

# Washington International Law Journal

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Volume 23 | Number 2

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4-1-2014

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### Recommended Citation

Duan Xiaosong, *Criminal Liability of Arbitrators in China: Analysis and Proposals for Reform*, 23 Pac. Rim L & Pol'y J. 343 (2014).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol23/iss2/3>

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# CRIMINAL LIABILITY OF ARBITRATORS IN CHINA: ANALYSIS AND PROPOSALS FOR REFORM

Duan Xiaosong <sup>†</sup>

*Abstract:* This article is prompted by a Chinese criminal provision governing the impartiality of arbitration. The goals of the article are to critically examine the criminal statute created by the provision and to put forward some proposals for reform, which can be employed to resolve the tension that exists between arbitrator impartiality and deference to arbitration. Although the provision appears to eliminate the abuse of arbitral power, it may raise more questions than it resolves. This article explores the problems and undertakes a comparative analysis of the corresponding United States provision as well as an analysis of some cultural and traditional elements influencing the criminal statute in China. Ultimately, this article argues that the concerns can be addressed by fine-tuning the rule in order to keep a balance between the previous two conflicting values. Borrowing from U.S. experience, this article proposes a mechanism of judicial interpretation. When contemplating the judicial interpretation, four aspects need to be taken into consideration: private prosecution, criminal liability for the neutral arbitrator, civil liability, and a detailed definition of the criminal provision. Considering these aspects of judicial interpretation will ensure that China can retain the benefits of arbitration without sacrificing impartiality.

## I. INTRODUCTION

Although international commercial arbitration in China started in the 1950s,<sup>1</sup> it stood still until the adoption of the "reform and opening-up" policy of the late 1970s.<sup>2</sup> China's accession into the World Trade Organization ("WTO") in December 2001 and the growing globalization of the world economy have greatly increased international trade and investment in China.<sup>3</sup> In the wake of the modern explosion of international trade and transnational investment, arbitration has become "the accepted method for resolving international business disputes."<sup>4</sup> Arbitration has also become a

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<sup>1</sup> The first arbitration commission in the People's Republic of China, the China International Economic and Trade Arbitration Commission ("CIETAC"), formerly known as the Foreign Trade Arbitration Commission, was set up in April 1956. *Introduction*, CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, <http://www.cietac.org/index/aboutUs.cms> (last visited Dec. 8, 2013).

<sup>2</sup> LIU XIANGSHU, ZHONGGUO SHEWAI ZHONGCAI CAIJUE ZHIDU YU XUELI YANJIU (中国涉外仲裁裁决制度与学理研究) [A JURISPRUDENTIAL STUDY ON THE INTERNATIONAL COMMERCIAL ARBITRAL AWARD SYSTEM OF CHINA] 24 (2001).

<sup>3</sup> See INFORMATION OFFICE OF THE STATE COUNCIL, CHINA'S FOREIGN TRADE (2011), <http://www.chinausfocus.com/library/government-resources/chinese-resources/documents/white-paper-chinas-foreign-trade-december-2011/> (last visited Feb. 1, 2014).

<sup>4</sup> YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 6 (1996).

preferred method for foreign parties to resolve their legal disputes in China, due in large part to the distrust these parties have of Chinese courts.<sup>5</sup>

Nonetheless, parties must recognize that China's arbitration system is very young. Although commercial arbitration started in the 1950s, the first arbitration law, the Arbitration Law of the People's Republic of China, hereinafter Arbitration Law, is only twenty years old.<sup>6</sup> In contrast, the United States has a long history of arbitration. The U.S. Congress passed the Federal Arbitration Act ("FAA") in 1925.<sup>7</sup> The FAA provides that if there is an arbitration clause, the court shall, on application of one of the parties, stay the trial of the action until such arbitration has taken place.<sup>8</sup> In recent years, U.S. courts have expanded the range of enforceable arbitration agreements to include agreements that cover areas of law previously thought to be within the exclusive domain of courts.<sup>9</sup>

Parties from different nations tend to seek arbitration in order to prevent an abundance of jurisdictional problems.<sup>10</sup> Unlike litigation, arbitration provides a neutral venue for international disputes and aims to ensure procedural fairness for both parties.<sup>11</sup> Arbitration permits parties from different countries to exercise a great deal of control over how a dispute will be resolved.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> Most importantly, parties have the power to choose the decision maker.<sup>15</sup> This freedom to select the arbitrator is why arbitration has been described as

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<sup>5</sup> Michael I. Kaplan, *Solving the Pitfalls of Impartiality When Arbitrating in China: How the Lessons of the Soviet Union and Iran Can Provide Solutions to Western Parties Arbitrating in China*, 110 PENN ST. L. REV. 769, 780 (2006).

<sup>6</sup> Zhonghua Renmin Gongheguo Zhongcai Fa (中华人民共和国仲裁法) [Arbitration Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 31, 1994, effective Aug. 31, 1994) available at [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383756.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383756.htm) [hereinafter Arbitration Law].

<sup>7</sup> Federal Arbitration Act, 9 U.S.C. §§ 1–4 (1947).

<sup>8</sup> *Id.* §§ 2–4 (1947).

<sup>9</sup> For example, the disputes in respect of securities and antitrust laws are now deemed arbitrable. Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L. J. 1279, 1279 (1999–2000).

<sup>10</sup> Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 BERKELEY J. INT'L L. 329, 334 (1997).

<sup>11</sup> See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

<sup>12</sup> DEZALAY & GARTH, *supra* note 4, at 273.

<sup>13</sup> See *Scherk*, 417 U.S. at 518.

<sup>14</sup> See ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 5 (2d ed. 1991).

<sup>15</sup> IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* §3.2 (1st ed. 1995).

“hiring your own private judge.”<sup>16</sup> Arbitration benefits parties not only by ensuring procedural fairness, but also by providing predictability, lowering attorney fees, and increasing the privacy and expertise in decision making.<sup>17</sup> The finality of arbitration is another advantage, which is often attractive for its speed and cost-effectiveness.<sup>18</sup> Arbitral awards are final and binding, and can be enforced in the same manner as court judgments.<sup>19</sup> Particularly with the well-functioning international enforcement system under the 1958 New York Convention,<sup>20</sup> arbitral awards are often easier to enforce than court judgments.<sup>21</sup> With its acceptance and popularization, international commercial arbitration now plays a very important role in settling private conflicts.

Arbitrator bias, however, negates many of the benefits of arbitration to commercial parties.<sup>22</sup> In China, where bribery of public officials is prevalent, arbitral awards might also be tainted by bribery.<sup>23</sup> For instance, Jiang Hanwu, the former vice chairman of the Arbitration Commission in Lian Yun Gang city, Jiangsu Province, was charged with bribery in 2001.<sup>24</sup> The increased risk that Western parties may incur in this aspect of relations with Chinese parties increases the importance of ensuring the impartiality of the arbitrators deciding their disputes.<sup>25</sup> The issue of arbitrator impartiality is therefore critical to the development of arbitration rules and cannot be ignored in the process of international private dispute resolution. The legitimacy of international commercial arbitration relies heavily upon the thoroughness of arbitration institutions as well as the independence and impartiality of arbitrators.

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<sup>16</sup> MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* §1:01 at 1 (3d ed. 2001).

<sup>17</sup> See Amy J. Schmitz, *Ending a Mud Bowl: Ending Arbitration's Finality through Functional Analysis*, 37 GA. L. REV. 123, 157–60 (2002–2003).

<sup>18</sup> See Catherine Cronin-Harris, *Mainstreaming: Systematic Corporate Use of ADR*, 59 ALB. L. REV. 847, 853–54 (1995–1996).

<sup>19</sup> See ZHAO XIUWEN, *GUOJISHANGSHI ZHONGCAIFA* (国际商事仲裁法) [INTERNATIONAL COMMERCIAL ARBITRATION LAW] 5 (2004).

<sup>20</sup> See generally Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention].

<sup>21</sup> See Andrew T. Guzman, *Capital Market Regulation in Developing Countries: A Proposal*, 39 VA. J. INT'L L. 607, 632 (1998–99).

<sup>22</sup> Kaplan, *supra* note 5, at 778.

<sup>23</sup> See Xuan Bingzhao & Zhou Zhibin, *Wangfa Zhongcaide Ruzui Zhengdangxing Fenxi* (枉法仲裁的入罪正当性分析) [*The Analysis of the Legitimacy of Distortion of Arbitration Law*], in HEXIE SHEHUI DE XINGFA XIANSHI WENTI (和谐社会的刑法现实问题) [THE PRACTICAL PROBLEMS OF CRIMINAL LAW IN A HARMONIOUS SOCIETY] 1758 (Li Jie et al. eds., 2007).

<sup>24</sup> *Id.*

<sup>25</sup> Kaplan, *supra* note 5, at 782.

While Chinese arbitration has seen remarkable progress in a relatively short period of time,<sup>26</sup> many problems remain.<sup>27</sup> Among those problems is the issue of biased arbitrators. This article focuses on criminal liability for biased arbitrators. Criminal liability is largely prompted by a provision titled *Wangfa Zhongcai Zui* (Arbitration by “Perversion of Law”),<sup>28</sup> which was added to the Criminal Law of the People’s Republic of China<sup>29</sup> in 2006 by Amendment VI (hereinafter the Amendment), an amendment designed to punish biased arbitrators for their wrongdoings.<sup>30</sup> This article critically examines the legal regime of arbitrator impartiality in China, including this provision, and puts forward some proposals for reform. Part II provides a brief description of the framework of the Chinese arbitration. Part III presents a background of Arbitration by “Perversion of Law;” examines the debate on the criminal statute; compares it with some provisions of 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 a jurisprudential perspective and offers some reform proposals, borrowing from U.S. experience. The article argues that the criminal liability should be limited only to the neutral arbitrator and that a detailed definition is needed when applying the law. Finally, Part V provides a summary, along with concluding remarks.

## II. THE ARBITRATION SYSTEM IN CHINA

Arbitration is by nature quasi-private and procedurally more flexible than judicial mechanisms.<sup>31</sup> This allows arbitrators to work quickly and

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<sup>26</sup> See CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, *supra* note 1; see also *Introduction to the Beijing Arbitration Commission*, BEIJING ARBITRATION COMMISSION, [http://www.bjac.org.cn/en/about\\_us/index.html](http://www.bjac.org.cn/en/about_us/index.html) (last visited Mar. 8, 2014).

<sup>27</sup> For example, *ad hoc* arbitration is not legally recognized by Chinese law, and there are different criteria for judicial review of arbitral awards between domestic and international arbitration. See ZHAO XIUWEN, *supra* note 19, at 512-13, 518. See also *infra* Part II.

<sup>28</sup> Article 20 of this Amendment inserted Article 399 (I) after Article 399 of the Criminal Law, which is titled “Arbitration by ‘Perversion of Law.’” See *Zhonghua Renmin Gongheguo Xingfa Xiuzhengan* (liu) (中华人民共和国刑法修正案(六)) [Amendment VI to the Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2006, effective June 29, 2006) (China), art. 20, available at [http://www.npc.gov.cn/englishnpc/Law/2008-01/02/content\\_1388005.htm](http://www.npc.gov.cn/englishnpc/Law/2008-01/02/content_1388005.htm). [hereinafter The Amendment].

<sup>29</sup> *Zhonghua Renmin Gongheguo Xing Fa* (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by the Nat'l People's Cong. July 1, 1979, effective Mar. 14, 1997) available at [http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content\\_1384075.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm) [hereinafter Criminal Law].

<sup>30</sup> See generally The Amendment, *supra* note 28. For a detailed description of the provision, see *infra* Part III.

<sup>31</sup> ZHAO XIUWEN, *supra* note 19, at 6.

more efficiently, which is very important for time-sensitive commercial arrangements.<sup>32</sup> Meanwhile, it provides parties with other advantages, such as greater certainty and a higher level of expertise than the court-based system.<sup>33</sup> Arbitration mitigates the jurisdictional disputes amongst parties.<sup>34</sup> International commercial arbitration has long been regarded as an effective choice-of-forum mechanism to resolve international commercial disputes.<sup>35</sup> Due to the near-universal acceptance of the New York Convention,<sup>36</sup> parties cannot resolve their disputes in multiple forums if one party contests the decision of the arbitral tribunal because the Convention provides for the confirmation of arbitration awards in member nations.<sup>37</sup> This section will examine the two categories of arbitration in the People's Republic of China: international commercial arbitration and domestic arbitration.<sup>38</sup>

International commercial arbitration started in 1956 with the establishment of the China International Economic and Trade Arbitration Commission ("CIETAC").<sup>39</sup> In 1959, the China Maritime Arbitration Commission ("CMAC") was set up.<sup>40</sup> Both CIETAC and CMAC regulate international commercial arbitration, or foreign-related arbitration,<sup>41</sup> because they were designed to handle disputes arising from economic, trading,

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<sup>32</sup> For example, the lack of an appeal process in arbitration gives parties expedited finality in their legal disputes. See 9 U.S.C. § 10 (2004) (limiting judicial review of arbitration awards to a few very narrow situations); see also New York Convention, *supra* note 20, at art. 5 (narrowly restricting the situations where a member nation may not confirm an arbitration award).

<sup>33</sup> See ZHAO XIUWEN, *supra* note 19, at 36.

<sup>34</sup> See Brown & Rogers, *supra* note 10, at 332.

<sup>35</sup> ZHAO XIUWEN, *supra* note 19, at 9-10.

<sup>36</sup> China has been a member of the Convention since 1987. See *New York Convention Countries*, NEW YORK ARBITRATION CONVENTION, <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> (last visited Feb. 4, 2014).

<sup>37</sup> Article V of the New York Convention provides the limited reasons why parties to the Convention should not confirm an arbitration award. See New York Convention, *supra* note 20, at art. 5.

<sup>38</sup> China has adopted a "two-track" system for domestic arbitration and international commercial arbitration. In the Arbitration Law, Chapter VII, entitled "Special Provisions for Arbitration Involving Foreign Elements," has been set forth to deal with international commercial arbitration, which is also known as foreign-related arbitration. The two types of arbitration are distinct. For example, the Foreign-related arbitration commissions are established differently from Arbitration commissions (domestic arbitration). Article 66 provides: "[f]oreign-related arbitration commissions may be organized and established by the China Chamber of International Commerce." Arbitration Law, *supra* note 6, at art. 66. Article 10 states: "[a]rbitration commissions may be established in municipalities directly under the Central Government and in cities that are the seats of the people's governments of provinces or autonomous regions. They may also be established in other cities divided into districts, according to need. *Id.* at art. 10. Arbitration commissions shall not be established at each level of the administrative divisions. See *id.* People's governments of the cities referred to in the preceding paragraph shall arrange for the relevant departments and chambers of commerce to organize arbitration commissions in a unified manner." See *id.*

<sup>39</sup> The history of CIETAC and its arbitration rules can be found at CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, <http://www.cietac.org/index.cms> (last visited Mar. 8, 2014).

<sup>40</sup> See CHINA MARITIME ARBITRATION COMMISSION, <http://www.cmac-sh.org/en/home.asp> (last visited Mar. 8, 2014).

<sup>41</sup> See *id.*; CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, *supra* note 1.

transportation, and maritime activities involving a foreign element.<sup>42</sup> The arbitration rules and practices of CMAC are virtually identical to those of CIETAC, so examination of the CIETAC rules and practices will suffice to demonstrate the nature of Chinese international commercial arbitration.<sup>43</sup> In accordance with its rules, disputes arising between Chinese parties and/or parties from Hong Kong, Macau, or Taiwan, or between Chinese-foreign joint ventures and Chinese parties, are within CIETAC's jurisdiction.<sup>44</sup> CIETAC is well-developed—it permits foreign arbitrators to be included in the panel of arbitrators,<sup>45</sup> a fact that has helped to bring the CIETAC Arbitration Rules more in line with recognized international standards.<sup>46</sup> However, a significant problem of cross-pollination appeared in 1996, which resulted in ambiguity surrounding CIETAC's jurisdiction.

In contrast, domestic arbitration has a shorter history. With the promulgation of the Arbitration Law in 1994, domestic local arbitration commissions were gradually established mainly for resolving domestic economic contract disputes or cases without foreign elements.<sup>47</sup> In fact, there are other arbitration mechanisms available to some special domestic disputes. For instance, employment disputes,<sup>48</sup> some intellectual property rights disputes,<sup>49</sup> and securities disputes<sup>50</sup> are not arbitrated pursuant to the

<sup>42</sup> See Arbitration Law, *supra* note 6, at art. 65.

<sup>43</sup> See LIU XIANGSHU, *supra* note 2, at 35.

<sup>44</sup> See China International Economic and Trade Commission Arbitration Rules (promulgated by the China Council for the Promotion of International Trade/China Chamber of International Commerce, Feb. 3, 2012, effective May 1, 2012), art. 3, available at <http://www.cietac.org/index/rules.cms>.

<sup>45</sup> See *id.*, at art. 24.

<sup>46</sup> See Ge Jun, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 133 (1996).

<sup>47</sup> For example, the Beijing Arbitration Commission (BAC) was founded on September 28, 1995, following the passage of the Arbitration Law. See BEIJING ARBITRATION COMMISSION, *supra* note 26.

<sup>48</sup> See Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa (中华人民共和国劳动争议调解仲裁法) [Law of the People's Republic of China on Labor-dispute Mediation and Arbitration] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008) [hereinafter Labor-dispute Mediation and Arbitration Law], art. 2, available at <http://law.npc.gov.cn:87/home/begin1.cbs>. Article 2 of the Labor-dispute Mediation and Arbitration Law states: "[t]his Law is applicable to the following labor disputes arising between employing units and workers within the territory of the People's Republic of China." *Id.* Article 5 states, "[w]here a labor dispute arises and the parties are not willing to have a consultation, or the consultation fails, or the settlement agreement reached is not performed, they may apply to a mediation institution for mediation. Where the parties are not willing to have mediation, or the mediation fails, or the mediation agreement reached is not performed, they may apply to a labor-dispute arbitration commission for arbitration. Where they are dissatisfied with the arbitral award, they may initiate litigation to a people's court, unless otherwise provided for in this Law." *Id.* at art. 5.

