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PROMOTING IMPARTIALITY OF INTERNATIONAL COMMERCIAL ARBITRATORS THROUGH CHINESE CRIMINAL LAW: ARBITRATION BY “PERVERSION OF LAW”

Deng Ruiping.^{a1} Duan Xiaosong^{aa1}

ABSTRACT

This essay is prompted by a recent Chinese criminal provision governing the impartiality of arbitration. The goal of the essay is to critically examine the new law and to put forward some proposals for reform, which could be employed to resolve the tension that exists between arbitrator impartiality and deference to arbitration. Although the new provision appears to be a rule to eliminate the abuse of arbitral power, it may raise more questions than it resolves. This essay explores the problems and undertakes a comparative analysis of the U.S. provision as well as an analysis of some cultural and traditional elements influencing the new crime in China. From the author’s point of view, the concerns could be better met by fine-tuning the rule rather than abandoning it in order to keep a balance between the previous two conflicting values. A mechanism of judicial interpretation, borrowing some U.S. experience, has been proposed. It could well suit China’s needs because the benefits of arbitration can be retained without sacrificing the impartiality of arbitration.

I. INTRODUCTION

China’s accession into the World Trade Organization (WTO) in December 2001 and the growing globalization of the world economy has greatly increased international trade and investment. In the wake of the modern explosion of international trade and transnational investment, arbitration has become “the accepted method for resolving international business disputes.”¹

Parties from different nations tend to seek arbitration in order to prevent an abundance of jurisdictional problems.² Arbitration has also become a preferred method for foreign parties to resolve their legal disputes in China, largely due to the distrust these parties have of Chinese courts.³

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¹ YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 6 (1996).

² Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the PRC*, 15 BERKELEY J. INT’L L. 329, 333 (1997).

³ See Deborah Chow, *Development of China’s Legal System Will Strengthen Its Mediation Programs*, 3 CARDOZO ONLINE J. CONFL. RESOL. 4 (2002).

With its acceptance and popularization, international commercial arbitration now plays a very important role in private conflicts settlement. Arbitration provides a neutral venue that aims at ensuring procedural fairness for both parties, unlike litigation in the national courts of one of the parties to a dispute.⁴ Arbitration permits parties from two different countries to exercise a great deal of control over how a dispute will be resolved.⁵ The parties are free to tailor the proceedings to meet their needs. Specifically, parties can contract to govern all disputes by a certain set of laws or procedures.⁶ They decide the scope and content of the arbitration, define its procedures, and choose the location of the arbitration by specifying these stipulations in the arbitration agreement.⁷ Most importantly, parties have the power to select the decision maker.⁸ This freedom to select the arbitrator is why arbitration has been described as “hiring your own private judge.”⁹ Arbitration allows parties to not only realize procedural fairness, but also benefit from the predictability to their disputes, lower attorney fees, more privacy, and expert decision making. The finality of arbitration is another advantage, which is often attractive for its speed and cost-effectiveness. Particularly, with well-functioning international enforcement system under the 1958 New York Convention,¹⁰ arbitral awards are often easier to enforce than court judgments.¹¹ The issue of arbitrator impartiality is, therefore, critical to the development of arbitration rules and cannot be ignored in the process of international private disputes resolution. The legitimacy of international commercial arbitration relies, to a large degree, upon the thoroughness of arbitration institutions and the independence and impartiality of arbitrators.

While Chinese arbitration has seen remarkable progress in a relatively short period, there are many problems remaining that need to be addressed. The focus of this essay is criminal liability for biased arbitrators. This essay is largely prompted by the codification of a new crime: Arbitration by “Perversion of Law” (Wangfa Zhongcai Zui), which has been provided in the Amendments to the Criminal Law of the People’s Republic of China (VI)¹² in 2006 and designed to punish biased arbitrators for their wrongdoings. The goal of this essay is to critically examine the legal regime of arbitrator impartiality in China, including

⁴ See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

⁵ DEZALAY & GARTH, *supra* note 1, at 273.

⁶ See *Scherk*, 417 U.S. at 518.

⁷ See ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 5 (2d ed. 1991).

⁸ IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* §3.2 (1st ed. 1995).

⁹ MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* §1:01 at 1 (3d ed. 2001).

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

¹¹ See Andrew T. Guzman, *Capital Market Regulation in Developing Countries: A Proposal*, 39 VA. J. INT’L L. 607, 632 (1999).

¹² The Amendments to the Criminal Law of the People’s Republic of China (VI) (Zhonghua Renmin Gongheguo Xingfa Xiuzhengan) (liu) was promulgated and effective on Jun. 29, 2006. For a relatively detailed description of the provision, see *infra* Part III.

this provision, and put forward some proposals for reform. Part II provides a brief description of the framework of arbitration system in China. Part III presents a background of Arbitration by “Perversion of Law,” and examines the debate on the new law, compares it with some provisions of the U.S. arbitration laws, and explores the relative Chinese legal culture, tradition, and economic environment factors that underlie criminal liability of arbitrators. Part IV gives evaluations from the perspective of jurisprudence and offers some reform proposals on the basis of borrowing some U.S. experience. Finally, Part V provides a summary, along with some concluding remarks.

II. ARBITRATION SYSTEM IN CHINA

Arbitration in China was traditionally divided into two types: domestic arbitration and foreign-related arbitration. The latter was also called international arbitration, which was designed to handle disputes arising from economic, trading, transportation, and maritime activities involving a foreign element.¹³ In contrast, the former is labeled as having jurisdiction over cases without foreign elements. Obviously, Chinese law treated foreign-related and domestic arbitration separately.

Accordingly, domestic Arbitration Commissions in different regions are established mainly for resolving domestic economic contract disputes. As a matter of fact, there are --in theory-- at least several arbitration mechanisms for domestic disputes. For instance, employment disputes, intellectual right disputes, and securities disputes are not arbitrated pursuant to voluntary agreement, but submitted to arbitration because of particular laws. These do not fall within the scope of our present discussion, since they are not commercial in nature and those tribunals are more like administrative organs. This essay will primarily focus on international commercial arbitration. The institutions for handling international cases include China International Economic and Trade Arbitration Commission (“CIETAC”) and China Maritime Arbitration Commission (“CMAC”).¹⁴ The arbitration rules and practices of CMAC are virtually identical to those of CIETAC, so foreign-related arbitration can best be demonstrated by CIETAC. In accordance with its rules, disputes arising between Chinese parties and/or parties from Hong Kong, Macao or Taiwan, or between Chinese-foreign joint ventures and Chinese parties, are within CIETAC’s jurisdiction.¹⁵

¹³ See 1995 Arbitration Law of the People's Republic of China, art. 65. [hereinafter Arbitration Law].

¹⁴ China International Economic and Trade Arbitration Commission was first set up in 1954 by the name of Foreign Economic and Trade Arbitration Commission, and China Maritime Arbitration Commission in 1958 by the name of Maritime Arbitration Commission. Both are within China Council for Promotion of International Trade. Arbitration Law sets forth a special chapter dealing with their legal status in China's dispute resolution system. The history of CIETAC and their arbitration rules are available online at <http://www.cietac.org> (last visited March 12, 2012).

¹⁵ See CIETAC Arbitration Rules, art. 3.

CIETAC's long-standing exclusive jurisdiction over foreign-related disputes, however, was dramatically by State Council Notice,¹⁶ Article 3, which provided that domestic Arbitration Commissions now had the "power to accept foreign-related arbitrations when the parties have agreed to submit disputes to such Arbitration Commissions."¹⁷ Additionally, according to the newly revised 2005 CIETAC Arbitration Rules, CIETAC can also accept cases involving domestic disputes.¹⁸ This allows cross pollinizing between foreign-related arbitration matters with domestic Arbitration Commissions and domestic disputes with CIETAC. Indeed, the ambiguity of these provisions appears to be the source of conflicts.

Another notable distinction between domestic and foreign-related arbitration is the different criterion of judicial review over arbitral awards. The People's Courts can review not only procedural issues but also the legal reasoning supporting the domestic arbitral awards.¹⁹ As for international arbitration, however, the courts are not allowed to consider the legal merits to overturn an award. These courts can only scrutinize the procedural issues,²⁰ which is also in conformity with the New York Convention. Similar provisions can be found in the Convention, of which China became a member in 1987.²¹ The procedural review is certainly a remarkable achievement, given the short history of the development of China's arbitration.

Generally speaking, China's international arbitral tribunals are better established and more sophisticated, and it is important that they remain distinct from domestic arbitral tribunals, which do not share CIETAC's reputation.²² Empirical research has revealed that CIETAC holds a leading position in terms of the caseload in China. In 2010, CIETAC accepted 1,352 new cases in total, including 418 foreign-related cases, accounting for 30.9% of the total caseload.²³

¹⁶ The full name of the State Council Notice is "Circular of the General Office of the State Council Regarding Several Issues Which Need to be Clarified in Relation to the Implementation of the Arbitration Law of the People's Republic of China," June 8, 1996.

¹⁷ Brown & Rogers, *supra* note 2, at 346.

¹⁸ CIETAC Rules, *supra* note 15, at art. 3.

¹⁹ If a party can prove that evidence on the basis of which the award was made had been forged, or the other party withheld evidence sufficient enough to have an impact on the impartiality of arbitration, he may submit an application for vacation of the award. *See* Arbitration Law, *supra* note 13, art. 58.

²⁰ *See* 2008 Civil Procedure Law of the People's Republic of China, art. 258. [hereinafter Civil Procedure Law].

²¹ *See* New York Convention, art. 5.

