concluding comments are presented in the final Chapter 5, summing up the key takeaways and the author's concluding thoughts from the study.

[16] See generally International Chamber of Commerce, *Transnational Rules in International Commercial Arbitration*, Paris (1993).

2 Historical and Cultural Background

2.1 Introduction

The choice of a dispute resolution method in a society is greatly influenced by the culture, tradition and legal evolution of said society.[17] In order to comprehend the concept of arbitration in China, as well as the legal system in general, one therefore needs to understand the historical and cultural background of Chinese society. While taking into consideration the pitfalls of using terms such as 'legal culture' and 'legal tradition' as mentioned in Chapter 1, this Chapter 2 aims at providing an understanding of the historical background of the Chinese legal system and describe important factors in the development of the system.

2.2 Confucianism and Chinese Legal Tradition

A main influence in the development of Chinese law and in Chinese society in general, is Confucianism. Already in the 18th century, Montesquieu wrote about 'the Chinese spirit' in his book *L'esprit des lois*, referring to the Confucian philosophy and its moral rules for a virtuous life.[18] The Confucian doctrine derives from the philosopher Confucius (551 BC–479 BC). The Confucian school teaches moral values about social conduct, correctness and justice. The main principles of Confucianism are peace, harmony and conciliation, of which the former two should not be disrupted but maintained, by means of the latter.[19]

The Confucian rule of justice is based on *li* (reason) in contrast to *fa* (law).[20] However, one cannot simply translate the word *fa* as 'law' and expect it to comprise the same meanings as the term 'law' does in Western societies. *Fa* derives from the Chinese word for 'punish'.[21] In a Confucian society, law is only required to punish wrongdoers who do not obey the rules of morally

[17] Fan (2013) p. 182.
[18] Richter (1977) p. 279.
[19] Lee (1985) p. 2; Fan (2013) p. 187.
[20] Ibid. Preface.
[21] Fan (2013) p. 184.

right conduct.[22] Thus is the scope of the Chinese term *fa* much narrower than the Western perception of the word 'law'. The concept of *li* on the other hand, commonly translated into 'reason', is based on the notion that all human beings are born good and have a moral compass with great sense of right and wrong.[23] What is right and wrong is already predestined by natural law and it is the behaviour in accordance with these universal moral principles and values that constitutes *li. Li* is enforced by social sanction, whereas *fa* is enforced by legal sanction.[24] China's legal culture is often described as having two spirits; a Confucian spirit, which refers to *li*, and a legalist spirit, referring to *fa.* The rule of *fa* was promoted by the legalist movement some hundred years BC, during the period often referred to as 'hundred schools of thought contending'.[25] Ultimately Confucianism and *li* prevailed, although the beneficial aspects of legalism were assimilated into the system.[26] The concepts now co-exist, however *fa* is by Confucian means a necessity, while *li* is the desirable guideline. Consequently, *li* has traditionally always been upheld as supreme to *fa*.[27]

A phenomenon which is closely linked to Confucianism and *li* is the concept of face. The ultimate goal of Confucianism is to retain peace and harmony in society.[28] Disrupting the harmony, i.e. not following the principles of *li*, could cause a person to lose face. Following socially moral conduct is to keep respect for one's face.[29] Face is, very simply described, a person's reputation and standing, and loosing face brings shame and humiliation. Keeping face means behaving in accordance with morally right conduct when interacting with other people, and avoiding embarrassment at all cost, both for oneself and others. Likewise, it is possible to gain face and give face.[30] Thus, face is an important element in Chinese culture and a factor which affects the general attitude toward social phenomena such as disputes.

Another important aspect of living in accordance with *li* is to obey the clear hierarchy which exists in society. Every social relationship has an established hierarchy, such as between the ruler and the subject, father and son, husband and wife, the elder and the younger. A main part of this hierarchy is the substantial filial obedience. One should respect the elders

[22] MacCormack (1996) Preface XIV.
[23] Lee (1985) Preface; Pan (2011) p. 3.
[24] MacCormack (1996) p. 5–7; Pan (2011) p. 2.
[25] 《百家争鸣》(*bai jia zheng ming)*.
[26] Fan (2013) p. 187–189.
[27] Pan (2011) p. 2.
[28] Fan (2013) p. 194.
[29] Ibid. p. 195.
[30] Hu (1944) p. 45–46, 51, 64.

and honour one's mother and father. In the oldest Chinese laws, one of the worst offenses was to disrespect one's father or elder brother.[31] This social structure emphasises the institution of the family and consolidates the role of each individual in society. It is important to observe that in imperial China each individual was not considered a separate entity in society, but the group, the family, was. There did thus not exist any independent individual rights; a person was only entitled to what their social role amounted to, which meant an obvious inequality in society. The rights of an individual could, in line with the principle of *li*, be set aside for the benefit of the group.[32]

Throughout the history of imperial China, Confucianism established its place as a sort of "state philosophy", which teachings of moral values and virtuous conduct were to be indoctrinated into the people.[33] Imperial Confucian leaders considered education, and not law, to be the right way through which to guide the people to correct moral conduct.[34] Although moral rules were taught to be followed, written law also did play a role in imperial China. During the Han dynasty (206 BC–220 AD), emperors started to implement Confucian values into law. This was an expression of the legalist *fa*-characteristics. The purpose of the law was to strengthen the moral values and punish those who were not living in accordance with them. Most law provisions were penal, together with some public administrative regulations. In imperial China, there never existed what we today refer to as a civil code.[35] The traditional penal code provided clear instructions for how to live in accordance with the Confucian teachings and undertake morally correct actions. Not all of these rules were necessarily enforced by the courts but purely followed due to it being socially mandatory to act in accordance with Confucian values.[36] The following emperors continued this "Confucianisation" process until it reached its peak during the Tang dynasty (618-907).[37] The Confucian philosophy thus helped forming Chinese law and society simultaneously through time. Confucianism is therefore said to constitute the foundation for the Chinese legal system.[38]

As revealed above, legal provisions have been documented for over two millenniums in China, owing to the long and uninterrupted history of the civilisation. Some provisions have survived several centuries without

[31] MacCormack (1996) p. 2, 10.
[32] Fan (2013) p. 192–193.
[33] MacCormack (1996) p. 7.
[34] Ibid. p. 11.
[35] Fan (2013) p. 189–190.
[36] MacCormack (1996) Preface XIV–XV.
[37] Ibid. p. 3.
[38] Lee (1985) Preface–p.1.

notable change. For instance, the penal law of the last dynasty, Qing (1616-1911), bore great resemblance to the penal code of the Tang dynasty.[39] One reason for this continuous and uninterrupted development is the intact literary tradition in China with written characters which have undergone only minor changes during the many centuries of evolution of Chinese law.[40] This is also of course due to the fact that the law was continuously based on the same Confucian values throughout the history of imperial China.[41]

Today, the ancient philosophies and Confucian values still have impact on the legal climate in China. Although many other factors have influenced the legal environment during China's modernisation process, the traditional Confucian culture seem to be the predominant one.[42] This will be elaborated on further in this paper.

2.3 Recent Legal History

To understand how China transformed from an ancient empire into the nation it is today, reviewing the main events of the 20th century is of essence. Though one of the oldest nations in the world, China as a modern state is very young. After more than two thousand years of dynasties and the rule of emperors, the last dynasty of Qing fell in 1911 and the Republic of China was founded. The country had been turbulent for decades and was under great pressure from Western powers following the Opium war in 1840. This external pressure motivated legal reception from the West which was undertaken to modernise China's legal system.[43] China left its imperial history behind embarking on a journey to become a modern nation and marked its borders to create a distinct territory, declared the sovereignty of the people, adopted the solar calendar, etcetera.[44] In this transformation era of political instability, some politicians and scholars, such as the reformer Kang Youwei, argued that Confucianism should be made state religion.[45] At the same time many Chinese had started to question the omnipotence of the philosophy.[46] Numerous reformers called for cultural change in hope for a more modern, functioning democracy and promoted anti-Confucian ideas.

[39] MacCormack (1996) p. 1.
[40] Gu (2009) p. 16.
[41] MacCormack (1996) p. 7.
[42] Zhang (2014) p. 321.
[43] Fan (2013) p. 214.
[44] Wasserstrom (2016) p. 106–108,
[45] Ibid. p. 111.
[46] Spence (2013) p. 261.

However, as concluded in the previous chapter, many Confucian concepts survived the birth of the new China.[47]

An important activist wave in post-imperial China was the so-called May Fourth movement. The movement received its name from events taken place in Beijing on 4 May 1919, when students gathered at Tiananmen square to demonstrate in order to awaken the masses and initiate reformation of society. The movement gained nationwide support, much owing to the numerous socialist groups which had been established all over the country. Most reformers of the May Fourth movement shared a vision of a new, improved and unified nation, and many different approaches for how to reach this goal was suggested. It was in connection with the movement that ideological discussions sparked the interest for socialist, communist and Marxist thoughts throughout the country.[48] Sparked from this era of welcoming change, inspiration was also taken from the West and traditional Chinese law was discarded. Instead, new laws were enacted, transplanted from mainly European civil law.[49] The Chinese history authority Jonathan Spence describes the May Fourth movement as "an attempt to redefine China's culture as a valid part of the modern world".[50]

National political parties were also established in the new Republic, one of them the Guomindang, the Nationalist Party of China, founded by Sun Yat-sen.[51] Sun was initially elected the provisional president of the new republic, but lost the first presidency to the military leader Yuan Shikai who had the sufficient military power.[52] After Yuan's death in 1916, the control of China was divided between warlords and Sun and the Guomindang gained partial control, mainly over the southern region Canton.[53] Three principles of the Guomindang party were adopted: anti-imperialist nationalist, democracy and socialism.[54] A Guomindang competitor was the Chinese Communist Party (CCP)[55], which originated from Lenin sending Soviet agents to China to meet with potential members of a Chinese communist party. Influences from the Soviet Union and communism was already present in China and several communist groups were quickly formed, for example one in the Hunan province started by Mao Zedong. The first plenary meeting of the CCP was held in 1921, and Mao was invited because of his status in

[47] Wasserstrom (2016) p. 113–115.
[48] Spence (2013) p. 286–289.
[49] Fan (2013) p. 214.
[50] Spence (2013) p. 288.
[51] Ibid. p. 301.
[52] Wasserstrom (2016) p. 106, 108.
[53] Spence (2013) p. 273, 301.
[54] Ibid. p. 301.
[55] Also known as the Communist Party of China (CPC).

Hunanese politics.[56] Due to their shared goal of a unified China, the Guomindang and CCP formed a brief alliance which lasted for a couple of years, until the Guomindang claimed power under the leadership of Chiang Kai-shek in 1928.[57] The party remained in power for twenty years, although constantly battled by the CCP. In the war years 1937 to 1949, China was at war with Japan and the Goumindang fought the CCP in the Chinese civil war. The CCP emerged as the ultimate victor, and on 1 October 1949 the People's Republic of China (PRC) was founded by its leader Mao Zedong.[58]

During the Guomindang reign an initial court system was developed in the country; however, no unified judicial system was accomplished. Following the establishment of the PRC, a new socialist legal system was built up. The system contained governmental, judicial and legislative structures.[59] Public ownership and planned economy was introduced, as well as the political model of 'people's democratic dictatorship' and the supremacy of the CCP.[60] All economic activities were dictated by the authorities and in accordance with a centralised plan.[61] In the judicial field, legislation was adopted, most importantly the first PRC Constitution which was promulgated in 1954. The legal profession as well as many legal institutions and courts were also established. In the developing years of the new nation several movements and reforms were launched, targeting counter-revolutionaries, corruption and other subjects threatening the socialist state. The supremacy of the Party meant that these political reforms were upheld as superior to the promulgated laws. Laws were therefore something flexible and adjustable, compliant to the then current reforms imposed by the Party.[62] The new legal system was based on principles of legal independence, stipulated in the Constitution. However, in practice, neither the system nor the principles could be fully executed.[63] In 1957, an anti-rightist campaign was launched at which time many intellectuals were penalised and purged for criticising the system after initially being invited by the Party to do so. After being considered rightist thoughts, the principles of legality, independence of the judiciary and equality before the law were completely discarded, and so the decline of the legal system commenced. It was followed by the Cultural Revolution (1966-1976). During this period, the last remaining parts of the legal system was abolished. There were no

[56] Spence (2013) p. 295–298.
[57] Ibid. p. 301, 331.
[58] Wasserstrom (2016) p. 150.
[59] Li (2014) p. 1.
[60] Wang and Zhang (1997) p. 9.
[61] Fan (2013) p. 228–229.
[62] Wang and Zhang (1997) p. 10.
[63] Li (2014) p. 1–2.

functioning courts, no lawyers, and no laws. The only remaining guidance was the policies of the Party and the State.[64]

The death of Mao in 1976 resulted in a power struggle which lasted until Deng Xiaoping took over the leadership of the country in 1978. At that point China basically did not have any legal system at all and it was thus needed to be rebuilt from scratch. It was declared that the Party shifted its priority from class struggle to economic development. During the reign of Deng Xiaoping China adopted an opening-up policy and launched major economic reforms.[65] The economic reforms carried out by the government included the reinstatement of private ownership, introduction of foreign investment and subsequently Sino-foreign joint ownership as well as a move towards the rule of law.[66] Numerous new laws were enacted to revive the legal system, mainly in the areas of property, trade and investment. Since there was no legal foundation to build on due to the previously existing laws being enacted in a time with only public ownership and planned economy, most laws were imported from the West.[67] Furthermore, the court system was re-established as well as the legal profession.[68] Today China has a quite comprehensive legislation system in place. Still, the development of the whole legal system started from virtually nothing forty years ago and its evolution is ongoing. The system is not yet fully integrated and there are some major problem areas, such as governmental influence and outside pressure on the courts, lack of legal interpretation and insufficient amount of guiding case law published.[69]