<sup>49</sup> See Zhonghua Renmin Gongheguo Shangbiao Fa (中华人民共和国商标法) [Trademark Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Dec. 1, 2001, amended by the Standing Comm. Nat'l People's Cong., Aug. 30, 2013, effective May 1, 2014), art 41, available at [http://npc.gov.cn/englishnpc/Law/2007-12/13/content\\_1384018.htm](http://npc.gov.cn/englishnpc/Law/2007-12/13/content_1384018.htm) [hereinafter Trademark Law]. This article deals with Decisions on Registered Trademark Disputes, which

Arbitration Law, but submitted to arbitration by reason of other specific laws. Since these types of disputes are not commercial by nature and those tribunals (Labor-dispute Arbitration Commissions, Trademark Review and Adjudication Board, and State Council Securities Committee) are more like administrative organs,<sup>51</sup> they do not fall within the scope of this article.

However, a State Council Notice dramatically changed CIETAC's long-standing exclusive jurisdiction over foreign-related disputes.<sup>52</sup> Article 3 of the State Council Notice provides that domestic arbitration commissions now "have the power to accept foreign-related arbitrations when the parties have agreed to submit disputes to such Arbitration Commissions."<sup>53</sup> On the other hand, according to the newly revised 2005 CIETAC Arbitration Rules, CIETAC can also accept cases involving domestic disputes.<sup>54</sup> This allows cross-pollination between foreign-related arbitration matters with domestic arbitration commissions and domestic disputes with CIETAC. Indeed, the ambiguity of those provisions appears to be a source of conflict.<sup>55</sup>

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provides: "[n]otwithstanding the preceding two paragraphs, if a registered trademark is in dispute, an application may be filed for decision with the Trademark Review and Adjudication Board within five years of the date when that trademark is approved to be registered." *Id.*

<sup>50</sup> See Guiro Faxingyu Guanli Zhanxing Tiaoli (股票发行与交易管理暂行条例) [Interim Regulations on the Administration of the Issuing and Trading of Stocks] (promulgated by State Council, Apr. 22, 1993, effective Apr. 22, 1993), art. 80, available at <http://law.npc.gov.cn:87/home/begin1.cbs> [hereinafter Stocks Regulations]. This article provides that "[d]isputes between securities dealing institutions or between a securities dealing institution and a security exchange on the issuance or trading of shares shall be resolved through mediation or arbitration under the auspices of an arbitration organ that has been established with the approval of the SCSC or designated by the State Council Securities Committee (SCSC)." *Id.*

<sup>51</sup> For example, the administrative department of labor under the State Council formulates arbitration rules and the administrative departments of labor of the province governments provide guidance in labor-dispute arbitration within their own administrative areas. A labor-dispute arbitration commission is composed of representatives of the administrative department of labor, the trade unions and the enterprises. See Labor-dispute Mediation and Arbitration Law, *supra* note 48, art. 18-19. The State Council's administrative department for industry and commerce establishes a Trademark Review and Adjudication Board to be responsible for handling trademark disputes. See Trademark Law, *supra* note 49, at art. 2. SCSC is the agency in charge of the national securities market and is responsible for the unified administration of securities markets throughout China in accordance with the provisions of laws and regulations. See Stocks Regulations, *supra* note 50, art. 5.

<sup>52</sup> GENERAL OFFICE OF THE STATE COUNCIL, CIRCULAR OF THE GENERAL OFFICE OF THE STATE COUNCIL REGARDING SOME PROBLEMS WHICH NEED TO BE CLARIFIED FOR THE IMPLEMENTATION OF THE ARBITRATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA (1996), <http://www.cietac.org/index/references/Laws/47607b541f984c7f001.cms> (last visited February 4, 2014) [hereinafter CIRCULAR].

<sup>53</sup> Article 3 of the State Council Notice provides: "[t]he functions and duties of newly established arbitration commissions are mainly to arbitrate domestic disputes; they may accept foreign-related cases if the parties concerned make such choice. Newly established arbitration commissions shall adopt identical charging standards for arbitration of either domestic or foreign-related disputes." CIRCULAR, *supra* note 52, at art. 3. See also Brown & Rogers, *supra* note 10, at 346.

<sup>54</sup> CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, *supra* note 39, at art. 3.

<sup>55</sup> See Brown & Rogers, *supra* note 10, at 347.



Another notable distinction between domestic and foreign-related arbitration is the difference in criteria required for judicial review of arbitral awards. The Chinese courts, which are officially named the People's Courts, can review not only procedural issues, but also the legal reasoning supporting the domestic arbitral awards.<sup>56</sup> Conversely, in international arbitrations the courts are not allowed to consider the legal merits to overturn an award. Instead, the courts generally scrutinize procedural issues,<sup>57</sup> a practice that conforms to the New York Convention.<sup>58</sup>

Generally speaking, China's international arbitral tribunals are better established and more sophisticated than their domestic counterparts.<sup>59</sup> "It is important that they remain distinct from domestic arbitral tribunals, which do not share CIETAC's reputation."<sup>60</sup> In accordance with the New York Convention, CIETAC awards are recognized and enforced in more than 140 countries.<sup>61</sup> CIETAC's nearly 20,000 concluded arbitration cases have involved parties from more than seventy countries and regions outside the Chinese mainland, and its awards have been recognized and enforced in more than sixty countries and regions.<sup>62</sup> Since 1990, CIETAC's caseload has been one of the heaviest among the world's major arbitration institutions.<sup>63</sup> However, the current two-track system can also create some

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<sup>56</sup> If a party can prove that evidence on the basis of which the award was made had been forged, or that the other party withheld evidence sufficient to have an impact on the impartiality of arbitration, the first party may submit an application for vacation of the award. *See* Arbitration Law, *supra* note 6, at art. 58.

<sup>57</sup> *See* Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] art. 274 (promulgated by Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1992, amended for the second time by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Jan. 1, 2013) [hereinafter Civil Procedure Law], available at <http://law.npc.gov.cn:87/home/begin1.cbs>.

<sup>58</sup> Similar provisions can be found in the Convention. *See* New York Convention, *supra* note 20, art. 5.

<sup>59</sup> For example, a foreign-related arbitration commission may appoint arbitrators from among foreigners with special knowledge in the fields of law, economy and trade, science and technology, etc. *See* Arbitration Law, *supra* note 6, at art. 67. The foreign arbitrator may serve as a check on the arbitration process to assure that it is fairly and impartially conducted. *See* Ge Jun, *supra* note 46, at 133.

<sup>60</sup> As mentioned earlier, one of the characteristics of China's arbitration is its "two-track" system under which the foreign-related arbitration (or international commercial arbitration) is treated differently from domestic arbitration. The international commercial arbitration is more in-line with international norms and practices than domestic arbitration. Therefore, the international arbitral tribunals remain distinct from domestic ones. *See supra* note 37, at 58. *See also* Brown & Rogers, *supra* note 10, at 338.

<sup>61</sup> *See* CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, *supra* note 1.

<sup>62</sup> *Id.*

<sup>63</sup> *See id.*

ambiguity and fear that a foreign arbitrator might be found criminally liable one day.<sup>64</sup>

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

On June 29, 2006, at its twenty-second meeting, China’s legislature, the Standing Committee of the National People’s Congress, adopted and promulgated an important piece of law: Amendment VI to the Criminal Law of the People’s Republic of China (the “Amendment”).<sup>65</sup> Although the absence of arbitrator regulation seems astonishing, the passage of this Chinese criminal provision indicates that only the most rigorous law, criminal law, is sufficient to regulate the arbitrator liability system in China. Under this law, biased arbitrators are subject to criminal liability:

Where a person, who is charged by law with the duty of arbitration, intentionally runs counter to facts and laws and twists the law when making a ruling in arbitration, if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; and if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.<sup>66</sup>

Nevertheless, it does not suggest that the criminal approach is defect free. In order to provide insight into the strengths and weaknesses of the provision and context for an evaluation of the law in the next section, this section examines A) the background of Arbitration by “Perversion of Law,” B) current debates, C) the U.S. experience of arbitrators’ impartiality, and D) the historical development of China’s legal system.

#### A. *Background of the Arbitration by “Perversion of Law” Criminal Provision*

International arbitration developed as an alternative form of dispute resolution because of a fear that foreign courts would be biased in favor of local parties, yet the impartiality of international arbitration itself is also

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<sup>64</sup> See Xu Qianqian, *Wangfa Zhongcaizui Zhi Pipan* (枉法仲裁罪之批判) [A Criticism of Law-bending Arbitration], 3 GUANGXI MINZU XUEYUAN XUEBAO ZHIXUE SHEHUIXUE BAN (广西民族学院学报哲学社会学) [J. OF GUANGXI U. FOR NATIONALITIES] 120, 124 (2006).

<sup>65</sup> See The Amendment, *supra* note 28, at art. 20.

<sup>66</sup> *Id.*

important.<sup>67</sup> In order to guarantee the legitimacy of the arbitration process, the arbitral institution must ensure the neutrality of the arbitrator.<sup>68</sup> Thus, having a neutral and impartial arbitrator to resolve commercial disputes is a fundamental goal in modern arbitration.<sup>69</sup> In response to this goal, states throughout the world enacted laws to deal with the arbitrator responsibility in domestic and international arbitration.<sup>70</sup> Surprisingly, rather than following the policy of developed nations, China's legal policy on partiality seems to take a slightly different track. Vacatur and refusal to implement an arbitral award are the universal ways to deal with partiality of international arbitration.<sup>71</sup> These approaches are also used in China, but the Arbitration by "Perversion of Law" provision uniquely imposes criminal liability on biased arbitrators.<sup>72</sup>

In debating the Amendment, many arbitration scholars openly objected to the inclusion of the provision because holding arbitrators criminally liable does not comply with international practices.<sup>73</sup> Nevertheless, fears of arbitrators mishandling power and of a threat to justice prevailed over objections.<sup>74</sup> The provision falls within the category of crimes regarding dereliction of duty.<sup>75</sup> Article 399 of the Criminal Law pertains to dereliction of duties of judicial personnel. This article was formally named Civil and Administrative Judgment by "Perversion of

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<sup>67</sup> See YU XIFU, GUOJI SHANGSHI ZHONGCAI DE SIFAJIANDUYU XIEZHU (国际商事仲裁的司法监督与协助) [THE JUDICIAL SUPERVISION AND ASSISTANCE OF INTERNATIONAL COMMERCIAL ARBITRATION] 80-81 (2006).

<sup>68</sup> See *Aetna Cas. & Sur. Co. v. Grabbert*, 590 A.2d 88, 92 (R.I. 1991).

<sup>69</sup> See YU XIFU, *supra* note 67, at 80.

<sup>70</sup> See Liu Xiaohong, *Queding Zhongcaiyuan Zeren Zhidu de Fali Sikao* (确定仲裁员责任制度的法理思考) [Jurisprudence Analysis of the Establishment of Arbitrators' Liability], 5 HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [J. E. CHINA U. POL. SCI. & L.] 82, 85 (2007).

<sup>71</sup> See ZHAO XIUWEN, *supra* note 19, at 454.

<sup>72</sup> See Song Lianbin, *Wangfa Zhongcaizui Pipan* (枉法仲裁罪批判) [A Critical Analysis of the Crime of Distortion of Arbitration Law], 62 BEIJING ZHONGCAI (北京仲裁) [ARB.BEIJING] 22, 32 (2007). Besides China, similar criminal provisions for biased arbitrators can be found in Japan and Taiwan. See Keihō (Keihō) [PEN. C.] 1907, art. 197 (Japan); Republic of China Criminal Law, art. 124 (Taiwan), translated at law.moj.gov.tw/LawClass/LawSearchNo.aspxNo.aspx?PC=C0000001&DF=&SNo=124. See also Luo Guoqiang, *Wangfa Zhongcaizui Sibian* (枉法仲裁罪思辨) [Thoughts on the Crime of Distortion of the Law of Arbitration], 1 ZHONGGUO XINGSHIFA ZAZHI (中国刑事法杂志) [J. CHINA'S CRIM. LAW] 63, 71 (2009).

<sup>73</sup> See Song Lianbin, *supra* note 72, at 32.

<sup>74</sup> See Xu Li, *On Wangfa Zhongcaizui de Lifa Zhengdangxing Tanta* (枉法仲裁罪的立法正当性探讨) [Research About Its Legislative Righteousness Of Crime Of Misuse of Law in Adjudication], 5 FAXUE ZAZHI (法学杂志) [LEGAL STUD. MAG.] 85, 88 (2009).

<sup>75</sup> Chapter IX of Criminal Law, which covers article 397 to article 419, is named Crimes of Dereliction of Duty. See Criminal Law, *supra* note 29.

Law.”<sup>76</sup> The purported legislative purpose of the criminal provision is to regulate arbitrators’ conduct and guarantee fairness and justice in the course of arbitration, which was previously considered a legal loophole.<sup>77</sup> Because arbitration competes with litigation, supporters contended that an arbitrator should be similarly liable as a judge if he bends the law.<sup>78</sup> Considering that judges are criminally liable for biased rulings, it was unreasonable, supporters contended, for arbitrators to escape a similar punishment.<sup>79</sup> Notwithstanding so much criticism about the criminal provision,<sup>80</sup> the worry that an arbitrator might misuse his power formed a sound basis for the provision, as this worry is prominent in China.<sup>81</sup>

Arbitration became a popular means of dispute resolution only after institutional reform and a growing openness to meet the needs of its rapidly growing economy.<sup>82</sup> As an import from the West, arbitration is still new to a large portion of China’s population.<sup>83</sup> Unlike the Western tradition of “rule of law,”<sup>84</sup> China has a unique tradition termed *guanxi* (rule of relationship).<sup>85</sup> *Guanxi* means a complex web of informal personal connections. The concept is a type of gift economy that involves the “cultivation of personal networks of mutual dependence and trust.”<sup>86</sup> Someone seeking and maintaining *guanxi* directly or indirectly with those who have authority over social resources, no matter by what means, has a massive advantage, as the latter would repay the former in the future according to the “rule of

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<sup>76</sup> Article 399 of the Criminal Law provides: “[i]n civil or administrative proceedings, any judicial officer who intentionally runs counter to the facts and law and twists the law when rendering judgments or orders, . . . shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention. If any judicial officer who takes a bribe and bends the law, which also constitutes a crime as provided for in Article 385 (Bribery) of [the Criminal Law], he shall be convicted and punished in accordance with the provisions for a heavier punishment.” The Amendment, *supra* note 28, at art. 20.

<sup>77</sup> See Chen Zhongqian, *Lun Wangfa Zhongcaizui de Sheli Danghuan* (论枉法仲裁罪的设立当缓) [On To Delay Setting up the Crime of Distorting the Law of Arbitration], 7 ZHONGCAI YANJIU (SPECIAL ISSUE) (仲裁研究专论) [ARB. STUD. (SPECIAL ISSUE)] 1, 2 (2006).

<sup>78</sup> *Id.*

<sup>79</sup> See YU XIFU, *supra* note 67, at 88.

<sup>80</sup> See Song Lianbin, *supra* note 72.

<sup>81</sup> See *id.*, at 32–33.

<sup>82</sup> China International Economic and Trade Commission Arbitration Rules (promulgated by the China Council for the Promotion of International Trade/China Chamber of International Commerce, Feb. 3, 2012, effective May 1, 2012), available at <http://www.cietac.org/index/rules.cms>.

<sup>83</sup> See LIU XIANGSHU, *supra* note 2, at 20.

<sup>84</sup> In Western societies, law is an end in itself, above and separate from government. The law protects the rights of citizens and permits those citizens to shape their conduct in the knowledge that the law will be applied fairly, consistently, and predictably. See generally James Hugo Friend, *Foreword the Rocky Road toward the Rule of Law in China: 1979-2000*, 20 NW. J. INT’L L. & BUS. 369, 374 (2000).

<sup>85</sup> Carol A. G. Jones, *Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China*, 3 SOC. & LEGAL STUD. 195, 197 (1994).

<sup>86</sup> *Id.*

*guanxi*.”<sup>87</sup> The “rule of *guanxi*,” also operative in other 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.<sup>88</sup> In practice, there is the risk of arbitrators taking bribes and ruling wrongfully.<sup>89</sup> The worry whether the other party has *guanxi* with arbitrators makes the question of the arbitrators’ impartiality much more important. This problem is disconcerting because it might lead to a cooling in commerce between China and foreign nations. That is not the outcome China presently wants to encourage.<sup>90</sup> Thus, understandably, due to lack of arbitrator ethics, criminal responsibility is appropriate in the case of a biased arbitrator.<sup>91</sup> As the culture of *guanxi* has the potential to influence arbitrators and calls their neutrality into question, the criminal liability provision was enacted as an attempt to ensure the impartiality of the arbitrators.

A significant consequence of the provision is that it changes the way arbitral awards are judicially reviewed. The power of courts and public prosecutors will inevitably be expanded to review the merits of an arbitral award,<sup>92</sup> which is beyond the standard of procedural review according to the New York Convention.<sup>93</sup> In the Chinese criminal justice system, one of the important aspects is the dichotomy drawn between public prosecution and private prosecution.<sup>94</sup> Criminal cases are publicly prosecuted with the

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<sup>87</sup> See HUANG GUANGGUO, *RUIJIA GUANXI ZHUYI (儒家关系主义) [CONFUCIAN RELATIONALISM]* 12 (2006).

<sup>88</sup> See Xuan Bingzhao & Zhou Zhibin, *supra* note 23, at 1758.

<sup>89</sup> Zhang Yong & Huang Xiaohua, *Lun Wangfa Zhongcaizui Yu Shouhuizui De Jinghe (论枉法仲裁罪与受贿罪的竞合) [On the Overlap of Arbitration by “Perversion of Law” and Bribery]*, 5 FAXUEPINGLUN (法学评论) [LAW REV.] 120, 120 (2008).