²² Brown & Rogers, *supra* note 2, at 329, 339.

²³ *See Foreign-related Arbitration Identified as Key Priority of Arbitration Services*, CIETAC, <http://www.cietac.org/index/news/4772c81b4d672a7f001.cms> (last visited Feb. 12, 2014).

III. THE NEW CRIMINAL PROVISION OF ARBITRATION BY “PERVERSION OF LAW”

On June 29, 2006, China’s legislature, the Standing Committee of the National People’s Congress adopted and promulgated at its 22nd meeting an important piece of law: The Amendments to the Criminal Law of the People’s Republic of China (VI). The enactment imposed criminal liability on the biased arbitrators by the recognition of a new crime: Arbitration by “Perversion of Law,” which falls within the scope of Dereliction of Duties of Judicial Personnel.

A. Background of the New “Perversion of Law” Criminal Provision

In order to guarantee the legitimacy of the arbitration process, the arbitral institution must ensure the neutrality of the arbitrator.²⁴ Thus, having a neutral and impartial arbitrator resolve commercial disputes seems a fundamental goal in modern arbitration. In response to this, states throughout the world enact laws to deal with the corruption in arbitration. Surprisingly, Chinese legal policy pertaining to the partiality of arbitration differs from those of western nations. Apart from vacatur and refusal of implementation of an arbitral award, which may look familiar to westerners, a recent provision in China’s criminal law establishes criminal liability of biased arbitrators.

Chinese Arbitration Law, unlike its western counterparts, is extremely young due to a limited history of arbitration in China. Arbitration in China began in the 1980s under a policy of instituted reform and openness to meet the needs of China’s rapid growing economy. Being an import from the west, it is new to most Chinese people. The purported legislative purpose of the new enactment is to regulate arbitrators’ conducts and guarantee fairness and justice in the course of arbitration, which was once considered a legal loophole.²⁵ The new crime is inserted after Article 399 of Criminal Law, which falls within the category of crimes of dereliction of duty and is named Civil and Administrative Judgment by “Perversion of Law.” The Criminal Law became effective in 1997 while the new crime was proclaimed in 2006. Now that a judge could face a criminal penalty for a malevolent ruling since enactment of the original criminal law nine years ago, why should an arbitrator escape from a similar punishment? As arbitration competes with litigation for status, some contend that an arbitrator should be as liable as a judge is when bending the law.

In debating the bill that would later become the law, many arbitration scholars openly objected to the inclusion of the new crime. They did so because the arbitrator’s criminal liability is not in line with international

²⁴ See *Aetna Cas. & Sur. Co. v. Grabbert*, 590 A.2d 88, 92 (R.I. 1991).

²⁵ See Zhongqian Chen, *Lun Wangfa Zhongcai Zui De Sheli Dangum* [To Delay Setting up the Crime of Distorting the Law to Arbitrate], 1 ZHONGCAI YANJIU [ARBITRATION STUDY] 2 (2006).

practices. Nevertheless, it has been adopted and has become a new law. Admittedly, it was the fear that the power of arbitrators could be mishandled and justice could be threatened that prevailed over the objections to the new crime and eventually formed a sound basis for the new provision, because this worry is prominent particularly in the context of China.

Unlike Western tradition of “rule of law,” China has a unique culture often termed “rule of relationship (guanxi),” which is a sort of gift economy that involves the “cultivation of personal networks of mutual dependence and trust.”²⁶ The “rule of guanxi,” also operative in Asian societies, appears to make it challenging for parties to find a mutually accepted “fair” arbitrator, and even the selection of an arbitral institution problematic, because parties distrust each other. The question whether the other party has “guanxi” with arbitrators highlights the significance of the impartiality of the arbitrators deciding their disputes. This problem is disconcerting, because it might lead to a cooling in commerce between China and foreign nations and there might be fewer international arbitration cases occurring. That is not the outcome that China would presently like to encourage. Understandably, a more severe punishment would be called for on a biased arbitrator.²⁷

One unavoidable and significant consequence of the new provision worth noting is the early intervention of the public power with arbitration. Generally, there is a division of criminal cases in Chinese criminal justice system based on the burden of proof, namely, cases of public prosecution and private prosecution. The public prosecutors, also known as a judicial authority like courts, are named Procuratorate and obligated to prove before the court in the former cases whereas the claimant himself should provide evidence of the wrongdoing of the accused in the latter cases. Most of the crimes are public prosecution cases and only a small number of them are private prosecution ones.²⁸ However, a crime of dereliction of duty is a public prosecution case. In other words, it is the Procuratorate instead of the claimant who should bear the burden of proof. They should investigate and collect evidence before bringing the case to the court. In such a case, not only the courts but also the Procuratorate have been indirectly warranted the power of substantial review of arbitral awards by the new enactment.

²⁶ Carol A.G. Jones, *Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China*, 3 SOC. AND LEGAL STUD. 195, 197 (1994).

²⁷ See Guoqiang Luo, *Wangfa Shongcai Zui Sibian [Crime of Misuse of Law in Adjudication]*, 1 ZHONGGUO XINGSHIFA Zazhi [CRIMINAL SCIENCE] 71 (2009).

²⁸ Cases of private prosecution include the following: (1) cases to be handled only upon complaint; (2) cases for which the victims have evidence to prove that those are minor criminal cases; and (3) cases for which the victims have evidence to prove that the defendants should be investigated for criminal responsibility according to law because their acts have infringed upon the victims personal or property rights, whereas, the public security organs or the People’s Procuratorate do not investigate the criminal responsibility of the accused. See 1997 Criminal Procedure Law of the People’s Republic of China, art. 170.

B. The Debate Surrounding the New Provision

1. *The Anti-crime Arguments*

Article XX of Amendment (VI) provides that an article be inserted after Article 399²⁹ of the Criminal Law as Article 399 (I):

Where anyone who undertakes the duties of arbitration according to law intentionally goes against the facts and law and makes any wrongful ruling in the process of arbitration, he shall be sentenced to fixed-term imprisonment of not more than three years or detention. If the circumstances are extremely serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.

This simple paragraph raises a host of complicated questions, and has incurred a lasting national debate.

Prior to the legislation, the issue of penal punishment upon a biased arbitrator has been at the heart of the discussion and has received a wide range of practical and academic attention. While the new crime was an effort to fill the legal gap of liability for arbitrators, many arbitration scholars have denounced that it seems to have fallen short of its goal.³⁰ The anti-crime arguments are mainly as follows:

First, one of the continuing debates is whether contract traits, rather than judicature characteristics, form the cornerstone of, and exercise pervading influence over, arbitration. It has been criticized that the analogy of arbitration with litigation may be arbitrary and seems to have an impressionistic flavor.³¹ A common objection to the new crime is that it is against arbitration's nature. It is important to understand that

²⁹ Article 399 of the Criminal Law of the People's Republic of China (Zhonghua Renmin Gongheguo Xingfa) provides that judicial personnel who act with partiality and defeat the ends of justice and bend the law for the benefit of relatives or friends, subjecting to prosecution persons they clearly know to be innocent or intentionally protecting from prosecution persons they clearly know to be guilty, or, intentionally go against facts and laws in criminal trials to render judgments that misuse the law, shall be sentenced to not more than five years of fixed-term imprisonment or criminal detention, and when the circumstances are serious, "not less than five years and not more than 10 years" of fixed-term imprisonment; and in exceptionally serious circumstances, not less than 10 years of fixed-term imprisonment. Whoever intentionally goes against facts and laws in civil and administrative trials to render judgments that misuse the law, and when the circumstances are serious, shall be sentenced to "not more than five years" of fixed-term imprisonment; and, in exceptionally serious circumstances, "not less than five years and not more than 10 years" of fixed-term imprisonment. Judicial personnel who take bribes, bend the law, and commit the crimes mentioned in the two preceding paragraphs, and meanwhile constituting the crimes mentioned in Article 385 of this law, shall be convicted and punished in accordance with the stipulations for a heavier penalty. See 1997 Criminal Law of the People's Republic of China, art. 399.

³⁰ See Xiaohong Liu, *Queding Zhongcaiyan Zeren Zhidu De Fail Sikao* [Jurisprudence Analysis of Establishment of Arbitrators' Liability], 54 HUADONG ZHONGFA DAXUE XUEBAO [JOURNAL OF EAST CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW] 89 (2007).

³¹ See Zhongqian Chen, *Lun Wangfa Zhongcai Zui De Redning* [Cognizance of Law-bending Judgment Crime], 24 ZHONGCAI YANJIU [ARBITRATION STUDY] 76 (2011).

arbitration is not litigation with another name. An arbitrator performs a task that resembles that of a judge, yet there are critical differences between judges and arbitrators. The latter charge fees from parties, whereas the former, as state personnel, receive wages from state budget. Further, arbitrators are experts chosen from the same industry in most cases and sometimes are not required to possess any legal education.³² Rooted within market economics, disputants have chosen arbitration to settle controversies for hundreds of years. As such, it is the participants who shape the arbitration, which is then recognized by a state's legal system among various private dispute resolutions.³³ The rationale behind arbitration is the doctrine of party autonomy. In light of this doctrine, the parties' consent to address arbitral issues through arbitration should be so respected and enforced that neither of the parties can initiate judicial proceedings before the arbitration takes place. Opponents of the new law also argue that the judicial value system should allow no intervention of public power in the private domain when parties mutually agree to exercise their autonomy to arbitrate. Under this view, arbitrators' authority comes from the authorization of parties instead of a state because the former have the natural right of self-regulation. Therefore, the nature of arbitration should first be deemed as a product of contract between the parties and the arbitrators other than a form of judicature, and then as a legal service other than judicial power.³⁴ This is particularly important where one goal of international arbitration is to limit state influence on the dispute resolution process between and among international parties. Otherwise, the expected benefits of arbitration would be dramatically reduced.³⁵

Second, and more importantly, it is not clear that the new law is workable. Some arbitrators show signs of bias, and others appear objective. It is highly likely that in practice this provision will not function as expected, because the language in Amendment (VI) offers little guidance as to what particular conduct constitutes this crime. Specifically, the first challenge is figuring out who is covered by the new law. Although the person who commits the crime is referred to as "anyone who undertakes the duties of arbitration according to law," it is far from clear as to who might be considered "anyone." Without exception, the description covers both arbitrators and any other personnel working in arbitration commissions,³⁶ which causes some practical

³² See Lianbin Song, *Wangfa Zhongcai Zui Pipan* [A Critical Analysis of the Crime of Deliberately Rendering an Arbitral Award in Violation of Law], 62 BEIJING ZHONGCAI [ARBITRATION IN BEIJING] 27 (2007).