2.4 Evolution of Dispute Resolution and Arbitration

For dispute resolution, the traditional Confucian values of peace, harmony and conciliation historically meant that litigation was not an option since such a conflict confrontation would disrupt the social harmony. Confucianism was however not the only school of thought promoting the pursuit of harmony. Actually, the pursuit of harmony is a common denominator for all major Chinese philosophies, including Legalism and Taoism, for the reason that the pursuit of harmony is considered to be the

[64] Wang and Zhang (1997) p. 10–12; Li (2014) p. 2.
[65] Li (2014) p. 2; Fan (2013) p. 218.
[66] Wang (1996) p. 5–6.
[67] Fan (2013) p. 218.
[68] Wang and Zhang (1997) p. 13.
[69] Fan (2013) p. 219.

key ingredient in ensuring social stability.[70] To retain this social stability, conflicts should be resolved through amicable discussion or conciliation instead of litigation.[71] Evidence of this deeply rooted viewpoint can be found in several Chinese proverbs: "in death avoid hell, in life avoid law courts"; "to enter a court of law is to enter a tiger's mouth"; "avoid litigation; for once you resort to law there is nothing but trouble".[72]

The basis of the Confucian view of dispute resolution are the concepts of harmony and concession, the doctrine of the middle way, and avoidance of litigation. The doctrine of the middle way is a central Confucian teaching that emphasises moderation and balance, and promotes the virtue of compromise. One should always strive towards finding the 'middle way' i.e. compromising, in order to restore balance and social harmony. The doctrine of the middle way clearly explains the prominent status of mediation in China. The goal of mediation is essentially to find the 'middle way'. The virtue of finding the middle way by mediating instead of litigating is closely linked to keeping respect for one's face. Litigation means confrontation and disruption of harmony, and therefore disobedience of *li*. Since the virtue of moral conduct was the guiding principle of society, disputing parties were automatically inclined to compromise and conciliate. In doing so one acted honourably and did not risk losing face, a fate much worse than losing the dispute itself. [73]

The promotion of mediation and the reluctance to litigate did not mean that judicial courts did not exist in imperial China. However, the courts, *yamen*, did not have a very good reputation. The *yamen* judges, the magistrates, were governmental officials educated in the Confucian classics and not lawyers practicing *fa*. Their rulings were primarily guided by *li* and not *fa*, which made the judgments somewhat arbitrary. There was also little or no distinction between civil and criminal cases.[74] Furthermore, the principle of presumption of innocence was never adopted in imperial China, and anyone participating in a litigation was therefore marked as a wrongdoer, even though the ruling ultimately was in their favour.[75] Consequently, the general view of the *yamen* among the people was not very positive, due to the magistrates' abuse of power, arbitrary judgments often containing hefty punishments and the shame and humiliation associated with the *yamen* procedures. This negative view contributed to the use of alternative dispute

[70] Wong (2000) p. 304.
[71] Fan (2013) p. 155–156.
[72] See for example Philip Chen, Law and Justice: the Legal System in China 2400 B.C. to 1960 A.D. New York 1973; Pan (2011) p. 5-6.
[73] Fan (2013) p. 180, 194–195.
[74] Ibid. p. 190–191.
[75] Wang (1996) p. 8.

resolution mechanisms, i.e. mediation.[76] However, recent research has shown that during the Qing dynasty (1616-1911) litigation was more common, especially in civil cases concerning land, debt, marriage and inheritance.[77]

Nevertheless, mediation continued to be the leading choice of dispute resolution mechanism in China up until the 1980s, at which point the proceedings had become institutionalised. The major legal reforms that followed the founding of the PRC in 1949 did not overthrow mediation in China. Instead, the mediation system was codified in 1954. In the late 1980s, it has developed into the largest dispute resolution system in the world with over one million mediation committees and six million mediators in the country. However, following the increasing amount of commercial transactions with the open-door policy, the Chinese law and litigation system was not up to par with the growing need for dispute resolution in the 1980s and 1990s.[78] Today, it is therefore arbitration that, beside the general courts (the People's Courts), has become the most essential dispute resolution mechanism in China. Due to its international character, it is however the most common for commercial cases.[79] Mediation stands as the second most common method among the alternative dispute resolution mechanisms.[80]

Arbitration has actually been the common choice of dispute resolution in international commercial disputes related to China for a long time, mainly since the 1980's.[81] The real development of a modern arbitration system in China commenced in the beginning of the 20th century. The Western concept of arbitration was introduced in China just before the fall of the Qing dynasty when the first chambers of commerce had been established in the country. The government did not like the idea of a body independent from the state courts which could exercise adjudicatory power and therefore prohibited the establishment of an arbitration institution with such authority. The government subsequently adopted a term for arbitration, '*gongduan*', in order to distinguish the procedures of such institutions form that of the state courts.[82] In 1912, the newly established government promulgated the Constitution for Commercial Arbitration Offices (商事公断处章程) and the following year the Working Rules for Commercial Arbitration Offices (商

[76] Lee (1985) p. 3.
[77] Fan (2013) p. 198.
[78] Association for International Arbitration (2009) p. 19–21, 33.
[79] Wang (2006) p. 2.
[80] Association for International Arbitration (2009) p. 21.
[81] Zheng (2002) p. 122.
[82] Fan (2013) p. 207.

事公断处办事细则）to regulate the scope and authority of commercial arbitration offices established under the chambers of commerce.[83] The rules stipulated that an arbitral award did not become legally binding unless both parties consented. This meant that a dissatisfied party could simply not consent to the judgment and file proceedings at the general courts.[84] The two directives remained in force until 1927. At this time, the Commercial Arbitration Office functioned in practice only as a mediation institute.[85]

In the following years, several local governments issued regulations for mediation and arbitration, such as the 1943 Jin Cha Ji region directive on the work of arbitration commissions and its 1949 Tianjin and Shanghai equivalents, which regulated the organisation, practice, jurisdiction, governance of the arbitration commission as well as its relation to other authorities. After the founding of the PRC in 1949, China continued to build separate arbitration systems for both domestic and foreign-related affairs. As a result of the attempt to restore the Chinese economy in the new republic, the presence of contractual relations became increasingly widespread.[86] However, China had adopted a planned economy system and the government controlled most legal and economic aspects of society, including commercial transactions and relations. Wang Guiguo, renowned professor in international economic and comparative law, notes that during this time, the general public hade a very vague sense of contractual relationships or breach of contract.[87] Nevertheless, arbitration was in the early years of the PRC promoted by the state as the preferred dispute resolution method.

From 1950 until the beginning of the Culture Revolution in 1966, there were regulations in force stipulating that disputes concerning commercial contracts were to be tried only by arbitration commissions, not the general courts.[88] This mandatory arbitration meant that party autonomy was non-existent. However, the domestic arbitration was so called ‘administrative arbitration’ governed by the state and performed by administrative authority officials, not impartial arbitrators.[89] This model was a product of planned economy and was adopted from the Soviet Union. Administrative arbitration is vastly different from modern arbitration. The awards were merely administrative decisions and were not final since the parties had the

[83] Huang et. al. (2008) p. 15. There are no official English translations of these regulations, and different translations may thus be used by other scholars.
[84] Tao (2012) p. 2.
[85] Huang et. al. (2008) p. 15.
[86] Ibid. p. 15.
[87] Wang (1996) p. 5.
[88] Huang et. al. (2008) p. 15–16.
[89] Tu (2016) p. 177.

option to appeal to the general courts.[90] For international commercial disputes however, the system was completely different. In the 1950s, two modern arbitration institutions not following the Soviet model were established as a result of provisions in the Protocol for General Conditions of Delivery of Goods between China and the Soviet Union, which stipulated that any disputes arising in connection with the protocol were to be resolved through arbitration. In 1956, the Foreign Trade Arbitration Commission (FTAC) was founded, followed by the Maritime Arbitration Commission in 1959.[91] These were the predecessors to CIETAC and CMAC. The two institutions were the only authoritative bodies with mandate to render awards in foreign-related disputes and was at the same time forbidden to arbitrate domestic disputes.[92] The scope of the two arbitration institutions was very limited due to China's lack of interaction with the rest of the world. To illustrate, from its establishment in 1956 to Mao's death in 1976, the FTAC only dealt with 27 cases, the majority of in which the counterparty was from another socialist country.[93]

Even though a dispute resolution system existed in theory, actual dispute resolution in China during the Mao era was minimal in practice. It was after the implementation of the opening-up policy in 1978 that the legal system commenced its modernisation development. The economic reforms carried out by the government sparked an increase in commercial relationships, both domestic and international. Commercial dispute resolution naturally develops alongside economic independence and increasing commercial transactions, and the case in China was no exception. What was quite exceptional in China though was the rapid pace of change and as previously mentioned, the need for a more developed dispute resolution system became urgent. In 1983, the State Council promulgated the Regulations of the People's Republic of China on Economic Contract Arbitrations. [94] The rules allowed disputing parties to submit commercial disputes to either a general court or to arbitration.[95] The regulations were however only applicable on domestic disputes, which received much criticism from Chinese scholars and governmental officials. That criticism resulted in China legislating the Arbitration Law which came into force in 1995, containing provisions for both domestic and foreign-related arbitration, however in a system of separate dual tracks.[96] The Arbitration Law was a major advancement for

[90] Fan (2013) p. 115.
[91] Huang et. al. (2008) p. 15; Fan (2013) p. 18.
[92] Tao (2012) p. 8–9.
[93] Tu (2016) p. 178.
[94] Wang (1996) p. 5–6, 10.
[95] Sun and Willems (2015) p. 3.
[96] Wang (1996) p. 10.

arbitration in China. Prior to its enactment, the Chinese domestic arbitration system suffered lack of independence and party autonomy, and the arbitral awards were not binding. These were the major problems that the Arbitration Law was aiming at resolving.[97]

2.5 The Role of Law

As have been touched upon previously in this chapter, the role of the law in China is different from the Western perception. In the West, the rule of law is a fundamental principle of the legal system.[98] In imperial China, when society was guided by *li* and *fa*, the system was based on the rule of *li*, when the virtue of moral rules and rites was continuously upheld as superior to the written law, *fa.* The only role of the law was to punish. *Fa* has thus traditionally never been considered as the ultimate supremacy. This implies that the principle of rule of law does not exist in China.

However, in connection with the opening-up reform in the late 1970s, calls for the rule of law arose within China. Deng Xiaoping expressed a need for a strengthened legal system and increased legislation which secured fundamental principles and would not be arbitrarily interchanged. Since then a socialist rule of law has been promoted in China, and the supremacy of law has been proclaimed by the succeeding Chinese leaders.[99] In 1999 China formally consolidated the rule of law in the Constitution, stipulating that "The People's Republic of China governs the country according to law and makes it a socialist country under [the] rule of law".[100]

The rule of law consists of a few components which need to be present for the principle to be realised. Some scholars propose that the rule of law contains as many as ten elements, among them the supremacy of law, the independence of the judiciary, separation of power and the principles of freedom and equality. The element most commonly emphasised by the Chinese leadership is the supremacy of law, whereas scholars, corporations and organisations as well as ordinary people in China express a dissatisfaction with the others.[101] Nevertheless, there are scholars arguing that China is on a path towards the rule of law.[102] What seems indisputable

[97] Tao (2012) p. 4; Fan (2013) p. 20–21.
[98] Fan (2013) p. 233.
[99] Blasek (2015) p. 3–4; Zhang (2014) p. 310.
[100] Article 5 of the Constitution of the People's Republic of China.
[101] Blasek (2015) p. 1–5, 14–15.
[102] See for example Randall Peerenboom: *China's Long March Toward Rule of Law*. (Cambridge 2002), Zhang Mo: 'The Socialist Legal System with Chinese

is that China's economic reforms and development has led to an increased reliance on, and thus a strengthened role of, law.[103]

Law is subject to the social norms and practices of the society in which it exists. In China, law was historically a mean of power to control and punish the people. During the Mao era, law was at first an instrument to promote class struggle, then the opposite during the Cultural Revolution when it was considered a bourgeois concept. Ultimately, after the opening up of China, the purpose of law transformed to ensure the economic development of the country.[104]

Today, a complete rule of law cannot be said to prevail in China. A more appropriate description of the current status of the principle is 'rule *by* law'.[105] One explanation for this is that the Chinese government has embraced the benefits of a strong legal system, but not surrendered to complete rule of law since that may challenge the dominance of the CCP.[106] Another reason may simply be the rapid social and legal reform that China has undergone during the past few decades. The legal system has not initially developed from the rule of law and the principle does not go hand in hand with China's legal tradition.[107] Perhaps China has simply not reached the rule of law yet. This theory is consistent with the scholars arguing that China really is moving toward the rule of law.

Characteristics: China's Discourse for the Rule of Law and a Bitter Experience.' *Temple International & Comparative Law Journal*, Vol. 24, 2010, and Wang and Zhang (1997) p. 12–13.

[103] Fan (2013) p. 216.