<sup>90</sup> Fan Mingchao, *Shangshi Zhongcai Shiyexia de Wangfa Caijuezui (商事仲裁视野下的枉法裁决罪) [Crime of Distortion of the Law of Arbitration under the Vision of Commercial Arbitration]*, 27 HEBEIFAXUE (河北法学) [HEBEI LAW SCIENCE] 125, 129 (2009).

<sup>91</sup> See Luo Guoqiang, *supra* note 72, at 71.

<sup>92</sup> See Song Lianbin, *supra* note 72, at 35.

<sup>93</sup> See New York Convention, *supra* note 20.

<sup>94</sup> Both public prosecution and private prosecution can result in criminal punishment. Public prosecution occurs when the proceedings are initiated by the People’s Procuratorates with the People’s Courts, while in private prosecution it is the victim, the victim’s legal representative, close relative, or others who are entitled to initiate the proceedings and file a criminal case with the People’s Courts. See CHEN ZEXIAN, *CONTEMPORARY CHINESE LAW* 163 (2009). All cases requiring initiation of a public prosecution shall be examined for decision by the People’s Procuratorates. See ZHONGHUA RENMIN GONGHEGUO XING SHI SU SONG FA (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People’s Republic of China], art. 167 (promulgated by the Standing Comm. Nat’l People’s Cong., July 1, 1979, amended for the second time by Nat’l People’s Cong., Mar. 14, 2012, effective Jan. 1, 2013) [hereinafter *Criminal Procedure Law*], available at <http://law.npc.gov.cn:87/home/begin1.cbs>.

exception of three categories of less serious crimes.<sup>95</sup> In the former cases, the public prosecutors, named People's Procuratorates, bear the evidentiary burden before the courts.<sup>96</sup> In the latter, similar to civil litigation, the private prosecutor (often the victim himself) is obligated to prove the wrongdoing of the accused.<sup>97</sup> Since a crime of dereliction of duty is a public prosecution case,<sup>98</sup> it is the People's Procuratorates rather than the claimants who must prove the crime. Before bringing cases to the court, the Procuratorates will be given the chance to substantially review the arbitral award because they need to investigate and collect evidence.<sup>99</sup> In turn, the court has to review the merits of the arbitration again in order to make a decision. This conflicts with China's obligation of procedural review under the New York Convention.

### B. *The Debate Surrounding the Criminal Provision*

The criminal provision established the institutional framework for the imposition of penal punishment on biased arbitrators. However, it raised a host of complicated questions as well, which became the subject of national debate. The questions concerned the nature of arbitration, the feasibility of the criminal provision, whether the law is in line with international practice, and the appropriate legal responsibility, criminal responsibility, or civil liability, for the biased arbitrator.

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<sup>95</sup> 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 victim's personal or property rights, whereas, the public security organs or the People's Procuratorates do not investigate the criminal responsibility of the accused. See Criminal Procedure Law, *supra* note 93, at art. 170.

<sup>96</sup> During the course of a criminal case, the People's Procuratorates have the ability to exercise four major powers. First, they have the right to investigate criminal cases assigned to them by the law, and to take all kinds of coercive measures against suspects. Second, they examine cases submitted by the police organs and decide whether to approve arrest or to prosecute suspects. Third, they have the right to prosecute suspects, and to protest the judgments. Lastly, as a law supervisory organ, they have the right to supervise all the criminal processes, including investigation, interrogation, trial, and execution. See WANG GUIGUO & JOHN MO, CHINESE LAW 648 (1999).

<sup>97</sup> *Id.* at 652. The burden of proof in a private prosecution case is on the prosecutor. If he lacks criminal evidence and cannot present supplementary evidence, the People's Court shall persuade him to withdraw the private prosecution or order its rejection. See also Criminal Procedure Law, *supra* note 93, at art. 171(2).

<sup>98</sup> In cases involving crimes of corruption and dereliction of duty, the People's Procurates shall conduct the investigation and initiate a public prosecution. See Criminal Procedure Law, *supra* note 93, at art. 136.

<sup>99</sup> See Xu Qianquan, *supra* note 64, at 124.

### 1. *Arguments Against Criminalization of Arbitrator Bias*

Prior to the legislation, the issue of penal punishment upon a biased arbitrator had been at the heart of the discussion of the liability of arbitrators and received a wide range of practical and academic attention.<sup>100</sup> While the criminal statute was an effort to fill the legal gap of liability for arbitrators, many arbitration scholars have denounced the statute as having fallen short of its goal.<sup>101</sup> They argued that the criminal responsibility of an arbitrator is not in line with international practice, as it disregards the contractual nature of arbitration.<sup>102</sup> Additionally, the vague wording makes the workability of the criminal statute problematic.<sup>103</sup>

Arbitration is seen first as a matter of contract rather than a form of adjudication.<sup>104</sup> One of the continuing debates is indeed whether contract traits rather than judicature characteristics form the cornerstone of, and exercise pervading influence over, arbitration.<sup>105</sup> Critics argue that analogizing arbitration to litigation may be arbitrary and imprecise.<sup>106</sup> A common objection to the criminal statute is that it is against the nature of arbitration.<sup>107</sup> It is important to understand that arbitration is not litigation with another name.<sup>108</sup> An arbitrator performs a task that resembles that of a judge, yet there are critical differences between judges and arbitrators. Arbitrators charge fees from the parties, whereas judges, as state personnel, receive wages from the state budget.<sup>109</sup> Further, arbitrators are often experts chosen from the same industry in which the dispute arises, and are not always required to have a legal education.<sup>110</sup> Rooted within international trade, disputants have chosen arbitration to settle controversies for hundreds of years.<sup>111</sup> It is the participants who shape the arbitration, which is then

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<sup>100</sup> See Lu Jing, *Zhongcai Youxian Xingshi Zeren Chengdan* (仲裁有限刑事责任承担) [*On Limited Criminal Liability for Distortion of the Law of Arbitration*], 24 ZHONGCAI YANJIU (仲裁研究) [ARB.STUDY] 82 (2010). See also Liu, *supra* note 42, at 89.

<sup>101</sup> See Liu Xiaohong, *supra* note 70, at 88–90.

<sup>102</sup> Chen Zhongqian, *supra* note 77, at 2–3.

<sup>103</sup> See Song Lianbin, *supra* note 72, at 26–31.

<sup>104</sup> Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 487 (1997).

<sup>105</sup> Xu Qianquan, *supra* note 64, at 120–21.

<sup>106</sup> As a matter of contract, arbitration is influenced by the respective bargaining strength of each party. Thus, party-appointed arbitrators are a reflection of the parties' positions in the dispute. See Rau, *supra* note 103, at 511. See also Chen Zhongqian, *Lun Wangfa Zhongcaizui de Rending I* (论枉法裁判罪的认定(上)) [*On When Should the Court Find a Violation of Arbitration Law I*], 24 ZHONGCAIYANJIU (仲裁研究) [ARB. STUDY] 72, 76 (2011).

<sup>107</sup> Chen Zhongqian, *supra* note 106, at 77.

<sup>108</sup> See Xu Qianquan, *supra* note 64, at 121.

<sup>109</sup> See *id.*

<sup>110</sup> See Song Lianbin, *supra* note 72, at 33, 35.

<sup>111</sup> See LIU XIANGSHU, *supra* note 2, at 2–3 .

recognized by a state's legal system through various private dispute resolutions.<sup>112</sup> The rationale behind arbitration is the doctrine of party autonomy: parties' consent to address issues through arbitration should be respected and enforced such that neither of the parties can initiate judicial proceedings before the arbitration takes place.<sup>113</sup>

Opponents of the criminal statute also argue that judicial policy should not allow public intervention in the private domain when parties have mutually agreed to exercise their autonomy to arbitrate.<sup>114</sup> Under this view, arbitrators' authority comes from the authorization of the parties instead of the state because the private parties have the natural right of self-regulation.<sup>115</sup> Therefore, the nature of arbitration should be deemed a product of contract between the parties and the arbitrators rather than a form of judicature, and as a legal service rather than a form of judicial power.<sup>116</sup> This is particularly important, as one goal of international arbitration is to limit state influence on the dispute resolution process between and among international parties.<sup>117</sup> Otherwise, the expected benefits of arbitration would be dramatically reduced.<sup>118</sup>

Additionally, critics doubt that the criminal statute is workable because of the ambiguity of the provision.<sup>119</sup> It is highly likely that in practice the criminal statute will not function as expected because the language in the Amendment offers little guidance as to what particular conducts constitute the crime.<sup>120</sup> For instance, the first challenge is to establish how the criminal statute covers the accused. Although the person who commits the crime is referred to as "a person who is charged by law with the duty of arbitration," the term "person" is far from clear.<sup>121</sup> The description covers both arbitrators and any other personnel working in arbitration commissions,<sup>122</sup> which has caused some practical difficulties.<sup>123</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> Chen Zhongqian, *supra* note 106, at 73.

<sup>114</sup> *Id.* at 76.

<sup>115</sup> See Chen Zhongqian, *supra* note 77, at 3.

<sup>116</sup> *Id.*

<sup>117</sup> See ZHAO XIUWEN, *supra* note 19, at 17.

<sup>118</sup> See Song Lianbin, *supra* note 72, at 36.

<sup>119</sup> See *id.*, at 26-31.

<sup>120</sup> *Id.* at 35.

<sup>121</sup> See Xu Qianqian, *Zhongcaiyuan Falv Zeren Zhi Jiantao II* (仲裁员法律责任之检讨(下)) [The Criticism of Arbitrators Legal Responsibility II], 11 ZHONGCAI YANJIU (仲裁研究) [ARB. STUDY] 25 (2006).

<sup>122</sup> For example, "anyone" can also refer to the chairman of an arbitration commission in accordance with the provision. For example, the Arbitration Law states: "Whereas the parties concerned agree that the arbitration tribunal shall be composed of three arbitrators, each of them shall choose one arbitrator or the appointment to the chairman of the arbitration commission, with the third arbitrator jointly chosen by the parties concerned or appointed by the chairman of the arbitration commission jointly entrusted by the two parties. The third arbitrator shall be the chief arbitrator." Arbitration Law, *supra* note 6, at art. 31.



Furthermore, an arbitral award is often made on the basis of the majority opinion among the arbitrators and dissenters need not provide a signature on the award.<sup>124</sup> Suppose some arbitrators showed signs of bias and others appeared objective.<sup>125</sup> It would be unjust if an arbitrator who disagreed and refused to sign was included as “person” and found guilty of Arbitration by “Perversion of Law.”<sup>126</sup>

Second, defining intentionally is another fundamental issue. Neither the Amendment itself nor the Arbitration Law provides detailed rules about how intentionality should be ascertained.<sup>127</sup> By including this word, it appeared to have precluded a negligent act.<sup>128</sup> 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 it is not easy for the court to discern an arbitrator’s intentions.<sup>129</sup> In practice, what satisfies intentionally is subject to interpretation.<sup>130</sup>

Third, the problem of explaining the expression “runs counter to facts and laws” is particularly severe and disconcerting.<sup>131</sup> The use of the word “and” indicates that the crime exists only when both of the two conditions, “runs counter to the facts” and “runs counter to the laws,” are satisfied.<sup>132</sup> The enactment is silent about whether a crime exists when only one condition is fulfilled.<sup>133</sup> Further, as previously shown, both CIETAC and domestic arbitration commissions have jurisdiction over international or foreign-related disputes.<sup>134</sup> Following international practice, parties often choose what law they want to govern interpretation and enforcement of their

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<sup>123</sup> Xu Qianquan, *supra* note 121, at 25.

<sup>124</sup> Arbitration Law, *supra* note 6, at art. 53-54.

<sup>125</sup> See Chen Zhongqian, *supra* note 106, at 78.

<sup>126</sup> See *id.*

<sup>127</sup> For the argument that the Arbitration Law provided no guidance for the application of the new enactment. See Song Lianbin, *supra* note 72, at 29–30.

<sup>128</sup> An intentional crime is a crime committed with clear knowledge that the act will cause socially dangerous consequences, and hopes for or is indifferent to those consequences. Intentional crimes always result in criminal liability. However, a negligent crime occurs when an act, or a foreseeable act, may cause socially dangerous consequences but continues in the action out of carelessness. Alternatively, a negligent crime occurs when the actor has foreseen the consequences but erroneously assumes he can prevent them, resulting in such consequences. Criminal liability is imposed for negligent crimes only when the law so stipulates. See Criminal Law, *supra* note 29, at art. 14–15.

<sup>129</sup> See Song Lianbin, *supra* note 72, at 29-30. See also Lu Jing, *supra* note 100, at 84.

<sup>130</sup> Song Lianbin, *supra* note 72, at 29.

<sup>131</sup> See Chen Zhongqian, *supra* note 105, at 78.106

<sup>132</sup> Fan, *supra* note 90, at 127.

<sup>133</sup> *Id.*

<sup>134</sup> See China International Economic and Trade Commission Arbitration Rules (promulgated by the China Council for the Promotion of International Trade/China Chamber of International Commerce, Feb. 3, 2012, effective May 1, 2012), art. 3, available at <http://www.cietac.org/index/rules.cms>. See also CIRCULAR, *supra* note 52, at art. 3.

agreement.<sup>135</sup> 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.<sup>136</sup> Therefore, what specific law do they refer to in these situations? If the applicable law is a foreign law, it is questionable whether Chinese courts have the competent jurisdiction to make a decision that an arbitral award “runs counter to” a foreign law.<sup>137</sup> Admittedly, such a decision on a foreign law would constitute an infringement of sovereignty of a foreign country in violation of a basic international law principle of sovereign equality.<sup>138</sup>

Further confusion arises with respect to the clause “if the circumstances are extremely serious,” without detailed criteria of those serious circumstances.<sup>139</sup> The enactment is silent on this crucial and controversial area, which makes it difficult for courts to use the provision in deciding what circumstances would be extremely serious.<sup>140</sup>

The criminal statute may also be incompatible with China’s international obligations.<sup>141</sup> As previously outlined, China adopts a two-track approach to judicial review of arbitral awards, under which Chinese courts are not permitted to review any of the legal merits or reasoning except procedural issues in international arbitration.<sup>142</sup> A verdict of Arbitration by “Perversion of Law” requires first of all a substantial judicial review of the arbitral award.<sup>143</sup> Courts must request that the arbitration panel provide reasons justifying its decision in order to judge whether criminal conduct exists, but arbitral awards are often rendered without explanation of the reasoning or even a complete record of the proceedings.<sup>144</sup> Furthermore, a domestic arbitration commission now has jurisdiction over both domestic

<sup>135</sup> See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518 (1974).

<sup>136</sup> See LIU XIANGSHU, *supra* note 2, at 5.

<sup>137</sup> See Song Lianbin, *supra* note 72, at 35.

<sup>138</sup> Zhang Junying, *Shangshizhongcai Wangfaxingwei de Xingshi Guizhi Yanjiu* (商事仲裁枉法行为的刑事规制研究) [Study on the Criminal Rule of Perversion of Law in Commercial Arbitration], 4 SHANGCHANG XIANDAIHUA (商场现代化) [MARKET MODERNIZATION] 311, 311 (2007).

<sup>139</sup> Song Lianbin, *supra* note 72, at 31.

<sup>140</sup> *Id.*

<sup>141</sup> See Huang Hui, *Lun Wangfa Zhongcai Zui Zhi “Wangfa” Xing* (论枉法仲裁罪之枉法性) [*The “Perverting” Nature of Law-bending Arbitration*], 4 SICHUAN DAXUE XUEBAO (四川大学学报) [J.SICHUAN U.] 120, 124 (2010).

<sup>142</sup> See Civil Procedure Law, *supra* note 57, at art. 274; Arbitration Law, *supra* note 6, at art. 58.

<sup>143</sup> For a discussion of the specific difficulties brought by the two-track system, see Huang Hui, *supra* note 141, at 124.

<sup>144</sup> See Arbitration Law, *supra* note 6, at art. 54. A written arbitral award need only specify “the arbitration claim, the facts of the dispute, the reasons for the decision, the results of the award, the allocation of arbitration fees and the date of the award.” *Id.* The parties can agree to not specify the facts of the dispute and the grounds for the award in a written arbitral award. *Id.* A written arbitral award shall be signed by the arbitrators and affixed with the seal of the arbitration commission. *Id.* Arbitrators with different opinions on the arbitral award may or may not sign the award. *Id.*

and foreign-related disputes.<sup>145</sup> An arbitrator of a domestic arbitration commission handling domestic and foreign-related cases must utilize different criteria for judicial review.<sup>146</sup> An international arbitrator, who may be held criminally liable under domestic criteria, could be immune from penal punishment under international standards,<sup>147</sup> because in accordance with international standards there could be less chance to judicially scrutinize the facts and merits, which are essential when an arbitrator is found to run counter to the facts.

In determining whether an arbitrator is guilty, the courts must scrutinize the merits and reasoning used in the arbitration proceedings. However, in accordance with the New York Convention, the courts of member states may only review the procedural issues of international commercial arbitration.<sup>148</sup> That is to say, the facts and merits, including even those with which the arbitrator might be found guilty of the crime, are not within the scope of the scrutiny of the courts. Therefore, it is unlikely that international arbitrators would be convicted of the crime, which makes judicial review a deterrent only for domestic arbitrators.<sup>149</sup> A responsible and capable arbitrator would be overly cautious and understandably reluctant to risk accepting appointment, which might cause the decline of the quality of arbitration and eventually do harm to the development of arbitration as well as rule of law efforts in China.<sup>150</sup> The language of the Amendment is too vague and simplistic to provide any concrete guidelines in practice, and there is only a theoretical possibility that a biased arbitrator would be caught and convicted of the crime.<sup>151</sup> The law remains theoretical since it is difficult to apply in practice.<sup>152</sup> Nevertheless, the Amendment has been criticized as being over-inclusive.<sup>153</sup> Some opine that it only provides moral force and that there are already enough rules that prevent arbitrator misconduct.<sup>154</sup> The existing remedies include application for the withdrawal

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<sup>145</sup> See CIRCULAR, *supra* note 52, at art. 3.