³³ See Qianquan Xu, *Wangfa Zhongcai Zui Zhi Pipan* [A Criticism of Law-bending Arbitration], 3 GUANGXI MINZU XUEYUAN XUEBAO [JOURNAL OF GUANGXI UNIVERSITY FOR NATIONALITIES] 28 (2006).

³⁴ *Id.*

³⁵ See Song, *supra* note 32, at 36.

³⁶ For example, "anyone" can also refer to the chairman of an arbitration commission in accordance with the provision "Where the parties agree that an arbitration tribunal shall be composed of three arbitrators, they shall each select or entrust the chairman of the arbitration

difficulties. An arbitral award is often made based on majority opinions of arbitrators and dissenters need not sign on the award.³⁷ Should an arbitrator who disagrees and refuses to sign the award be included as “anyone” if later the crime of Arbitration by “Perversion of Law” is found? If he were the “anyone,” would that be fair?³⁸

Moreover, with regard to defining “intentionally,” yet,” which is another fundamental question, neither Amendment (VI) itself nor the arbitration law provides detailed rules about how it should be ascertained. By including “intentionally,” a “negligent” act may be precluded from prosecution. But it is very difficult, if not impossible, to draw a line between an arbitrator’s “intentional” disregard of law and a “negligent” mistake in the process of handling a case, because the intentions of an arbitrator cannot be easily verified by a court. In practice, what satisfies “intentionally” is subject to interpretation.³⁹

Further, currently there is confusion about the expression “goes against the facts and law.” At first blush, it indicates that where both the two conditions of “goes against the facts” and “goes against the law” are satisfied, the said crime exists. However, the new enactment keeps silent when only one condition is fulfilled. As previously shown, both CIETAC and a domestic Arbitration Commission have jurisdiction over international or foreign-related disputes. Following international practice, parties could often choose what law they want to govern interpretation and enforcement of their agreement. Sometimes, in amicable arbitration or ad hoc arbitration, no applicable law is selected and arbitrators are empowered to disregard the strictures of legal rules in search of more equitable resolutions to disputes.⁴⁰ Therefore, to what specific law does it refer? Suppose that the applicable law is a foreign law; do Chinese courts have the competent jurisdiction to make a decision that the arbitral award “goes against” a foreign law?⁴¹ Additionally, more confusion in respect to the phrase “if the circumstances are extremely serious” would arise because of its inherent ambiguity. The new enactment has been silent on this crucial and controversial area. As such, it is extremely difficult to use the mere provision in making a judgment as to the “circumstances” that are “extremely serious.”⁴²

Another problem with the new law is that it is inconsistent with existing Chinese law, as well as international obligations. As previously outlined, China adopted a “two-track” approach in judicial review of arbitral awards, under which Chinese judicial organs are not permitted to

commission to appoint one arbitrator. The parties shall jointly select or entrust the chairman of the arbitration commission to appoint the third arbitrator, who shall be the principal arbitrator.” See 1995 Arbitration Law of the People’s Republic of China, art. 31.

³⁷ Arbitration, art. 53 to 54.

³⁸ See Chen, *supra* note 31, at 78.

³⁹ See Song, *supra* note 32, at 29.

⁴⁰ Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT’L L. 351, 352 (2002).

⁴¹ Song, *supra* note 32, at 27.

⁴² *Id.*

review any of the legal merits or reasoning except procedural issues in international arbitration. However, how can a court bring in a verdict of Arbitration by “Perversion of Law” without substantial judicial review of the arbitral award?⁴³ Unfortunately, to judge if the crime exists, courts have to require the arbitration panel to provide reasons justifying its decision, despite the fact that arbitral awards are often rendered without explanation of reasons and even without a complete record of proceedings.⁴⁴ Furthermore, as a domestic Arbitration Commission now has jurisdiction over both domestic and foreign-related disputes, suppose that an arbitrator of a domestic Arbitration Commission handles a domestic case and a foreign-related case in the same manner. He then has to face two different criterion of judicial review. What he might be held criminally liable for under domestic criteria would be immune to penal punishment under international criteria.⁴⁵ This, in turn, makes judicial review act as a deterrent only to domestic arbitrators. Accordingly, a responsible and capable arbitrator would be overly cautious and understandably reluctant to risk accepting appointment. As such, the quality of arbitration may decline and eventually harm the development of arbitration as well as the efforts of rule of law in China.

Lastly, Amendment (VI) has also been criticized as both under-inclusive and over-inclusive. On the one hand, although the language of the amendment is too vague and simplistic to provide any concrete guidelines in practice, there is only a theoretical possibility that a biased arbitrator would be caught and convicted of the crime. After all, corruption occurs in more subtle ways and open partiality is very rare. The new law is more like a moral announcement or a law in paper than a mature legal provision.⁴⁶ On the other hand, it has been opined that there are already enough rules to prevent arbitrator misconduct. The existing remedies include application for withdrawal and replacement of an arbitrator, application for vacation of the award, denial of enforcement of the award, notification of re-arbitrating by the tribunal, and rejection of the application.⁴⁷ And even penal punishment could sometimes be used.⁴⁸

⁴³ See Hui Huang, *Lun Wangfa Zhongcai Zui Zhi “Wangfa” Xing [The “Perverting” Nature of Law-bending Arbitration]*, 169 SICHUAN DAXUE XUEBAO [JOURNAL OF SICHUAN UNIVERSITY] 124 (2010).

⁴⁴ A written arbitral award shall specify the arbitration claim, the facts of the dispute, the grounds for the award, the result of the award, the apportionment of the arbitration costs, and the date of the award. Where the parties agree not to specify the facts of the dispute and the grounds for the award in a written arbitral award, they may do so. A written arbitral award shall be signed by the arbitrators and affixed with the seal of the arbitration commission. Arbitrators with different opinions on the arbitral award may or may not sign the award. See 1995 Arbitration Law of the People's Republic of China, art. 54.

⁴⁵ Huang, *supra* note 43, at 125.

⁴⁶ Song, *supra* note 32, at 36.

⁴⁷ According to Arbitration Law, arbitration shall be carried out independently and free from interference by administrative authorities, social organizations or individuals; where an arbitrator has privately met a party or agent or has accepted an invitation or gift from such party or agent, he must withdraw and his name shall be removed from the list of arbitrators; where arbitrators demanded and/or accepted bribes, practiced graft or made an arbitral award that perverted the law, a party may submit an application for vacation of the award. See Arbitration Law, art.8, 34, 38, 58. Moreover,

In addition, it is worth noting that the new provision, as a distinctive Chinese characteristic, is not in conformity with the international trend of minimal judicial intervention.⁴⁹ Similar provisions can hardly be found in most other jurisdictions.⁵⁰

2. *The Pro-crime Arguments*

Despite such criticisms, however, many criminal academics and practitioners support the use of penal punishment on arbitrators. The Procuratorate, for example, have been strong advocates of the new law. They believe that no arbitrator should misuse his power to go against facts and laws intentionally because of the notion of basic justice, which is accepted universally no matter how it manifests.⁵¹ The new provision would encourage high standards of integrity and lasting confidence in the process of arbitration. The pro-crime arguments focus mainly on the following aspects.

As with most legal debates, the issue of appropriateness of penalty could not be sensibly examined without taking account of a conduct's social harm. China has long accepted this concept, giving more consideration to the maintenance of social stability. Though highly abstract, social harm is widely believed to be a core factor in devising a law.⁵² On the one hand, an arbitral award is a final law-bound decision equal to and maybe even more than that of a judicial decision, because it is not subject to any appellate review. Arbitrators are completely free to use their own personal knowledge in making the decision and are not obliged to follow rules of evidence. Further, they are not required to give express reasons for their decisions. On the other hand, courts are generally deferential to an arbitral award and will not review the legal merits to overturn it. While international arbitration develops as an alternative dispute resolution along with the fear that foreign courts will be biased in favor of local parties, its own impartiality cannot be guaranteed. Those features leave the door open to abuse of arbitral powers. In reality, arbitrators do have an incentive to render an unfair

where one or several arbitrators committed embezzlement, accepted bribes or practiced graft, or made an award that perverted the law, people's courts shall rule to deny execution of the arbitral award. See 2008 Civil Procedure Law of the People's Republic of China, art. 258.

⁴⁸ For example, an arbitrator who accepts a bribe cannot be charged of bribery, because he is not state personnel, but he may be accused of non-state personnel bribery or commercial bribery. See 1997 Criminal Law of the People's Republic of China, art. 163.

