WHY ARBITRATE RATHER THAN LITIGATE COMMERCIAL DISPUTES IN CHINA? IMPLICATIONS FOR THE RULE OF LAW

Jian Fu*

ABSTRACT

In this paper the author reviews the process leading to the enactment of the PRC Arbitration Law and analyses the characteristics of this Law. The drafting of this Law started in August of 1991 and reflected the perceived need for a more open door approach and the acceleration of economic law reform. It also reflected the standardisation of different types of 'arbitrations' in China. Although the legislators originally planned to enact this Law within one year this took three years due to systemic problems and the slow development of China's open door policy. The Arbitration Law is probably one of the laws most influenced by foreign experience. It reflects the common features of other countries' arbitration laws as well as having Chinese characteristics. The Law sets out the basic rules of arbitration, arbitration under the agreement, the procedure for selecting the arbitration commission by the parties under the agreement, the system of 'a single and final award', the use of arbitration in camera and the system of the court supervision. Through a comparative study of the characteristics of both arbitration and litigation in China the author offers insights into the development of the Rule of Law and its application to commercial dispute handling.

I. INTRODUCTION

As a way of dispute resolution, arbitration has a long history. It came into being in the ancient Greek times. With the development of capitalism, it is gradually being more widely used as a way of dispute resolution; eventually it became an alternative to litigation[1] due to its many different features from litigation. The arbitration laws of most countries evolved on the basis of long-term arbitration practice. China's Arbitration Law went through the same process. To understand China's Arbitration Law we must understand the history of China's arbitration practice and the legislative process of China's Arbitration Law.

Although the Arbitration Law of the People's Republic of China came into effect in 1995, the practice of arbitrating commercial disputes has existed for a long time in China, especially in the case of foreign-related arbitrations. Two major arbitration bodies for foreign-related commercial disputes were established soon after the foundation of the People's Republic of China. On 6 May 1954, the then Administration Council of the Central Government (now the State Council of the PRC) released the Decision on the Establishment of the Foreign Trade Arbitration Commission within

* Research Officer, National Centre for Corporate Law and Policy Research, University of Canberra, Australia

1 M Pryles, and I Kazuo, *Dispute Resolution in Australia-Japan Transactions*, Sydney, LBC, 1983.

China Council for the Promotion of International Trade (CCPIT).[2] According to this Decision, the Foreign Trade Arbitration Commission (FTAC) was established to resolve all the disputes arising from the foreign trade contracts and transactions.

On 31 March 1956, CCPIT released the Provisional Rules for the Arbitration Procedure of the Foreign Trade Arbitration Commission.[3] In April, the first official Chinese arbitration body, FTAC, was established within CCPIT.[4] Subsequently, on 21 November 1958, the State Council released the Decision on the Establishment of Maritime Arbitration Commission (MAC) within CCPIT.[5] Another arbitration body, the Maritime Arbitration Commission (MAC) within the CCPIT, was set up in January 1959.[6] Provisional Rules for the Arbitration Procedure were enacted in January 1959 after MAC was set up.[7]

MAC mainly dealt with disputes arising out of navigation, sea transport and insurance. Both commissions had operated under the guidance of CCPIT.[8] One thing which needs to be noticed is that MAC not only dealt with foreign-related maritime cases but also dealt with domestic maritime cases.[9]

From the establishment of the two foreign-related disputes arbitration commissions until late 1970s, not many disputes were resolved by arbitration because few foreign-related disputes arose. Instead, these disputes were resolved mainly by conciliation. However, in February 1980 the State Council renamed FTAC as the China Foreign Economic and Trade Arbitration Commission (CIETAC). The scope of this organisation's arbitration was extended to cover disputes arising from various kinds of economic co-operation with other countries, such as joint ventures, foreign investment in the building of factories, loans between Chinese and foreign banks etc.[10] However, the rules of CIETAC remained unchanged from those of FTAC.

With the adoption of an open-door policy, foreign trade and foreign economic co-operation developed rapidly. CIETAC dealt with an increasing number of arbitration cases: in 1985 it accepted 37 cases: in 1986 this number increased to 75; in 1987 this number leapt to 129; in 1988 it increased to 189 cases.[11]

In order to underscore the increasing internationalisation and modernisation of Chinese arbitration as a result of the adoption of the new open-door policy, CCPIT replaced CFETAC with CIETAC and replaced MAC with CMAC in 1988 following the ratification of this change by the

2 Civil Law Deparment of the Legislative Affairs Commission of the Standing Committee of the National People's Congress of PRC, *Encyclopaedia on the Arbitration Law of PRC*, Beijing, Law Publishing House, 1995, 72.
3 Ibid.
4 He, S, *A Summary of the Arbitration Law of the PRC*, Beijing, China Legal System Publishing House, 1995, pp 116-117.
5 Ibid, p 117.
6 Ibid.
7 Ibid.
8 Ibid.
9 *The Provisional Rules for the Arbitration Procedure of MAC*
10 V Triebel and G Xu, 'International Economic, Trade and Maritime Arbitration in the People's Republic of China: New Developments', (1989) *6 Journal of International Arbitration 13.*
11 The Civil Law Department of the Legislative Affairs Commission of the Standing Committe of The National People's Congress of the People's Republic of China, *Encyclopaedia of the Arbitration Law of the People's Republic of China,* Beijing, Law Publishing House, 1995, p 73.