[104] Ibid. p. 217; Wang and Zhang (1997) p. 12.

[105] Zhang (2014) p. 310, 327.

[106] Gallagher and Woo (2011) p. 4–5.

[107] Wang and Zhang (1997) p. 13–14; Zhang (2014) p. 310–311.

3 Arbitration system

3.1 Legal Framework

3.1.1 General Remarks

As previously mentioned, China today has a quite extensive legislation framework, dispute resolution included. However, the structure is quite complex and difficult to overview and navigate. There are a few main laws of significant importance which are applicable to arbitration in China: the Arbitration Law, the Civil Procedure Law and to some extent also the Contract Law. Additionally, there are numerous regulations, notices and interpretations, mainly by the SPC, regulating certain issues pertaining to arbitration. Since the framework is too massive to be comprised in full within the scope of this essay, focus will be on the main legislative bodies and SPC interpretations.

The National People's Congress (the NPC) and its Standing Committee are the legislative bodies of the PRC. In addition to their legislative powers, the NPC and the Standing Committee, together with the SPC and the Supreme People's Procuratorate[108], have the authority to interpret laws. It is mainly the interpretations of the SPC that serve as guidance to lower courts and fill in voids in the legislation.[109]

Since the whole legal system was abolished during the Cultural Revolution, China's massive legislative framework has been created in only forty years, a short period of time for such a task. In order to enact laws in the rapid pace needed after the opening-up of China in 1978, most laws were imported from the West by what is called 'legal transplant'.[110] For China, the legal transplant seems to have been a relative success, compared to other countries undergoing the same process. Professor Randall Peerenboom ascribes this success to China's large size, generating a large pool of intelligent and qualified persons as well as making China a great economic power. The Chinese government has also used effective methods in their reform, conducting extensive prior research and pilot programmes before implementing reforms on national level. On the downside, Peerenboom

[108] The Supreme People's Procuratorate is the highest State organ for legal supervision. It is mainly responsible for supervising regional procuratorates and special procuratorates and protecting the unified and proper enforcement of State laws.
[109] Fan (2013) p. 12.
[110] Zhang (2014) p. 314.

notes, China's size also makes the implementation of reform more difficult.[111]

Internationally, the PRC is a signatory to most major multilateral treaties for economic cooperation, such as CISG[112], the Paris Convention for the Protection of Industrial Property, the Hague Service Convention[113] and the New York Convention[114]. Additionally, China has entered into an extensive number of bilateral agreements, such as trade agreements, judicial assistance agreements and bilateral investment treaties (BITs).[115] Of significant relevance for international arbitration is of course the New York Convention as well as the ICSID Convention[116] and BITs.

3.1.2 Domestic

3.1.2.1 The Arbitration Law

The main regulation for arbitration in China, both domestic and international, is the Arbitration Law which came into force in 1995. The enactment of the Arbitration Law was a major step forward for Chinese arbitration. The Arbitration Law was created to resolve some major problems in Chinese arbitration and to make the Chinese arbitration system and legislation more in conformity with transnational standards.[117] The Chinese Arbitration Law was drafted with reference to international framework such as the UNCITRAL Model Law and the New York Convention. The law adopted most internationally recognised arbitration principles, however discrepancies between it and international practice are evident.[118]

The three major problems of Chinese arbitration stated in Section 2.4 were all addressed in the first chapter of the new Arbitration Law. Firstly, the principle of party autonomy is set out in Article 4. The parties' submission to arbitration shall be made on the basis of their free will. It is further stipulated that the arbitration commission as well as the arbitrators shall be

[111] Peerenboom (2013) p. 19–20.
[112] United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).
[113] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague, 1965).
[114] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
[115] Tao (2012) p. 15.
[116] Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
[117] Tao (2012) p. 5.
[118] Tu (2016) p. 178.

selected by the parties by agreement.[119] Secondly, the principle of independence is established in Articles 8 and 14, which state that arbitration shall not be subject to interference from administrative authorities or others, and arbitration commissions shall be independent from said authorities. Finally, arbitral awards are binding. Article 9 of the Arbitration Law declares that arbitral awards are final, and proceedings concerning the same dispute matter cannot be initiated in the People's Courts. The first two principles are also upheld in the initial Article 1, which declares the purpose of the Arbitration Law: an assurance of impartial arbitration and party autonomy, as well as safeguarding the development of the socialist market economy.

Another important addition in the Arbitration Law is that the People's Court have no jurisdiction when a valid arbitration agreement exists. Article 5 stipulates that the People's Court may accept a case brought before it only if the arbitration agreement is null and void. Pursuant to Article 9, proceedings may be initiated in a general court regarding the same dispute, given that the arbitral award over the matter has been set aside or enforcement is refused.

The Arbitration Law also contains provisions on arbitration commissions (Articles 10-15), arbitration agreements (Articles 16-20), arbitration procedure and competence of state courts (Articles 21-29 and 39-57), arbitration tribunals (30-38), and enforcing and setting aside awards (Articles 58-73), most of which will be further elaborated on below.

As mentioned in Section 2.4, the Arbitration Law contains a dual-track system; one track for domestic arbitration, and one track for foreign-related arbitration. This means that there are two separate systems with different rules applicable depending on which type of arbitration is at hand. Chapter 7 of the Arbitration Law contains provisions solely regulating foreign-related arbitration. The nine articles of the chapter regulate what differentiates foreign-related arbitration from domestic arbitration, which is mainly the arbitration institutions and tribunals, and the enforcement and judicial review of awards. The following two laws also implement the dual-track system with provisions differentiating the arbitration types.

3.1.2.2 The Civil Procedure Law

The Civil Procedure Law is the primary source for international civil procedure rules in China.[120] Prior to the enactment of the Arbitration Law in

[119] Articles 6 and 31 of the Arbitration Law.
[120] Tu (2016) p. 115.

1995, the Civil Procedure Law was one of the main regulatory sources for arbitration in China. The Civil Procedure Law came into force in 1991, and was last revised in 2012. Unless otherwise noted, reference in this paper to the Civil Procedure Law is made to the revised law of 2012.

As regards arbitration, the Civil Procedure Law regulates the recognition and enforcement of arbitral awards, and recognises the finality of the award as well as no jurisdiction for the People's Courts when an arbitration agreement exists.[121] The Civil Procedure Law, like the Arbitration Law, implements the dual-track system with separate rules for domestic and foreign-related civil proceedings respectively.[122]

Since still in force, some provisions in the Civil Procedure Law and the Arbitration Law overlap in some areas. This is natural and references are made between the two laws. The problem, however, is that the provisions are not completely corresponding. Considering the rapid pace of reform in China, these inconsistencies are understandable. Nonetheless, they create deficiencies in the law. Moreover, many scholars and practitioners alike claim that the provisions in both the Arbitration Law and the Civil Procedure Law are vague, which result in difficulties in the implementation and application of the law.[123]

3.1.2.3 The Contract Law

The Chinese contract law was promulgated in 1999. It contains some provisions applicable to arbitration. For instance, the Contract Law stipulates that a party has the right to request the People's Court or an arbitration institution to amend or confirm the invalidity of (i) a contract which is made based on a significant misunderstanding; or (ii) a contract which was clearly unfair when concluded.[124] A party may also apply to the People's Court or an arbitration institution regarding the validity of a contract which the other party wishes to dissolve.[125] Furthermore, the Contract Law also provides for the application for arbitration if the parties fail to resolve their dispute through mediation.[126] Pursuant to the Contract Law, the time limit for applying for arbitration regarding contracts on international sale of goods and contracts on technology import and export is four years.[127]

[121] Tao (2012) p. 11.
[122] Tu (2016) p. 115.
[123] Fan (2013) p. 171–172.
[124] Article 54 of the Contract Law.
[125] Article 96 of the Contract Law.
[126] Article 128 of the Contract Law.
[127] Article 129 of the Contract Law.

3.1.2.4 Judicial Interpretations

The deficiencies in the legislation mentioned above has led to the issuance of a series of judicial interpretations of the laws, mainly from the SPC. Although not recognised as an official source with legal status, the SPC interpretations are a principal source with an important guidance function for lower courts as well as legal practitioners.[128] The judicial interpretations of the SPC come in different forms. A few interpretations referred to in this paper are so called 'replies', which are interpretations of the SPC made by request from a lower court. The replies concern issues of general application in specific cases. Judicial interpretations named 'interpretations' or 'opinions', however, are independent legal documents issued by the SPC unrelated to any specific case.[129] These interpretations are structured as laws with articles either clarifying or supplementing articles in the law subject to interpretation. The following are a selection of important judicial interpretations relevant to arbitration:

- Supreme People's Court's Interpretations on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China, promulgated on 23 August 2006 (SPC Interpretations 2006).
- Supreme People's Court's Opinions on Certain Issues Concerning the Application of the Civil Procedure Law of the People's Republic of China, promulgated on 14 July 1992.
- Supreme People's Court's Interpretations on the Applicability of the Civil Procedure Law of the People's Republic of China, issued on 30 January 2015.
- Supreme People's Court's Interpretations on Several Issues Concerning the Application of the Law of the People's Republic of China on Foreign-Related Civil Relations, promulgated on 28 December 2012.
- Supreme People's Court's Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, promulgated on 10 April 1987.

Criticism of the interpretations contain the inconsistency also between the interpretations, and the fact that they are isolated legal documents not part of

[128] Tu (2016) p. 9.
[129] Susan Finder: "The Supreme People's Court and Interpreting the Law, Revisited", Supreme People's Court Monitor, <https://supremepeoplescourtmonitor.com/2015/07/10/the-supreme-peoples-court-and-interpreting-the-law-revisited-part-one/>. Accessed 20 December 2017.

a legislative system. The ambiguity in both the legislation and its interpretations has caused inconsistencies also in judicial decisions.[130]

3.1.2.5 Private Sources

It should be mentioned also that the arbitral institutions' rules of arbitration are important sources in Chinese arbitration. Although not carrying the force of law, the arbitration rules of arbitral institutions is an important guidance factor in arbitration practice. Especially the CIETAC rules carry great weight as they have helped pave way for arbitration modernisation in China for decades. CIETAC is the leading arbitration institution in China and many smaller institutions follow CIETAC's practice for guidance.[131]

3.1.3 International

3.1.3.1 International Conventions

In 1987, China acceded to the New York Convention. The accession was a step towards increasing the number of disputes submitted to arbitration. After the accession, the caseload of CIETAC and CMAC, the two main arbitration institutions in China for foreign-related arbitration, increased immensely.[132] The purpose of the New York Convention is to encourage recognition and enforcement of awards in the greatest number of cases possible. That purpose is achieved through the Convention by removing conditions for recognition and enforcement in national laws that are stricter than the conditions in the convention.[133] The New York Convention is applicable to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards is sought.[134] China has made two reservations to the Convention; the reciprocity reservation and the commercial reservation.[135]

China is also a member state of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). For this Convention, China has made a reservation to Article 25(4) comprising that 'the Chinese government will only consider

[130] Fan (2013) p. 172.
[131] Ibid. p. 16, 117; Yu (2011) p. 272–276.
[132] Tao (2012) p. 14.
[133] Key Provisions and Article VII of the New York Convention.
[134] Article I(1) of the New York Convention.
[135] New York Convention Contracting States <www.newyorkconvention.org/countries>. Accessed 20 November 2017. See further Section 3.7.

submitting to the jurisdiction of the ICSID disputes over compensation resulting from expropriation and nationalisation'. ICSID arbitration is commonly provided for in BITs.[136]

3.1.3.2 Bilateral Investment Treaties

China is currently a party to more than one hundred BITs.[137] The BITs regulate two types of disputes, namely disputes arising between a Contracting State and a national or entity of the other Contracting State, and disputes between investors.[138] Many of the earliest BITs, concluded between 1982 and 1998, contained no or only a limited investor-state arbitration clause. The later BITs, however, include more detailed arbitration clauses.[139]

3.2 Types of Arbitration

The Arbitration Law has, as have already been established, adopted a dual-track system for domestic and foreign-related arbitration respectively. There is an additional third type, namely 'foreign arbitration'. Arbitrations which do not fall within the scope of neither of the aforementioned arbitration types are Hong Kong, Macau and Taiwan arbitrations or arbitrations related to Hong Kong, Macau and Taiwan.[140] The definitions for the different types of arbitration are not clearly established in the law. Basically, domestic arbitration is when the award in a dispute between two Chinese parties is rendered in Mainland China by or in connection with a Chinese arbitration institution. Foreign-related arbitration is referred to in both the Arbitration Law and the Civil Procedure Law as 'arbitration with a foreign element'.[141] The Arbitration Law stipulates that the dispute shall arise from economic, trade or maritime activities involving a foreign element, and the dispute shall be administered by a foreign-related arbitration institution.[142]

For foreign-related arbitration, the award shall also be made in Mainland China, by an arbitral tribunal governed by a Chinese arbitration institution,

[136] Tao (2012) p. 15.
[137] "China Bilateral Investment Treaties", Investment Policy Hub, United Nations Conference on Trade and Development (UNCTAD). http://investmentpolicyhub.unctad.org/IIA/CountryBits/42. Accessed 11 December 2017.
[138] Tao (2012) p. 15.
[139] Fan (2013) p. 15–16.
[140] Sun and Willems (2015) p. 102.
[141] Chapter VII of the Arbitration Law and Part IV of the Civil Procedure Law.
[142] Article 65 of the Arbitration Law.

and additionally have a connection with a foreign country.[143] According to Article 304 of the SPC's Opinions on Certain Issues Concerning the Application of the Civil Procedure Law of the PRC (1992), such connection exists if (i) one or both parties are foreigners or foreign enterprises or organisations, (ii) if the legal fact which establishes, alters or terminates the civil legal relationship between the parties take place in a foreign country, or (iii) if the subject matter is located in a foreign country. The Interpretations of the SPC on the Applicability of the Civil Procedure Law of the PRC (2015) added one criterion which did not help improving the understanding of foreign-related cases; '[or] other situations based on which the case can be regarded as a foreign-related case'.[144]

The SPC has issued several judicial interpretations relating to arbitration with a foreign element where further clarification is provided. For instance, if an agreement has both foreign elements and a connection with Hong Kong, the award is an arbitral award with a foreign element.[145] If all parties involved in a case are legal persons registered in China, and the dispute involves no foreign element, the award is considered to be a domestic arbitral award, even if it was rendered by CIETAC (which was traditionally an arbitration institution for foreign-related cases and was at the time of the judgment unauthorised to deal with domestic cases).[146] In a case which was initially deemed to be domestic since all parties were Chinese enterprises, the SPC ruled that the arbitration should be considered foreign-related, since the subject matter of the dispute concerned a foreign company.[147] As shown, there are no clear definitions for the different arbitration types, and it can be tricky for parties to establish what is applicable in their dispute. The distinction between the arbitration types is very important however, due to it may affecting whether the award can be enforced or not, since different rules are applicable to the different arbitration types[148]. This is further elaborated on in Section 3.7 and Section 4.2 below.