⁴⁹ See Huang, *supra* note 43, at 123.

⁵⁰ One similar crime is in 1935 "Criminal Law of Republic of China" (Taiwan), Article 124 stipulating the crime "Decision by Perversion of Law." However, to date, no case has occurred. Some commentators aggressively contend that this fact, however, proves that arbitrator misconduct is a severe social problem only in drafters' imagination. See Huang, *supra* note 43, at 126.

⁵¹ Yonghong Han, *Guanya Wangfa Zhongcai Zhi Sikao: Jiyu Xianshi De Shijiao* [Reflection on Criminal Liability of Arbitrators: A Realistic Perspective], 26 HANNAN DAXUE XUEBAO RENWEN SHEHUI KEXUE BAN [HUMANITIES & SOCIAL SCIENCES JOURNAL OF HAINAN UNIVERSITY] 145 (2008).

⁵² See Siyang Xia, *Wandfa Zhongcai Gaibugai Shou Xingfa Tiaosheng* [Is the Crime Arbitration by Perversion of Law Appropriate], JIANCHA RIBAO [PROCURATORIAL DAILY], Jan. 23, 2006, at A6.

award because of the inherently self-interested nature of their decisions. In that case, the partiality in arbitration could result in actual injury to the complaining party and social justice would then be greatly harmed. By stipulating the new crime, the law establishes what might be a credible penalty regime imposed on a biased arbitrator, even though the cases involving such conduct are relatively rare. It should be kept in mind that “no crime without law making it so; no penalty without law making it so” is a generally accepted principle of criminal law in most jurisdictions.⁵³ In response to the attack of redundancy of crimes, it is a normal phenomenon that various crimes might compete and overlap. However, that fact alone does not justify that there is no need for the new crime.⁵⁴

Another powerful counterargument is that besides the feature of contract, arbitration also has another very important trait—quasi-judicature—that helps make arbitration an attractive alternative to litigation. This is best illustrated by the enforceability of an arbitral award. Notably, it is an indisputable fact that arbitration resembles litigation and remains intimately dependent on a national legal system. Arbitrators are expected to act like judges who will provide justice to all parties and guarantee them a fair hearing and a just award. More importantly, arbitral awards, like judgments, are expected to be enforced by national courts.⁵⁵ Thus, arbitration cannot be viewed merely as a contract of legal services. Rather, it might be viewed as a power to make a decision, which is indeed a part of an authority of judicature.⁵⁶ Even if parties’ intent to arbitrate should be respected in accordance with the doctrine of party autonomy, it does not mean the arbitrator’s freedom to bend the law should be respected too.⁵⁷ While an arbitrator is a private judge, a “judge” means that he is empowered to make a decision in accordance with the law instead of going against the law. Undoubtedly, parties’ do not consent to select a biased arbitrator and accept an arbitral ruling by “perversion of law.”⁵⁸

Next, even after acknowledging that the new provision is far from developed, especially in its workability, the solution of simply abrogating the new provision because of these shortcomings still appears insensible. Lack of clarity should not be used as an excuse to deny the necessity of the new provision.⁵⁹ This concern could be better met by

⁵³ See Luo, *supra* note 27, at 65.

⁵⁴ *Id.*

⁵⁵ Li Xu, *Wangfa Zhongcai Zui De Lifa Zhengdangxing Tantaoyan* [Research about its Legislative Righteousness of Crime of Misuse of Law in Adjudication], 5 FAXUE ZAZHI [LAW SCIENCE MAGAZINE] 86 (2009).

⁵⁶ See Xia, *supra* note 52, at A6.

⁵⁷ Xu, *supra* note 55, at 86.

⁵⁸ *Id.*

⁵⁹ See Bingzhao Xuan, *Wangfa Zhongcai De Ruzui Zhengdangxing Fenxi* [The Analysis of the Legitimacy of Arbitration by “Perversion of Law”], in Hexie Shehui De Xingfa Xianshi Wenti [THE PRACTICAL PROBLEMS OF CRIMINAL LAW IN A HARMONIOUS SOCIETY] 1759 (Jie Li et al. eds., Publishing House of Chinese People’s Public Security University 2007).

providing detailed rules to make it more workable rather than abandoning the law. Additionally, with the help of judicial interpretation, it could be more feasible and function more efficiently. Even assuming a skeptical attitude towards the workability, it is reasonable to make an exception and argue that the new provision will take an active role in response to corruption in arbitration. Having established this law, the court then could proceed to articulate an arbitrator's liability in case of his "perversion of law." This change is a necessary step to improve the appearance of partiality. Along with other legislation, the new enactment has greatly enhanced China's arbitration legal framework.⁶⁰ Frankly, most crimes in Chinese criminal law are virtually non-enforceable without further detailed rules.⁶¹

While it has been attacked for being contrary to international practice, some contend that with decreasing the possibility of arbitral power misuse, arbitration would benefit from the more severe punishment. Additionally, it would ensure the healthy development of arbitration and make China an attractive place for international arbitration.⁶² Furthermore, the new provision is desirable because it meets the present stage of economic development of China.⁶³ Due to underdevelopment of market economics and lack of the tradition of rule of law, some Asian countries and districts like Japan, South Korea, and Taiwan, have undergone a period characterized by more intervention of mandatory laws with many aspects of social lives. A better development of arbitration in those regions appears to be achieved through the support of public power. They do not have to wait hundreds of years to "naturally" raise the professional quality of arbitrators, establish a code of arbitrator ethics, cultivate social trust in arbitration and repeat the same mistakes and then correct them.⁶⁴ In consideration of the social and cultural similarity, it is also inadequate for China, currently, to follow the same route of regulating arbitrator conduct as the west. The development of arbitration can be promoted by the means of legislation, with advantages from both common law and civil law systems being fully used.⁶⁵

Additionally, qualification of arbitrators is a key factor in introducing the new law. Building a highly qualified team of arbitrators is extremely difficult, given the short history of China's market economy. Unlike judges, arbitrators are not required to obtain any legal training or pass any professional examinations before performing their duties. Arbitral awards are sometimes rendered in favor of the party with guanxi. However, it is certain that the situation would be much worse if

⁶⁰ Luo, *supra* note 27, at 64.

⁶¹ Xu, *supra* note 55, at 87.

⁶² See Xuan, *supra* note 59, at 1758.

⁶³ *Id.*

⁶⁴ See Luo, *supra* note 27, at 71.

⁶⁵ *Id.* at 72.

there were not such a strict stipulation pertaining to the impartiality of arbitrators.⁶⁶

Finally, the fact that it took the legislators nine years to decide and to create this law illustrates the necessity of criminalizing the conduct in China.⁶⁷ There is an increasing concern about the judicial corruption in China. Now that a judge who acts with bias and bends the law can assume penal punishment, why should a “private judge” be immune from the same punishment? Since the professional judicial personnel are likely to bend the law, why could not similar things happen to an arbitrator? The new enactment embodies the principle that similar cases should be dealt with similarly, which serves as a good prevention of the crime.⁶⁸

C. Situating the Chinese Debate with the U.S. Experience on Impartiality of Arbitrators

In sharp contrast to the current Chinese approach, which has minimal provisions concerning arbitrator neutrality but a sharply punitive criminal statute if there is bias “by perversion of law,” the U.S. approach has been quite different. The analysis of arbitral impartiality in the U.S. relies on analogy to judicial impartiality. Arbitrators in America are viewed in the same light as judges and therefore must be held to the same standards of impartiality as are imposed on judges.⁶⁹ Additionally, a judge does not have to assume civil or criminal liability for his wrong ruling in litigation, and⁷⁰ neither does an arbitrator. Instead, the usual remedies for unfairness on the part of an arbitrator include removal or replacement of the disqualified arbitrator and vacation or impeachment of the award.

Similarly, the Federal Arbitration Act (FAA) provides that an arbitration award may be vacated “[w]here there [is] evident partiality or corruption in the arbitrators, or either of them.”⁷¹ To show “evident partiality” in an arbitrator under the FAA, a party must either establish specific facts indicating actual bias toward or against a party or show that the arbitrator failed to disclose to the parties information that creates a reasonable impression of bias.⁷² “This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.”⁷³ Nevertheless, “arbitration differs from adjudication, among many other ways, because the ‘appearance of partiality’ ground of disqualification for judges does not apply to

⁶⁶ Xia, *supra* note 52, at A6.

⁶⁷ See Xu, *supra* note 55, at 88.

⁶⁸ *Id.*

⁶⁹ *Commonwealth Coatings Corp. v. Cont’l Casualty Co.*, 393 U.S. 145, 149 (1968).

⁷⁰ See *Stump v. Sparkman*, 435 U.S. 349 (1978).

⁷¹ 9 U.S.C.A. § 10(a)(2) (2012). See also Uniform Arbitration Act § 12(a)(2) (1956); Revised Uniform Arbitration Act § 24(a)(2)(A), (B) (2000).

⁷² 9 U.S.C.A. § 10(a)(2) (2012). See *Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634 (9th Cir. 2010).

⁷³ *Commonwealth*, 393 U.S. at 150.

arbitrators; only evident partiality, not appearances or risks, spoils an award.”⁷⁴

The U.S. Supreme Court has established four factors to determine if a claimant has demonstrated evident partiality: “(1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding, (2) the directness of the relationship between the arbitrator and the party he or she is alleged to favor, (3) the connection of that relationship to the arbitration, and (4) the proximity in time between the relationship and the arbitration proceeding.” When considering each factor, the court should determine whether the asserted bias is direct, definite, and capable of demonstration rather than remote, uncertain, or speculative, and whether the facts are sufficient to indicate the arbitrator’s improper motives.⁷⁵ More recently, the Supreme Court expressed disfavor with any notion that the slightest pecuniary interest would constitute evident partiality⁷⁶, thus suggesting that this standard is fairly high.