State Council.[12] The State Council extended the scope of CIETAC's arbitration to cover all the disputes arising from international economic trade and empowered CIETAC to amend the Rules of Arbitration in accordance with:

(i) the laws of China;

(ii) the international conventions concluded by or involving China; and

(iii) international customs.[13]

The Arbitration Rules of CFETAC and CMAC were amended and put into effect on 1 January 1989. These two sets of Rules were based on a study of the UNCITRAL Rules, the Arbitration Rules of the Arbitration Institution of the Stockholm Chamber of Commerce and the ECC Arbitration Rules.[14] In the 1990s, foreign economic and trade arbitration developed greatly in China. In 1993 there were 486 cases accepted by the three sub-commissions of CIETAC.[15] There were 829 cases accepted in 1994 and 800 cases were accepted in the first eleven months of 1995.[16] These figures show that foreign arbitration through CIETAC has become widely accepted.

CIETAC's Arbitration Rules were again amended in March 1994 in order to clarify and streamline its processes and strengthen its attraction to foreign investors. After the Arbitration Law was enacted in August 1994, CIETAC amended its Arbitration Rules once again to comply with the new law.

Various stages in the establishment of China's arbitration system for foreign-related economic and trade disputes can be identified. First, the Central Government of the PRC decided to establish this system by administrative regulations. At that time, the arbitrations which occurred were basically administrative arbitrations. This was because the arbitration bodies existing at that time were established by the government; the arbitration rules were made by the government; the arbitration scope was specified by the government and the arbitrators were government workers. Second, the Civil Procedure Law (for Trial Implementation) (1982) provided foreign economic and trade arbitration in one chapter. In 1987 the PRC became a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitration Awards (1958). During this period, China's foreign economic and trade arbitration began to be internationalised. With the enactment of the Civil Procedure Law (1991) the arbitration system was further developed. Third, with the enactment of the Arbitration Law (1995) a modern and internationalised arbitration system was finally established in the PRC.

One fundamental characteristic of modern arbitration is the autonomy of the parties. Before the Arbitration Law was enacted, domestic

12 Wang, CM, 'Arbitrating Business Disputes in Beijing', (1994)1(1) *Commercial Disputes Resolution Journal* 39-51.

13 The State Council, 'Reply Concerning the Renaming of the Foreign Economic and Trade Arbitration Commission as the China International Economic and Trade Arbitration Commission and the Amendment of its Arbitration Rules', *Gazette of the State Council of the People's Rupublic of China,* 21 June 1988.

14 S Bond and L Yan, 'International Arbitration in the Asia Pacific Region', (1992) *International Court of Arbitration Bulletin* 22.

15 Ibid.

16 Wang, GG, 'The Dispute Resolution System in China', (1996)13 (2) *Journal of International Arbitration* 27.

commercial dispute arbitration in the PRC was in fact administrative arbitration without autonomy of the parties. The first decrees of the PRC with respect to domestic dispute arbitration were made by the State Commission for Basic Construction in its Provisional Regulation on Construction and Equipment Contracts, and the commission's Provisional Regulation on Survey and Design Contracts. According to these two regulations, the disputes arising from these two types of contracts must be arbitrated by the State Commission for Basic Construction or its sub-commissions at the provincial level.

On 8 August 1979, the State Economic Commission, the State Administration Commission for Industry and Commerce and the People's Bank of China released the Joint Circular on Some Questions about the Administration of Economic Contracts in which the State Economic Commission and the State Commission for Industry and Commerce were empowered to arbitrate economic disputes. Administrative arbitration was first introduced in the form of 'Law' on 13 December 1981 in the Economic Contract Law of the PRC which was approved by the Fourth Session of the Fifth National People's Congress.[17]

Administrative arbitration in China has the following elements: the arbitration commissions are the departments of the government; either party to the dispute can apply for arbitration even without arbitration agreement; the jurisdiction by level is adopted; if one party is not satisfied with the award, he or she may then bring an action to the court.

There are two fundamental key features of administrative arbitration:

(i) there is no autonomy of the parties;

(ii) the arbitration commissions' powers to arbitrate is not derived from the parties but from its administrative powers.

Although these features of the PRC's administrative arbitration violated the basic principles of commercial arbitration, administrative arbitration was still the most common way to resolve domestic economic disputes before the Arbitration Law was enacted because these arbitration commissions had strong executive powers. For instance, up to 1994 there were about 3400 arbitration commissions and some 8800 arbitrators who worked on economic contracts in the whole country.[18] In 1990, before the autonomy of arbitration was stipulated in the Civil Procedure Law (1991), 478,147 economic contract cases were arbitrated by the arbitration commissions on economic contract.[19] Apart from the arbitration commissions on economic contract, several other commissions, such as arbitration commissions on technological contract and arbitration commissions on real property, were set up under the relevant administrative departments and most of their arbitrators were government workers.