[143] Article 66 of the Arbitration Law; Sun and Willems (2015) p. 103.
[144] Article 522 of the Supreme People's Court's Interpretations on the Applicability of the Civil Procedure Law of the PRC Zhu Shi [2015] No. 5, issued on 30 January 2015.
[145] Reply of the Supreme People's Court on Whether the Enforcement of an Arbitral Award Made by CIETAC Should be Denied, [2005] Min Si Ta Zi No. 45.
[146] Reply of the Supreme People's Court to the Request for Instruction Regarding Denying the Enforcement of CIETAC Arbitral Award No. 0112, [2003] Min Si Ta Zi No. 26.
[147] Reply of the Supreme People's Court on Dismissal by the Shanghai First Intermediate People's Court of the Application Filed by Shanghai Jiushi Mansion Real Property Co., Ltd. and Shanghai Jiu Mao Foreign Trade Co., Ltd. to Deny Enforcement of the Arbitration Award Concerned, [2001] Zhi Ta Zi No. 15.
[148] Sun and Willems (2015) p. 110.

As regards foreign arbitration, Chinese scholars agree that the term relates to arbitration with the seat located outside China.[149] However, in Article 283 of the Civil Procedure Law, foreign arbitration is defined as arbitration where the award is made by a foreign arbitration institution, which entails that the definition of foreign arbitration is twofold. Whether an institution is considered foreign is depending on its location.[150] Also for foreign arbitration the classification rules are of great significance for how the award can be recognised and enforced. The New York Convention defines the awards which falls within the scope of the Convention as "awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought […]".[151] The Convention mentions nothing about arbitration institutions. However, it further states that the Convention "also [shall] apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".[152] This implies that China would apply the New York Convention to both foreign arbitration awards and foreign-related arbitration awards, which has historically also been the case.[153]

The main reason for the equivocal definitions of arbitration types under Chinese law is the fact that the concept of legal seat of arbitration is not recognised in the legislation or judicial practice in China.[154] Generally, the seat of arbitration refers to the legal jurisdiction selected by the parties and the legal connection of the dispute to that jurisdiction, rather than the physical location of the proceedings.[155] The seat is of significant relevance due to its potential bearing on the law governing the dispute as well as the arbitral proceedings as such.[156] In China, the classification of different types of awards determines the conditions for the recognition and enforcement of the award. The focus is on the arbitration institution rather than the seat of arbitration. This is possible due to China not recognising ad hoc arbitration, which means that in China, all arbitration is referred to an arbitration institution by default. Nevertheless, making the arbitration institution the base instead if the seat of arbitration results in ambiguous definitions of arbitration types as well as ambiguous classification of awards.[157] This purports to some difficulties regarding the recognition and enforcement of arbitral awards, see further Section 3.7 below.

[149] Fan (2013) p. 22.
[150] Sun and Willems (2015) p. 104.
[151] Article I(1) of the New York Convention.
[152] Article I(1) of the New York Convention.
[153] Sun and Willems (2015) p. 104–105.
[154] Fan (2013) p. 23.
[155] See Article 20(1) and 20(2) of the UNCITRAL Model Law.
[156] Andrews (2016) p. 51; Bantekas (2015) p. 50, 169.
[157] Fan (2013) p. 24; Tao (2012) p. 110.

The dual-track system also conveys other legal consequences. Firstly, all domestic arbitration is governed by Chinese law. Pursuant to Article 126 of the Contract Law, parties to a foreign-related contract may choose the law applicable to the settlement of the disputes arising from their contract. No corresponding provision exists for domestic disputes, and the general interpretation is therefore that Chinese substantive law always applies in domestic arbitration. Secondly, domestic arbitration may not be seated outside China. Pursuant to Article 128 of the Contract Law, parties to a foreign-related contract are allowed to submit their dispute to either a Chinese arbitration institution or any other arbitration institution, i.e. a non-Chinese institution, for arbitration. Conversely, a domestic dispute can only be submitted to a Chinese arbitration institution.[158] This view has for a long time been upheld by the People's Courts. In recent years, however, this practice has started to loosen up.[159] CIETAC opened for domestic arbitration to be conducted outside China already in its 2005 rules, stating that where the parties have agreed on the place of arbitration in writing, the parties' agreement shall prevail.[160] However, concerns still remain regarding the enforceability of such arbitration awards. The main reason for the loosening up is really the widened scope of what it considered to constitute a foreign-related element. In Article 1 of the SPC Interpretations on Several Issues Concerning the Application of the Law of the People's Republic of China on Foreign-Related Civil Relations, the SPC widens the definition of foreign elements to include also the following situations: (i) at least one party's habitual residence is outside of Mainland China; or (ii) there are other circumstances in which a foreign-related civil relationship may be deemed to exist.

In practice, most foreign-related cases are those in which at least one party is a foreign citizen or a foreign company. The dual-track system in general provides for foreign-related arbitration to be less strictly regulated and presents more options for the parties. Foreign-related arbitration and arbitration awards are also less reviewed by the courts than their domestic counterparts.[161]

[158] Fan (2013) p. 26.
[159] Cao (2017) p. 138.
[160] Article 31(1) of the CIETAC Rules (2005).
[161] Yu (2011) p. 279; Fan (2013) p. 25–27.

3.3 Arbitration Agreement

The arbitration agreement has a central role in Chinese arbitration. Article 4 of the Arbitration Law stipulates that if a party submits an application for arbitration without an existing arbitration agreement, the arbitration institution shall not accept the case. Prior to the enactment of the Arbitration Law, however, an arbitration agreement was not considered a prerequisite to submit a dispute to arbitration in China.[162] The arbitration agreement is regulated in Chapter 3 of the Arbitration Law. Article 16 provides that an arbitration agreement could be constituted by both a contract containing an arbitration clause as well as any other written agreement concerning submission to arbitration, whether that separate arbitration agreement is concluded before or after the dispute arises. Consequently, under Chinese law, an arbitration agreement must be in writing.[163] This requirement applies to all types of arbitration under Chinese law.[164] The 'in writing' requirement is a fairly common prerequisite in many jurisdictions.[165] Both the New York Convention and the UNCITRAL Model Law provides for a written agreement. Article 2 of the New York Convention states that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration […]"[166], and "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".[167] Article 7(1) of the UNCITRAL Model Law defines an arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement." The following Article 7(2) declares: "The arbitration agreement shall be in writing."

Pursuant to the Arbitration Law, the arbitration agreement shall contain (i) an expression of the parties' wish to submit their dispute to arbitration; (ii) matters to be arbitrated; and (iii) a designated arbitration commission.[168] If an agreement for arbitration fails to specify or specify clearly matters concerning arbitration or the choice of arbitration commission, parties

[162] Sun and Willems (2015) p. 3.
[163] This also appears from Article 271 of the Civil Procedure Law and Article 1 of the SPC Interpretation 2006.
[164] See Sun and Willems (2015) p. 39–40.
[165] Sun and Willems (2015) p. 37.
[166] Article 2.1 of the New York Convention.
[167] Article 2.2 of the New York Convention.
[168] Article 16 of the Arbitration Law.

concerned may conclude a supplementary agreement. If a supplementary agreement cannot be reached, the agreement for arbitration is invalid.[169] These provisions entail that all three of the aforementioned requirements need to be fulfilled for the arbitration agreement to be valid.

The first requirement, an intention to refer the dispute to arbitration, means that arbitration needs to be the only dispute resolution method chosen by the parties. An arbitration agreement stating that disputes may be resolved through either arbitration or litigation is thus invalid in China and will not be given effect.[170] There are cases from the SPC, however, where no other dispute resolution method is mentioned in the agreement, and still the arbitration agreement has been considered to be void, e.g. due to misinterpreted translation or ambiguous wording such as "*if* a dispute is referred to arbitration, [country] law shall apply". To avoid such outcome, parties should explicitly state in their arbitration agreement that it is to be exclusive. Moreover, the first requirement also means that the parties must expressly choose arbitration in their arbitration agreement. No implied arbitration agreements, such as the parties accepting arbitration by contract implied in fact or in other ways imply arbitration in their agreement which can be interpreted through its wording, are accepted, mainly with reference to the 'in writing' requirement.[171]

The second requirement regards matters to be arbitrated. The matters which are to be subject to arbitration need to be clearly specified in the arbitration agreement and must fall within the scope of arbitrability.[172] The dispute matter must be contractual or non-contractual if it relates to rights and interests in property. The parties must be equal for the dispute to be arbitrable.[173] Administrative disputes, disputes concerning personal rights such as marriage, adoption etc. and other disputes specified by law (e.g. labour disputes) may not be arbitrated.[174]

The third and final requirement about the choice of arbitration commission is like the first requirement quite strict. Previously, it was possible for parties to state two arbitration commissions in their agreement and submit their dispute to arbitration at either of the two.[175] This practice was changed through the SPC Interpretation 2006. In its Article 5, the SPC states that if two or more arbitration institutions are agreed upon in an arbitration

[169] Article 18 of the Arbitration Law.
[170] Article 7 of the SPC Interpretation 2006.
[171] Sun and Willems (2015) p. 49–50.
[172] Tao (2012) p. 66.
[173] Article 2 of the Arbitration Law.
[174] Article 3 of the Arbitration Law; Tao (2012) p. 66.
[175] Tao (2012) p. 71–72.

agreement, the parties concerned may select, by agreement, one of these arbitration institutions to which they will apply for arbitration. If the parties fail to reach an agreement on the arbitration institution, the arbitration agreement shall be deemed invalid. Hence, the parties are ultimately allowed to select only one arbitration institution for the arbitration agreement to be valid. It should be noted also that it is not sufficient to only state, for example, that the arbitration should be conducted at an arbitration institution in China. A specific arbitration institution needs to be designated by the parties in the agreement.[176] However, pursuant to Article 16 of the SPC Interpretation 2006, the validity of the arbitration agreement in foreign arbitration is determined by the law of the place of arbitration (given that the parties have not otherwise agreed upon the applicable law). This means that for arbitration in countries where the law deems it sufficient to only state the place of arbitration, such as in countries which have adopted the UNCITRAL Model Law, the arbitration agreement should remain valid.[177]

The fact that the parties are required by law to select an arbitration institution for their dispute raises the question of ad hoc arbitration. Ad hoc proceedings are conducted by an arbitral tribunal independent from an institution with rules agreed upon by the parties, and is common in international arbitration practice.[178] The UNICTRAL Model Law recognises ad hoc in its definition of arbitration: "'arbitration' means any arbitration whether or not administered by a permanent arbitral institution".[179] The Chinese Arbitration Law does not expressly exclude ad hoc arbitration. However, pursuant to Articles 16 and 18, arbitration agreements which do not designate a specific arbitration institution are deemed invalid. Consequently, ad hoc arbitration cannot be carried out in China with legal effect. Nonetheless, foreign arbitral awards rendered by an ad hoc arbitration tribunal can still enjoy recognition and enforcement in China, see further Section 3.7 below.

The doctrine of severability, i.e. the independence of the arbitration agreement, is one of the fundamental principles of international arbitration and has been enshrined in Article 16 of the UNCITRAL Model Law as well as in many other legislations in various jurisdictions.[180] The principle was adopted in China over a decade before the Arbitration Law was enacted, when China signed the CISG Convention in 1980.[181] The severability principle is now incorporated into the Arbitration Law and states that an

[176] Tao (2012) p. 74–75.
[177] See Article 20 of the UNCITRAL Model Law.
[178] Fan (2013) p. 40–41.
[179] Article 2(a) of the UNCITRAL Model Law.
[180] Fan (2013) p. 29–31.
[181] Tao (2012) p. 83.

arbitration agreement shall exist independently and its validity shall not be affected by amendment, rescission, termination or invalidity of the contract.[182] It is further established in Article 57 of the Contract Law, which states that if a contract becomes invalid, or is rescinded or terminated, the validity of its independently existing clauses pertaining to the settlement of disputes shall not be affected. In practice, however, the principle has not been fully recognised by the courts. For instance, prior to the enactment of the Arbitration Law, the People's Courts held that if a contract was found to be void *ab initio* ('from the beginning') due to fraud, the arbitration clause should be void as well.