Additionally, only neutral arbitrators are held to this standard. As mentioned above, many arbitral tribunals have a three-arbitrator panel. Under the common arrangement, each party designates one arbitrator (party arbitrators or non-neutral arbitrators) and the two select a third (neutral arbitrator). Party arbitrators are not expected to be as impartial as neutral arbitrators. “Evident partiality” is a ground for vacatur only for neutral arbitrators, because non-neutral arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them.⁷⁷ In other words, absent overt corruption or misconduct in the arbitration itself, no arbitrator appointed by a party may be challenged on the ground of his relationship to that party.⁷⁸ Furthermore, a party with constructive knowledge of the potential partiality of an arbitrator may waive its right to challenge an arbitration award based on evident partiality if it fails to object to the arbitrator’s appointment or the arbitrator’s failure to make disclosures until after an award is issued.⁷⁹

Vacatur of arbitration award is appropriate under FAA only in exceedingly narrow circumstances, such as where arbitrators are partial or corrupt, or where an arbitration panel manifestly disregards, rather than merely erroneously interprets, the law.⁸⁰ An arbitration award can only be vacated on one of four exclusive statutory grounds: “ (1) corruption, fraud, or misconduct in procuring the award; (2) partiality of an arbitrator appointed as a neutral; (3) an overstepping of the arbitrators

⁷⁴ *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 621 (7th Cir. 2002).

⁷⁵ *ANR Coal Co., Inc. v. Cogentrix of N.C., Inc.*, 173 F.3d 493 (4th Cir. 1999).

⁷⁶ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 n.3 (1986); *See In re Equimed, Inc.*, 2006 WL 1865011 (E.D. Pa. 2006) (remote and trivial relationship do not exhibit required appearance of bias).

⁷⁷ *See Delta Mine Holding Co. v. AFC Coal Prop., Inc.*, 280 F.3d 815, 821–22 (8th Cir. 2001).

⁷⁸ *Anderson v. Nichols*, 359 S.E.2d 117 (W. Va. (1987).

⁷⁹ *JCI Commc’ns, Inc. v. Int’l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 52 (1st Cir. 2003).

⁸⁰ 9 U.S.C.A. § 10 (West 2002); *Metromedia Energy, Inc. v. Enserch Energy Services, Inc.*, 409 F.3d 574 (3d Cir. 2005), petition for cert. filed, 74 U.S.L.W. 3131 (U.S. Aug. 31, 2005).

of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or (4) a failure to follow the procedure of this Arbitration Code, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.”⁸¹ A financial interest in the outcome of the arbitration or a direct relationship with a party are relevant considerations when determining whether an arbitrator's relationship is material to the arbitration at issue, for purposes of determining whether failure to disclose a conflict of interest warrants vacatur of award under FAA.⁸²

It has been widely recognized that an arbitrator has the obligation to disclose to the parties any interest or bias and failing to do so might constitute “evident partiality”, though no specific provision pertaining to disclosure has been found in U.S. laws. In addition, peculiar industry practices and norms are considered in determining whether an arbitration award is subject to vacatur, particularly with an arbitrator’s full and timely disclosures regarding business relationships with the parties.⁸³ Under the evident partiality standard, arbitrators are held to a less strict disclosure regime than the appearance of partiality standard that applies to judges.⁸⁴ According to the Revised Uniform Arbitration Act, an arbitrator has a continuing duty to disclose any fact he learns after his appointment if a reasonable person would consider it likely to affect the impartiality of the arbitrator.⁸⁵ The arbitrator also has the duty of disqualifying himself or herself upon discovering sufficient reasons for such action, in order not to prejudice an effective arbitration. This self-disqualification of the arbitrator is required under the Rules of the American Arbitration Association (AAA) which require any person appointed or to be appointed as an arbitrator to disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationships with the parties or their representatives.⁸⁶

Although an arbitrator must disclose any bias or interest, arbitrators are not required to explain the arbitration award and their silence cannot be used to infer grounds for vacating an award.⁸⁷ A party seeking vacatur

⁸¹ O.C.G.A. § 9-9-13(b); 9 U.S.C.A. § 10 (West 2002); *Progressive Data Systems, Inc., v. Jefferson Randolph Corp.*, 568 S.E.2d 474, 475 (2002); *Metromedia Energy, Inc., v. Enserch Energy Services, Inc.*, 409 F.3d 574 (3d Cir. 2005), petition for cert. filed, 74 U.S.L.W. 3131 (U.S. Aug. 31, 2005).

⁸² *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 64 (2d Cir. 2012).

⁸³ *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 648 (6th Cir. 2005).

⁸⁴ *Local 814, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. J & B Sys. Installers & Moving, Inc.*, 878 F.2d 38, 40 (2d Cir. 1989).

⁸⁵ See NAT’L CONFERENCE OF COMM’R ON UNIF. STATE LAWS, REVISED UNIFORM ARBITRATION ACT § 12 (2000).

⁸⁶ See AM. BAR ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES § 16(a) (2013).

⁸⁷ *Robbins v Day*, 954 F.2d 679, 682–85 (11th Cir. 1992).

of an arbitration award on grounds of evident partiality has the burden of proof, and, to meet this burden, he or she must demonstrate that a reasonable person would conclude that an arbitrator was partial to the other party to the arbitration.⁸⁸ To be specific, the party who alleges that an arbitration award was procured by corruption, fraud, or other undue means must: “(1) establish the fraud by clear and convincing evidence; (2) demonstrate that the fraud was not discoverable by the exercise of due diligence before or during the arbitration hearing; and (3) demonstrate that the fraud was materially related to an issue in the arbitration.”⁸⁹

Generally, the merits of the controversy between the parties to arbitration cannot be challenged as an attack for the allegation of evident partiality or corruption by the losing party. Largely for this reason, the merits of an award are not subject to judicial review. Courts will not review the validity of the arbitrator’s reasoning, and may not review the sufficiency of the evidence supporting an arbitrator’s award. Thus, the general rule is that an arbitrator’s decision cannot be reviewed for errors of fact or law. In addition, the legislature has reduced the risk to the parties by providing for judicial review only in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process.⁹⁰

This U.S. approach works for a well-developed legal system with a strong rule of law model, but it is less clear that it would work well for China’s arbitration system. Perhaps it is because the Chinese understanding of corruption, fraud or misconduct is still evolving, which may be why the Chinese statute is ambiguous. In addition, arbitration awards have a stronger history of publication in the West than in China, which makes it more difficult to hide or disguise a distortion of law. To fully understand why Chinese approach of criminal statute was a rational choice, we need to step back and place the arbitration process in the context of the history of the Chinese legal system.

Stepping Back: Exploring the “Perversion of Law” Provision in Light of the Historical Development of Chinese Legal System without a fundamental knowledge of the Chinese legal system, a plain reading of the provision of the new enactment may lead the reader to make a misconceived attempt to analogize and extrapolate from his own ethnocentric experiences to a quite distinct legal system. The contemporary Chinese legal system is still heavily burdened and influenced by traditional forces. This section undertakes an analysis of some cultural and traditional elements influencing the new crime, demonstrating some probable reasons for the new statute from the perspective of history. This author argues that a criminal law-oriented

⁸⁸ ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc., 173 F.3d 493, 500 (4th Cir. 1999).

⁸⁹ Fla. Stat. Ann. § 682.13 (West 2013). Davenport v. Dimitrijevic, 857 So. 2d 957, 961 (Fla. Dist. Ct. App. 2003).

⁹⁰ Moncharsh v Heily & Blase, 832 P.2d 899, 904 (1992).

legal culture, a civil law tradition, and an underdevelopment of market economy in China contribute to the penal liability of arbitrators.

1. *Chinese Legal Culture*

A law must operate in a cultural context and be impacted by the culture, yet that culture is in turn affected by the operation of law.⁹¹ Arbitration by “Perversion of Law” has become a new crime due to various social and cultural elements. Chinese legal culture, which differs greatly from those of western countries, is at the heart of the issue. The basic philosophy underlying traditional Chinese law is the belief of harmony, which leads officials to deal with legal cases in terms of a “situation to be restored” rather than in terms of “individuals seeking justice”. Under this theory, two prominent characteristics have to be mentioned in China’s ancient legal system. One is that all legislation was criminal law, named Xing. Thus, in the eyes of ancient Chinese people, laws for a long period of time have just meant one thing —punishment. The other is that a teaching of morality called Li, which was traditionally considered the highest form of regulation, was used in coordination with Xing. Li includes a set of moral standards of conduct appropriate to persons of varying status in different situations. If ordinary people could be taught Li by precept, example and symbolic ritual, there would have been no need for anything like Xing, which was seen as inferior to Li. But, for those rebellious people who failed to make their behavior conform to Li, punishments had to be prescribed in the form of a code of penal law.