The purpose for the introduction of the Arbitration Bill in 1991 was to modernise and internationalise China's arbitration and to improve the economic legal system which had been created by the National People's Congress. After the Civil Procedure Law was enacted in April 1991, three major litigation procedure laws, namely the Criminal Procedure Law, the Civil Procedure Law and the Administrative Procedure Law, were enacted.

17 The Economic Contract Law of PRC; article 48.

18 He, S, *A Summary on the Arbitration Law*, Beijing, China Legal System Publishing House, 1995, p 15.

19 Ibid.

The arbitration law is, in essence, a procedural law. To fully frame its procedural laws the Legislative Affairs Commission under the Standing Committee of the National People's Congress started to investigate and research the operation of arbitration in the whole country. I was lucky to be a member of the first 6 person group to do this research. This investigation and research examined more than 10 government departments and some leading arbitration commissions. Generally, we found that foreign-related economic arbitration was quite mature and in keeping with the development of arbitration in other countries. However, major issues arose in relation to domestic arbitration. Some of the issues or questions were as follows:

(i) Should there be one uniform national law on arbitration or just leave it within different laws and regulations?

Before the Arbitration Law was enacted there were many provisions on arbitration such as the Law enacted by NPC or its Standing Committee, the Administrative Regulation released by the State Council and the Provincial Regulation released by the People's Congress at the level of province, autonomous region and municipality directly under the control of central government. Up to 1991 there were 14 Laws, more than 80 Administrative Regulations and about 200 Provincial Regulations containing provisions on arbitration.[20] The contents of these provisions were very different. Some provided that arbitration might be conducted without the agreement of the parties to the dispute while others provided that the disputes could only be arbitrated on the parties' agreement. Some provisions said that if either party was not satisfied with the first award, he or she might appeal to the upper level arbitration commission. If either party was not satisfied with the second award, he or she might sue to the court. If either party was not satisfied with the first judgment, he or she might appeal to the upper level court. The second judgment was final. This system was known as 'two awards and two judgments'. Some provisions stipulated that if either party was not satisfied with the award, he or she might sue to the court. If either party was not satisfied with the first judgment, he or she might appeal to the upper level court. The second judgment was final. This system was known as 'one ward and two judgments'. Of course some provided that when the dispute arose, either party might go to the arbitration commission or to the court. This system was known as 'either arbitration or litigation'. Many domestic arbitrations adopted the system of 'one award and two judgments'. Some adopted the system of 'two awards and two judgments'. Few adopted the system of 'either arbitration or litigation'. Most members of the Standing Committee of the National People's Congress thought that it was better to have a uniform law to avoid chaos in domestic arbitration and to standardise the domestic arbitration.

(ii) The scope of arbitration.

It was clear that the scope in the early Laws and Regulations was too broad, not only including commercial disputes such as disputes over economic contracts, disputes over technological contracts, disputes over

20 Ibid, at note 1, p 12.

joint ventures but also including non-commercial disputes such as disputes over fishing areas, disputes over issuing manufacturing licenses, disputes over ownership of land, disputes over administrative fees or fines, disputes over employment contracts, disputes over changing jobs, disputes over whether one could seek more than one job at one time, disputes over leasing small size industrial enterprises, disputes over the testing of quality of several kinds of goods and even disputes over planned birth-giving etc. The word 'arbitration' was obviously abused. These types of 'arbitrations' were not those in which a referee was chosen by both parties on their agreement and arbitration was brought by arbitration commission not by the parties to the dispute. Some of these disputes had been dealt with by the competent administrative departments, some of them had been tested by the technical departments. Although these disputes were not suitable to be arbitrated they were routinely arbitrated.

(iii) What should arbitration institutions be like?

Most of the so-called 'arbitration commissions' were not true arbitration commissions. This can said of the real property arbitration commission, the economic contract arbitration commission within the State Administration for Industry and Commerce, the technological contract arbitration commission, etc. These were in fact government departments operating under the name of 'an arbitration commission'. They were in fact exercising administrative powers on behalf of the 'referee'. Most of their arbitrators were also government workers.

(iv) What should the character of the arbitration agreement be?

It was clear that before the Arbitration Law was enacted many kinds of arbitrations were being conducted without the agreement of the parties and under the territorial jurisdiction. These were not in accordance with the nature of arbitration.

(v) What arbitration systems and proceedings should be used?

Before 1994, some arbitration commissions adopted jurisdiction by level of government; some adopted territorial jurisdiction; some adopted the system of 'a single and final award', some adopted the system of 'a second and final award', some adopted the system of 'one award and two judgments', some applied 'two awards and two judgments'. This was very confusing and complex.

(vi) What review (or supervision) of the arbitration should be provided?

Other questions which arose concerned whether it was necessary for the court to conduct substantial review on the award and whether the court was entitled to disallow the arbitration award? These were two very debatable problems. In other countries, the courts normally do not substantially review the arbitration award. But in China most of the domestic arbitrations are administrative ones without the free will of the parties. Some legislators suggested the adoption of a different supervision system for foreign-related arbitrations and domestic arbitrations.