<sup>146</sup> See Huang Hui, *supra* note 141, at 125.

<sup>147</sup> While domestic arbitration is subject to judicial review of facts, arbitral decision-making, and international commercial arbitration are immune from substantive scrutiny after an award is made. International arbitrators actually do not have a chance to be convicted of "Perversion of Law." If international arbitrators could be found guilty of this crime, the courts would have to review the merits and reasoning in arbitration proceedings first, which means a violation of China's obligation under the New York Convention that courts of member states are only entitled to reviewing the procedural issues of international commercial arbitration. See New York Convention, *supra* note 20, at art. V

<sup>148</sup> *Id.*

<sup>149</sup> See Chen Zhongqian, *supra* note 106, at 78.

<sup>150</sup> See Song Lianbin, *supra* note 72, at 35-38.

<sup>151</sup> *Id.* at 35-36.

<sup>152</sup> See Song Lianbin, *supra* note 72, at 36.

<sup>153</sup> See Lu Jing, *supra* note 100, at 82, 85.

<sup>154</sup> See Xu Qianquan, *supra* note 64, at 122-23.

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.<sup>155</sup> Occasionally, even penal punishment can be used.<sup>156</sup> Similar provisions are rare.<sup>157</sup>

## 2. *Arguments for Criminalization of Arbitrator Bias*

Despite such criticisms, other experts are concerned with corruption and arbitrator misconduct, which concern, for them, justifies the use of criminal punishment.<sup>158</sup> Many criminal academics and practitioners support the use of penal punishment on arbitrators.<sup>159</sup> People's Procuratorates, for example, have been strong advocates of the criminal statute.<sup>160</sup> To them, the idea that no arbitrator should intentionally misuse his power to go against facts and laws comes from the notion that both arbitration and litigation are the means to resolve civil disputes and they are in essence the same, no matter the way in which they are manifested.<sup>161</sup> Further, the provision would encourage high standards of integrity and lasting confidence in arbitration proceedings.<sup>162</sup> The arguments for criminalization focus mainly

<sup>155</sup> According to the 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, *supra* note 6, at art. 8, 34, 38, 58. Moreover, 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 Civil Procedure Law, *supra* note 57, at art. 213, 258.

<sup>156</sup> For example, although an arbitrator who accepts a bribe cannot be charged with bribery because he is not state personnel, he may be accused of non-state personnel bribery or commercial bribery. See Criminal Law, *supra* note 29, at art. 163.

<sup>157</sup> One similar criminal provision is found in the 2006 Criminal Law of Republic of China (Taiwan), Article 124, which stipulated the crime Decision by Perversion of Law. As of today, no case has occurred. Therefore, some commentators aggressively contend that this fact proves that arbitrator misconduct is a severe social problem only in the drafters' imaginations. Zhang Wenxian, *China's Rule of Law in the Globalization Era*, 4 FRONT LAW CHINA 471 (2006) available at [http://wenku.baidu.com/link?url=y26JxSCXo6RBd8XruUoAB7culbB8SOX2YIw\\_klHeUpGYOGwN-7HSZuOVIrskXTUUI2KQXYkkzMrzrURwo-PjcewvmLna37U2tCdTQQNYTJ7](http://wenku.baidu.com/link?url=y26JxSCXo6RBd8XruUoAB7culbB8SOX2YIw_klHeUpGYOGwN-7HSZuOVIrskXTUUI2KQXYkkzMrzrURwo-PjcewvmLna37U2tCdTQQNYTJ7); See Huang Hui, *supra* note 141, at 126.141

<sup>158</sup> See Luo Guoqiang, *supra* note 72. See also Xu Li, *supra* note 74.

<sup>159</sup> Han Yonghong, *Guanyu Wangfa Zhongcai Zhi Sikao: Jiyu Xianshi De Sijiao*, (关于枉法仲裁之思考: 基于现实的视角) [Reflection on Criminal Liability of Arbitrators: A realistic Perspective] 26 HAINAN DAXUE XUEBAO RENWEN SHEHUIKEXUE BAN (海南大学学报人文社会科学版) [HUMAN. & SOC. SCI. J. OF HAINAN U.] 144, 145 (2008) (China).

<sup>160</sup> *Id.*

<sup>161</sup> See Xu Li, *supra* note 74, at 88.

<sup>162</sup> See Chen Wei, *Wangfa Zhongcaizui Zhuisu Fangshi Zhi Biangengji Tichang* (枉法仲裁罪追诉方式之变更及提倡) [The Change and Advocacy of Prosecution of Arbitration by Perversion of Law], 4 ZHONG GUO XINGSHI FA ZAZHI (中国刑事法杂志) [MAG. ON CHINA'S CRIM. SCI.] 57 (2008) (China).

on the social harm of arbitrator misbehavior and the quasi-judicial nature of arbitration.<sup>163</sup> Some contend that the lack of workability is not a real problem because it can be remedied by providing more detailed rules.<sup>164</sup> Proponents also believe that the criminal statute fits within the reality of China's current economic and social situation.<sup>165</sup>

Advocates for criminalization emphasize the social harm of corruption and misconduct in arbitration. Since all adjudicators should be neutral when making a decision, the social harm of corruption and misconduct in arbitration is as serious as in litigation, which is regulated under the 1997 criminal law as well.<sup>166</sup> As with most legal debates, the issue of the appropriateness of a penalty cannot be sensibly examined without taking into account the conduct's social harm.<sup>167</sup> In China, social harm is widely believed to be a relevant factor in choosing to promulgate a criminal statute.<sup>168</sup> The concept of giving more consideration to the maintenance of social stability has long been accepted.<sup>169</sup> An arbitral award is a final binding decision equal to and potentially more final than that of the judiciary because an arbitral award is not subject to any appellate review.<sup>170</sup> Arbitrators are usually free to use their own personal knowledge in making decisions and are not obliged to follow rules of evidence.<sup>171</sup> Meanwhile, courts are generally deferential to an arbitral award and do not review the legal merits to overturn it.<sup>172</sup> For the advocates of criminalization, these features allow for abuse of arbitral powers. These advocates believe arbitrators have an incentive to render an unfair award if they will benefit from bribes or other personal benefits.<sup>173</sup> Arbitrators can earn hundreds of

<sup>163</sup> See Xu Li, *supra* note 74, at 88.

<sup>164</sup> Luo Guoqiang, *supra* note 72, at 64.

<sup>165</sup> See Chen Wei, *supra* note 163, at 58-59.

<sup>166</sup> A judge assumes criminal responsibility in that situation. See The Amendment, *supra* note 28, at art. 20.

<sup>167</sup> See Xuan Bingzhao & Zhou Zhibin, *supra* note 23, at 1757.

<sup>168</sup> See Xia Siyang et al., *Wangfa Zhongcai Gaibugai Shou Xingfa Tiaozheng* (枉法仲裁该不该受刑法调整) [Is the Crime Arbitration by Perversion of Law Appropriate] JIANCHA RIBAO (检察日报) [PROCURATORIAL DAILY], Jan. 23, 2006, at A6.

<sup>169</sup> Yang Mi, *Lun Zhongguo Chuantong Wenhua de Tezhi Dui Zhonghua Faxide Yingxiang* (论中国传统文化的特质对中华法系的影响) [The Impact of the Characteristics of Traditional Chinese Culture on Chinese Legal System], 33 HARBIN XUEYUAN XUEBAO (哈尔滨学院学报) [J. HARBIN U.] 58, 60 (2012).

<sup>170</sup> LIU XIAOHONG ET AL., GUOJI SHANGSHI ZHONGCAI ZHUANTI YANJIU (国际商事仲裁专题研究) [A MONOGRAPHIC STUDY ON INTERNATIONAL COMMERCIAL ARBITRATION LAW] 432 (2009).

<sup>171</sup> See *Burchell v. Marsh*, 58 U.S. 344 (1854). See also *Springs Cotton Mills v. Buster Boy Suit Co.*, 275 A.D. 196 (N.Y. App. Div. 1949); *American Almond Products Co. v. Consol. Pecan Sales Co.*, 144 F.2d 448 (2d Cir. 1944); *Dampskibsselsk Dannebrog v. Strange & Co., Inc.*, 1 F. Supp. 380 (S.D.N.Y. 1932).

<sup>172</sup> ZHAO XIUWEN, *supra* note 19, at 18.

<sup>173</sup> See Xu Li, *supra* note 74, at 88.162

thousands to sometimes over a million dollars from a single arbitration.<sup>174</sup> In the case of bribery, partiality in arbitration could result in actual injury to the complaining party and social justice would then be greatly harmed.<sup>175</sup> By promulgating the Amendment, the law establishes what might be a credible penalty regime imposed on a biased arbitrator, even though the cases of Arbitration by “Perversion of Law” are relatively rare.<sup>176</sup> The advocates argue that “no crime without law; no penalty without law” is one of the generally accepted principles of criminal law in most jurisdictions.<sup>177</sup>

Another powerful pro-criminalization argument is that arbitration is quasi-judicial in nature and thus should be held to similar standards as the judiciary.<sup>178</sup> The advocates for criminalization realize the fact that arbitration resembles litigation and remains intimately dependent on a national legal system.<sup>179</sup> Arbitrators are expected to act like judges who will do justice to all parties and guarantee them a fair hearing and a just award.<sup>180</sup> More importantly, there is an expectation that arbitral awards, like judgments, are to be enforced by national courts.<sup>181</sup> Thus, for the pro-crime advocates, arbitration cannot be viewed merely as a contract of legal services, but the power to make a judicial decision, which falls within the authority of the judicature.<sup>182</sup> Respecting parties’ intent to arbitrate under the doctrine of party autonomy does not imply a respect for an arbitrator’s freedom to disregard the law.<sup>183</sup> While an arbitrator is a private judge, to be a judge means to be empowered to make a decision in accordance with the law instead of going against it.<sup>184</sup>

For the advocates for criminalization, the qualification of arbitrators is also a key factor in introducing the criminal statute. They argue that building a highly qualified team of arbitrators is extremely difficult, given that China’s market economy has not had much time to develop.<sup>185</sup> Unlike

<sup>174</sup> John Yukio Gotanda, *Awarding Costs and Attorneys’ Fees in International Commercial Arbitrations*, 21 MICH. J. INT’L L. 1, 1–3 (1999).

<sup>175</sup> See Wang Jianbo, *Xingfa Xiuzheng’an Liu Diershitiao Wangfa Zhongcai Zui De Lijie Yu Shiyong* (刑法修正案（六）第二十条枉法仲裁罪的理解与适用) [Understanding the Application of Article XX. of the Amendments to the Criminal Law (VI): Distortion of Arbitration Law] 1 GUANGZHOU SHI GONGAN GUANLI GANBU XUEYUAN XUEBAO (广州市公安管理干部学院学报) [J.GUANGZHOU POLICE ADMIN.C.] 47, 47 (2007).

<sup>176</sup> See Xu Li, *supra* note 74, at 88.

<sup>177</sup> See Luo Guoqiang, *supra* note 72, at 65.

<sup>178</sup> Xu Li, *supra* note 74, at 88.

<sup>179</sup> *Id.* at 86.

<sup>180</sup> See Chen Wei, *supra* note 162, at 58.

<sup>181</sup> See Xu Li, *supra* note 74, at 86.

<sup>182</sup> See Liu Xiaohong, *supra* note 70, at 86.

<sup>183</sup> See Xu Li, *supra* note 74, at 86.

<sup>184</sup> Liu Xiaohong, *supra* note 70, at 86.

<sup>185</sup> See Luo Guoqiang, *supra* note 72, at 71.

judges, arbitrators are not required to obtain any legal training or pass any professional examinations before performing their duties.<sup>186</sup> Lacking training, it is more likely for them to intentionally go against the law and make a wrongful ruling for the sake of money than judges.<sup>187</sup> After all, the fee amount is often determined by, or at least influenced by, the arbitrators themselves.<sup>188</sup> Arbitral awards are sometimes rendered in favor of the party with *guanxi*.<sup>189</sup> It is certain the situation would be much worse if there were no such a strict law regarding the impartiality of arbitrators.<sup>190</sup>

Since the lack of workability issue can be addressed by promulgating further detailed rules, the advocates for criminalization argue that it should not be used as a justification to deny the validity of the criminal provision.<sup>191</sup> For the pro-crime advocates, while the provision is far from developed, especially with respect to its workability, it seems unreasonable to reject the criminal statute based solely on this shortcoming.<sup>192</sup> After all, most crimes in Chinese criminal law are virtually non-enforceable without further detailed rules.<sup>193</sup> Even with a measure of skepticism, it is reasonable to make an exception and argue that the provision will deter the corrupted arbitrators in arbitration.<sup>194</sup> Having established the validity of the criminal statute, the court can proceed to articulate a judicial standard for imposing liability on arbitrators who violate the statute. This change is a necessary step to address the appearance of partiality and will ensure the enactment is one that contributes to China's arbitration framework.<sup>195</sup>

The advocates for criminalization also argue that the criminal provision is appropriate given the present stage of economic development in China.<sup>196</sup> Due to the underdevelopment of market economies and the short history of arbitration, absolute party autonomy in some Asian countries and districts—such as Japan, South Korea, and Taiwan—appears not to work well because of a lack of enforcement, making it necessary to govern arbitration with strict laws.<sup>197</sup> In addition, while such laws have been

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<sup>186</sup> Xu Li, *supra* note 74, at 88.

<sup>187</sup> *See id.*

<sup>188</sup> *See* Gotanda, *supra* note 174.

<sup>189</sup> The increased risk that Western parties may incur in this aspect of relations with Chinese parties increases the importance of ensuring the impartiality of the arbitrators deciding their disputes. *See* Kaplan, *supra* note 5, at 781.

<sup>190</sup> *See* Xuan Bingzhao & Zhou Zhibin, *supra* note 23, at 1758.

<sup>191</sup> Luo Guoqiang, *supra* note 72, at 64.

<sup>192</sup> *Id.*

<sup>193</sup> Xu Li, *supra* note 74, at 87.

<sup>194</sup> *See* Chen Wei, *supra* note 162, at 59.

<sup>195</sup> *See* Luo Guoqiang, *supra* note 72, at 66.

<sup>196</sup> *See id.*

<sup>197</sup> *See id.* at 70.

attacked for being contrary to international practice, some contend that arbitration would benefit from the imposition of more severe punishments to decrease the possibility of arbitral misuse.<sup>198</sup> It would ensure the healthy development of arbitration and make China an attractive place for international arbitration.<sup>199</sup> A more well-developed arbitration system in those regions appears to be achieved through the support of public power.<sup>200</sup> Those countries do not have to wait hundreds of years to naturally raise the professional quality arbitrators, establish a code of arbitrator ethics, and cultivate social trust in arbitration.<sup>201</sup> Moreover, given social and cultural differences, it would be inadequate for China to follow the same route of regulating arbitrator conduct as the West. The development of arbitration can be promoted by means of legislation, making full use of the advantages from both the common law and continental law systems.<sup>202</sup>

### 3. *Conclusions Based on Both Sides of the Debate*

As previously shown, the criminal liability of biased arbitrators has been widely debated. The arguments against criminalization criticize the provision for its failure to conform to either the nature of arbitration or the international trend of minimal judicial intervention.<sup>203</sup> In addition, critics regard the poor wording and lack of guidance in the statute as fatal flaws.

Conversely, the strength of the arguments for criminalization has come to be recognized by legislators.<sup>204</sup> A powerful argument is the analogy drawn between the social harm of judicial corruption and that of arbitrator misconduct. If a judge who acts with bias and perverts the law assumes criminal responsibility, why should a “private judge” be immune from similar punishment? Arbitrators are no less susceptible to corruption than professional judicial personnel.<sup>205</sup> At the very least, the criminal provision appears to embody the principle that like situations must be treated alike.<sup>206</sup>

Proponents of the 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

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<sup>198</sup> Chen Wei, *supra* note 162, at 58.

<sup>199</sup> See Luo Guoqiang, *supra* note 72, at 72.

<sup>200</sup> *Id.* at 71.

<sup>201</sup> See *id.*

<sup>202</sup> *Id.* at 72.

<sup>203</sup> See *id.* at 123.

<sup>204</sup> See Xu Li, *supra* note 74, at 88.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*



can only be realized through the development of arbitration itself. The possibility of criminal conviction would presumably deter biased arbitrators. While such deterrence is a net social good, there is another risk: abuse of the statute by prosecutors. The prosecutor, by threatening to bring a criminal prosecution unless the arbitrator rules a certain way, could undermine the independence of the arbitration process. The debate over the criminal statute remains largely inconclusive and, as such, will continue into the foreseeable future, as will empirical studies seeking to resolve the debate.

Admittedly, the arguments for criminalization are not without criticism. It is universally acknowledged that arbitration is different from litigation: the former has historically been a dispute resolution mechanism for transactions that implicate only private law.<sup>207</sup> Thus, the power of arbitrators should not be deemed the same as that of judges. But apart from this, the lack of workability is a good argument that invites serious consideration. Of greatest concern is the conflict between China's domestic law and its international obligations. Unfortunately, in practice, the provision is not likely to serve its purported function because the problem of workability cannot be addressed by the provision itself.<sup>208</sup> Thus, it urgently needs to be restructured. To address these problems, it is beneficial to compare China's arbitration system with other international arbitral institutions.

C. *Situating the Chinese Debate with the U.S. Experience Regarding the 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. As early as 1632, Massachusetts became the first colony to adopt laws supporting arbitration as a means of dispute resolution.<sup>209</sup>

The analysis of arbitral impartiality in the United States relies on an analogy to judicial impartiality.<sup>210</sup> Arbitrators are viewed in the same light

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<sup>207</sup> 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, 63 (1997).