While the codification of laws was undertaken a long time ago in China, there was no division of public laws and private laws in the early codes. In ancient China, commercial disputes were very rare. The codes were all public laws (criminal laws) by nature even though they were commonly applied in private fields. The criminal law-favored and morality-oriented tradition was also the mainspring of China’s ancient legal system and machinery of law enforcement. Of the two, the criminal law favor is probably the most important element because in Chinese history, the “law” has long been believed to be criminal law. The criminal law-favored tradition embodies the need for the convenience of state rule at that time that results in centralization of state power. The more prevalent the idea of concentration of power is in a society, the more developed the criminal law system.⁹² Where the notion of centralization of state power is so dominated that the state and collective interests surpass those of individuals, any infringement of private rights can be interpreted as damage to social order and state interests. Rather,

⁹¹ Zhongzheng Tan, *Xingfa Jieru Shangshi Zhongcai De Lilun Fansi* [On Theoretic Reflection of Intervention of Criminal Law into Commercial Arbitration (Xingfa Jieru Shangshi Zhongcai De Lilun Fansi)], 71 BEIJING ZHONGCAI [ARBITRATION IN BEIJING (Beijing Zhongcai)] 67 (2010).

⁹² *Id.* at 68.

the state and the people will clearly express their attitude: revenge and punishment. This attitude best explains why the partiality of arbitrators becomes a social concern and why a country will eventually choose a criminal punishment to address it. Therefore, all the laws the society needs are criminal laws, or at least criminalized laws.⁹³

However, this changed at the dawn of the 20th century, when a legal reform (Legal Reform of Qing Dynasty) aimed at imitating western legal systems took place. This reform effectively separated the civil laws from criminal laws. However, it is still difficult to fill the gaps of different legal cultures that originated from different legal traditions. Law is generally thought to be a merely passive instrument whose operation can either be promoted or impeded by culture. Thus, the ancient Chinese legal tradition continues to impact the legal process in at least two aspects. First, lawmakers are inclined to employ criminal laws to maintain stability in large areas of social life. This feature, as a distinctive Chinese characteristic, is still strong and might remain so in the foreseeable future. Meanwhile, criminal provisions often contain more moral statements than particular legal rules. Secondly, due to a lack of tradition of private rule of law, the average person has less trust in private rights, and is accustomed to turning to intervention of public power for their sense of security.⁹⁴

The distinction between eastern and western legal cultures seems much more pronounced than the distinctions among different western legal cultures. The categories and functions of laws vary even more across cultures. Considering those diametrically opposed traditions, the Chinese arbitration system is within the larger framework of China's national legal system and evolves along with the development of that system. With no western rule of law tradition on one side, and a strong impact of local criminal law-favored and morality-oriented tradition on the other side, it appears that the penal liability of arbitrators is not only desirable in the eyes of Chinese authority, but also welcomed by the people. This of course is not surprising given the ambivalent value of criminal law for modern China.

2. *Civil Law Tradition*

Following the Legal Reform of the Qing Dynasty, a significant development of modern law in China was characterized by the introduction of a Civil Code. This code borrowed a lot from the Japanese and German models and today has a direct offspring in Taiwan. It has only been more than a few decades since China began creating systematic codes. Legal ideas were directly taken from one legal system to another. Legislators were content with formalism and law-making. For

⁹³ Zhongqiu Zhang, *COMPARATIVE STUDIES OF CHINESE AND WESTERN LEGAL CULTURES* (Zhong Xi Falv et al. eds., 2009).

⁹⁴ See Han, *supra* note 51, at 146.

this reason, it is often believed that the contemporary Chinese legal system is attributed to the influence of the civil law family. Traditionally, civil law countries were hostile to arbitration. Arbitration by “Perversion of Law” has to some extent, followed this tradition.

One of the enduring characteristics of the differences between common and civil law system is with respect to what is law. It is well known that in common law countries, case law is commonly believed to be the main source of the law. However, in civil law countries, the law is statutory. The latter jurisdictions have put emphasis on legislation. Furthermore, people find themselves with more interest in statute making than dispute resolution. Thus, civil law judges are described as “mechanically appl[ying] legislative provisions to given fact situations.”⁹⁵ This feature embodies the deductive method of civil law systems, which is distinct from the inductive method of common law. Some jurisdictions, such as China, even look at the deductive method that has become popular and introduce it into their domestic legal systems. Because arbitration is a significant part of the justice system on which Chinese society relies, it is not surprising that the legislature believes that it is in the public interest to establish a generally accepted enactment to regulate arbitration. The overconfidence in the power of legislation can also be a fruitful ground for an explanation of the new enactment in China, regardless of the significant gap between enacted rules (the law-in-the-books) and actual practice (the law-in-action).

Another noteworthy aspect is the influence of judges in different legal systems. Civil law adjudicators should mechanically follow the law (statutes), rather than “create” the law. Parties in a civil law system go to court to resolve disputes where statutory law is not interpreted, but is rather applied by judges to determine the outcome of cases.⁹⁶ While continental judges have broad managerial powers, they are expected to apply the law in an almost mechanical way, remaining a controlled instrument of the legislature.⁹⁷ This system leaves no room for judges’ participation in the creation or transformation of legal rules. Conversely, in the United States it is readily acknowledged that parties seek to achieve changes in the law through the legal system, and that judges have the ability through statutory interpretation to make laws. The task of a common law judge is to evaluate counsel’s competing arguments about hyper-factual analogies and subtle distinctions in prior decisional law.⁹⁸ By following the precedents, judges can make a breakthrough to create new rules when necessary. They have express law-making and policy-

⁹⁵ Mitchel de S.-O.-l’E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1334 (1995).

⁹⁶ *Id.*

⁹⁷ JOHN HENRY MERRYMAN, *THE LONELINESS OF THE COMPARATIVE LAWYER---AND OTHER ESSAYS IN FOREIGN AND COMPARATIVE LAW* 184 (1999).

⁹⁸ Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 76–77 (2001).

creating functions.⁹⁹ In addition, many civil law judges consider it an important part of their job to help the parties reach an amicable settlement. Judges in common law systems are comparatively passive in their fact-finding role. Notably, civil law judges do have more chances to engage in “perversion of law.” Without doubt, their impartiality duties do not and cannot be the same as those of common law judges. A common law judge is not accountable for his decision (even unfair decisions) and for any losses incurred by the parties. Likewise, neither is an arbitrator, who is deemed a quasi-judge. Decisions that deviate from the law would not be considered an inappropriate violation of impartiality obligations in common law system. How can a U.S. judge be charged with bending the law since he has the power to make the law? Therefore, crimes like adjudicators’ perversion of law appear to be found only in Asian countries with a civil law tradition.

3. *Market Economy*

Arbitration is widely believed to be an inherently private, contract-drawer system of dispute resolution, and a product of a market economy. This perception is supported to some extent by the history of arbitration and the degree of parties’ control in shaping arbitration proceedings. However, it cannot be assumed that arbitration in China has the similar background of market economy as that in the west. China’s commercial environment is significantly different. Chinese arbitration lacks its purported popularity, custom, and ability of private governance from the incomplete development of market economy. While China is transitioning from a centrally planned economy to a market-oriented economy, the latter is extremely young, having only been around since the 1990s. The underdevelopment of market economy and the socialist central planning-featured impact provide arbitration with less soil for growth. It is important to note that the development of arbitration in China is not due to the maturity of market economy and party autonomy, but instead is a result of government promotion. Although Arbitration Commissions are proclaimed to be administratively independent from both the local and national governmental units in accordance with Arbitration Law,¹⁰⁰ they are far from being truly independent. Most of them are to some extent linked to various administrative authorities in that their existence depends on the manner and degree to which they are supported by the local Chinese governments.¹⁰¹ Arbitrators are thus

⁹⁹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, 16–23 (1962).

¹⁰⁰ Arbitration commissions shall be independent from administrative authorities and shall have no subordinate relationships with administrative authorities. There shall also be no subordinate relationships between arbitration commissions themselves. *See* Arbitration Law, *supra* note 13, art. 14.

¹⁰¹ For example, the People’s Governments of the municipalities shall arrange relevant departments and chambers of commerce to organize and establish arbitration commissions in a unified manner. *See* Arbitration Law, *supra* note 13, art. 10.

viewed as government officials, and the standard of arbitrator impartiality is naturally expected to be the same as that of judges. Furthermore, there is no such thing in China as a code of ethics for arbitrators. Therefore, regulation of arbitrators can hardly be realized through a code of ethics or through market rules such as competition, and reputation. On the contrary, it has to depend upon public power and criminal provisions. Moreover, the criminal provisions do not completely replace a code of ethics for arbitrators. Though there is a system in place that regulates arbitration in China, it will still take much longer to perfect its arbitration laws.

IV. EVALUATIONS ON THE NEW CRIME AND PROPOSALS FOR REFORM

A. Evaluations on the New Crime

Arbitration is efficient, inexpensive, and harmonious. Parties have long regarded international commercial arbitration as an effective choice-of-forum and mechanism for resolving international commercial disputes. It provides parties with specific advantages over traditional litigation. Foremost, arbitration alleviates most of the jurisdictional disputes amongst parties.¹⁰² However, the Chinese legislative attitude towards arbitration, as shown in the enactment, seems to be unfriendly to arbitrators, as it discourages the deference to arbitration. Arbitration is by its nature quasi-private and procedurally more flexible than judicial systems. It provides greater certainty and a higher level of expertise than the court-based system. This flexibility allows arbitrators to work more quickly and efficiently, which is very important for time-sensitive commercial arrangements. However, with this flexibility it is possible for arbitrators to betray the trust of the parties and rule against the provision of the law. Because arbitral awards are final, binding, and enforceable in the same manner as court judgments, and because wide discretion is left to the parties, their attorneys, and the arbitrators to fashion the procedure as they wish without any judicial interference, this system could cause an infringement of legal interests and rights.¹⁰³ Furthermore, due to the universal acceptance of the New York Convention, which provides for the confirmation of arbitration awards in member nations, parties cannot resolve their disputes in multiple forums if one party contests the decision of the arbitral tribunal.¹⁰⁴

From an economic perspective, the issue of quality of service is critical in that a common criterion of quality needs to be set out for the

¹⁰² See Thomas Lundmark, *Verbose Contracts*, 49 AM. J. COMP. L. 121, 131 (2001).