Apart from these problems, another big issue which was considered was whether there should be one uniform national arbitration law or two

national arbitration laws dealing with foreign-related arbitrations and domestic arbitrations, respectively.[21]

Soon after this research was completed, Deng Xiaoping made his famous speech on his tour to south China. The Standing Committee of the National People's Congress of the PRC decided to tighten the legislation for Arbitration to facilitate economic reform. It planned to take one year to enact this piece of legislation. The two main reasons for this were that, firstly, under the instruction of the senior official of the Standing Committee, some laws could be borrowed directly from other countries' legislative experience, and, secondly, that arbitration law was a procedural law and therefore would not be difficult to enact.

The achievement or implementation of such a program is often easier said than done, as the literature on law making and policy implementation shows. Although the Arbitration Law is not difficult and not very long,[22] it took more than three years to enact this new law due to the different opinions on each of the key issues mentioned above,[23] such as how to standardise the current domestic arbitration commissions; this was because it involved the reform of government departments. The slow process of legislation also reflected the gradual development of the open-door policy.

After the Arbitration Law was enacted in 1994, the State Council's General Office released two administrative regulations on the implementation of this law. The first was the Method to Re-establish Arbitration Institutions on 1 August 1995. The second was Circular on Several Problems to be Clarified Concerning the Implementation of the Arbitration Law of the PRC on 8 June 1996. The new Arbitration Rules of CIETAC were released on 4 September 1995 and came into effect on 1 October 1995. The basic structure of foreign-related arbitration was by then formed.

Foreigners who wish to understand China's foreign-related arbitration system must therefore understand the Arbitration Law, the two administrative regulations of the State Council and the newly revised Arbitration Rules of CIETAC and the arbitration rules of the major newly established arbitration commissions, such as the Beijing Municipal Arbitration Commission and the Tianjin Municipal Arbitration Commission. The following discussion in this paper is based on the Arbitration Law of the PRC, the Regulations of the State Council, the Arbitration Rules of CIETAC and those of the Beijing Municipal Arbitration Commission. I will provide a brief introduction to the legislative background and discuss the basic rules and systems adopted in the Arbitration Law of China.

II. WHAT DISPUTES CAN BE ARBITRATED?

Before the Arbitration Law was enacted almost any kind of dispute could be arbitrated.

Referring to the international experience, mainly the UNCITRAL Model Law of Arbitration and the Arbitration Rules of the Arbitration Institute of

21 At the beginning of legislation CIETAC strongly suggested two arbitration laws but most academics strongly suggested a uniform law in order to standardise legislation.
22 There are 79 articles totally.
23 It was enacted in August of 1994.

Stockholm, and aiming at the problems in China's practice, the scope of arbitration in the PRC is determined by the following basic principles or assumptions:

(i) the parties to the dispute should be equal;

(ii) the parties are entitled to deal with this dispute;

(iii) international arbitration may involve contract disputes and noncontract disputes.

The scope of arbitration is limited in two ways:

(i) contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organisations which are equal subjects may be arbitrated;[24]

(ii) the following disputes may not be arbitrated: marital, adoption, guardianship, support and succession disputes; administrative disputes which must be handled by administrative organs as prescribed by law.[25]

In (ii), the first type of dispute involves the people's non-property rights such as divorce and adoption disputes and so is excluded from the scope of arbitration. The second type of dispute resolution is within the government's executive power and it has been decided that these administrative disputes cannot be arbitrated.

Article 2 implies that only commercial disputes can be arbitrated.

Labour disputes and agricultural contractors' contract disputes arising within the agricultural collective economic organisations are property disputes. But one party to these types of disputes is government or the agencies of government. Special procedures should therefore be applied to these disputes. The Arbitration Law simply left this to be developed in later legislation.[26]

III. WHERE TO ARBITRATE ?

In most foreign countries there are *ad hoc* arbitration and institutional arbitration. It is very flexible to select the place to make arbitration. In China the legislators took the view that it is very difficult to ensure impartiality in *ad hoc* arbitrations if 'the single and final award' system is applied. The Arbitration Law does not directly say that *ad hoc* arbitration is not to be allowed, but in article 16 it is provided that an arbitration agreement shall contain the following particulars, including 'a designated arbitration commission'. This impliedly excludes the *ad hoc* arbitration from being conducted in China. Because China is one member of the New York Convention on Recognition and Enforcement of Foreign Arbitration Awards (1958), the *ad hoc* arbitration awards made by the arbitration institutions of the member states of the Convention are however recognised and enforceable in China so long as there are no conflicts with the reservations held by China on this Convention.

There were many types of domestic arbitration commissions before the Arbitration Law was enacted. Most of the arbitration commissions were set up within the different government departments operating at all

24 The Arbitration Law, article 2.
25 Ibid, article 3.
26 Ibid, article 77.

levels. They had a territorial judiciary system and a judiciary system at all levels. They were playing two roles-that of government departments and that of arbitration institutions. Obviously, these were not in compliance with the assumptions of a modern arbitration system. In many cases the parties to the disputes had to accept the awards from these arbitrations although they might not want their cases to be arbitrated or they might not be happy with the awards. The parties to the dispute were afraid of the administrative power of these arbitration commissions.