The independence of the arbitration clause has been tried multiple times by the Chinese courts. The courts have sometimes limited the scope of the severability principle, such as in the fraud cases, and incorrectly applied the principle in other cases. The independence of an arbitration clause does not mean that the clause needs an acceptance separate from that of the main contract. Chinese courts have however in some cases denied effect of an arbitration agreement due to parties assigning a contract not separately accepting the arbitration clause within the assigned contract. Judicial practice and interpretation of the severability matter has generally been inconsistent in China.[183]

3.4 Arbitration Institutions

The prominence of the arbitration institution in China has already appeared from the previous sections. As mentioned, parties are obligated by law to designate a specific arbitration institution in their arbitration agreement. The Arbitration Law does not provide for ad hoc proceedings, which means that arbitration at an institution is the only option in China for domestic and foreign-related arbitration alike. This institutionalisation is part of the authoritative Chinese legal society. The arbitration institution is an authoritative body to which the parties submit their dispute. This view of the arbitration institution in China differentiates from the Western one and might explain why Chinese arbitration institutions are referred to as arbitration commissions (委员会 *weiyuanhui*) instead of institutions.[184] Western arbitration institutions on the other hand, such as the ICC and the

[182] Article 19 of the Arbitration Law.
[183] Tao (2012) p. 84–85; Fan (2013) p. 31–34.
[184] Association of International Arbitration (2009) p. 12–13.

SCC, are called '院'(*yuan*), which translates to 'institute'.[185] In this paper, the words 'commission' and 'institution' is used interchangeably.

The Arbitration Law safeguards the autonomy of the institution. Arbitration commissions shall be independent from administrative authorities and there shall be no subordinate relationship between arbitration commissions and administrative authorities.[186] Quite contradictory, the Arbitration Law also stipulates that arbitration commissions shall be established directly under the central government of the municipality where the commission is located. When setting up an arbitration commission, the local government shall organise the establishment together with the local chambers of commerce.[187]

Unsurprisingly, governmental involvement is rather substantial in Chinese arbitration despite the independence statement in the Arbitration Law. A major factor which contributes to this close bond is that Chinese arbitration institutions receive government funding. The fees paid by disputing parties are allocated to the government directly, and in return the arbitration commissions receive funding in accordance with a fixed budget. This results in arbitration commissions being forced to restrict the number of cases they can accept, as more cases means higher costs but no additional revenue since the funding from the government is pre-determined. Another issue is that many chairmen and senior officers at the arbitration institutions concurrently serve as high-ranking officials of the local governments. Some arbitration institutions are also organised as a governmental organ, directly led by a superior authority. In some influential cases, the commission is required to report to the local government before rendering the award.[188]

The role of the arbitration institution according to transnational standards is administrative in nature. The institution provides a platform for the parties and the tribunal on which their proceedings can be organised. The arbitration institution shall not take a participating role in specific cases; the dispute resolution is based on a contract between the parties and the arbitral tribunal where the latter is empowered to settle the arisen dispute.[189] It is thus the contract that determines jurisdiction over the dispute, not the institution. For instance, pursuant to the ICC Rules, all jurisdictional power lies with the arbitration tribunal, except for only a few uncertain cases, in

[185] 国际商会仲裁院(ICC) http://www.icc.se/wp-content/uploads/2015/04/ICC-2017-Arbitration-and-2014-Mediation-Rules-chinese-version.pdf; 斯德哥尔摩商会仲裁院(SCC) http://sccinstitute.com/chi/%E5%85%B3%E4%BA%8Escc/.
[186] Article 14 of the Arbitration Law.
[187] Article 10 of the Arbitration Law.
[188] Sun and Willems (2015) p. 8–9.
[189] Fan (2013) p. 57.

which the ICC Court shall decide if it is *prima facie* satisfied that an arbitration agreement may exist.[190] In China, it is the arbitration institution and not the arbitral tribunal which decides on the arbitrators' jurisdiction. This further consolidates the institutionalisation of Chinese arbitration, which often restricts the contractual nature and general principles of arbitration, such as party autonomy.[191]

The only authority to trump the arbitration institution is the People's Court. Article 20 of the Arbitration Law stipulates that a party who wants to challenge the validity of the arbitration agreement may request the arbitration commission to make a decision or apply to the People's Court for a ruling. If one party requests the arbitration commission to make a decision and the other party applies to the People's Court for a ruling, the People's Court will rule. However, the SPC has in its interpretations clarified that if a party applies to a People's Court after an arbitration institution has made a decision on the validity of an arbitration agreement, the People's Court shall dismiss the application.[192]

Since the Arbitration Law came into force in 1995, more than 200 new arbitration commissions have been established in China. Many of these have been established solely for administrative purposes, not because of an increased demand for dispute resolution.[193] It is therefore of great importance not to view all Chinese arbitration institutions equally. The CIETAC is the largest, oldest and leading arbitration commission in China.[194] Together with CMAC, it is the main international arbitration institution in the country. CIETAC deals with all types of general commercial disputes, whereas CMAC focuses on maritime disputes. Historically, due to the dual-track system in the Chinese legislation, the international arbitration institutions only had jurisdiction over foreign-related matters, and no domestic disputes could be submitted to arbitration at these institutions. This has since been changed, and in the year 2000 CIETAC expanded its jurisdiction to include domestic arbitral cases as well.[195] From the handful of cases CIETAC administered some fifty years ago, the caseload has increased dramatically, reaching over one thousand cases per year today.[196] This puts CIETAC on the caseload top list

[190] Articles 6(3)–6(5) of the ICC Rules of Arbitration 2017.
[191] Fan (2013) p. 57.
[192] Article 13 of the SPC Interpretation 2006.
[193] See Yu (2011) p. 274; Sun and Willems (2015) p. 4–5.
[194] Fan (2013) p. 117.
[195] Tao (2012) p. 22, 30–31.
[196] Sun and Willems (2015) p. 5–6.

internationally.[197] In China, CIETAC is transcendent in regard to dispute amounts, with double the amount of the second in line, the BAC.[198]

The newer commissions are so called local arbitration commissions (LACs). The LACs are to a great extent influenced by CIETAC's rules and governance due to its status as the leading institution in Chinese arbitration practice. However, there are many differences between the major arbitration commissions, such as CIETAC, and the LACs. It is the smaller LACs that struggle the most with the aforementioned autonomy issues. The level of independence of an LAC depends to a great extent on the attitude of the local government towards arbitration. The BAC, for instance, has reached a forefront position in Chinese arbitration owing to the freedom from interference from the Beijing local administration.[199] The BAC has proclaimed itself the first financially independent arbitration commission in China. That goal is not easily reached for smaller and less prominent institutions, though. Additional sources of income are needed, such as income derived from assets like real estate property. Even then, the financial situation might be too strained due to the hefty taxes imposed on arbitration institutions not following the 'separation of revenue and expenditure' model.[200]

Lastly, it is worth noticing that pursuant to the Arbitration Law, all Chinese arbitration commissions are required to be members of the China Arbitration Association (CAA). The CAA is described as a self-regulating organisation of arbitration commissions which shall, in accordance with its charter, supervise arbitration commissions and their members and arbitrators as to whether or not they breach discipline.[201] However, in 2012, the CAA had still not been established[202], and the author finds no evidence of any establishment of the association as of today.

3.5 Arbitral Tribunals

The Arbitration Law possesses some similarity with common international rules as regards the arbitration tribunal. The UNCITRAL Model Law offers parties the freedom to choose the number of arbitrators and the procedure for appointing them. If failing to do so, there are applicable rules in Articles

[197] Fan (2013) p. 171.
[198] Sun and Willems (2015) p. 6–7.
[199] Yu (2011) p. 274–275.
[200] Sun and Willems (2015) p. 9–10.
[201] Article 15 of the Arbitration Law.
[202] Tao (2012) p. 41.

10(2), 11(3) and 11(4) where a court or other authority may help with the appointment upon the request of a party.[203] The institutionalisation of Chinese arbitration is evident in this area as well. In China, the arbitration tribunal may be composed of one or three arbitrators, which the parties, with certain limits, have the freedom to choose.[204]

The chairman of the arbitration commission is vested with the power to appoint one or more arbitrators to the tribunal, either by entrustment of the parties or if the parties fail to agree on the method of formation of the arbitration tribunal or to select the arbitrators within the allotted time limit.[205] These stipulations are similar to the Articles 10(2), 11(3) and 11(4) of the UNCITRAL Model Law; however, the Chinese provisions are a little more authority invasive. If the parties of a Chinese arbitration dispute do select the arbitrators themselves, they do not have the freedom to appoint just any person of their choosing to the tribunal. Article 13 of the Arbitration Law sets out a few requirements for potential arbitrators. Firstly, an arbitrator must be an upright, righteous person. Secondly, the arbitrator needs to meet one of the following conditions:

(i) to have been engaged in arbitration work for at least eight years;
(ii) to have worked as a lawyer for at least eight years;
(iii) to have served as a judge for at least eight years;
(iv) to have been engaged in legal research or legal education, possessing a senior professional title; or
(v) to have acquired the knowledge of law, engaged in the professional work in the field of economy and trade, etc., possessing a senior professional title or having an equivalent professional level.

This provision strictly controls what persons are eligible to serve in an arbitral tribunal in China and thus limits the parties' contractual freedom.[206] Article 13 further stipulates that each arbitration commission shall keep a register of arbitrators with different specialisations. This is generally viewed as a compulsory panel system existing in China, with the arbitration commissions' lists being the only pool of potential arbitrators for the parties to choose from. Each of China's more than 200 arbitration commissions has its own panel list. A person listed on CIETAC's panel register cannot be appointed as an arbitrator at a BAC dispute, unless that person is also on

[203] Article 10(1) and 11(2) of the UNCITRAL Model Law.
[204] Articles 30 and 31 of the Arbitration Law.
[205] Articles 31 and 32 of the Arbitration Law.
[206] Fan (2013) p. 65.

BAC's panel list.[207] However, in recent years, the strictness of the compulsory panel system has been somewhat loosened.

In 2005, CIETAC introduced the opportunity for parties to choose arbitrators from outside the panel list in its rules.[208] This widened the pool of possible arbitrators and opened up for foreigners. Previously, the panel consisted mostly of governmental officers and the commissions' own administrative staff, all local residents sharing acquaintance.[209] The new rules naturally improved the impartiality among appointed arbitrators. SHIAC and SCIA later followed suit and now also allow appointment of arbitrators from outside the panel list.[210] Nevertheless, there are still some requirements in place for the parties to meet. Any appointment of an arbitrator not chosen from the arbitration commissions' panel list needs to be approved by the chairman of the arbitration commission.[211] The appointed arbitrators must also meet the requirements set forth by the law, i.e. the arbitrators must fulfil one of the five conditions stated on the previous page.[212] Hence, the parties still do not enjoy full freedom in forming the tribunal. It is for instance virtually impossible to appoint technical specialists such as engineers as arbitrators, given the legal requirements. Although the regulations provide for a narrow scope of arbitrator choice, one must bear in mind that the major Chinese arbitration institutions have immense panel lists; CIETAC's list comprise over one thousand arbitrators, SHIAC's around eight hundred, and SCIA's and BAC's about five hundred each.[213]

Impartiality and independence of the arbitrators is another topic of interest when examining the Chinese arbitration system. The UNCITRAL Model Law declares the impartiality and independence of the arbitrators in several clauses.[214] The Arbitration Law mentions impartiality when stating circumstances in which an arbitrator must withdraw: "the arbitrator [must withdraw if he or she] has another relationship with a party or his agent in the case which may affect the impartiality of the arbitration".[215] Nowhere in the Arbitration Law is the independence of the arbitrators or tribunal mentioned. The CIETAC Rules, however, follow the UNCITRAL Model

[207] Fan (2013) p. 65–66.
[208] See Article 21(2) of the CIETAC Rules (2005); and Yu (2011) p. 273.
[209] Gu (2008) p. 140–144.
[210] Pisacane (2016) p. 13.
[211] Article 26(2) of the CIETAC Rules (2015), Article 21(2) of the SHIAC Rules (2015) and Article 26(2) of the SCIA Rules (2016), respectively.
[212] See Article 21(2) of the SHIAC Rules (2015), Article 27(3) of the SCIA Rules (2016) and Article 30 of the CIETAC Rules (2015).
[213] Pisacane (2016) p. 14.
[214] See Articles 11(5), 12(1), 12(2),
[215] Article 34(3) of the Arbitration Law.