<sup>208</sup> See Song Lianbin, *supra* note 72, at 36.

<sup>209</sup> In 1925, the federal government enacted the Federal Arbitration Act ("FAA"). The statute recognized the benefits of arbitration and established a national policy favoring arbitration. See Steven A. Certilman, *This Is a Brief History of Arbitration in the United States*, 3 NEW YORK DISP. RES. LAW. 10, 10-12 (2010).

<sup>210</sup> See Claudia T. Salomon et al., *Arbitrator's Disclosure Standards: the Uncertainty Continues*, 63 OCT DISP. RESOL. J. 76, 82 (2008).

as judges and therefore must be held to the same standards of impartiality as are imposed on judges.<sup>211</sup> As a judge is immune to civil and criminal liability for his wrong rulings,<sup>212</sup> an arbitrator does not have to assume any legal responsibility for a wrong arbitral award either.<sup>213</sup> The usual remedies for an arbitrator's unfairness include removal of the arbitrator and vacatur of the award.<sup>214</sup> The Federal Arbitration Act ("FAA") provides that an arbitration award may be vacated "[w]here there was evident partiality or corruption in the arbitrators, or either of them."<sup>215</sup> To show "evident partiality" by an arbitrator under the FAA, a party either must 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.<sup>216</sup> The Supreme Court held "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."<sup>217</sup> Nevertheless, the Seventh Circuit found "arbitration differs from adjudication, among many other ways, because the 'appearance of partiality' grounds for disqualification of judges does not apply to arbitrators; only evident partiality, not appearances or risks, spoils an award."<sup>218</sup>

U.S. appellate courts have established four factors to determine if a claimant has demonstrated evident partiality: 1) any personal interest, pecuniary or otherwise, the arbitrator has in the proceeding; 2) the directness of the relationship between the arbitrator and the party he is alleged to favor; 3) the connection of the relationship to the arbitration; and 4) the proximity in time between the relationship and the arbitration proceeding.<sup>219</sup> 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.<sup>220</sup> The Supreme Court expressed disfavor

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<sup>211</sup> *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 148–49 (1968).

<sup>212</sup> *Stump v. Sparkman*, 435 U.S. 349, 355–56 (1978).

<sup>213</sup> Liu Xiaohong, *supra* note 70, at 85.

<sup>214</sup> See New York Convention, *supra* note 20, at art. V.

<sup>215</sup> 9 U.S.C. § 10(a)(2) (2011). See UNIF. ARBITRATION ACT § 12(a)(2) (1956); UNIF. ARBITRATION ACT § 23(a)(2)(A)–(B) (2000).

<sup>216</sup> 9 U.S.C. § 10(a)(2) (2011); *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 645–46 (9th Cir. 2010).

<sup>217</sup> *Commonwealth Coatings*, 393 U.S. at 150 (interpreting the rules of the American Arbitration Association and standards applicable to judges).

<sup>218</sup> *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 621 (7th Cir. 2002).

<sup>219</sup> *Consol. Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F. 3d 125, 130 (4th Cir. 1995).

<sup>220</sup> *ANR Coal Co., Inc. v. Cogentrix of N. Carolina, Inc.*, 173 F.3d 493, 500 (4th Cir. 1999).

with any notion that the slightest pecuniary interest would constitute evident partiality.<sup>221</sup>

As discussed above, many arbitral tribunals have a three-arbitrator panel.<sup>222</sup> Under the common arrangement, each party designates one arbitrator (party arbitrators or non-neutral arbitrators) and the parties collectively select a third (neutral arbitrator). Party arbitrators are not expected to be as impartial as neutral arbitrators.<sup>223</sup> “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.<sup>224</sup> 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.<sup>225</sup> 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.<sup>226</sup>

Vacatur of an arbitration award is appropriate under the FAA only in exceedingly narrow circumstances, such as when arbitrators are partial or corrupt, or when an arbitration panel manifestly disregards, rather than merely erroneously interprets, the law.<sup>227</sup> 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 arbitrator; 3) an overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; 4) a failure to follow the procedure of the Arbitration Code unless the party applying to vacate the award continued with the arbitration with notice of the failure and without objection; or 5) the arbitrator’s manifest disregard of the law.<sup>228</sup>

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<sup>221</sup> *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 n.3 (1986). *See In re EquiMed, Inc.*, No. 05-1815, 2006 WL 1865011, at \*5 (E.D. Pa. June 30, 2006) (remote and trivial relationship does not exhibit the required appearance of bias).

<sup>222</sup> A panel of two arbitrators is seldom used because if the arbitrators disagree, there is no way of reaching a majority. *See* THOMAS J. STIPANOWICH & PETER H. KASKELL, *COMMERCIAL ARBITRATION AT ITS BEST* 90 (2001).

<sup>223</sup> Olga K. Byrne, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-appointed Arbitrators on a Tripartite Panel*, 30 *FORDHAM URB. L.J.* 1815, 1816 (2003).

<sup>224</sup> *See Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 821–22 (8th Cir. 2001).

<sup>225</sup> *Anderson v. Nichols*, 359 S.E.2d 117, 124 (W. Va. 1987).

<sup>226</sup> *JCI Commc'ns, Inc. v. Int'l Bhd. of Elec. Workers, Local 103*, 324 F.3d 42, 52 (1st Cir. 2003).

<sup>227</sup> 9 U.S.C. § 10 (2011); *Metromedia Energy, Inc. v. Enserch Energy Servs., Inc.*, 409 F.3d 574, 578 (3d Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006).

<sup>228</sup> *See* 9 U.S.C. § 10(a) (2011). *See also Metromedia Energy, Inc.*, 409 F.3d at 578; *Progressive Data Sys. v. Jefferson Randolph Corp.*, 568 S.E.2d 474, 475 (Ga. 2002). *See, e.g., GA. CODE ANN.* § 9-9-13(b) (West 2003).

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 an award under the FAA.<sup>229</sup> An arbitrator has the obligation to disclose to the parties any interest or bias, and failing to do so might constitute "evident partiality,"<sup>230</sup> though no specific provision pertaining to disclosure has been established in U.S. law.<sup>231</sup> 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.<sup>232</sup> Under the evident partiality standard, arbitrators are held to a less strict disclosure regime than the appearance of partiality standard that applies to judges.<sup>233</sup> 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.<sup>234</sup>

The arbitrator has a duty to disqualify him or herself upon discovery of sufficient reasons for such action, in order to avoid prejudicing an effective arbitration.<sup>235</sup> 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.<sup>236</sup>

In principle, arbitrators are not required to explain an arbitration award and their silence cannot be used to infer grounds for vacating an award.<sup>237</sup> A party seeking vacatur of an arbitration award on grounds of

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<sup>229</sup> 9 U.S.C. § 10 (2011). See *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co.*, 732 F. Supp.2d 293, 307 (S.D.N.Y. 2010).

<sup>230</sup> See Ruth V. Glick & Laura J. Stipanowich, *Arbitrator Disclosure in the Internet Age*, 67 DISP. RESOL. J., 22, 23 (2012).

<sup>231</sup> *Id.*

<sup>232</sup> *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 647–48 (6th Cir. 2005).

<sup>233</sup> See Salomon et al., *supra* note 210, at 82.

<sup>234</sup> See UNIF. ARBITRATION ACT § 12(b) (2000).

<sup>235</sup> See Merrick T. Rossein & Jennifer Hope, *Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What is Sufficient to Vacate Award*, 81 ST. JOHN'S L. REV. 203, 205-06 (2007).

<sup>236</sup> See AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, R-16(a) (2009).

<sup>237</sup> *Robbins v. Day*, 954 F.2d 679, 684 (11th Cir. 1992).

evident partiality has the burden of proof; to meet this burden, the party must demonstrate that a reasonable person would conclude that an arbitrator was partial to the other party to the arbitration.<sup>238</sup> Specifically, the party that 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.<sup>239</sup> Generally, a controversy of merits between parties to arbitration cannot be challenged as an allegation of evident partiality or corruption by the losing party.<sup>240</sup> It is largely for this reason that the merits of an award are not subject to judicial review.<sup>241</sup> 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.<sup>242</sup> Thus, the general rule is that an arbitrator's decision cannot be reviewed for errors of fact or law.<sup>243</sup> In addition, "California's 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."<sup>244</sup> Arbitration awards have a longer history of publication in the West than in China, which makes it more difficult to hide or disguise a distortion of law.<sup>245</sup>

The 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. To fully understand why the Chinese approach using a criminal provision is a rational choice, it is important to place the arbitration process in the context of the history of the Chinese legal system.

*D. Stepping Back: Exploring the "Perversion of Law" Provision in Light of the Historical Development of Chinese Legal System*

In order to fully comprehend the criminal provision of arbitrator responsibility, it is necessary to obtain some perspectives on the historical development of the Chinese legal system as a whole as it functions in practice. The current Chinese legal system is still heavily burdened or

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<sup>238</sup> ANR Coal Co. v. Cogentrix of N. Carolina, Inc., 173 F.3d 493, 500 (4th Cir. 1999).

<sup>239</sup> FLA. STAT. ANN § 682.13(1)(a) (West 1997). See Davenport v. Dimitrijevic, 857 So.2d 957, 961 (Fla. Dist. Ct. App. 2003).

<sup>240</sup> Moncharsh v. Heily & Blasé, 832 P.2d 899 (Cal. 1992).

<sup>241</sup> See *id.* at 916.

<sup>242</sup> *Id.* See Anderson v. Nichols, 359 S.E.2d 117, 124 (W. Va. 1987).

<sup>243</sup> See *Moncharsh*, 832 P.2d, at 904.

<sup>244</sup> *Id.* at 905.

<sup>245</sup> See Luo Guoqiang, *supra* note 72, at 70-72.

influenced by traditional forces.<sup>246</sup> For example, corruption has been long regarded as one of the most serious crimes in China.<sup>247</sup> Penal punishment, including the death penalty, has been applied to state officials found guilty of accepting bribes.<sup>248</sup>

Without a fundamental knowledge of the Chinese legal tradition, a plain reading of the provision might lead readers to make a misguided attempt to apply their own ethnocentric experiences to a quite distinct legal system. Analyzing some cultural and traditional elements influencing the criminal provision demonstrates some probable reasons for the statute from a historical perspective. The analysis suggests that a criminal law-oriented 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

Law operates in a cultural context and is impacted by the culture around it, yet that culture is in turn affected by the operation of law.<sup>249</sup> Arbitration by “Perversion of Law” became a criminal provision 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 dominance of Confucian thinking influenced Chinese attitudes toward law.<sup>250</sup> The basic philosophy underlying ancient Chinese law is a belief in 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.”<sup>251</sup> Any recourse by citizens to legal process was regarded as a disturbance of harmony and a shame not only for both parties, but also for

<sup>246</sup> See Liang Zhiping, *Zhongguofa de Guoqu, Xianzaiyu Weilai: Yige Wenhua de Jiantao* (中国法的过去, 现在与未来: 一个文化的检讨) [The Past, Present and Future of Chinese Law: A Review from the Perspective of Culture], 2 *BIJIAOFA YANGJIU* (比较法研究) [J. COMP. L.] 17, 28 (1987).

<sup>247</sup> See LIANG ZHIPING, *FA BIAN* (法辩) [IDENTIFICATION OF LAWS] 116–17 (2002).

<sup>248</sup> The death penalty appears to be a harsh penalty for a non-violent crime like bribery, particularly from a Western perspective, but in ancient China, death penalties once accounted for 40 percent of the total laws in the dynasty of Beiwei (北魏). See Yang Mi, *supra* note 170, at 60. See also Criminal Law, *supra* note 29, at art. 383, 385.

<sup>249</sup> See Yang Mi, *supra* note 169.

<sup>250</sup> See Han Xiaolian, *Zhongguo Chuangtong Falü Zhidu de Xingfahua Jiqi Chengyin Fenxi* (中国传统法律制度的刑法化及其成因分析) [Analysis of the Criminalization of the Traditional Chinese Legal System], 6 *FAZHI YU SHEHUI* (法制与社会) [LEGAL SYS. & SOC'Y] 33, 34 (2007).

<sup>251</sup> See He Weifang, *Zhongguo Gudai Sifa Panjuede Fenggeyu Jingsheng—Yi Songdai Panjuwei Jiben Yijujianyu Yingguo Bijiao* (中国古代司法判决的风格与精神—以宋代判决为基本依据兼与英国比较) [The Style and Spirit of Judicial Judgment in Ancient China – Based on the Judgments in Song Dynasty and a Comparative Study with English Law], 6 *ZHONGGUO SHEHUI KEXUE* (中国社会科学) [SOC. SCI. CHINA] 206 (1990).

their families, relatives, and clans.<sup>252</sup> Traditionally, the preferred means for settling most civil disputes is to resort to informal mediation rather than to bring their disputes to court, which reflects the attitude among many Chinese of avoiding litigation as much as possible.<sup>253</sup>

In accordance with this theory, two prominent characteristics in China's ancient legal system have to be mentioned. One is that the law was only a tool of government policy and all legislation was criminal law, named *Xing*.<sup>254</sup> *Xing*, similar in meaning to *Bing* (war) in old Chinese, originated from the state policy of violence, and both *Xing* and *Bing* constitute two sides of the coin.<sup>255</sup> *Xing* concerns an internal policy of violence; *Bing* represents a foreign policy.<sup>256</sup> The law was equated with violence, and there was no bifurcation between criminal and civil law.<sup>257</sup> The state took little interest in large areas of society, notably contract and commercial law: sales, loans, and banking.<sup>258</sup> These areas could be regulated and were regulated if any state interest became involved.<sup>259</sup> Thus, in the eyes of an average Chinese citizen, law for a long period of time meant one thing: punishment.<sup>260</sup> Historically, the Emperor was concerned primarily with maintaining order; his attention, and the attention of local bureaucrats, was only incidentally drawn to what would be called civil matters today.<sup>261</sup>

The other prominent characteristic of the Chinese legal system is that the law was actually regarded as an accessory to moral education, and claims of morality were always held superior to those of law.<sup>262</sup> For instance, natural harmony would best be preserved if men behaved in accordance with *Li* (the teaching of morality), which recognized the inequality of persons on account of social status, age, gender and local kinship ties.<sup>263</sup> *Li*, used in

<sup>252</sup> A clan was a grouping of families with a common surname, claiming descent from a common ancestor. See FEI XIAOTONG, XIANGTU ZHONGGUO & SHENGYU ZHIDU (乡土中国生育制度) [RURAL CHINA & THE INSTITUTIONS FOR REPRODUCTION] 54-56 (1998).

<sup>253</sup> *Id.* at 57.

<sup>254</sup> See Liang Zhiping, *supra* note 246, at 19.

<sup>255</sup> See Liang Zhiping, *Gudai Fa: Wenhua Chayi Yu Chuantong* (古代法:文化差异与传统) [*The Differences and Integration of Ancient Legal Cultures*], 3 DUSHU (读书) [READING] 50 (1987), available at <http://club.kdnet.net/disppbs.asp?boardid=2&id=430346>.

<sup>256</sup> *Id.*

<sup>257</sup> See Liang Zhiping, *supra* note 246, at 21-22.

<sup>258</sup> See Han Xiaolian, *supra* note 250, at 34.

<sup>259</sup> See William C. Jones et al., Law of the PRC, iii, 9-10 (Dec. 28, 1993) (unpublished manuscript) (on file with author).

<sup>260</sup> Liang Zhiping, *Lun Lifa Wenhua* (论礼法文化) [*On the Culture of Legislation*], 2 TIANJIN SHEHUI KEXUE (天津社会科学) [TIANJIN SOC. SCI.] 24 (1989).

<sup>261</sup> See Han Xiaolian, *supra* note 250, at 34.

<sup>262</sup> See LIANG ZHIPING, *supra* note 247, at 95.

<sup>263</sup> See *id.* at 23.

conjunction with *Xing*, included a set of moral standards of conduct in different situations appropriate for persons with high social status.<sup>264</sup> These standards shaped the attitudes that were considered to be morally correct and were regarded as the ideal for relationships in society.<sup>265</sup> If ordinary people could be taught *Li* by precept, example, and symbolic ritual, there would have been no need for anything like *Xing*. But for those refractory persons who failed to make their behavior conform to *Li*, punishments had to be prescribed in the form of penal law.<sup>266</sup> Therefore, the distinction between law and morality was sometimes indeterminate in practice.<sup>267</sup>

There was no category of public law and private law in early Chinese codification.<sup>268</sup> Most of these codes focused on punishment for administrative breaches of bureaucratic procedure or for conduct considered disruptive to social order.<sup>269</sup> These laws were all public by nature even though they were commonly applied in private fields.<sup>270</sup> Despite being penal in form, the provisions of the codes covered all private matters. For instance, the codes covered loan conflicts, marriage, and succession, which are classified as civil law under Western jurisprudence.<sup>271</sup> In fact, there were few commercial disputes in ancient China which were solved by laws.<sup>272</sup>

The criminal law and morality-oriented tradition was the mainspring of China's ancient legal system and method of law enforcement.<sup>273</sup> Of the two, the criminal law is probably the more important element, as "law" and criminal law have generally been considered equivalent in the historical context of China.<sup>274</sup> The criminal law tradition also embodied the need for state rule at that time, which resulted in centralization of state power.<sup>275</sup> The traditional pattern of Chinese government was authoritarian and

<sup>264</sup> *Id.*

<sup>265</sup> *See id.* at 88-91.

<sup>266</sup> *Id.* at 28.

<sup>267</sup> *See id.* at 96.

<sup>268</sup> *See id.* at 52.

<sup>269</sup> *Cf.* GEORGE JAMIESON, CHINESE FAMILY AND COMMERCIAL LAW 10 (1921). (stating that "over half the [Ching] Code is devoted to the regulation of the official activities of government officials.")