¹⁰³ See THOMAS J. STIPANOWICH & PETER H. KASKELL, COMMERCIAL ARBITRATION AT ITS BEST 281–85 (2001).

¹⁰⁴ NEW YORK Convention ARTICLE V, on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3838, available at <http://www.wipo.int/amc/en/arbitration/ny-convention/text.html> (last visited Feb. 22, 2012); Currently, 91 nations are parties to the Convention. The list of nations is available at http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=16 (last visited May 13, 2014).

healthy development of a market. If it is lower than the standard of the market, and the service provider cannot be expelled, the results would be a decrease of quality of service and a collapse of market in the end.¹⁰⁵ In terms of arbitrator impartiality, it is reasonable and fair to make a biased arbitrator, the provider of poor quality service, assume some liability.

It has been recognized that arbitration rulings must be subject to some judicial review to ensure that the arbitral proceeding has operated within the state's legal framework. This supports a conclusion that the judicial authority should act as a watchdog in supervising arbitrators and providing a remedy when necessary. Adjudicators should act for the common good. Regardless of which laws govern, the rule that the bias or partiality of an arbitrator, whom the parties expected to be neutral, is good cause for invalidating the arbitration award appears to be universally accepted.¹⁰⁶

To ensure impartiality, it is necessary for China to legislate on the serious misconduct of arbitrators. However, Chinese legislation addresses the concern with a more severe means than may be necessary, criminal liability. Clearly, the lawmakers made an inappropriate analogy between the role of an arbitrator and that of a judge, in which an arbitrator is virtually identical to a judge. They probably believe that all adjudicators should be neutral when making a decision and arbitrators should behave as impartially as judges. This belief confuses the distinction between arbitration and litigation. It is helpful to begin by noting that although the arbitrator performs a task that resembles that of a judge, there are critical differences between judges and arbitrators. Despite the resemblance between arbitration proceedings and court proceedings, it is important to keep in mind that the former is the result of a private contract while the latter arises from the state's authority to resolve disputes and to compel compliance. As private actors, arbitrators perform their function for private gain.¹⁰⁷ The basic role of arbitration is a sort of legal services, which is at essence market participants' self-regulating and an unofficial dispute resolution system without state intervention.¹⁰⁸ It has been opined that if it had been necessary to create a new crime in regulating an arbitrator's misconduct, it would be better to be one like fraud or infringement upon property on the basis of contract, rather than a crime of dereliction of duty.¹⁰⁹ In fact, blindly transplanting the crime of Judicial Personnel by Perversion of Law and applying it to arbitrators was an ineffective method to achieve the social goals. This, along with the provision of establishment of arbitration commissions, is

¹⁰⁵ Mingchao Fan, *Crime of Misuse of Law in Adjudication under the Vision of Commercial Arbitration*, 27 HEBEI LAW SCIENCE 126 (2009) (China).

¹⁰⁶ 4 AM. JUR. PROOF OF FACTS 2d 709 § 1 (1975).

¹⁰⁷ Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1302-03 (2000).

¹⁰⁸ Jing Lu, *On Limited Criminal Responsibility of Arbitration* 24 ARB. STUDY, 82, 85 (2010) (China).

¹⁰⁹ See Huang, *supra* note 43, at 123.

difficult to make people believe that arbitration in China is truly independent.¹¹⁰

The lawmakers also seem to think that an imperfect system is better than no system. However, a lack of market rules, industry regulation, and a code of arbitrator ethics and civil liability, makes the cure worse than the illness. The core issue here is not whether the biased arbitrator should be liable or not, but instead the issue is how and to what extent should the arbitrator be liable. Any change of institution, especially in the form of criminal law, must be prudential even though confidence in criminal law is one of the most rooted political faiths in China. Ensuring the enforcement of standards and providing meaningful remedies to those injured by arbitral misconduct is equally as important as articulating standards of conduct and professional ethics for arbitrators and provider institutions.¹¹¹ There are some market forces that discourage arbitrator misconduct. Arbitrators wishing to attract business would have an incentive to develop a reputation of impartiality. Many are obedient to the law, even though there is no formal punishment and no benefit can be obtained from breaking the law. Arbitrators' actions are restricted by custom, conscience, and such concerns like caring for one's reputation. Additionally, Arbitrators' consider the net profit by deducting the cost and risks of law breaking or being sympathetic to the victims. Thus, arbitration develops along with the market economy, and market rules seem to function effectively and play a more important role than legal rules.¹¹²

While it appears a good objection that the criminal punishment is inconsistent with the international practice, it fails to further explain why similar crimes can rarely be found in most other jurisdictions. A criminal penalty results in harsh consequences to the individual, to his or her family, and indirectly to society as a whole. A state should avoid misuse of a criminal penalty or should tailor the penalty to avoid excessive, ineffective, or costly penalties. In a modern society, with the focus being moved on citizens' rights and interests, civil laws play a more important role than criminal laws. Criminal laws should be cautiously applied because of the higher social cost. The basic idea is that the law-makers should make attempts to procure maximum social benefits—effective prevention and control of misconducts at the expense of minimum social pay—use of less or none of criminal penalty. Even though it is submitted that China should address the issue of arbitrator impartiality, it cannot

¹¹⁰ Arbitration Law provides that arbitration shall be carried out independently according to law and shall be free from interference by administrative authorities, social organizations or individuals. See Arbitration Law, art. 8; Arbitration commissions may be established in centrally-governed municipalities and in municipalities where provincial and autonomous regional governments are located...the People's Governments shall arrange relevant departments and chambers of commerce to organize and establish arbitration commissions in a unified manner. See Arbitration Law, *supra* note 13, art. 10.

¹¹¹ Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 458 (2004).

¹¹² See Chen, *supra* note 25, at 3.

put this inclination to an unlimited extreme without consideration of the potential harms associated with the penal punishment. This ultimately reflects a national cognition of the nature of arbitration and the extent of transfer of public power to the arbitral right. Some scholars are worried that the new law might be easily misused which, in turn, would deter many foreign candidates that otherwise would have been appointed as arbitrators.¹¹³ It is like a double-edged sword which might harm both the state and the individual. With the belief that the rulers should try to avoid employing the criminal law as much as possible, the criminal law remedy can only be considered the last resort. Furthermore, the previous function of criminal liability discussed above could be replaced by some other means of social regulation such as a code of ethics and a civil liability of arbitrators. Unfortunately, the new Chinese civil tradition and arbitration experience do not yet provide a strong foundation for other non-criminal means of controlling arbitrator misconduct.

With the new enactment, the task of ensuring arbitrator neutrality in China presents a number of possible barriers in both perception and reality. While a new crime has been articulated, its purported effect is questionable if true enforcement is unavailable as what may constitute it is very uncertain. On the contrary, the ambiguity of the provision will undoubtedly impact arbitrators' power of discretionary evaluation of evidence as well as offer the opportunity of misuse itself by the judicial authority. That might infringe the legal rights and interests of the arbitrator and the parties.

B. Proposals for Reform

The international community has been seeking a balance for years: on the one hand, arbitrators should be required to assume liabilities—in light of arbitral justice—for losses of parties incurred from their deliberate or negligent misconduct in arbitration; on the other hand, to realize the value of efficient arbitration, arbitrators should be warranted certain immunity when performing their duties, which is necessary for them to be free from improper interference and offence. How to keep the balance depends not only on understanding the nature of arbitration and the roles of arbitrators, but also of the current situation of development in arbitration under a number of certain social conditions, such as social identification of arbitration and the overall qualification of arbitrators. Therefore, nations may set up institutions of arbitrator liability suitable for their national conditions on the basis of jurisprudence for deference to arbitration.

As outlined earlier, the newly established arbitrator criminal liability regime in China is riddled with problems. The current regime can well be described as a legislator-based system, characterized by paternalism and rigidity. It appears that impartiality of arbitration and deference to

¹¹³ *Id.* at 6.

arbitration are two conflicting values. This problem is particularly severe and disconcerting in China. The simplistic approach of the new law needs to be reformed because it is unable to achieve the goal of impartiality of arbitrators. It is reasonable to expect that detailed rules will emerge in the future, however, this does not suggest that China should wholly abandon the use of the new law.

In discussing the reform of the regime, it is the author's view that a better method for realizing the goal is through a Judicial Interpretation of the criminal statute.¹¹⁴ Some U.S. experience has appeal and can be borrowed in the context of China. In general, it must be kept in mind that maintaining deference to arbitration is one of the most important principles underlying judicial review of arbitration. The goal of Judicial Interpretation is to design an effective mechanism to ensure fairness and justice in the course of arbitration and at the same time preserve deference to arbitration. Four aspects can be included.