Law and extend the requirements for the arbitrators. Article 32(2) of the CIETAC Rules (2015) states that "a party having justifiable doubts as to the impartiality or independence of an arbitrator may challenge that arbitrator in writing and shall state the facts and reasons on which the challenge is based with supporting evidence". The CIETAC rules even go one step further and also demand that the arbitral tribunal independently and impartially renders a fair and reasonable arbitral award based on the facts of the case and the terms of the contract, in accordance with the law, and with reference to international practices.[216] This provision is quite unusual in international arbitration practice.[217] Despite the existence of these provisions, the fact that CIETAC and other arbitration commissions appoint its own personnel and government officials as arbitrators is still an impartiality and independence issue. Some restrictions have been made to tackle this issue, such as CIETAC prohibiting parties to appoint staff members of the commission to the tribunal and only allowing the chairman to do so in small claim cases.[218]

It is evident that the Arbitration Law limits the power of the arbitral tribunal in several ways. For example, it does not permit the tribunals to determine the validity of arbitration agreements and jurisdictional matters.[219] Independency is thus a major issue, since the still quite substantial administrative nature of Chinese arbitration, the arbitral tribunal is inferior and subordinate to the arbitration commissions.[220]

3.6 The Combination of Mediation and Arbitration

The Chinese heritage of avoiding litigation provides for mediation maintaining its role as the preferred dispute resolution method in China.[221] Due to the strong mediation culture, conciliation elements have been integrated into the Chinese arbitration system. This practice is often referred to as 'med-arb'. The modern history of med-arb begins in the early years of CIETAC (then FTAC) in the 1950s, when most cases submitted to the commission were resolved through mediation, even though no arbitration rules at that time comprised any mediation provisions.[222] Today both the Arbitration Law and most major arbitration commission rules contain

[216] Article 49(1) of the CIETAC Rules (2015).
[217] Liu and Shan (2015) p. 106.
[218] Fan (2013) p. 67.
[219] Sun and Willems (2015) p. 23–24.
[220] Yu (2011) p. 275.
[221] Ibid. p. 149.
[222] Sun and Willems (2015) p. 423.

provisions on the combination of arbitration and mediation or conciliation.[223]

Pursuant to the med-arb provisions, an arbitration tribunal may carry out conciliation prior to giving an arbitration award if both parties consent.[224] This practice raises the question about the role of the arbitrator. The same person, i.e. the appointed arbitrator, is to act as both mediator and arbitrator in the same proceeding. In med-arb, the distinction between the two roles therefore becomes blurred.[225] The role of the arbitrator is a key issue of the dispute resolution method that is arbitration. If the role of the arbitrator is to reach a verdict and resolve disputes by delivering binding judgements, the combination with the mediating role is not suitable. However, if the purpose of the arbitrator is to simply oblige the parties with resolving their disputes, then mediation may be a good means by which to do so.

Professor Fan has compiled the major pros and cons expressed by med-arb supporters and opponents. The key arguments for med-arb are that arbitrators should resolve disputes in the most efficient way, the parties voluntarily choose med-arb, and the practice is an efficient means of dispute resolution. The main arguments against med-arb are that the mission of arbitrators is to adjudicate and render a binding decision, med-arb induces the risk of failure to achieve due process and natural justice, affecting the impartiality of arbitrators. Whether or not arbitration and mediation can be accepted as suitable to combine ultimately boils down to fundamental legal standpoints regarding the role of the arbitrator.[226] In China, the practice seems to work well. Med-arb has a long tradition in China and fits well with the local dispute resolution history and culture. This is supported by research, which shows that Asian parties more often accept a facilitated settlement.[227]

3.7 Recognition and Enforcement of Arbitral Awards

The Arbitration Law has adopted the principle of the finality of the arbitral award, meaning that the award is not subject to appeal. However, if an

[223] The provisions refer to '调解' (*tiaojie*) which translates to either mediation or conciliation.
[224] See Articles 51–52 of the Arbitration Law, Article 47 of the CIETAC Rules (2015) and Articles 42–43 of the BAC Rules (2015).
[225] Fan (2013) p. 137–138.
[226] Ibid. p. 139, 142.
[227] Wang (2001) p. 177–179.

arbitration award is set aside or its enforcement is denied by the People's Court in accordance with the law, a party may reapply for arbitration, or institute an action in the People's Court, regarding the same dispute.[228] The recognition and enforcement of arbitral awards in China is strongly linked to what type of arbitration the award concerns. The legal framework, namely the Arbitration Law and the Civil Procedure Law, sets out different standards for the recognition and enforcement of domestic, foreign-related and foreign judgments respectively.[229] For all types, parties are obligated to comply with the award of their own accord.[230] Despite the principle of the finality of the arbitral award, if the losing party does not want to comply with it, that party may initiate an action to set aside the award. Such action is possible for domestic and foreign-related awards, but not for foreign awards. The application for setting aside an award shall be submitted within six months from the date the award was received.[231] The Arbitration Law sets out the following grounds on which the People's Court may set aside a domestic award:

(i) there is no arbitration agreement;
(ii) the matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitration commission;
(iii) the formation of the tribunal or the arbitration procedure was not in conformity with the statutory procedure;
(iv) the evidence on which the award is based was forged;
(v) the other party has withheld evidence sufficient to affect the impartiality of the arbitration; or
(vi) the arbitrators have committed embezzlement, accepted bribes, conducted malpractice for their personal benefit or perverted the law.[232]

Article 70 of the Arbitration Law regulates the setting aside of foreign-related awards. It refers to Article 260 of the Civil Procedure Law (Article 274 of the Civil Procedure Law revised in 2012) which sets out the following grounds for setting aside a foreign-related arbitral award:

(i) there is no arbitration clause in the parties' contract and no subsequent written arbitration agreement between them;

[228] Article 9 of the Arbitration Law.
[229] Tao (2012) p. 170.
[230] Article 62 of the Arbitration Law.
[231] Article 59 of the Arbitration Law.
[232] Article 58 of the Arbitration Law.

(ii) the party against whom the application for enforcement is made was not given notice of the appointment of an arbitrator or of the initiation of the arbitration proceedings or was unable to present its case due to causes beyond its responsibility;
(iii) the formation of the arbitration tribunal or the arbitration procedure was not in conformity with the rules of arbitration; or
(iv) matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitration institution.[233]

The losing party can also wait for the winning party to apply for enforcement and then resist recognition and enforcement of the arbitral award. For domestic awards, if the party against whom the enforcement is sought presents evidence which proves that the arbitration award involves one of the following circumstances very similar to those for setting aside awards, the People's Court shall rule to refuse enforcement:

(i) there is no arbitration clause in the parties' contract and no subsequent written arbitration agreement between them;
(ii) matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitration institution;
(iii) the formation of the tribunal or the arbitral procedure was not in conformity with the statutory procedure;
(iv) the main evidence for ascertaining the facts was insufficient;
(v) application of law was incorrect; or
(vi) the arbitrators have committed embezzlement, accepted bribes, conducted malpractice for their personal benefit or perverted the law while arbitrating the case.[234]

For foreign-related awards, the criteria for refusing enforcement are identical to the ones for setting aside arbitral awards since Article 71 of the Arbitration Law which regulates the enforcement of foreign-related awards also refers to Article 260 of the Civil Procedure Law (Article 274 of the Civil Procedure Law revised in 2012). Moreover, for both domestic and foreign-related arbitration, the People's Court may also set aside or refuse enforcement of an arbitration award if it determines that the award violates the public interest.[235]

[233] Article 274 of the Civil Procedure Law.
[234] Article 63 of the Arbitration Law; Article 237 of the Civil Procedure Law.
[235] Article 58 of the Arbitration Law; Article 237 and Article 274 of the Civil Procedure Law.

As regards completely foreign awards, i.e. arbitral awards rendered in a foreign country, the recognition and enforcement is based on either international treaties concluded or acceded to by the PRC, or the principle of reciprocity.[236] As of yet, the principle of reciprocity has never been invoked for the recognition and enforcement of a foreign arbitral award.[237] The main source applicable to the recognition and enforcement of foreign arbitral judgments in China is the New York Convention. Pursuant to Article I(1), the convention is applicable to foreign awards in China.

China has made two reservations to the convention; the reciprocity reservation and the commercial reservation.[238] The reciprocity reservation means that China will apply the New York Convention only to the recognition and enforcement of awards made in the territory of another contracting state. The commercial reservation means that China will apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the PRC.[239] Pursuant to the New York Convention, enforcement of a foreign award can (but does not have to) be refused on the following grounds:

(i) Incapacity of a party or invalidity of the arbitration agreement;
(ii) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case;
(iii) The award deals with matters outside the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the arbitration agreement;
(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, lacking such agreement, the law of the country where the arbitration took place; or
(v) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[240]

[236] Article 281 of the Civil Procedure Law.
[237] Pisacane (2016) p. 39; Fan (2013) p. 85.
[238] New York Convention Contracting States www.newyorkconvention.org/countries. Accessed 20 November 2017.
[239] Article 1(3) of the New York Convention.
[240] Article V(1) of the New York Convention; Pisacane (2016) p. 39.

Under Chinese law, the recognition and enforcement of foreign awards is regulated in the Civil Procedure Law. The international treaties mentioned in the law also refers to BITs on judicial assistance entered into by China. The law stipulates that if an award made by a foreign arbitral institution requires recognition and enforcement by a People's Court of the PRC, the party concerned shall directly apply to the intermediate People's Court of the place where the party against whom enforcement is being sought has its domicile or where its property is located.[241] According to Article 282 of the Civil Procedure Law, a foreign arbitral award can be denied recognition and enforcement if the People's Court finds that the award violates the basic principles of the law of the PRC or the sovereignty, security and social and public interest of the country. Unless such violation is deemed to be present, the People's Court shall make a ruling to recognise the effects of the foreign award. This provision has received criticism from scholars because of its vagueness. This wording is quite ambiguous and not further explained or elaborated on in the law. Moreover, there are no other provisions declaring what effects foreign judgments may have in China.[242]

As stated above, Chinese law refers to the recognition and enforcement of awards "made by a foreign arbitral institution". Where does that leave foreign ad hoc awards? It has previously been noted that the Chinese Arbitration Law does not provide for ad hoc arbitration. Despite that, China still recognises and enforces foreign ad hoc awards. This is due to China being a contracting state to the New York Convention. Article I(2) provides that the term "arbitral awards" in the convention includes both institutional and ad hoc awards. China is hence obligated to recognise and enforce ad hoc awards rendered in another contracting state.[243] Ad hoc arbitral awards from all jurisdictions, including non-contracting states, are generally recognised and enforced by Chinese courts provided that ad hoc arbitration is recognised under the law of the seat of arbitration.[244] In practice, however, there exists a collective resentment toward non-institutional arbitration in China, which may affect the recognition of ad hoc arbitration.[245]

There is a widespread opinion among legal practitioners in China which allege that the recognition and enforcement of arbitral awards is a major issue and legal obstacle in the country.[246] In the past, China has been cautious about the recognition and enforcement of foreign judgments. Some scholars have ascribed this cautiousness to China trying to prevent the

[241] Article 283 of the Civil Procedure Law.
[242] Zhang (2014) p. 34.
[243] See Articles I-III of the New York Convention; Fan (2013) p. 42.
[244] Sun and Willems (2015) p. 13.
[245] Fan (2013) p. 44.
[246] PwC and QMUL Survey (2008) p. 3.

outflow of resources from the country.[247] Several surveys have been conducted on the enforcement rates of arbitral awards in China. In short, the results vary, mainly due to the use of different research methods.[248] The studies indicate that the enforcement rates have increased over time. In a survey conducted by professor Randall Peerenboom in 2001, the results showed that 52 per cent of foreign awards were enforced, and 47 per cent of CIETAC awards.[249] The most recent survey made by the international law firm King & Wood Mallesons in 2016 found an overall average enforcement rate of 68 per cent. The survey covered cases from 1994 to 2015, and demonstrated improved enforcement rates over time. The enforcement rate for cases 2011–2015 was 86.4 per cent. A survey made by PwC (PricewaterhouseCoopers) and the School of International Arbitration at Queen Mary University of London also showed that foreign arbitral awards generally are recognised and enforced.[250]

For the courts to refuse enforcement of an award, a ground for the refusal must be invoked. One might believe that 'violation of public policy'[251] would be frequently invoked due to its seemingly arbitrary applicability and the prominent status public policy holds in China.[252] According to the King & Wood Mallesons study, however, that ground was only cited once as a basis to deny enforcement within the cases researched in the survey.[253] What primarily affects the enforceability of an award is the location for the enforcement, amount of the award or the sensitivity of the subject of the arbitration. In some areas in China, awards are easier to enforce due to the more positive attitude of the courts and local governments.[254] More sizeable awards and legally and politically sensitive awards may limit the enforceability of an award.[255] Nevertheless, the trends in the research show that the long-lived fear for the enforceability of arbitral awards in China may no longer be justified.

[247] Reyes (1997) p. 266; Tu (2016) p. 169.
[248] Fan (2013) p. 92.
[249] Peerenboom (2001) p. 254.
[250] PwC and QMUL Survey (2008) p. 11.
[251] Article V(2)(b) of the New York Convention; see also equivalent grounds in Article 282 of the Civil Procedure Law.
[252] Wang & Zhang (1997) p. 10; Zhang (2014) p. 315.
[253] Utterback et. al. (2016) p. 8.
[254] Ibid. p. 2–5.
[255] Fan (2013) p. 92–93.

4 Chinese Arbitration Characteristics

4.1 Introduction

Chinese arbitration has been compared to Chinese chess, since it "shares a common ancestry with international arbitration standards, but also has differences that make it unique".[256] Although the Chinese government has made a great effort in trying to bring Chinese arbitration in line with international arbitration standards, there are still some existing discrepancies. China is currently in a stage with development of a modernised legal system, while the ideology and legal culture of the nation remains traditional.[257] From the foregoing account, a few patterns of reoccurring characteristics can be detected. These will be elaborated on below.