<sup>270</sup> LIANG ZHIPING, *supra* note 247, at 53.

<sup>271</sup> *Id.* at 22.

<sup>272</sup> *See* Han Xiaolian, *supra* note 250, at 34.

<sup>273</sup> *See* Liang Zhiping, *supra* note 246, at 20. *See also* He Weifang, *Zhongguo Gudai Sifade Sanda Chuantong Jiqidui Dangdaide Yingxiang* (中国古代司法的三大传统及其对当代的影响) [*The Three Miracles of the Integration of Ancient Chinese Judiciary and Their Impact on Modern China*], 3 HENAN ZHENGFA GUANLI GANBU XUEYUAN XUEBAO (河南政法管理干部学院学报) [J.HENAN ADMIN.INST.POL.& L.] 2 (2005), available at [http://article.chinalawinfo.com/Article\\_Detail.asp?ArticleId=30490](http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=30490).

<sup>274</sup> Wang Luyu, *Zhongguo Chuantong Falü Wenhuae Xingzhizhuyi Tezheng* (中国传统法律文化的刑治主义特征) [*A Characteristic of Chinese Traditional Legal Culture: Focus on Criminal Sanction*], 6 FAZHIYU SHEHUI (法制与社会) [LEGAL SYS. & SOC'Y] 28 (2008).

<sup>275</sup> *Id.* at 29.



bureaucratic.<sup>276</sup> There was no concept of “checks and balances” or “separation of powers.”<sup>277</sup> Even courts have always been a functional arm of the Chinese bureaucracy.<sup>278</sup> For example, in imperial China the central government appointed local officials.<sup>279</sup> They exercised a wide range of functions, being generally accountable for the good order and prosperity of their districts, for the collection of local taxes and supply of corvée labor, and concurrently discharging judicial duties when occasion arose.<sup>280</sup> When the concentration of power in a society enlarges, inevitably the criminal legal system becomes more developed.<sup>281</sup>

When the notion of centralization of state power is so dominant that the state and collective interests surpass those of individuals, any infringement of private rights could be interpreted and deemed as damaging to social order and state interests.<sup>282</sup> The state and the people will clearly express their attitude towards wrongdoers in the form of revenge and punishment.<sup>283</sup> The scope of public matters was therefore greatly expanded and it is unsurprising that all laws in ancient Chinese society were criminal laws, or at least laws with criminal elements.<sup>284</sup> This attitude better explains why the partiality of arbitrators becomes a social concern and criminal punishment—instead of breach of contract or damages—is eventually considered as a remedy to address the problem.<sup>285</sup>

At the dawn of the 20th century, a legal reform by the Qing Dynasty, the last imperial dynasty, aimed to imitate Western legal systems.<sup>286</sup> It was generally recognized that if China was to play a significant part in world affairs, the Chinese would have to bring their law in line with the modern systems of the West.<sup>287</sup> The most distinguishing substantive change was the

<sup>276</sup> LIANG ZHIPING, *supra* note 247, at 54.

<sup>277</sup> *See id.*, at 49-53.

<sup>278</sup> *See id.*, at 54, 61.

<sup>279</sup> *See* J. L. Brierly, et al., *LAW AND GOVERNMENT IN PRINCIPLE AND PRACTICE* 310 (Odhams Press).

<sup>280</sup> *Id.*

<sup>281</sup> *See* Tan Zhongzheng, *Xingfa Jieru Shangshi Zhongcai de Lillun Fansi* (刑法介入商事仲裁的理论反思) [A Theoretical Reflection on the Involvement of Criminal law Through Criminalization of Distortion of Arbitration Law], 71 *BEIJING ZHONGCAI* (北京仲裁) [ARB.BEIJING] 64, 68 (2010).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> ZHANG ZHONGQIU, *ZHONGXI FALÜ BIJIAO YANJIU* (中西法律文化比较研究) [COMPARATIVE STUDIES OF CHINESE AND WESTERN LEGAL CULTURES] 96 (Law Press 2009).

<sup>285</sup> *See* Tan Zhongzheng, *supra* note 281, at 78.

<sup>286</sup> Yang Xiaoli, *Dui Qingmo Falv Yizhide Sikaoyu Jiejian* (对清末法律移植的思考与借鉴) [A Thought and Reference on the Legal Reform in Late Qing Dynasty], 1 *LILUN DAOKAN* (理论导刊) [JOURNAL OF SOCIALIST THEORY GUIDE] 110, 110 (2010).

<sup>287</sup> *Id.*

separation of civil laws from criminal laws.<sup>288</sup> However, the whole development of modern law in China was hampered by the inability of the regime to create a satisfactory pattern of supporting institutions.<sup>289</sup> At the very least, the principle of law reform was accepted, but much still needed to be done.<sup>290</sup>

To date, 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.<sup>291</sup> This feature, a distinctive Chinese characteristic, is still strong and might remain so in the foreseeable future.<sup>292</sup> Meanwhile, criminal provisions often contain moral statements.<sup>293</sup> Second, due to lack of a tradition of private rule of law, average people have less trust in private rights and are more accustomed to turning to state power for their sense of security.<sup>294</sup> Because of the long history of Confucianism influence of moral teaching, local officials were not only government officials and judges appointed by the central government, but were also ideally expected to be models and educators on a moral level, and were called “father-and-mother officials.”<sup>295</sup> That understanding is also why corruption became a felony where the officials’ rule was not as good as their name suggested.<sup>296</sup>

Law is a passive instrument whose operation can be either promoted or impeded by culture. The distinction between Eastern and Western legal cultures seems much more pronounced than the distinctions among different Western legal cultures.<sup>297</sup> It is difficult to compare different legal cultures that originated from different legal traditions. Taking those diametrically opposed traditions into account, the Chinese arbitration system is within the larger framework of China’s national legal system and it evolves with that national system. With no Western rule of law tradition on one side, and a

<sup>288</sup> ZENG XIANYI, *ZHONGGUO FAZHI SHI* (中国法制史) [CHINESE LEGAL HISTORY] 214 (2009).

<sup>289</sup> See ZHANG JINFAN, *ZHONGGUO FAZHISHI* (中国法制史) [The Legal History of China] 290 (2007).

<sup>290</sup> See *id.* at 299.

<sup>291</sup> Wang Luyu, *supra* note 277, at 28.

<sup>292</sup> Tan Zhongzheng, *supra* note 281, at 77-78.

<sup>293</sup> See Xiao Wen & Zhu Qianli, *Lun Xingfa Shiyong Zhong Daode Pingjia Yinsu De Kaoliang* (论刑法使用中道德评价因素的考量) [*Ethical Elements Considered in Applying Criminal Law*], 3 *XINAN ZHENGFA DAXUE XUEBAO* (西南政法大学学报) [JOURNAL OF SWUPL] 49 (2006).

<sup>294</sup> See Han Yonghong, *supra* note 159, at 146.

<sup>295</sup> The local officials in ancient China were both administrative and judicial officials (judges, prosecutors and police). See J. L. Brierly, et al., *supra* note 279. See also LIANG ZHIPING, XIN BOSIREN XINZHA (新波斯人信札) [THE NEW PERSIAN LETTERS] 91-99 (2000).

<sup>296</sup> See Han Xiaolian, *supra* note 250, at 33.

<sup>297</sup> See Liang Zhiping, *Dongxifang Fazhiguannian de Bijiao* (东西方法制观念的比较) [*The Comparison of the Awareness of Law Between Eastern and Western Cultures*], 6 *FALV XUEXIYU YANJIU* (法律学习与研究) [JURISTS REVIEW] 40, 41 (1986).

strong influence from local criminal law-favored and morality-oriented tradition on the other, it appears that penal responsibility of arbitrators is not only the best choice in the eyes of Chinese authorities, but also desirable for the vast majority of people.<sup>298</sup> This is not surprising given the ambivalent value of criminal law for modern China.

## 2. *Civil Law Tradition*

It was only a century ago that China started systematically codifying civil laws.<sup>299</sup> Following the Legal Reform of Qing Dynasty, for the first time a division between civil and criminal law was substituted for the traditional classification according to administrative departments.<sup>300</sup> From 1929 to 1931, a civil code was introduced, based on the legal codes of Germany and Japan, which now has a direct offspring in Taiwan.<sup>301</sup> Legal ideas were directly copied from one legal system to the other.<sup>302</sup> Legislators were content with formalism and law-making.<sup>303</sup> For these reasons, it is often believed that the current Chinese legal system can be classified as part of the civil law family.<sup>304</sup> The influence of civil law in the criminal provision is apparent because, in general, civil law systems favor codified legislation as opposed to judge-made rules, and in common law systems it is difficult to hold judges liable for misuse of the law.

One of the enduring differences between the common and civil law systems is with respect to what is actual law.<sup>305</sup> If the law is only defined as statutes, then “law” in China means something much different than it does in the United States. In common law countries, case law is commonly believed to be the main source of the law, whereas in civil law countries, the law is primarily based on statutes.<sup>306</sup> The latter jurisdictions have put emphasis on legislation, and people find themselves with more interests in statute-making than dispute resolution.<sup>307</sup> Civil law judges are thus described as

<sup>298</sup> Wang Luyu, *supra* note 274, at 29.

<sup>299</sup> See Yang Xiaoli, *supra* note 286, at 111.

<sup>300</sup> See ZHANG JINFAN, *supra* note 289, at 291.

<sup>301</sup> CHANG-FALO, *THE LEGAL CULTURE AND SYSTEM OF TAIWAN* 3 (2006).

<sup>302</sup> Xu Aiguo, *Dalu Faxivu Zhongguo Chuantongfade Zhuanxing* (大陆法系与中国传统法的转型) [*Continental Legal System and the Transformation of Chinese Traditional Law*], 186 SHEHUI KEXUE JIKAN (社会科学季刊) [SOC. SCI. J.], 47 (2010).

<sup>303</sup> See *id.* at 50.

<sup>304</sup> *Id.* at 47.

<sup>305</sup> See Zhang Honghao, *Lun Sanda Faxi de Lishichuantong* (论三大法系的历史传统) [*On the Tradition of Three Legal Systems*], 1 JINING XUEYUAN XUEBAO (济宁学院学报) [JOURNAL OF JINING UNIVERSITY] 93, 94 (2011).

<sup>306</sup> Xu Aiguo, *supra* note 302, at 50.

<sup>307</sup> *Id.*

“mechanically appl[ying] legislative provisions to given fact situations.”<sup>308</sup> This feature embodies the deductive method of the civil law system, which is distinct from the inductive one of common law.<sup>309</sup>

China introduced the deductive method into its domestic legal system.<sup>310</sup> In civil law countries, a dichotomy often exists between “paper law,” or the law in published regulations, and a law in action.<sup>311</sup> This dichotomy seems more exaggerated in China than in other countries.<sup>312</sup> As 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.<sup>313</sup> If punishments are to act as deterrents, it is important to have them systematized and published so that arbitrators know the consequences of wrong-doing. It is unclear to what extent the criminal provision of arbitrator responsibility reflects the status quo in China. However, much of China’s formal law does not generally reflect practice and has not been developed with an eye to existing social realities.<sup>314</sup> This difference results in certain regulated areas being unregulated in practice.<sup>315</sup> The Chinese overconfidence in the power of legislation helps explain the provision regardless of the significant gap between the law de facto and the law de jure. Although officially enacted, the provision does not yet represent actual practice in China, and can hardly be expected to function well, especially when the provision is so abstract that it has little workability as a “living” law.<sup>316</sup>

Another noteworthy aspect is the influence of the judge in different legal systems. Civil law adjudicators should mechanically follow the law (statutes), rather than “create” the law.<sup>317</sup> Parties go to court only to resolve disputes in the civil law system where statutory law, and in particular the civil codes, are not interpreted, but are rather simply applied by judges to

<sup>308</sup> Mitchel de S.-O.-I’E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1334 (1995).

<sup>309</sup> Pierre A. Karrer, *The Civil Law and Common Law Divide: An International Arbitrator Tells it like He Sees it*, 63 APR DISP. RESOL. J. 72, 75 (2008).

<sup>310</sup> Xu Aiguo, *supra* note 302, at 49.

<sup>311</sup> *Id.* at 51.

<sup>312</sup> William Alford, *Chinese Living Law: An Interview with Professor William Alford*, 7 ARIZ. J. INT’L & COMP. L. 135, 136 (1989) (stating “I think that in every society, including our own, there is a distance between formal and actual law. This distance may be especially obvious in the People’s Republic of China . . .”).

<sup>313</sup> See Xuan Bingzhao & Zhou Zhibin, *supra* note 23, at 1757-58.

<sup>314</sup> See Jones et al., *supra* note 259, at 166.

<sup>315</sup> See Luo Guoqiang, *supra* note 72, at 64.

<sup>316</sup> See Song Lianbin, *supra* note 72, at 35-36.

<sup>317</sup> Lasser, *supra* note 308, at 1334.

determine the outcome of cases.<sup>318</sup> While civil law judges have broad managerial powers, they are expected to apply the law in an almost mechanical way, remaining controlled instruments of the legislature.<sup>319</sup> In fact, there is no room for judges' participation in the creation or transformation of legal rules.<sup>320</sup> Conversely, it is readily acknowledged that in the United States, parties seek to achieve changes in the law and judges make law.<sup>321</sup> The task of a common law judge is to evaluate counsels' competing arguments about hyper-factual analogies and subtle distinctions in prior decisional law.<sup>322</sup> They have express law-making and policy-creating functions.<sup>323</sup> In addition, many civil law judges consider it an important part of their job to help the parties reach an amicable settlement.<sup>324</sup> In the amicable settlement, civil law judges play a positive role and sometimes have to "disregard" the law. Thus, they are more likely to "twist the law." However, judges in the common law system are comparatively passive in their fact-finding role. Notably, civil law judges have more chances to engage in "perversion of law." Without doubt, their impartiality duties need not be, and cannot be, the same as those of common law judges.<sup>325</sup> A common law judge is not accountable for his decision, even if unfair, or for any loss the parties may thereby incur.<sup>326</sup> Nor is an arbitrator, who is deemed to be a quasi-judge.<sup>327</sup> Decisions that deviate from the law would not be considered an inappropriate violation of impartiality obligations in the common law system.<sup>328</sup> Since a U.S. judge has the power to make law, he could hardly be charged with "disregard of law." Crimes like adjudicators' "perversion of law" appear only to be found in Asian countries with a civil law tradition.<sup>329</sup> These countries lack experiences in arbitration, which leads to the misleading judicial referent that arbitrators and judges are both subsets of adjudicators and they should abide strictly by

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<sup>318</sup> *Id.*

<sup>319</sup> See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 34–38 (2d ed. 1985).

<sup>320</sup> *See id.*

<sup>321</sup> See Alexander M. Bickel, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962) (arguing that judges make law even though they are not elected as legislators).

<sup>322</sup> 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).

<sup>323</sup> See generally Stephen Guest, *The Role of Courts in the Making of Policy*, 25 *U. QUEENSL. L. J.* 307 (2006).

<sup>324</sup> Karrer, *supra* note 309, at 81.

<sup>325</sup> See Luo Guoqiang, *supra* note 72, at 70.

<sup>326</sup> Chen Wei, *supra* note 162, at 57.

<sup>327</sup> *Id.*

<sup>328</sup> See, e.g., N.H. SUP. CT. R. 2.2 cmt. 3 (stating "[w]hen applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.>").

<sup>329</sup> Luo Guoqiang, *supra* note 72, at 69.91

the statutes in a similar way.<sup>330</sup> The orientation of Arbitration by “Perversion of Law” offences have, to some extent, been deeply rooted in this tradition.

### 3. *The Underdevelopment of China’s Market Economy*

The traditional Chinese society differed sharply from the contemporary Western one in that the former was an agricultural countryside society whereas the latter was a society based on market economies.<sup>331</sup> Agriculture was viewed as the natural form of economy in ancient China.<sup>332</sup> Beginning early in the imperial dynastic period, the state adopted a policy of encouraging agriculture and restraining commerce.<sup>333</sup> The prevailing attitude was that war and agriculture were the only occupations fit for the people.<sup>334</sup> The law did little to protect merchants.<sup>335</sup> On the contrary, sanctions were placed on those who chose to engage in commercial activities rather than agricultural work.<sup>336</sup> The Chinese rulers even issued decrees criminalizing trade.<sup>337</sup> These events led an entire nation to lose interest in commerce.<sup>338</sup> Furthermore, Chinese leaders wished to control the beliefs and ideas of the populace in order to preserve sociopolitical stability.<sup>339</sup> With fewer market transactions, there would be less movement among the Chinese population and lowered risk of the exchange and dominance of ideas such as equality, freedom, and democracy.<sup>340</sup>

Unlike a market economy, which is a society of strangers, the agricultural society of ancient China was a society of acquaintances.<sup>341</sup> In this society, traditional moral education played a more important role than law.<sup>342</sup> Confucian thought, emphasizing harmony and inequality among people of different social statuses, had a meaningful influence on government and individual behavior.<sup>343</sup> There was a strong sense of

<sup>330</sup> See Song Lianbin, *supra* note 72, at 34.

<sup>331</sup> See FEI XIAOTONG, *supra* note 252, at 56–57.

<sup>332</sup> Wang Luyu, *supra* note 274, at 29.

<sup>333</sup> See ZHANG ZHONGQIU, *supra* note 284, at 53.

<sup>334</sup> See *id.*

<sup>335</sup> Wang Luyu, *supra* note 274, at 29.

<sup>336</sup> ZHANG ZHONGQIU, *supra* note 284, at 53.

<sup>337</sup> *Id.* at 268.

<sup>338</sup> See Xu Aiguo, *supra* note 302, at 48.

<sup>339</sup> See Mao Jiaqi, *Wanqing Yixiang Shehui Changqi Luohoude Zhengjie* (晚清以降社会长期落后的症结) [The Crucial Reasons for the Social Backwardness of China from the Late Qing Dynasty], 2 XUZHOUSHIFAN DAXUE XUEBAO (徐州师范大学学报) [J. XUZHOUSHIFAN DAXUE (PHIL. & SOC. SCI. ED.)] 71, 73 (2010).