There were two opinions as to how to legislatively establish the arbitration institutions. The government departments in which the arbitration commissions were set up thought that the arbitration institutions should be set up in different professional groups. They acknowledged that it was not appropriate for 'administrative arbitration' to continue but they also thought that it would take a long time to transfer from the old to the new system. They suggested that the Arbitration Law should only set the basic requirements for the arbitration institutions and let the arbitration commissions compete, and in this way, transfer to the new modern arbitration system. Many people thought that this would not modernise China's arbitration but make it more chaotic. Another approach was to empower the government to be in charge of the establishment and reorganisation of the existing arbitration institutions. This second approach was adopted finally in the new legislation. One purpose of this new legislation was to standardise these arbitration institutions. Articles 6 and 10 of the Arbitration Law also emphasise the abolition of the territorial jurisdiction system and the jurisdiction by level system.

Article 14 provides guidelines for the government to ensure the independence and impartiality of arbitration. Under article 79 the arbitration commissions established before 1 September 1995 are required to be reorganised. Based on this article and article 10, the State Council General Office promulgated the Reorganisation of Arbitration Institutions Program (on 1 August 1995) and issued the Circular on Several Problems to be Clarified Concerning the Thorough Implementation of the Arbitration Law (on 8 June 1996). According to these two Regulations, all domestic cases accepted by the old arbitration commissions before the Arbitration Law came into effect had to be arbitrated by the reorganised arbitration commissions.[27]

CIETAC and CMAC have been the key foreign-related arbitration institutions in China since they were established. They are impliedly given power by the Arbitration Law to arbitrate disputes involving foreign elements.[28] Although the names of these two commissions are not expressly mentioned, due to legislative custom, the words 'foreign-related arbitration commissions' in article 66 refer to CIETAC and CMAC.[29] But, in article 66, 'Foreign-related arbitration commissions may be organised and established by the China Chamber of International Commerce'. The word 'may' rather than 'shall' is used. This clause is perhaps confusing. When the State Council reorganised and established the domestic arbitration

27 The State Council's Circular on Several Problems to be Clarified Concerning the Implementation of the Arbitration Law of the PRC, article 1.
28 Ibid, article 66.
29 Ibid, at note 1, p 75. He, op.cit., 116.

institutions in accordance with article 10, it held that article 66 implied that the reorganised arbitration commissions may arbitrate the foreign-related arbitration cases. So, in article 3 of the State Council General Office's 'Circular on Several Problems to be Clarified Concerning the Thorough Implementation of the Arbitration Law' (issued on 8 June 1996), it is provided that the main duties of the reorganised arbitration commissions shall be to accept domestic arbitration cases. Where the parties to a foreign-related arbitration case voluntarily select arbitration by a reorganised arbitration commission, such commission may accept this case. Under the new Arbitration Rules of CIETAC, CIETAC can arbitrate some domestic disputes, such as securities disputes.

The costs of arbitration for foreign-related arbitration cases accepted by reorganised arbitration commissions shall be charged at the same rate as is applicable to domestic arbitration cases. Under the 1996 Circular, there are more arbitration commissions which may arbitrate foreign-related cases apart from CIETAC and CMAC. There is to some extent competition between CIETAC and CMAC, and the reorganised arbitration commissions. The costs of conducting an arbitration in CIETAC and CMAC are higher, but their arbitrators are more qualified. While the costs involved in the reorganised arbitration commissions are lower, their arbitrators are not very experienced in foreign-related arbitration. Because CIETAC has a longer history, having already established a world-known reputation, and has more than 90 arbitrators from Hong Kong, Macao and some foreign countries, at least for the immediate future the reorganised arbitration commissions cannot be the rivals of CIETAC and CMAC. There is no doubt that CIETAC and CMAC are still the most popular arbitration institutions for foreign-related arbitration.

No *ad hoc* arbitration is conducted in China. If the parties select an arbitration institution, this means that they select the arbitration place where the arbitration commission is located. As to whether the parties can choose a place outside China in which to arbitrate, the Arbitration Law is silent on this matter. According to article 16, the parties must designate the arbitration commission. It is therefore thought that if the designated arbitration commission is located outside China, the dispute can be arbitrated outside China.

On the nature of the arbitration institution, three opinions emerged in the process of law making. One opinion was that the arbitration institution was a service body like the law firm and that the current arbitration commissions under the government at all levels should be abolished. Any organ which has met the requirements for the arbitration institution could constitute an arbitration commission because the administrative arbitration violated the basic rule of the parties' autonomy. But the legislators noted that although administrative arbitration was inconsistent with international custom, it was a very efficient means to resolve disputes in China.

The second opinion was based on the view that the arbitration commission was a non-profit making agency of the government. Most legislators opposed this opinion. The third opinion was that arbitration was a public power-judiciary power and the arbitration commissions were judiciary institutions. This opinion was eventually adopted. Hence, in article 14, it is provided that arbitration commissions shall be independent from administrative organs and there shall be no subordinate relationships between arbitration commissions and administrative organs. As judicial

institutions, arbitration commissions shall be formed under a regulatory body. The Supreme People's Court did not want to be involved in this matter, but the State Council was happy to be the body in charge of establishing and reorganising the arbitration institutions. The influence of administrative departments still remained, as article 10 stipulated. The administrative departments' involvement in the establishing and reorganising of arbitration institutions disappointed many legislators. Actually, article 10 was the result of conciliation between the legislature and the government.