1. Private Prosecution

In accordance with the current Chinese law, the crime of dereliction of duty by state personnel who exercise public power on behalf of the state is public prosecution. Since arbitration by "Perversion of Law" falls within the scope of dereliction of duty, it is the Procuratorate, not the claimant, who should bear the burden of proof. Whenever a "biased" arbitrator is charged of "go[ing] against facts and law", the Procuratorate needs to examine the finding of the merits and the application of the law in arbitration and prove the crime before the court. The court again has to review issues like fact-finding and law application in determining what might constitute the crime. The status of the arbitrator has become weaker. It appears to be going farther away from the principle of deference to arbitration. Previously, only procedural issues rather than merits of international arbitration were allowed to be examined by the courts. But the enactment broke the limit of the legislation because it authorized both the courts and the Procuratorate the power of substantial investigation over an arbitral award—which simply means a retrial. That inquiry, however, is contrary to the finality of arbitration. The legislature has put itself and the judicial authority into a dilemma: a review of the merits of arbitration is in violation with China's international convention obligation whereas omission of criminal liability is against China's criminal law. The intervention of the public power with arbitration has also been expanded, and the balance has been broken.

¹¹⁴ The Judicial Interpretation in China is not a precedent based system, but involves workable rules enacted by the highest judicial authority, i.e., the Supreme People's Court and/or the Supreme People's Procuratorate, with the view to apply a particular statute. It is said coming from a practical understanding of the statute. Procedurally, it is more flexible and often acts as a valuable tool to avoid the ambiguity and awkwardness of a piece of legislation. It is also believed, to some degree, to unavoidably betray the legislation.

To place an important check and balance, arbitration by “Perversion of Law” would better be interpreted as private prosecution to shift the burden of proof to the party who accuses the “biased” arbitrator of the crime. The claimant, instead of the Procuratorate, should demonstrate the partiality in the process of arbitration. A similar U.S. provision is “[a] party seeking vacatur of an arbitration award on grounds of evident partiality must demonstrate that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration.” With the restructuring of the procedure, the Procuratorate no longer has the power to interfere with arbitration. The intervention of public power with arbitration can be narrowed and the chances of misuse of the criminal provision can be limited. The higher the threshold, the more difficult the new law can be employed and the more protection arbitration will get. When providing the elements which need to be taken into account as evidences, the U.S. experience concerning the proof of corruption, fraud, or other undue means can also be referenced. It seems that arbitration could get sufficient protection while at the same time necessary flexibility is preserved for deterring a biased arbitrator.

2. *Criminal Liability only for the Neutral Arbitrator*

The most popular method for appointing arbitrators to an arbitral panel in international disputes is for each side to appoint one arbitrator, with a third arbitrator appointed either by the two selected arbitrators or by the arbitration association (or another appointing authority).¹¹⁵ In many jurisdictions, non-neutral arbitrators have long been considered agents of the parties appointing them. In the United States, it is acceptable that non-neutral arbitrators are not expected to be impartial and only the neutral arbitrator is required to be “neutral”, as the term suggests. The most important obligation of an arbitrator’s impartiality is the duty to disclose information, especially the information concerning peculiar interest or identity, which provides the market with an early warning.

A significant issue that needs to be clarified is whether the non-neutral arbitrators assume the same penal liability as the neutral arbitrator. In other words, where an arbitral award is rendered on the basis of opinions of the majority or the neutral arbitrator, who, for example, goes against the facts and the law, should the non-neutral arbitrator or arbitrators who had different opinions be deemed as an accomplice of the crime? Many people believe that non-neutral arbitrators are just hired guns because being non-neutral makes these arbitrators more attractive to certain parties. What they say should have no more weight than the neutral arbitrator. Unfortunately, nothing in current Chinese law provides either a distinction in liabilities among

¹¹⁵ See Guzman, *supra* note 107, at 1279, 1303.

different arbitrators or a detailed working procedure of the new crime concerning the disclosure duty.

It is improper to enact a statute without regard to the specific context in which it is used. To ensure smoother transition and structural adjustment, this author argues that attention should be paid to the distinction of arbitrators in the panel, as they have different incentives in arbitral proceedings. Exploration of incentives that make the arbitrator free from partiality and exercise good faith and due diligence contributes to our understanding of the roles of panel members in commercial arbitration. There seems to be no good reason why all arbitrators should be required to be identically impartial since they have varied ways of appointment. Notably, some flexibility is necessary. A clarification should be made in the future Judicial Interpretation that only the neutral arbitrator should be criminally liable for arbitration by “Perversion of Law.” This seemingly would have a positive impact, especially when China is in a critical stage of encouraging the development of arbitration.

3. *Civil Liability*

It is presumed that parties to an arbitration agreement have agreed to bear the risk of the arbitrator’s mistake in return for a quick, inexpensive, and conclusive resolution to their dispute. The popularity of commercial arbitration is that it brings the value of benefit and impartiality together. As discussed earlier, arbitration historically has been a dispute resolution mechanism for transactions that only implicate private law.¹¹⁶ The relationship between arbitrators and parties is more like a contract, and an arbitrator should undertake the liability of breach of contract where he acts partially. Consequently, arbitrator civil liability can be introduced into the Chinese arbitration legal regime. This remedy cannot properly be viewed as a white elephant from the uncertainties of the system, but as a buffer.

4. *Detailed Definitions*

Without detailed rules, the criminal provision is of little practical value. Besides what has been mentioned earlier, there are still many vague terms which need to be carefully defined. In order to decide whether the arbitrator has perverted the law or not, where an arbitral award is rendered through mediation, neither a written mediation statement nor a written arbitral award can be in compliance with the facts and law.¹¹⁷ Suppose the law is not domestic law, the judicial authority

¹¹⁶ See Christine L. Davitz, Note, *U.S. Supreme Court Subordinates Enforcement of Regulatory Statutes to Enforcement of Arbitration Agreements: From the Bremen’s License to the Sky Reefer’s Edict*, 30 VAND. J. TRANSNAT’L L. 59, 62-63 (1997).

¹¹⁷ An arbitration tribunal may mediate before giving an award. An arbitration tribunal shall mediate where both parties voluntarily seek mediation. Where mediation is unsuccessful, an award shall be made in a timely manner. Where mediation leads to an agreement, the arbitration tribunal

has to prove first of all what the foreign law is and what its content and legislative purposes are. Proof of foreign law is so complicated because of different languages, understanding of laws, and notions of legislation. More importantly, any decision concerning the interpretation of foreign law by a Chinese court might constitute an infringement of foreign sovereignty in violation of the basic principle of international law because the foreign law is enacted and should only be interpreted by a foreign authority. Chinese judicial organs' inherited way of thinking in terms of domestic law might bring about real "verdict by perversion of law." Furthermore, an arbitrator is criminally liable only when his or her conduct is "intentional." But what if the arbitrator's liability of "negligence" resulted from lack of professional care and due diligence? In addition, the relation between the crime and the effectiveness of a foreign arbitral award has not been provided. It is likely to have a ridiculous concurrence that a foreign award which is rendered oversea by a Chinese arbitrator has been recognized and enforced by a Chinese court whereas the arbitrator is found guilty of this crime in China.

By carefully defining the conditions of the crime by listing some specific situations, the future Judicial Interpretation can help make the enactment more workable. The more detailed it is, the more authority the enactment has. Taking into account the relationship between the spirit of arbitration and the purpose of legislation in practice, the judicial authority may start from the stance of deference to the contract nature of arbitration and make some appropriate adjustments when interpreting the law. For instance, the crime can be more restricted to domestic arbitration than foreign and foreign-related arbitration; the "law" should not include foreign law, because the criminal law is a public law and should be strictly limited to a particular territory. Also, the nature of arbitration requires more discretion than litigation, and the criterion of an arbitrator's "perversion of law" should be inferior to those of a judge,¹¹⁸ so long as the award does not go against the fundamental principles of civil and commercial law, such as party autonomy, good faith and public policy, substantially, as well as equal hearing and admission of evidence procedurally.

V. CONCLUSION

In the first five years, there have been no published instances in which an arbitrator has been convicted under this provision. Records of

shall prepare a written mediation statement or a written arbitral award on the basis of the result of the agreement. Written mediation statements and arbitral awards shall have equal legal effect. *See* Arbitration Law, *supra* note 13, art. 51.

¹¹⁸ In accordance with Arbitration Law, disputes shall be resolved through arbitration on the basis of the facts, in compliance with the law and in an equitable and reasonable manner. While Civil Procedure Law provides that in trying civil cases, a people's court must take the facts as the basis and the law as the standard. Obviously, the requirement of "in compliance with the law" is inferior to that of "the law as the standard." *See* Arbitration Law, *supra* note 13, art. 7; *see also* Civil Procedure Law, *supra* note 20, art. 7.

prosecutions and convictions, however, are not public in China, so it is difficult to confirm whether cases have, in fact, been brought. On the one hand, the possibility of criminal conviction would presumably deter biased arbitrators. While that is a net social good, there is another risk. Prosecutorial abuse of the statute, by threatening to bring criminal prosecution unless the arbitrator rules a certain way, could be a threat to the independence of the arbitration process. The proponents of the new provision argue that the justice of arbitration and protection of the rights and interests of parties can be achieved in practice through the regulation of arbitration with state interference, whereas its opponents are against public intervention and believe that the previous goals can only be realized through the development of arbitration itself.

The debate over the crime remains largely inconclusive, and so will continue into the foreseeable future, as will the relevant empirical studies. To create a better balance between arbitrator impartiality and deference to arbitration, practice should have the final say on the effect of the new provision. This, by its nature, reflects the different attitude towards arbitration. The diversity of culture, tradition and condition among different nations plays a very important role in the distinction of policy adoption and law making in each nation. A dissimilar institution is not simply a deviation from international practice. It also manifests a diverse need at different stages of social development. Nations may take specific measures in conformity with their own context to support arbitration, so long as those measures, being deferential to an arbitral award, are applied for the independence and protection of legal rights of parties.