<sup>340</sup> See Wang Luyu, *supra* note 274 at 29.

<sup>341</sup> FEI XIAOTONG, *supra* note 252, at 10.

<sup>342</sup> See LIANG ZHIPING, *supra* note 247, at 86-87.

<sup>343</sup> *Id.* at 89-90, 146.

extended family and continuity between father and son, ancestors and self, and the dead and the living.<sup>344</sup> Moreover, in a much simpler and closer society, it is easier to enforce complete subordination of the individual to the state, exalt the absolute authority of the ruler, and regiment all citizens by the merciless enforcement of a brutal code of law and punishment.<sup>345</sup>

As shown in history, China suffered greatly from the suppression of the market economy.<sup>346</sup> Although Chinese civilization dominated the world for many hundreds of years, it ultimately fell far behind during the Ming dynasty (1368 to 1644).<sup>347</sup> Chinese people began to engage in significant foreign trade during the mid-sixteenth and seventeenth centuries.<sup>348</sup> Astonishingly, no laws pertaining to trade developed during this time, and foreign trade did not create enthusiasm in commerce.<sup>349</sup> As trade increased, foreign businesses and their governments came to exert increasing influence over Chinese affairs.<sup>350</sup> China lost many aspects of its sovereignty to foreign powers after a series of wars.<sup>351</sup> The comprehensive attempts to create a formal legal system governing commerce began only in 1979.<sup>352</sup> In the last four decades, a large body of laws and regulations has been enacted with the aim of creating rules that would support an economy based on market incentives, while retaining the basic principles of socialism.<sup>353</sup> Despite the movement toward market economics, real change was a gradual process and the Chinese economy remains, to some extent, under state control.<sup>354</sup> Since

<sup>344</sup> See *id.* at 38–41.

<sup>345</sup> *Id.*

<sup>346</sup> Mao Jiaqi, *supra* note 339, at 71.

<sup>347</sup> Lu Hanchao, *Zhongguo Heshi Kaishi Luohouyu Xifang* (中国何时开始落后于西方) [When Did China Fall Behind the West], 25 QINGHUA DAXUE XUEBAO (清华大学学报) [J. TSINGHUA U. (PHIL. & SOC. SCI.)] 5, 8 (2010).

<sup>348</sup> Mao Jiaqi, *supra* note 339, at 73.

<sup>349</sup> See *id.* at 71, 73.

<sup>350</sup> See Xu Aiguo, *supra* note 302, at 48.

<sup>351</sup> See *id.*

<sup>352</sup> See Friend, *supra* note 84, at 379, 382.

<sup>353</sup> See Liang Zhiping, *Zhongguotesede Fazhi Ruhe Keneng* (中国特色”的法治如何可能) [How is it Possible to Have a Rule of Law with Chinese Characteristics], 3 WENHUA ZONGHENG (文化纵横) [BEIJING CULTURAL REV.], 31–32 (2011).

<sup>354</sup> See Ji Weidong, *ZhongguoFawenhuade Tuibian Yu NeizaiMaodun* (中国法文化的蜕变与内在矛盾) [The Metamorphosis of Chinese Legal Culture and its Internal Contradiction], 4 BIJIAOFAYANJIU(比较法研究) [J. COMP. L.] 8 (1987). The goal of China's economic reform was to establish a system of "socialist market economy." The term "socialist" refers to the guarantee of public ownership, and whole people ownership (state ownership) in particular, which is the "leading force" of the nation's economy. See Report on the Conference, XIN HUA NEWS AGENCY, [http://news.xinhuanet.com/ziliao/2003-01/20/content\\_697129.htm](http://news.xinhuanet.com/ziliao/2003-01/20/content_697129.htm) (last visited Dec. 29, 2013). At the 14th National Conference of the Communist Party, held from October 1 to 18, 1992, establishing the socialist market economy system was officially prescribed as the ultimate goal of the economic reform. Article 7 of the 1982 Constitution of People's Republic of China (as amended in 2004) further describes whole people ownership as the state-owned

an economy based even partly on market principles requires significant decentralization of economic decision-making, there are conflicts with the centralized state power in Chinese legal culture. One must keep in mind that China is a country without a tradition of governance by law.<sup>355</sup>

Arbitration is widely believed to be an inherently private system of dispute resolution and a product of a market economy.<sup>356</sup> This perception is supported to some extent by the history of arbitration and the degree of parties' control in shaping arbitration proceedings.<sup>357</sup> However, the development of arbitration in China has not followed the same track of market economy as that in the West.<sup>358</sup> China's commercial environment is significantly different.<sup>359</sup> Chinese arbitration lacks the purported popularity, custom, and ability of private governance that American arbitration provides, due to the incomplete development of the market economy.<sup>360</sup> While China is transitioning from a centrally planned economy to a market-oriented economy, the latter is extremely young, having just been formally proposed in the 1990s.<sup>361</sup> There were few arbitrators with comprehensive knowledge of, and experience in, trade, maritime, economics, and law.<sup>362</sup> The immaturity of the market economy and the socialist central planning-featured tradition thus 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 its market economy or the principle of party autonomy, but as a result of government promotion.<sup>363</sup> Although arbitration commissions are proclaimed to be administratively independent from both the local and national governmental units in accordance with Arbitration Law,<sup>364</sup> in fact they are far from truly independent.<sup>365</sup> Most of them are in

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economy, and designates it as the leading force in the nation's economy. Article 7 provides that: "The State-owned economy, namely, the socialist economy under ownership by the whole people, is the leading force in the national economy. The State ensures the consolidation and growth of the State-owned economy". See XIANFA art. 7 (1982) (China).

<sup>355</sup> See Friend, *supra* note 84, at 379.

<sup>356</sup> See *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (White, J., concurring).

<sup>357</sup> See W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L. J. 1, 5 (1995).

<sup>358</sup> Wang Luyu, *supra* note 274, at 29.

<sup>359</sup> See Mao Jiaqi, *supra* note 339, at 76.

<sup>360</sup> See Xu Qianquan, *supra* note 105, at 120–21.

<sup>361</sup> See Stanley Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 387, 405 (2000).

<sup>362</sup> See Ge Jun, *supra* note 46.

<sup>363</sup> See Xuan Bingzhao & Zhou Zhibin, *supra* note 23, at 1756.

<sup>364</sup> Arbitration commissions are independent from administrative authorities and have no subordinate relationships with administrative authorities. There are no subordinate relationships between arbitration commissions themselves. See Arbitration Law, *supra* note 6, at art. 14.

<sup>365</sup> See Xuan Bingzhao & Zhou Zhibin, *supra* note 23, at 1757.



some respects 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.<sup>366</sup> It is unsurprising that arbitrators are thus easily viewed as government officials, and the standard of arbitrator impartiality is naturally expected to be the same as that of judges.<sup>367</sup> Furthermore, there is no Chinese code of ethics for arbitrators.<sup>368</sup> Therefore, regulation of arbitrators can hardly be realized through a common practice, market rules of competition, or reputation. On the contrary, regulation must be dependent upon state power and a criminal provision.

#### IV. EVALUATIONS OF THE CRIMINAL STATUTE AND PROPOSALS FOR REFORM

China's arbitrator liability system diverges in some respects from both civil law and common law in order to accommodate its peculiar cultural context. One rather unexpected move by the Chinese legislature was that they imposed criminal liability on biased arbitrators, which is rarely found in the rest of the world.<sup>369</sup> Arbitration can be efficient, inexpensive, and harmonious.<sup>370</sup> As wide discretion is left to the parties, their attorneys, and the arbitrators to fashion the procedure as they wish without any judicial interference,<sup>371</sup> it is possible for arbitrators to "betray" the trust of the parties and rule against the provision of the law.<sup>372</sup> However, the Chinese legislative attitude toward arbitration, demonstrated by the criminal statute, seems to be unfriendly to arbitrators and discourages deference to arbitration. To prevent the misconduct of a biased arbitrator, holding him criminally responsible appears to be the best alternative due to the emphasis on criminal law in the Chinese legal culture. Analyzing the criminal provision demonstrates that "when arbitrators step into judges' shoes, they seem to be wearing them on the wrong feet."<sup>373</sup> However, there are some

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<sup>366</sup> For example, the People's Governments of the municipalities arrange relevant departments and chambers of commerce to organize and establish arbitration commissions in a unified manner. See Arbitration Law, *supra* note 6, at art. 10.

<sup>367</sup> Xu Li, *supra* note 74, at 88.

<sup>368</sup> The criminal provision cannot completely replace the code of ethics of arbitrators. See Luo Guoqiang, *supra* note 72, at 71.

<sup>369</sup> See Xu Qianquan, *supra* note 105, at 122.

<sup>370</sup> See Kaplan, *supra* note 5, at 777-78.

<sup>371</sup> See CPR COMMISSION ON THE FUTURE OF ARBITRATION, COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 281-85 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001).

<sup>372</sup> Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 66-68 (2005).

<sup>373</sup> *Id.* at 57.

additional ways to help reform the criminal liability provision. Since the provision is abstract, there is much room relating to how to apply it. Some possible solutions such as private prosecution, criminal liability for the neutral arbitrator, civil liability, and a detailed definition of the criminal provision have also been proposed with the purpose of removing the workability limitations of the provision and making it function well. This part explores A) evaluations of the criminal provision and B) reform proposals.

A. *Evaluations on the Criminal Provision*

With the enactment, the task of ensuring arbitrator neutrality in China presents a number of possible barriers, both in perception and reality. While the criminal provision has been articulated, its purported effect is questionable because, as previously discussed, the ambiguity of its provisions make enforcement uncertain. On the other hand, the ambiguity of the provision will undoubtedly hinder arbitrators' power to evaluate the evidence at their discretion as well as provide People's Courts and People's Procuratorates the opportunity to abuse their power. A misapplication of the ambiguous provision will infringe on the legal rights and interests of the arbitrator and the parties. The Chinese legislature made an inaccurate analogy concerning arbitrators and judges when enacting the law without carefully examining the harsh consequences of a criminal penalty.<sup>374</sup> This results in the power of judicial review with arbitration expanded and the review cost increased. In turn, it seemingly would have had some negative impact on the arbitrator market and the development of arbitration in China.

1. *Inapt Analogy Between the Role of Arbitrators and Judges*

The Chinese legislature made an inapt analogy between the role of arbitrators and that of judges, in which the former are considered virtually identical to the latter. After all, arbitrators are not officials, as judges are.<sup>375</sup> Therefore, some scholars have claimed that if it was necessary to create a criminal provision dealing with arbitrator misconduct, it would be better phrased as fraud or infringement upon property, on the basis of contract, rather than a crime of dereliction of duty.<sup>376</sup>

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<sup>374</sup> See Xu Qianquan, *supra* note 64, at 122-23.

<sup>375</sup> See *id.*, at 57-58.

<sup>376</sup> See Huang Hui, *supra* note 141, at 123.

To ensure impartiality, it is imperative for China to regulate the biased arbitrators. The law makers, however, address the concern with a more severe means than may be necessary—criminal liability. A position that all adjudicators should be neutral and arbitrators should behave as impartially as judges confuses the distinction between arbitration and litigation.

“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.”<sup>377</sup> Arbitrators, as private actors, “perform their function for private gain.”<sup>378</sup> Consequently, blindly transplanting the criminal provision of Judicial Personnel of “Perversion of Law” and applying it to arbitrators is an ineffective method to achieve the desired social goals of impartiality and justice.<sup>379</sup>

## 2. *High Cost to Dispute Resolution*

The criminal provisions give the People’s Procuratorates power to intervene in arbitration. An increase in incidents of intervention carries the risk of an associated increase in cost of arbitration.

The crimes of dereliction of duty, which the state personnel who exercise state power may commit under the current Chinese law, involve a public prosecution case.<sup>380</sup> As Arbitration by “Perversion of Law” has been provided under the category of crimes of dereliction of duty, the suit should be filed by the People’s Procuratorates instead of the complainant.<sup>381</sup> Therefore, the People’s Procuratorates have been granted the power to review the findings of facts and application of laws in arbitration in order to prove the crime before the court. Further, in order to determine whether a “biased” arbitrator has gone “against facts and laws” and render a ruling, the People’s Courts have to examine and investigate the substantial parts of an arbitral award again,<sup>382</sup> which is equivalent to a retrial. That inquiry, however, challenges the finality of arbitration. Thus, the courts’ power has been greatly expanded. For many disputants, although the resolution is ostensibly by way of arbitration, it is the court’s ruling that ultimately resolves the case.<sup>383</sup> Arbitration itself serves no important purpose. The cost

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<sup>377</sup> Although an arbitrator performs a task that resembles that of a judge, there are critical differences between judges and arbitrators. Guzman, *supra* note 9, at 1302–03.

<sup>378</sup> *Id.* at 1303.

<sup>379</sup> See Song Lianbin, *supra* note 72, at 33–34.

<sup>380</sup> See Criminal Procedure Law, *supra* note 94, at art. 136.

<sup>381</sup> *Id.*

<sup>382</sup> See Xu Qianquan, *supra* note 64, at 124.

<sup>383</sup> Fan, *supra* note 90, at 129.

of dispute resolution has been increased because the statute seems to impose an additional level of litigation. The offence appears to be moving farther away from the principle of deference to arbitral rulings.

### 3. *Prelude to Abyss of Conflicts*

The criminal provision conflicts with China's international obligations and lacks detailed rules. The legislature has put itself and the judicial authority into a dilemma, in that the review of the merits of arbitration does not conform to China's international convention obligations, whereas omission of criminal liability is against China's criminal statute.<sup>384</sup> If international commercial arbitration is not subject to substantive scrutiny in China, then it fails to provide sufficient supervision as the criminal law requires.<sup>385</sup> The likely outcome is that only domestic commercial arbitrators, not international arbitrators, will be convicted.<sup>386</sup> Such discrimination towards domestic arbitrators would damage the integrity of China's criminal justice system. But to guarantee equal prosecution, the People's Procuratorates would have to review the merits and reasoning of international arbitration proceedings, which constitutes a violation of the New York Convention.<sup>387</sup> Furthermore, a foreign law is commonly applied in international commercial arbitration.<sup>388</sup> It is not appropriate for a Chinese court to make a decision concerning the interpretation of a foreign law, which may constitute an infringement of foreign sovereignty in violation of the basic principle of international law, since the foreign law is enacted and should only be interpreted by the foreign authority.<sup>389</sup> Moreover, the determination of foreign law is another problem on account of the complexities of different languages, inaccurate understanding of the laws, and varying legislative intent.<sup>390</sup> Therefore, Chinese judicial organs' inherited way of thinking in terms of domestic law might bring about real "Verdict by Perversion of Law."

Without detailed rules, the crime of Arbitration by "Perversion of Law" is of little practical value. Besides what has been mentioned earlier,<sup>391</sup>

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<sup>384</sup> See New York Convention, *supra* note 20, at art. V; The Amendment, *supra* note 28, at art. 20.

<sup>385</sup> See Huang Hui, *supra* note 141, at 124

<sup>386</sup> *Id.*

<sup>387</sup> See Fan, *supra* note 90, at 127.

<sup>388</sup> See Kaplan, *supra* note 5, at 777.

<sup>389</sup> From an international law perspective, the power to interpret law is part of sovereignty, which can only be exercised by a national authority. See LIANG XI, GUOJI FA (国际法) [INTERNATIONAL LAW] 99 (2011).

<sup>390</sup> Huang Hui, *supra* note 141, at 124.

<sup>391</sup> See *supra* Part III.B.1.

the provision has not been defined well enough and there is still much ambiguity.<sup>392</sup> Sometimes an arbitral award is rendered through mediation,<sup>393</sup> which is not required to be in accordance with law.<sup>394</sup> In such a case, it is very difficult to determine whether there is “arbitrator running counter to the law.”<sup>395</sup> In addition, an arbitrator is criminally liable only when his or her conduct is intentional, but the law is silent on the arbitrator’s liability for negligence resulting from a lack of professional care and due diligence.<sup>396</sup> More importantly, it provides no clue to distinguish an intentional act from a negligent behavior.<sup>397</sup> Another unreasonable situation could occur if a foreign arbitral award made by a Chinese arbitrator is recognized and enforced by a Chinese court, but another Chinese court finds the arbitrator guilty of “Perversion of Law.”<sup>398</sup>

#### 4. *The Harsh Consequences of Criminal Liability*

Excessive or inappropriate criminal penalties may prevent productive conduct and should be minimized.<sup>399</sup> The criminal penalty can result in harsh consequences to the individual, his or her family, and indirectly to society as a whole.<sup>400</sup> A state should avoid misusing a criminal penalty and instead tailor a penalty that avoids excessive, ineffective, or costly penalties. In a modern society, with the focus moving towards citizens’ rights and interests, civil laws play a more important role than criminal laws.<sup>401</sup> Criminal laws should be cautiously applied, as lawmakers should attempt to procure maximum social benefits—effective prevention and control of misconduct at a minimum social expense—by reducing or eliminating criminal penalties.<sup>402</sup> China should address the issue of arbitrator impartiality, but it should consider the potential harms associated with penal punishment. Some scholars are even worried that the law might be easily

<sup>392</sup> See Song Lianbin, *supra* note 72, at 26–31.

<sup>393</sup> See Arbitration Law, *supra* note 6, at art. 51 (stating that “[a]n 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 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.”).

<sup>394</sup> See Rogers, *supra* note 372, at 67.

<sup>395</sup> See Huang Hui, *supra* note 141, at 124.302

<sup>396</sup> See Song Lianbin, *supra* note 72, at 29–30.

<sup>397</sup> *Id.*

<sup>398</sup> Huang Hui, *supra* note 141, at 124–25.

<sup>399</sup> See Chen Zhongqian, *supra* note 76, at 2–3.