The requirements for establishing an arbitration commission are provided in article 11. This article is borrowed from the requirements for a legal entity found in the General Principles of Civil Law.

It is also worth noticing article 14; this provision stipulates that an arbitration commission shall be independent from administrative departments and that there shall be no subordinate relationships between arbitration commissions and administrative departments. There shall also be no subordinate relationships between different arbitration commissions. This article may seem to be very strange to westerners. It reflects the early arbitration situation existing in China. This provision aims at abolishing the system of jurisdiction by level and sought to secure the independence of arbitration. This provision aims to make the arbitration institutions less interfered with the local protectionism compared with the courts. The enactment of the Arbitration Law reflects one aspect of the development of China from the centrally controlled planned economy to a market economy.

IV. ON WHAT BASIS CAN ARBITRATION BE BROUGHT? OR, ARBITRATION BY FREE WILL OR BY COMPULSION?

Compared with litigation, arbitration is more likely to be accepted because of the free will principle which is assumed in arbitration. This is the fundamental principle of arbitration. This principle implies that the parties to the dispute jointly choose to arbitrate the dispute; the parties jointly decide what disputes to be arbitrated; the parties jointly choose where to arbitrate; and the parties jointly choose a tribunal consisting of one arbitrator or three arbitrators.

As we have seen, before the Arbitration Law was enacted, there were many kinds of arbitrations. Some were traditional arbitration based on the principle of free will. But most early 'arbitrations' stipulated in the State Council's administrative regulations and the provincial regulations of the Provincial People's Congress were compulsory arbitration.[30] In compulsory arbitration, the arbitration commission could arbitrate the disputes upon the application of one party to the dispute without an arbitration agreement; the arbitration commission could even arbitrate the disputes on its own without an arbitration agreement and without one party's application. In effect, this served to resolve disputes by administrative measures.

The Arbitration Law now expressly provides the principle of arbitration by free will; this is set out in the first chapter of the general principles.[31] In the subsequent articles the right to choose an arbitration commission and

30 Ibid, at note 1, pp 12-13.
31 *The Arbitration Law*, article 4.

the right to choose arbitrators are given to the parties.[32] This change reflects the evolution of arbitration in China and the fact that China is responding to the effect of internationalisation and standardisation or legal harmonisation.

V. IS ARBITRATION AGREEMENT NECESSARY OR UNNECESSARY?

Foreign-related arbitration in China started in 1956. From the beginning, the principle of arbitration by agreement was applied in accordance with international arbitration.[33] The arbitration agreement includes an independent agreement or arbitration clause in a contract.[34] It is one of the important aspects of the free will principle. Before 1986, the rule of arbitration by agreement was not applied in domestic dispute arbitration. Either party to the dispute could apply for arbitration. Article 48 of the Economic Contract Law (1981) provided that the parties to the economic contractual dispute should seek to resolve the dispute through conciliation and either party could apply for mediation or arbitration, or directly sue in a court where the dispute could not be solved through conciliation. Even without an application from either party, the dispute could be arbitrated. For example, article 17 of the Sale of Industrial and Mineral Products Contract Regulation (1984) provided that disputes arising from quality test had to be arbitrated by the Authority for Quality Supervision and Testing.

Arbitration by agreement in the Arbitration Law stopped the system of 'administrative arbitration', getting close to international custom, but with a few differences. Under article 16 of the Arbitration Law, there are six features of an arbitration agreement: (i) it must be in written form; (ii) it may be a clause within a contract or may be a separate agreement; (iii) it may be reached either before or after the disputes arise; (iv) it must be an expression of intention to apply for arbitration; (v) it must include matters to be arbitrated; (vi) it must select an arbitration commission. However, oral arbitration agreements are not recognised and *ad hoc* arbitration is not conducted in China. These are two differences from international practice. The abolition of 'administrative arbitration' shows that a more modern way to resolve disputes has taken the place of the old method of arbitration derived from the former Soviet Union.

VI. WHO CAN BE APPOINTED AS ARBITRATOR/ARBITRATORS?

Most of the other countries' arbitration acts summarily stipulated the requirements for appointment as an arbitrator. Some countries even simply provide that if a person is of full legal capacity he/she can be appointed as an arbitrator. However, in China, some legislators were afraid that this would cause arbitration institutions to abuse their powers with the result that the quality of the arbitration could not be assured. But some other legislators thought that in order to keep the then arbitrators continuing their work, it was better not to specify the requirements for arbitrator. The final provision sought to maintain a balance between these two views.

32 Ibid, articles 6, 31.
33 *The Provisional Rules of FTAC(1956)*, article 3. *The Provisional Rules of MAC (1959)*, article 3.
34 Ibid, note 29.