4.2 The Dual-Track System

Although the Chinese arbitration institutions no longer are strictly divided between domestic and foreign-related institutions, the regulations for the different types are still separated in two different tracks. The differentiation of domestic and foreign-related arbitration provides for different governing of the procedures. Domestic arbitration is more controlled than its foreign-related counterpart. It needs to be seated in China, apply Chinese substantive law, and is also subject to substantive review by the People's Courts. The domestic awards are reviewed with respect to procedural issues, public policy and more invasively, also on substantive issues. This can be seen for instance in the provisions regulating the setting aside and enforcement of domestic awards, where the merits of the award to some extent are subject to review by the People's Court.[258]

Foreign-related arbitration, on the other hand, may be seated within or outside China and may choose the law applicable to their dispute. As regards review of awards, for foreign-related arbitration the judicial review is limited to procedural issues and public policy. Additionally, foreign-

[256] Paul Chow, cited in Julius Melnitzer, 'Reforms Make Arbitration in China a Safer Bet, Regs Still Not Up to U.S. Standards'. *Inside Counsel*, August 2005.
[257] Association for International Arbitration (2009) p. 20.
[258] See Section 3.7.

related arbitration enjoys the protection of the so-called 'Report-System' created by the SPC to safeguard foreign-related disputes from local protectionism. The Report System includes the prohibition of local officials' interference with the judicial process and the prohibition of individuals or organs obstructing execution orders of the People's Courts.[259]

The reason for the existence of the dual-track system is historical and is attributed to the development of arbitration in China. Prior to the enactment of the Arbitration Law in 1995, domestic and foreign-related arbitration were completely separate in terms of both regulation and procedure. The modern domestic arbitration system originates from the time in the mid-1900s when the government promoted arbitration and mediation as the preferred means for dispute resolution. For domestic disputes, only administrative arbitration was offered, and for foreign-related disputes, the predecessors to CIETAC and CMAC facilitated dispute resolution for disputes arising from commercial contracts with foreign counterparties. Although not very busy, the foreign-related arbitration institutions were active during the whole Cultural Revolution.[260] With the opening-up policy, the foreign-related dispute resolution system evolved from its existing form, but there was also again a need for domestic dispute resolution, which place in the legal system had been left with a void during the Cultural Revolution. The domestic arbitration system was revived and reinstalled many main features from the old domestic system.[261] Thus the separation and distinction between domestic and foreign-related arbitration prevailed, and continued to do so in the new Arbitration Law in the mid-90s. China is not the only country who has adopted a dual-track system, however what is distinct in China is the extreme form of separation and the discrimination of domestic arbitration.[262] In recent years, calls from both scholars and practitioners alike have been made for more harmonised and unified system for domestic and foreign-related arbitration, due to the inequalities between the two. However, it is still unclear if and when such reform would take place.[263]

4.3 Legislative Features

Despite the great efforts of the Chinese government to create a comprehensive legislative framework for arbitration, there are still

[259] See Articles 126 and 128 of the Contract Law; Fan (2013) p. 26–27.
[260] See Section 2.4.
[261] Tao (2012) p. 2.
[262] Moser (2012) p. 52–53.
[263] Ibid. p. 92.

prevailing ambiguities in both the legislation itself as well as in its implementation. Professor Fan notes that in almost every jurisdiction there is a discrepancy between the written law and its implementation in practice, however this divergence seems greater in China. Vague provisions and voids in the legislation have, despite the efforts of the SPC to provide interpretations, led to inconsistencies in judicial rulings. It is difficult even for experienced Chinese lawyers to understand the regulatory framework, especially given the fact that the officially issued interpretations are not always consistent with each other. They remain isolated documents, and no formal effort has been made to harmonise them. The ambiguous legal framework which leads to inconsistent judgments hence makes the predictability of arbitration in China somewhat lacking. For example, the judicial practice and interpretation of severability issues illustrate this inconsistency. Although incorporated in the Arbitration Law, the severability principle has been misunderstood by the courts and interpreted in various ways, resulting in different outcomes in different cases. A possible explanation is that the vagueness in the law increases the inconsistent application of the law in practice. Another explanation is the size of the country. China still does not have a unified and integrated legal system, which results in local governments and local courts providing different standards in the judicial practice.[264]

The discrepancy between the written law and its implementation as well as the inconsistency in judicial practice seem to indicate that the normative force of law is rather weak in China.[265] This is consistent with the legal tradition without the rule of law, and *li* above *fa*. In international practice, some jurisdictions open for parties allowing the tribunal to decide the dispute in accordance with equitable principles. Article 28(3) of the UNCITRAL Model Law stipulates that the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* if authorised by the parties to do so. This means that the tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law. In China, the Arbitration Law provides that arbitration disputes shall be resolved on the basis of facts, in compliance with the law and in an equitable and reasonable manner.[266] Many Chinese arbitration commissions have also incorporated this principle in their arbitration rules and are empowered to render the award based on equitable principles.[267] The provision embodies an old Chinese adage, *heli hefa*, meaning that ‘a just

[264] Fan (2013) p. 171–173.
[265] Ibid. p. 209.
[266] Article 7 of the Arbitration Law.
[267] Tao (2012) p. 114–115.

decision must be in conformity with law and reasonableness'.[268] Here a parallel can be drawn to imperial China where the magistrates adjudicated disputes based on this principle with focus on *li*, the reasonableness considering the circumstances of the case, a form of equitable principles. Reasonableness has thus been part of Chinese dispute resolution since ancient times and still is today. The difference between China and the West in this respect is that whereas arbitration tribunals in the West can base their decision on equitable principles only when expressly authorised to do so by the parties, Chinese arbitration commissions are empowered to do so by law.

While the arbitration legislation in some respects is quite vague and ambiguous, it is at the same time very rigid in other aspects. For example, the criteria for a valid arbitration agreement are very strict, as well as the regulations of the parties' ability to choose the arbitrators of their dispute. Although the principle of party autonomy is stated in the Arbitration Law, the many restrictions and specific requirements ultimately limits the parties' autonomy of the dispute.[269]

4.4 No Ad-Hoc Arbitration

Party autonomy is also restricted in other ways. The decision by the Chinese government to exclude ad hoc arbitration from the scope of the Arbitration Law, and consequently prohibit ad hoc proceedings, also limits the arbitration options for the parties. Not recognising ad hoc arbitration is quite unique for China; other countries with extensive governmental control such as the United Arab Emirates still provides ad hoc arbitration.[270] In recent years, however, a few signs of progress have been seen in China regarding ad hoc proceedings. Firstly, the SPC addressed the concept of ad hoc arbitration in its draft provisions in 2004, in which the SPC proposed that ad hoc arbitration should be allowed if both parties to the ad hoc arbitration agreement are nationals of member states to the New York Convention and neither country prohibits ad hoc arbitration.[271] The draft provisions thus excluded domestic ad hoc arbitration. Nevertheless, the provisions never became effective and therefore ad hoc arbitration is still not recognised in

[268] Fan (2013) p. 209.
[269] Sun and Willems (2015) p. 23.
[270] John Gaffney, Thomas R Snider and Dalal Al Houti: "United Arab Emirates", Global Arbitration Review, <http://globalarbitrationreview.com/jurisdiction/1000211/united-arab-emirates>. Accessed 29 November 2017.
[271] Article 27 of the Supreme People's Court's Interpretations to Several Issues on the Application of the China Arbitration Law (Draft Provisions for Opinion Solicitation) issued on 22 July 2004.

China. The draft provisions indicate that ad hoc arbitration may be a reality in China in the future, although the country was not ready for it in 2004. Secondly, arbitration commissions have also made advancements regarding ad hoc arbitration. Some institutions have accommodated ad hoc proceedings for years, however without regulation. As recently as April this year, Zhuhai Arbitration Commission in the Guangdong province promulgated a set of ad hoc arbitration rules, and more Chinese arbitration commissions are expected to follow suit.[272] Lastly, the most recent development from the government's side comes from SPC's Opinions on Providing Judicial Protection for the Construction of Pilot Free Trade Zones, which were issued on 30 December 2016 (FTZ Opinions). Although the FTZ Opinions do not recognise ad hoc arbitration per se, the SPC however encourages the use of alternative dispute resolution mechanisms such as arbitration and mediation to resolve commercial disputes within the free trade zones, support the innovation and development of the arbitration institutions and provide convenient judicial facilities for the different commercial disputes within the free trade zone.[273] Article 9 of the FTZ Opinions vaguely states the requirements for a valid arbitration agreement between FTZ registered enterprises. It can be interpreted as not demanding the parties to submit their dispute to a designated arbitration commission, which opens for legal ad hoc proceedings within China for FTZ enterprises.[274] However, the implementation in practice of these opinions are still unclear and all interpretations of their impact are merely speculations made by scholars and practitioners. It is yet to see if any legally effective ad hoc proceedings will take place in China in the future.

Since the Arbitration Law does not explicitly prohibit ad hoc arbitration, parties who agree on ad hoc proceedings can still conduct such arbitration voluntarily. However, the ad hoc arbitration agreement and any award rendered by ad hoc arbitrators in China will not have any legal bearing in China and will for instance not be able to enforce. The only enforceable ad hoc awards in China are foreign ad hoc awards enforced in accordance with the New York Convention.

The reason for denying ad hoc arbitration is said to be to secure the quality of arbitration. The same argument has been used for explaining the compulsory panel system for appointing arbitrators.[275] If an institution is in charge of the proceedings, the state can ensure due process. However, one can ask if the institutionalisation resolves this issue, since it has been shown

[272] Cao (2017) p. 142.
[273] Article 8 of the FTZ Opinions.
[274] Cao (2017) p. 142.
[275] Fan (2013) p. 66, 172.

that many local arbitration institutions struggle with administrative inference and conflicts of interest. There is also a political factor involved in this issue, entailing the wish of the government to oversee and control economic matters, which can be achieved by regulating and reviewing the arbitration practice. Allowing ad hoc arbitration would give parties the freedom to avoid governmental interference in their proceedings.[276] The issue of not recognising ad hoc arbitration is thus closely linked to another issue, namely the governmental interference in and influence of the arbitration practice.

4.5 Governmental Influence

The Western concept of arbitration is based on the notion of freedom of the contract. In China, arbitration is an alternative to litigation in the general courts, however still a method of 'state-sponsored dispute resolution'. It is an institutionalised procedure which in principle receives its authority from the state and not the parties.[277] As have been shown in the previous Chapter 3 of this essay, the arbitration process in China is much more strictly regulated than it is in the West. The administrative interference can be seen throughout the whole arbitration process. To begin with the arbitration institutions, which are currently the only resort for parties wanting to resolve their dispute through arbitration in China, these are in many places established in connection with the local government and sometimes even organised as governmental bodies. Even though the administrative interference is more evident in the LACs, larger institutions such as CIETAC also has some 'governmental flavour'. Although functionally independent and holding a non-governmental status, CIETAC was initially established by the government and is still financially dependent on it.[278]

Although the Arbitration Law sets out the main principles for an independent arbitration system, such as party autonomy and independence of the arbitration institutions, these are restricted due to the extensive administrative control of the process. The legislation contributes in this respect by establishing strict rules and requirements for the arbitration practice. As stated above, excluding ad hoc arbitration is one example of keeping control of the arbitration process, as well as the strict requirements for what constitutes an arbitration agreement. Furthermore, the options for parties to choose their arbitrators are limited to the institutions' panel lists.

[276] Yu (2011) p. 278–279.
[277] Association for International Arbitration (2009) p. 12.
[278] Fan (2013) p. 122, 125.

Although now possible to choose arbitrators from outside these lists, the appointments need to be approved by the chairman of the institution, and the arbitrators need to meet the requirements set forth in the Arbitration Law. There are no guidelines for when a chairman may reject an off-panel arbitrator appointed by parties, and the process may be too awkward for the parties to opt for it.[279] Ultimately, the awards are subject to review by the state courts. The domestic reviews are, to some extent, even subject to substantive review.

The reasons for this governmentally influenced arbitration system are both historical, cultural and political. The appreciation of a strong authority is inherited from Confucianism, in which hierarchy is a fundamental norm. This made China a collectivist society where the needs of the group were put before the needs of the individual. Throughout history, China has always had a strong ruler. After twenty centuries of emperors in imperial China followed a brief period of turbulence in the governance, China was united again under the rule of the CCP. The collectivist society followed the planned economy and centralised plans carried out by the government. It was in this Chinese society that arbitration was developed. After being institutionalised as administrative arbitration a mere half decade ago, it is understandable that the arbitration system still experiences a fair share of administrative interference. Lastly, as was touched upon in the previous Section 4.4, there may also be political motives for the strict control of the arbitration process. By regulating and intervening in the various aspects of arbitration, the government maintain its power and can ensure that the arbitration practice is conducted in accordance with state politics and public policy.[280]

Law professor and arbitration researcher Weixia Gu argues that state control over the arbitration process is the greatest obstacle for modern Chinese arbitration. Many of the other aforementioned issues concerning the Chinese arbitration system ultimately derives from the governmental influence in Chinese arbitration. In order for China to become a competitive arbitration destination and align its system with transnational arbitration standards, it needs to develop further to strengthen party autonomy and the independence of arbitration and eradicate the state control.[281]

[279] Yu (2011) p. 276.
[280] Ibid. p. 278–279.
[281] See Weixia Gu in Yu (2011) p. 281–283.