<sup>400</sup> See Han Yonghong, *supra* note 159, at 146.

<sup>401</sup> See Tan Zhongzheng, *supra* note 281, at 68–69.

<sup>402</sup> See *id.* at 68.

misused which, in turn, would deter many foreign candidates that otherwise would have been appointed as arbitrators.<sup>403</sup> It is a double-edged sword that might harm both the state and the individual. Lawmakers should avoid employing criminal punishment as much as possible, and only consider that remedy as a last resort. The previous function of criminal liability discussed above may be replaced by some other means of social regulation, such as a code of ethics or civil liability for arbitrators.

*B. Proposals for Reform*

As outlined earlier, the newly established criminal liability regime for arbitrators in China is riddled with problems. The current regime can be described as a legislator-based system, which is characterized by paternalism and rigidity.<sup>404</sup> It appears that impartiality of arbitration and deference to arbitral rulings are two conflicting values. This problem is particularly severe and disconcerting in China. The simplistic approach of the criminal enactment needs to be reformed because it is unable to achieve the goal of arbitrator impartiality. This does not suggest, however, that China should wholly abandon the criminal provision

In discussing the reform of the regime of arbitrator criminal liability, a better method for realizing the goal of reconstruction is through a judicial interpretation of the criminal statute, borrowing from the U.S. approach of deference to arbitration. That is to say, during the judicial review of arbitral award, a court should carry out its responsibilities subject to the requirement of respecting the substantial matters such as the finding of facts and the application of laws in arbitration. In general, it must be kept in mind that “although the arbitrator performs a task that resembles that of a judge, there are critical differences between judges and arbitrators.”<sup>405</sup> The goal of a judicial interpretation is to design an effective mechanism to ensure fairness and justice in the course of arbitration and, at the same time, give deference to an arbitral award. In restructuring the criminal provision of a biased arbitrator, four aspects need to be taken into consideration: 1) private prosecution, 2) criminal liability for the neutral arbitrator, 3) civil liability, and 4) a detailed definition of the criminal provision.

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<sup>403</sup> See Fan, *supra* note 90, at 129.

<sup>404</sup> See Tan Zhongzheng, *supra* note 281, at 77–78.

<sup>405</sup> Guzman, *supra* note 9, at 1302–03.

### 1. *Private Prosecution*

To place an important check on the power of the People's Procuratorates, Arbitration by "Perversion of Law" could be better reframed as a crime of private prosecution through judicial interpretation. Rather than rely on heavy-handed public prosecution, judicial interpretation of the criminal provision can require private parties to exercise their private right of action if there is arbitrator misbehavior. The complainant, instead of the People's Procuratorates, should accuse the "biased" arbitrator of the crime and bear the burden of proof. A comparable U.S. provision requires that a party seeking vacatur of an arbitration award on the 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."<sup>406</sup>

After such a reform, the People's Procuratorates would no longer have the power to prosecute an arbitrator. Converting the prosecution from a governmental power into a party's right could limit the potential for misuse of the criminal provision, since it is more difficult for a complainant—who has limited power to collect evidence compared to the People's Procuratorates—to demonstrate a violation in court. The more difficult it is for the complainant to bring an action, the higher the threshold is for implementation of the criminal provision. Thus, there exists less potential for the misuse of the provision. In addition, the U.S. approach in finding proof of corruption and fraud can be referenced in structuring the private prosecution.

One potential concern regarding private prosecution is that it would promote too much litigation. Some critics worry that if losing parties in arbitration are able to sue the arbitrator, they will frequently misuse the right.<sup>407</sup> This concern is misplaced: private prosecution does not necessarily lead to a flood of litigation.<sup>408</sup> As the losing party bears a heavy burden to establish specific facts that indicate improper motives on the part of the arbitrator, they have more difficulty collecting evidence than in a public prosecution. Without sufficient evidence, the losing party will likely recognize that their probability of success in a suit against the arbitrator is low. A party that has lost in arbitration will also expect to lose before the courts. In fact, the losing party fulfills the vast majority of arbitral awards.

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<sup>406</sup> ANR Coal Co. v. Cogentrix of N.C., 173 F.3d 493, 500 (4th Cir. 1999).

<sup>407</sup> See Chen Wei, *supra* note 162, at 56.

<sup>408</sup> See *id.* at 63-64.

Only a small fraction of all parties with disputes make a court filing, and only a small percentage of those that are actually filed go to trial.<sup>409</sup>

## 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 commission or another appointing authority.<sup>410</sup> Non-neutral arbitrators have long been considered agents of the parties in many jurisdictions.<sup>411</sup> In the U.S., it is acceptable for non-neutral arbitrators to be impartial and only the neutral arbitrator is required to be neutral.<sup>412</sup> The most important aspect of an arbitrator's impartiality is the duty of information disclosure,<sup>413</sup> especially the information concerning a particular interest or identity.<sup>414</sup>

In China, a significant issue that needs to be clarified is whether non-neutral arbitrators assume the same penal responsibility as a neutral arbitrator. For example, if an arbitral award is rendered on the basis of the opinion of the majority, and the arbitrators who make the decision are accused of Arbitration by "Perversion of Law," it is not fair for the non-neutral arbitrator to face the same punishment since he is not supposed to be "neutral." Non-neutral arbitrators sometimes are selected because a party or its counsel anticipates that an arbitrator of a particular type will react favorably to the arguments that the party plans to present, which, as to potential receptivity, is one of the advantages of arbitration.<sup>415</sup> Unfortunately, nothing in the current Chinese law provides either a

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<sup>409</sup> See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 5 (1983).

<sup>410</sup> Guzman, *supra* note 9, at 1279, 1303. Similarly, CIETAC Arbitration Rules provides, "within fifteen (15) days from the date of receipt of the Notice of Arbitration, the Claimant and the Respondent shall each nominate, or entrust the Chairman of CIETAC to appoint, an arbitrator, failing which the arbitrator shall be appointed by the Chairman of CIETAC." China International Economic and Trade Commission Arbitration Rules (promulgated by the China Council for the Promotion of International Trade/China Chamber of International Commerce, Feb. 3, 2012, effective May 1, 2012), art. 25, available at <http://www.cietac.org/index/rules.cms>.

<sup>411</sup> Nathan Isaacs, *Two Views on Commercial Arbitration*, 40 HARV. L. REV. 929, 934-35 (1927).

<sup>412</sup> Byrne, *supra* note 223, at 1816.

<sup>413</sup> See Laurence Shore, *Disclosure and Impartiality: an Arbitrator's Responsibility vis-à-vis Legal Standards*, 57-APR DISP. RESOL. J. 32, 35 (2002).

<sup>414</sup> See Salomon et al., *supra* note 210, at 80-81.

<sup>415</sup> James H. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for "Nonneutrals"*, 11 AM. REV. INT'L ARB. 295, 295 (2000).



distinction in liabilities among different arbitrators or a detailed working procedure of the criminal statute concerning the disclosure duty.<sup>416</sup>

To ensure a smoother transition and structural adjustment, attention should be paid to the distinction between arbitrators on the panel, as they have different incentives in arbitral proceedings.<sup>417</sup> There seems to be no good reason why all arbitrators should be required to be identically impartial since they have varied ways of appointment.<sup>418</sup> Some flexibility is necessary. A clarification should be made in future judicial interpretation such that only the neutral arbitrator should be criminally liable for Arbitration by “Perversion of Law.” Such clarification would have a positive impact, especially since China is in a critical stage of encouraging the development of arbitration.

### 3. *Civil Liability for Arbitrators and Arbitration Commissions*

Unfortunately, both the civil law tradition and arbitration experience in China do not yet provide a strong foundation for non-criminal means of controlling arbitrator misconduct. In civil law countries, arbitration is deemed as a matter of contract instead of a means of adjudication.<sup>419</sup> The arbitrator misconduct results in a liability similar to breach of contract.<sup>420</sup> Since arbitrators are not government officials like judges, it is not likely for them to commit a crime of dereliction of duty.<sup>421</sup> However, as outlined earlier, arbitrators are viewed as judges in the context of China. But under the civil law influence, Chinese law does not allow arbitrators to enjoy the judicial immunities which are available to arbitrators in common law countries. After all, arbitration in China has not been developed along with the market economy, but occurred through official measures.<sup>422</sup> Arbitration

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<sup>416</sup> See ZHANG JINFAN, *supra* note 289, at 311.

<sup>417</sup> See Fan, *supra* note 90, at 127.

<sup>418</sup> In respect of the Three-Arbitrator Tribunal, for example, CIETAC Arbitration Rules provides: “Within fifteen (15) days from the date of receipt of the Notice of Arbitration, the Claimant and the Respondent shall each nominate, or entrust the Chairman of CIETAC to appoint, an arbitrator, failing which the arbitrator shall be appointed by the Chairman of CIETAC; within fifteen (15) days from the date of the Respondent’s receipt of the Notice of Arbitration, the parties shall jointly nominate, or entrust the Chairman of CIETAC to appoint, the third arbitrator, who shall act as the presiding arbitrator.” See China International Economic and Trade Commission Arbitration Rules (promulgated by the China Council for the Promotion of International Trade/China Chamber of International Commerce, Feb. 3, 2012, effective May 1, 2012), art. 25, available at <http://www.cietac.org/index/rules.cms>.

<sup>419</sup> Liu Xiaohong, *supra* note 70, at 84.

<sup>420</sup> *Id.*

<sup>421</sup> See Luo Guoqiang, *supra* note 72, at 70.

<sup>422</sup> In the early time, some officials were part time arbitrators and the income of the arbitration commissions was dependent on the government budget. Even their structures were the direct imitation of the government. See Xuan Bingzhao & Zhou Zhibin, *supra* note 23, at 1756-57

in China lacks the nongovernmental characteristics as well as a professional regulation such as arbitrator ethics.<sup>423</sup> In the background of a culture that favors criminal law, penal regulation of arbitrator misconduct has easily been thought the best option for China.

Arbitration develops because of market economy, and market forces seem to function effectively and play a more important role than legal rules.<sup>424</sup> Any change of institution must be prudential, especially regarding criminal law, as confidence in the criminal law is one of the most rooted legal faiths in China. Chinese lawmakers seem to think that imperfect rules are better than none, given the lack of market rules, the absence of industry regulation, a code of arbitrator ethics, and civil liability, but fail to realize that the cure is worse than the illness. In fact, “[e]nsuring 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.”<sup>425</sup> Thus, arbitral institutions should enforce conduct standards enacted in the form of codes of ethics.<sup>426</sup> More importantly, the conduct standards, norms, rules and guidelines governing arbitrators’ professional conduct must be detailed rather than merely provided as abstract concepts.

The basic role of arbitration is as a sort of legal service, which is, in essence, the market participants’ self-regulation and unofficial dispute resolution system without state intervention.<sup>427</sup> Thus, the issue of quality of service is critical, and the criterion of service recognized by the participants is necessary for the healthy development of the market.<sup>428</sup> If the quality of service is lower than the standard of the market, and the service provider cannot be expelled, the result would be a decrease in quality of service and a collapse of the market in the end.<sup>429</sup> In terms of arbitrator impartiality, it is reasonable and fair to make a biased arbitrator—the provider of poor quality service—assume some liability. The core issue here is not whether the biased arbitrator should be liable, but how and to what extent he or she should be liable. There are some market forces that discourage arbitrator misconduct.<sup>430</sup> Arbitrators wishing to attract business have an incentive to

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<sup>423</sup> See Fan, *supra* note 90, at 130.

<sup>424</sup> See Chen Zhongqian, *supra* note 76, at 3.

<sup>425</sup> Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 458 (2004).

<sup>426</sup> See Rogers, *supra* note 372, at 58.

<sup>427</sup> See Lu Jing, *supra* note 100, at 85.

<sup>428</sup> See Fan, *supra* note 90, at 126.

<sup>429</sup> See *id.*

<sup>430</sup> Deng Ruiping & YiYan, *Shangshi Zhongcai Zhidu Jianlun* (商事仲裁制度简论) [*On Commercial Arbitration*], 11 CHONGQING DAXUE XUEBAO (重庆大学学报) [J.CHONGQING UNIV.] 117 (2005).

develop a reputation of impartiality. Arbitrators' actions may be restricted by custom, conscience, and concerns such as caring for their own reputation, or being sympathetic to both parties so that they are obedient to the law, even though there is no legal punishment.<sup>431</sup>

Civil liability may affect China's future arbitration regime. As discussed earlier, arbitration is largely an alternative process for resolving disputes under private law.<sup>432</sup> Some commentators have 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.<sup>433</sup> "[A]n arbitration proceeding is more properly viewed as the product of contract."<sup>434</sup> All contractual agreements include the obligation to perform in good faith.<sup>435</sup> Where an arbitrator acts partially, he or she betrays the principle of good faith and breaches the contract, which breach gives the injured party the right to sue the biased arbitrator for that breach.<sup>436</sup> If a court determines that arbitrator misconduct existed in a case, the aggrieved party is usually entitled to damages. The arbitrator could demand additional payment up front to compensate for the civil liability that he could face after the arbitration, which would be costly enough to make arbitration less appealing. In order to attract customers, arbitrators compete not only through the quality of their decisions and the desirability of their procedures, but also on price.<sup>437</sup> A single transaction can ruin an arbitrator's reputation. This, in turn, would give impartial arbitrators a price advantage, as many arbitrators are repeat players.

From a policy perspective, it might even be desirable to hold arbitration commissions jointly liable for arbitrator misconduct. It represents a transfer of the risk of liability from the arbitrator to the commission, which is forced to internalize the costs of liability—causing it to monitor the behavior of its arbitrators. Assuming that arbitration commissions seek to attract business, arbitrators and arbitration commissions will seek to develop a reputation for impartiality. If an arbitrator commits Arbitration by "Perversion of Law" on account of pecuniary interest, it certainly will have some impact on both the arbitrator and the arbitration commission's reputation. Fearing losing their job, the arbitrator, therefore,

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<sup>431</sup> See Chen Zhongqian, *supra* note 76, at 3–4.

<sup>432</sup> See Davitz, *supra* note 207.

<sup>433</sup> See Xu Qianquan, *supra* note 121, at 39.

<sup>434</sup> A commercial arbitration starts under the condition that the parties to a transaction contract to arbitrate their disputes. An arbitration agreement can also be deemed a covenant that arbitrators contract with these parties to resolve their disputes. Guzman, *supra* note 9, at 1316.

<sup>435</sup> See U.C.C. § 1-304 (1999).

<sup>436</sup> Deng Ruiping & YiYan, *supra* note 430, at 116.

<sup>437</sup> Guzman, *supra* note 9, at 1328.

would have no reason to do anything other than attempt to act impartially in the same circumstances and in the same fashion as a judge. Arbitrators' current incentive towards corruption would be replaced by an incentive to avoid unnecessary litigation. As a whole, the civil liability approach would impose a duty on the arbitrator to handle cases in the same impartial fashion as would a national court. Admittedly, there would still be some cases in which the risk of bias remains, but a large share of the potential instances of bias would be eliminated.

#### 4. *Detailed Definitions of the Criminal Provision*

By carefully defining the conditions of the criminal provision by listing some of the specific situations, 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 respecting the contractual nature of arbitration and make some appropriate adjustments when interpreting the law. For instance, the criminal provision can be restricted to domestic 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 criteria of an arbitrator's "Perversion of Law" should be different from those of a judge.<sup>438</sup> Further, when defining the issues of the provision, some principles such as party autonomy, good faith, public policy, and equal hearing should also be followed.

## V. CONCLUSION

Rights carry with them corresponding responsibilities.<sup>439</sup> It has been recognized that arbitration rulings must be subject to some judicial review to ensure that an arbitral proceeding is operating within a state's legal framework.<sup>440</sup> This supports the conclusion that the judiciary should act as a watchdog in supervising arbitrators and providing a remedy when necessary.

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<sup>438</sup> In accordance with the 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 the 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. Clearly, the requirement of "in compliance with the law" is inferior to that of "the law as the standard." See Arbitration Law, *supra* note 6, at art. 7; Civil Procedure Law, *supra* note 57, at art. 7.

<sup>439</sup> See Xu Qianqian, *Zhongcaiyuan Falv Zeren Zhi Jiantao* (仲裁员法律责任之检讨(上)) [*The Criticism of Arbitrators Legal Responsibility II*], 9 *ZHONGCAI YANJIU* (仲裁研究) [ARB. STUDY] 35, 41 (2006).

<sup>440</sup> Deng Ruiping & YiYan, *supra* note 430, at 117.

However, the criminal provision of Arbitration by “Perversion of Law” causes tension between arbitration impartiality and deference to arbitral rulings. Particularly, the ambiguity of the provision makes it hard to function. A better solution would be to use a judicial interpretation to restructure the criminal provision. In the judicial interpretation, China should tailor the offence as a private prosecution, alleging criminal liability only for the neutral arbitrator. Further, China should provide detailed guidelines for the criminal provision and civil liability for biased arbitrators. A judicial interpretation concerning the criminal provision of Arbitration by “Perversion of Law” can act as an effective mechanism to ensure both impartiality and deference to arbitration without abandoning the criminal provision. Thus, arbitration could have sufficient protection from the misuse of government power while, at the same time, the necessary flexibility to deter a biased arbitrator.

China has been seeking this balance for years. Arbitrators should be required to assume liabilities in light of arbitral justice for losses of parties incurred from their deliberate or negligent misconducts in arbitration. But in order to realize the efficiency of arbitration, arbitrators should also be granted a certain amount of immunity when performing their duties. Maintaining the balance between these two needs depends on the understanding of the nature of arbitration and the roles of arbitrators. This balance reflects the different attitude towards arbitration. The diversity of culture, tradition, and maturity of market economy among different nations plays a very important role in distinguishing the policies and laws of each nation. China may take specific measures within its own context to support arbitration, but those measures should require deference to an arbitral award to protect the legal rights of the parties.