Article 13 of the Arbitration Law not only stipulates the professional requirements which must be met by arbitrators but also provides character standards for arbitrators. Anyone who has one of the following professional qualifications can now be appointed as an arbitrator:

(i) Where a person has been engaged in arbitration work for at least eight years. This includes eight years of working in an arbitration commission before the Arbitration Law came into effect and eight years of working in an reorganised arbitration commission;

(ii) Where a person has been a practising lawyer for at least eight years. This includes working as a full time or a part time lawyer. It excludes those who passed the Lawyers' Examination managed by the Ministry of Justice but who have not been practicing. 'The legal worker' is excluded within this article;

(iii) Where a person has served as a judge for at least eight years. As the court exercises the power to supervise arbitration it is not suitable for serving judges to act as arbitrators. This provision is very different from other countries' provisions. Other countries' arbitration acts rarely prohibit judges from being arbitrators. In this regard China's Arbitration Law may be more modernised;

(iv) Where a person has been engaged in legal research or legal education and possesses a senior professional title. 'Legal research' includes legislative research and legal academic research. 'Senior professional titles' means associate professorship or above and associate research fellow or above; or

(vi) Where a person has acquired the knowledge of law, engaged in the professional work in the field of economy or trade, and possesses a senior professional title or equivalent. This means that non-legal professionals may also be appointed as arbitrators.

One of the reasons why arbitration is widely selected by the parties to disputes is its impartiality. This makes it extremely important for the arbitrators to have good characters. China's legislators strongly supported the addition of one further requirement as a condition for appointment as an arbitrator: an arbitration commission must appoint its arbitrators from among righteous and upright persons.[35]

Although the Arbitration Law does not expressly prohibit the current public procurators, current judges, current public servants from being arbitrators, the rules of independence and impartiality, as well as article 14, impliedly include this requirement.

The requirements for arbitrators of the foreign-related arbitration institutions are not stipulated in the Law. It is left to the relevant arbitration institutions to set the standards for their own arbitrators. Normally, besides the requirements provided in the Law, the arbitrators of the foreign-related arbitration must meet other requirements. In CIETAC the arbitrators with Chinese citizenship must have a good command of at least one foreign language such as English. Its arbitrators with foreign citizenship must have a relatively good command of Chinese. These foreign arbitrators accept appointment mainly for the reputation not for the payment[36] because CIETAC cannot pay them as well as the other international arbitration

35 *The Arbitration Law*, article 13
36 Ibid, at note 1, p 99

institutions. Some experts from other professions who are not legally trained may also be appointed as arbitrators.

Although the reorganised domestic arbitration commissions may now arbitrate foreign-related disputes, no commission has yet started to appoint arbitrators with foreign citizenship. This stops the parties to foreign-related disputes from referring their cases to these commissions.

The methods of appointing arbitrators provided for in the Arbitration Law are quite different from the ways used before either in domestic arbitrations or in foreign-related arbitrations. For instance, before the Arbitration Law was enacted in 1994, the arbitrators in domestic disputes normally were appointed by their arbitration commission.[37] In foreign-related arbitrations, even if the two arbitrators could be appointed by each party respectively, the third arbitrator was appointed by the chairman of the arbitration commission.[38]

In the process of law making many legislators thought that it was better to let the parties appoint all the three arbitrators so as to comply with the free will principle. Considering that it was difficult for the two parties to reach an agreement on the third arbitrator, the Arbitration Law provides that this person must be appointed by the chairman of the arbitration commission entrusted by the two parties.[39]

VII. HOW TO ARBITRATE?

The Arbitration Law in essence is a procedural law. Its procedures in many respects are similar to those found in the Civil Procedure Law. Many articles of the Arbitration Law were borrowed from the Civil Procedure Law, such as articles in sections 1 and 3 of chapter 4, article 58 of chapter 5, articles of chapter 6, article 71 of chapter 7.

According to the Arbitration Law, the arbitration can only be brought by the parties who meet prescribed conditions.[40] One party to the dispute must submit the application to the arbitration commission with the arbitration agreement.[41] After the arbitration commission accepts a case the applicant must be sent the arbitration rules and the panel of arbitrators. The respondent shall be sent the arbitration rules and the panel of arbitrators as well as the copies of the application.[42] The respondent must then submit a written defence to the arbitration commission within the time limit specified in the arbitration rules.[43] The parties to the disputes must appoint the arbitrator or arbitrators and form the tribunal. The tribunal must then arbitrate the case in camera. Both parties must provide their evidence. The tribunal also has the power to collect evidence. Both parties may examine the evidence given by the other side. In the process of arbitration, the parties may reach a conciliation or mediation agreement. If the parties cannot reach such a conciliation or mediation agreement, the tribunal will make the final decision according to the opinion of the majority of arbitrators.

37 *The State Council's Regulation on Economic Contract Arbitration,* article 16.
38 *Arbitration Rules of CIETAC* (1994), article 24.
39 *The Arbitration Law,* article 31.
40 *The Arbitration Law,* article 21.
41 Ibid, article 22.
42 Ibid, article 25.
43 Ibid.

The key rules in the arbitration procedure are as follows: (i) the parties select the arbitrator /arbitrators to form the tribunal; (ii) the arbitrator/ arbitrators with personal interests in the case must be challenged; (iii) the arbitration is conducted in camera; (iv) the parties bear the liability to provide evidence; (v) the arbitration commission may carry out mediation; (vi) the award is a single and final award.