4.6 Amicable Dispute Resolution

The Confucian virtue of maintaining harmony entails the aversion of litigation. The philosophy promoted avoidance of conflicts and hence litigation has historically been suppressed in China. The only dispute resolution methods available to the public in imperial China were the state courts, associated with crime, and the local conciliation practice emphasising compromise. The decisions of the local mediators were not legally binding or enforceable, the only force on the parties to follow the decision was the social pressure of acting morally correct and accepting compromise. The concept of party autonomy did not exist in this dispute resolution system, disputes were handled as to benefit the collective society. When modern arbitration was introduced in China it did not fit the model of either of these two practices. It has been a challenge for modern arbitration to be established in China in line with transnational standards, since the dispute resolution systems in China and the West derive from completely different origins.[282]

The Confucian principle of harmony is still promoted by the Chinese government and is thus still a part of the national ideology. It is set forth as a guiding principle in both law-making and judicial practice.[283] This naturally affects also the arbitration practice, and may be one of the reasons why the mediation and conciliation practice is still very prominent and effective in China. Another reason mediation has been the preferred mean of dispute resolution until modern days is the lack of laws and underdevelopment of the judiciary, which may naturally be a result of the Confucian heritage without the rule of law together with the promotion of amicable dispute resolution. The more the Chinese dispute resolution system evolves toward the rule of law and efficient dispute settlement accordingly, the more arbitration and litigation will increase and consequently the use of mediation will be reduced. Traces of this evolution can for instance already be seen in the amended Civil Procedure Law, where Article 9 stipulates that judicial mediation shall be conducted based on the law and the parties' voluntariness, unlike the old provision which promoted judicial mediation as the primary dispute resolution method. The new provision aims at modernising the judicial dispute resolution practice in China while still preserving the traditional Chinese mediation culture.[284]

[282] Fan (2013) p. 210–211.
[283] Zhang (2014) p. 320.
[284] Yu (2011) p. 259.

The prevailing mediation culture in China has survived thousands of years of dynasties, the decades of the Republic in the early 1900s and the establishment of the PRC with new ideology and the many reforms that brought. The Confucian heritage of litigation avoidance was continued in the new unified China in 1949. Communism is also hostile towards litigation, which consolidated this negative attitude toward litigation and encouraged mediation during that otherwise turbulent legal era. Even though arbitration may now be on the uprise in China, mediation still holds its place in Chinese dispute resolution. The practice of med-arb is widespread, and most Chinese arbitrators find it natural to facilitate settlement.[285] Chinese arbitrators can thus be seen as the modern version of the local dispute resolvers in imperial China. Evidence also show that merging the roles between the mediator and the arbitrator seems to work rather well in China.[286]

4.7 Chinese Legal Concepts

The description of the Chinese legal system by its leaders often include Chinese versions of legal concepts, such as China's socialist market economy[287], socialist rule of law[288], or the vision for the Chinese legal system as described by the then sitting president Jiang Zemin in 1997: "a socialist legal system with Chinese characteristics".[289] This shows that China has no intention of completely transform into a system identical with the Western model, but rather deliberately structures its legal system to suit the Chinese political and cultural climate. The Chinese leadership acknowledges and maintains Chinese characteristics in the legal system, and consequently in the arbitration system as well. Although the government in some respects is striving to make Chinese arbitration in conformity with transnational standards to facilitate commercial dispute resolution, the Chinese features are still promoted. Chinese scholars ascribe the need for these unique characteristics to historical, cultural, ideological and political reasons, and there seem to be no anticipation of China aligning with transnational standards anytime soon, even regarding fundamental principles such as the rule of law.[290]

[285] Fan (2013) p. 211, 223, 229–230.
[286] Ibid. p. 138.
[287] See for instance Article 15 of the Constitution of the People's Republic of China.
[288] Peerenboom (2002) p. 1; see Article 5 of the Constitution of the People's Republic of China.
[289] Jiang Zemin (1997) Chapter VI Paragraph (2) Report at the 15th National Congress of the CPC on 12 September 1997.
[290] Blasek (2016) p. 3–4, 15.

5 Closing Comments

The Chinese arbitration system has come a long way considering the short period of time in which it has evolved. The Arbitration Law marked a great breakthrough for Chinese arbitration recognising most of the fundamental arbitration principles such as party autonomy, the independence of arbitration institutions and the finality of arbitral awards. China's leading arbitration institution CIETAC is on the global top list for number of cases accepted, and the latest research show that as much as 86 per cent of all awards are enforced in China. Yet, as has been shown in this paper, Chinese arbitration is nevertheless far from aligned with transnational arbitration standards. The Chinese legal culture derives from vastly different origins than its Western equivalents. The Chinese legal tradition dates more than two thousand years back, and many major changes in the legal system have occurred only in the past century. The real development toward the modern Chinese legal system it is today commenced merely four decades ago.

The Confucian philosophy is still much prevalent in Chinese society. For arbitration, this entails the aversion towards litigation and preference for amicable dispute resolution, the existence of a strong authoritative body controlling the process, and the incorporation of equitable principles in the rendering of awards. Furthermore, due to historical reasons, the Chinese attitude towards law is different than in the West. Traditionally, law has been associated with crime and in China, as a necessary mean for punishment. Since the law has not also held the role as a protector of individual rights, it has not been of interest for the general public to learn the law, but rather to avoid it.[291] This, together with the teachings of Confucius to avoid litigation and instead resolve disputes through conciliation to maintain harmony, has characterised Chinese dispute resolution for centuries. The Confucian heritage of the virtue of *li* can also be seen in the Chinese legal system today. The Arbitration Law has incorporated the principle of *heli hefa*, and Chinese arbitrators view reason as a mean equal to law to be used when resolving disputes.

The modern Chinese arbitration system is relatively young, and originates from a time of communist rule with planned economy. Both Confucianism and the communist ideology share the aversion towards litigation and the appreciation of a strong authoritative ruler. This have only further consolidated these features of Chinese arbitration in the system. It is also from this era that the separation between domestic and foreign arbitration

[291] Zhang (2014) p. 318.

originates. Both tracks derive from Soviet influences; the domestic track from the Soviet model of administrative arbitration, and the foreign-related track not following the administrative model derives from the arbitration clause in the Protocol for General Conditions of Delivery of Goods between China and the Soviet Union in the 1950s. The foreign-related arbitration resembles international commercial arbitration to a much greater extent. This historical divide between domestic and foreign arbitration still prevails and is causing some imbalance in the system, mainly due to the inequality between the two with discrimination towards domestic arbitration which comprises less party autonomy and greater judicial review.

The extensive judicial review of domestic arbitral awards as well as them not being safeguarded by the Report System increases the risk of refused recognition and/or enforcement of domestic awards. This risk urges parties to try to make their dispute categorised as a foreign-related dispute. The dual-track system and the ambiguous legislation as regards the categorisation of arbitration types are thus Chinese characteristics affecting the recognition and enforcement of arbitral awards in China.

Furthermore, the enforcement surveys cited in this paper showed that the enforcement rates varied depending on the location of where the application for enforcement was made. These enforceability differences can prevail due to the Chinese legal system not being fully integrated yet, which may be a consequence of its adolescence. The local governments have different attitudes toward arbitration, and thus the level of governmental interference varies. Hence also the administrative interference seems to affect the recognition and enforcement of arbitral awards in China.

Although most of the fundamental arbitration principles are incorporated into the Arbitration Law, many of them are not completely established in practice. It is evident that party autonomy in many ways is restricted in Chinese arbitration. Party autonomy is a core element in modern arbitration, and even though the principle was adopted in the Arbitration Law, in practice the autonomy is restricted in too many ways in China. This is linked to the large amount of administrative interference and state control of arbitration in China, one of the more distinguishing elements of Chinese arbitration due to its deviance from a key element of modern arbitration, namely the independence of arbitration.

The independence of arbitration is also restricted due to the strong role of the arbitration commissions. This institutionalisation is both a cultural feature of the Chinese fondness of a strong authoritative body controlling the process, as well as a political issue. For the arbitration institutions

themselves the issue lies with the financial tie to the government. Just like for children in relation to their parents, financial independence is the key to independence. Some arbitration commissions such as the BAC have started the breakout, and hopefully other institutions will soon follow suit. The independence of the arbitration process is also a fundamental arbitration principle, just like the independence of the courts is for the entire legal system. How and when independence is achieved is a question for jurisprudence scholars to discuss and will not be debated by the author. Nevertheless, since arbitration is based on the voluntariness of the parties, and the parties have by contract chosen to resolve their dispute outside the state courts, one could argue that the parties want and thus should be granted a process free from governmental interference. As have appeared from the study in this paper, the administrative interference in the arbitral process is much more widespread than it is in the West. However, one needs to bear in mind the rapid development that the Chinese arbitration system has undergone. The administrative interference is far less than it was prior to the enactment of the Arbitration Law some 20 years ago. Both scholars and practitioners alike attest to this interference being a major issue and calls for change. If the development continues the same way, the governmental interference in the arbitration process is inclined to further decrease in the future.

Moreover, this paper has also shown that the Chinese government does not seem to be aiming at transforming the Chinese arbitration system to an international commercial arbitration system identical with Western standards. Chinese arbitration does not necessarily need to conform to Western standards either. Some issues such as the independence matter may have to be addressed and improved for the Chinese arbitration system to function as intended and for it to be completely accepted by the international community. Nevertheless, in a world of modern dispute resolution the Chinese arbitration system should still be able to preserve some of its cultural characteristics. It is not necessary for all other systems to copy the Western one, however it may be needed to agree upon and adopt internationally recognised fundamental principles of arbitration. Many Chinese characteristics will function well in accordance with such principles, such as the combination of mediation and arbitration. Here the issue merely concerns the role of the arbitrator, which there are different opinions on. China has chosen the one supporting facilitation of settlement by the arbitrator, a practice which is working well in China.

As have been stated many times in the above, much has happened in a short period of time for the Chinese arbitration system. The laws are not always consistent with each other and the implementation is equally inconsistent.

Both the legislation and the judiciary are struggling to keep up with the rapid pace of economic and commercial development. The way forward seems to be a revision of the Arbitration Law, which is argued by many scholars.[292] Twenty-two years have passed since it came to force and a revised Arbitration Law could address the many issues related to the present version. A breaktrough would be for it to permit ad hoc arbitration, which would reduce the power of the Chinese arbitration institutions immensely. Such a progress would seem unlikely however, considering the latest reports on the status of ad hoc discussions in China.

In our globalised legal environment, virtually all countries have foreign influences in their legal system and many attempts in harmonising law have been made internationally. Due to historical events China has had even greater influences from foreign legal systems than most countries, especially when it comes to transplants of law from the West. Especially after the end of the Culture Revolution when the opening-up reform was launched in China and the legal system needed to be practically rebuilt from scratch, many transplanted Western laws were directly adopted as Chinese laws. Most of them have now been infused with 'Chinese characteristics' to suit the social and political climate, and China's current legal system can therefore be said to have/be a "mixed system" of modern Western laws mixed with traditional Chinese cultural values. The same naturally applies also for the arbitration system, which covers the topic of this paper: Chinese characteristics in the contemporary Chinese arbitration system. Under the course China has encountered many issues in developing its legal system, arbitration included. Many issues are still prevalent; however, the development is still far from complete. Professor Cohen comprehensively comments the issues within this process:

> It is relatively easy to adopt legislative frameworks and regulatory regimes – often imported from abroad – to govern broad fields of activity. It is much more difficult and time consuming to put those laws into practice, to adapt them to local conditions, to fill in the gaps and to develop a body of interpretation and precedent that can make the rules meaningful in specific cases. Most difficult and time consuming of all – as evidenced by the continued weakness of the Chinese judiciary – is the task of building institutions that can effectively, consistently and fairly enforce those laws across a country as vast as China.[293]

Merely forty years ago, China was faced with the almost insurmountable task of trying to rebuild the whole legal system which had been eradicated over the past decades. One must appreciate how far China has come in this

[292] For an extensive list of scholars, see Ribeiro and Teh (2015) p. 460; Yu (2011) p. 283.
[293] Cohen and Lange (1997) p. 347–348.

short period of time. Considering the relatively few years in which Chinese arbitration has evolved, in addition to its unique historical and cultural background, it would not be feasible for it to be identical to a modern Western arbitration system with transnational standards.

This paper has reviewed the Chinese arbitration system in Chapter 3, and recognised certain Chinese characteristics which have been further elaborated on in Chapter 4, where the origins of these features have also been discussed. In summary, the Chinese arbitration system today is based on the Arbitration Law, which has adopted most of the core arbitration principles recognised internationally. However, many of them are not correctly implemented in practice. Various discrepancies with transnational arbitration standards remain, and some unique Chinese arbitration characteristics are featured in the system. These features include the dual-track system, the extensive governmental influence, the fondness of amicable dispute resolution, the denial of ad hoc arbitration and some legislative peculiarities. Many of these seem to contribute to the issue raised by legal practitioners in China about the enforceability of awards, however trends show that the number of awards enforced are steadily increasing. The author has identified three main factors shaping the Chinese arbitration system: the Confucian heritage, influences from a communist era with planned economy, and a young modern arbitration system (as well as the legal system in general) which is still in development. Ultimately, the modern Chinese arbitration system of today could, in brief, be summed up as modern dispute resolution in cultural clothing.

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