VIII. WHAT IS THE RELATIONSHIP BETWEEN THE ARBITRATION INSTITUTION AND THE COURT ?

Today arbitration is a well recognised way of resolving commercial disputes in China and is an alternative or supplement to litigation. Internationally, the arbitration institutions enjoy independence from interference from the courts and also are under the supervision of the courts. Most countries' Arbitration acts include a provision for the court to supervise an arbitration. But the most salient feature of this supervision is that the court only supervises the arbitration procedure and does not deal with the substantial problems.

As early as 1991, China considered the international practice in regard to this issue. Considering that many arbitrators of the domestic arbitration institutions were not well qualified, the Civil Procedure Law provided two ways of supervising the arbitration. For domestic arbitrations, the court will not only supervise the legality of the procedure but will also examine the legality of the substantial issues. If any such problem arises the court may rescind the arbitration award. For foreign-related arbitrations, the court only supervise the procedural issues. If there is any procedural problem the court may set aside the arbitration award. Once the award is rescinded, the dispute must be dealt with by the court. However, once an arbitration award is set aside, the award still exists so that if both parties to the dispute agree later, the award can still be enforced by the court. The same approach was applied in the Arbitration Law with slight changes.[44] By this way the Arbitration Law drew upon the experience of other countries as well as considering the practical situation which existed in China.

Apart from its supervision function, the courts help and co-operate with the arbitration institutions. When the parties to the dispute have different opinions on the effectiveness of the arbitration agreement, either the arbitration commission or the court may make the decision. But, if one party applies to the court for a decision while the other party applies to the court, only the court can make the decision.[45] Because the arbitration institutions are nonjudicial institutions, they are not entitled to take the interim measures such as the property preservation and evidence preservation.[46]

Before the Arbitration Law was enacted, because domestic arbitration adopted the territorial jurisdiction system, awards were very difficult to be enforced due to the existence of local protectionism. The reasons for abolishing the territorial jurisdiction were to break up local protectionism and adopt the free will principle. This is another important difference between arbitration and litigation.

44 *The Arbitration Law,* articles 58, 71.
45 Ibid, artıcle 20.
46 Ibid, articles 28, 46.

IX. HOW LONG DO THE PARTIES HAVE TO WAIT?

Before the Arbitration Law was enacted the arbitration term was left open to the arbitration commissions themselves. The arbitration term was very variable and flexible and article 52 of the Arbitration Rules of CIETAC provided that the tribunal should make an award within 9 months after the tribunal was formed. CIETAC might extend this term upon the application of the tribunal. Almost all the arbitration rules of the domestic arbitration commissions did not set the time limit for making an arbitration award. This caused great delay in resolving disputes.

According to article 74 of the Arbitration Law, the time limit for domestic arbitration is provided by the relevant law. In the absence of a time limit, the time limit for litigation is applied. The new 1995 Arbitration Rules of CIETAC maintain the nine months' time limit.

X. HOW MUCH DO THE PARTIES HAVE TO PAY FOR ARBITRATION?

Before the Arbitration Law was enacted, the fees asked by the arbitration commissions were set by the competent government department under which the arbitration commissions were established, for instance the fees for economic contract arbitration were set by the State Administration for Industry and Commerce.[47] The fees collected by CIETAC are ratified by CCPIT.

Article 76 of the Arbitration Law provides that measures for charging arbitration fees must be submitted to the price control authorities for examination and approval. This article only applies to domestic arbitration. CIETAC maintains its old fees charging measures. But, in article 3 of the State Council's Circular on Several Problems to be Clarified Concerning the Thorough Implementation of the Arbitration Law, it is provided that the costs of arbitration for foreign-related arbitration cases accepted by the reorganised arbitration commissions must be charged according to the same standards as those applicable to domestic arbitration cases. So, there are two measures for foreign-related disputes arbitration. This may cause a little competition between the reorganised arbitration commissions and CIETAC.

CONCLUSION

Compared with litigation in China, arbitration is usually more able to reflect the free will of the parties to the disputes, arbitration has simpler and more flexible procedures, arbitration suffers less undue interference from government and the courts, arbitration is usually quicker, arbitration is usually cheaper, arbitration is conducted in camera so that the secrets of the parties to the dispute can be kept and either party will not lose his face after arbitration. All these features of arbitration are different from those of litigation. These features make arbitration a more popular way to resolve disputes than litigation in China.

The Arbitration Law of China drew upon many experiences such as from the UNCITRAL Model Law of Arbitration as well as from the experience of other countries. The process of drafting this legislation reflected the urgent need of a modern arbitration system for economic

47 Regulation on the Arbitration of Economic Contract, article 36.

system reform. It also reflected the conflicts between this need and the then practice. It showed the reluctant disappearance of the government departments from the stage of arbitration. The conciliation or compromise reached between the legislature and the government departments in the drafting process could be seen in various articles of the Arbitration Law.[48] In conclusion the Arbitration Law was clearly one of the 'Laws' greatly influenced by the foreign legislation and practice and had the potential to further develop China's economic and trade internationalization.

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48 *The Arbitration Law,* articles 10, 76, 79.