

The Changing Landscape of Arbitration Agreements in China: Has the SPC-Led Pro-arbitration Move Gone Far Enough?

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I. Critique of the Validity Regime under Arbitration Law

A. Overly Rigid Conditions

The crucial statutory provision that governs the validity of arbitration agreements in China is Article 16 of the Arbitration Law (AL),¹ which stipulates, “An arbitration agreement shall include arbitration clauses stipulated in the contract and agreement of submission to arbitration that are in *writing* before or after disputes arise.”² Further, “[a]n arbitration agreement *shall* contain the following particulars: (1) an expression of intention to arbitrate; (2) matters for arbitration; and (3) a designated arbitration commission.”³

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1. See Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16, *translated in* 34 I.L.M. 1650, 1654 (1995) (P.R.C.) [hereinafter Arbitration Law] (listing the particulars that arbitration agreements must contain).
 2. See *id.* at art. 16 ¶ 1 (legislating that arbitration agreements must indicate an intention to apply for arbitration).
 3. See *id.* at art. 16, ¶ 2 (legislating that arbitration agreements must contain the arbitrable matters therein).

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It is clear from the first paragraph of Article 16 that parties' agreement to arbitrate must be made in writing.⁴ The writing requirement tends to clarify the issue of whether parties have actually consented to arbitration.⁵ That said, however, the AL fails to define what forms might satisfy the provision's writing requirement.⁶ With respect to this issue, an indirect answer may be found by referring to Article 11 of the Contract Law (the CL),⁷ which stipulates that "written contracts" refer to "contracts *signed* in written instruments such as letters and electrically or electronically transmitted documents."⁸ The jurisprudence on this issue, however, has been restricted to "*signature-based consent*" without taking up the scenario in which the consent to arbitrate is manifested by other means.⁹ It is true that consent will be easily established if the

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4. See MICHAEL CHARLES PRYLES, DISPUTE RESOLUTION IN ASIA 97 (3d ed. 2006) (describing a written agreement as something tangible that is represented in the form of written instruments such as letters, faxes, or e-mails); see also JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 34 (2004) [hereinafter JINGZHOU TAO, ARBITRATION] (explaining that although the first paragraph of Article XVI of the Arbitration Law requires arbitration agreement to be written, there is no explicit requirement on the form); see also Robert Briner, *Arbitration in China Seen from the Viewpoint of the International Court of Arbitration of the International Chamber of Commerce*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 25, 27 (2005) (stating that a written arbitration contract contains an expressed intent to request arbitration, the matters for arbitration, and the designated arbitration commission).
 5. See ARBITRATION LAWS OF CHINA 55 (The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China ed. 1997) (emphasizing that an arbitration clause is framed before the occurrence of a dispute, which demonstrates the parties' willingness to resort to arbitration in the case of a dispute); see also WANG SHENGCHANG, RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA 77 (1997) (affirming that Article XVI holds that an arbitration agreement must be made in written form and that it is binding whether it relates to a present or future dispute); see also JINGZHOU TAO, RESOLVING BUSINESS DISPUTES IN CHINA 2802 (2005) [hereinafter JINGZHOU TAO, BUSINESS] (explaining that Chinese economic contract laws provide legislative background to support the idea that arbitration laws should have to meet a writing requirement).
 6. See WANG SHENGCHANG, *supra* note 5, at 78 (noting that arbitration clauses cannot be made orally but that electronic means such as fax, telex, or cables are sufficient to comply with the written requirement); see also JINGZHOU TAO, BUSINESS, *supra* note 5, at 2802 (establishing that art. 11 in the Contract Law gives perspective on the types of written forms, which include letters, fax, electronic data interchange, and e-mail); see also Li Hu, *Setting Aside an Arbitral Award in the People's Republic of China*, 12 AM. REV. INT'L ARB. 1, 10 (2001) (defining "written form" as a form that can visibly describe what is being agreed to, which includes written, typed, and electronic forms).
 7. See Contract Law (promulgated by the Second Session of the Ninth Nat'l People's Cong., March 15, 1999, effective Oct. 1, 1999), art. 11, available at http://novexcn.com/contract_law_99.html [hereinafter Contract Law] (holding that China's Contract Law simultaneously repealed and superseded the Economic Contract Law, Foreign Economic Contract Law, and Technology Contract Law).
 8. See *id.* (defining a "writing" as memorandum of contract, letter or electronic message).
 9. See Briner, *supra* note 4, at 27 (noting that an arbitration agreement could exist outside the original contract); see also Ian A. Rambarran, *I Accept, But Do They? . . . The Need for Electronic Signature Legislation on Mainland China*, 15 TRANSNAT'L LAW. 405, 426 (2002) (explaining that PRC Contract Law does not expand on the legal effect of electronic signatures); see also Minyan Yang, *The Impact of Information Technology Development on the Legal Concept—A Particular Examination on the Legal Concept of "Signatures"*, 15 INT'L J.L. & INFO. TECH. 253, 260 (2007) (finding that if Chinese law requires a form for a transaction, most require a written form, not specifying whether a signature is even required).

arbitration agreement is signed by both parties.¹⁰ However, this may not always be the case in modern arbitration practice. According to a premier international arbitrator, Jingzhou Tao, the “written” requirement shall be stipulated dynamically in light of the rapid development of modern means of communications and for the convenience of transactions.¹¹ Problematic situations often arise as to whether a non-signatory third party can be bound by the arbitration agreement, a situation that is seen frequently with the rising use of arbitration in China;¹² in particular, to what extent the “written form” can be upheld in cases of contract assignment, agency relationship, etc.¹³ The AL is silent as to these particular issues and the vague regulation under Article 16(1) could be interpreted to deny the validity of arbitration agreements when the consent is given under a different capacity, until the practice is later resolved by the SPC through a series of judicial replies and opinions.¹⁴

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10. See ARBITRATION LAWS OF CHINA, *supra* note 5, at 56 (informing that arbitration institutions do not accept an application for arbitration without a written agreement); see also Jane Volz & Robert Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 905 (1996) (explaining that once an arbitral award is set aside by a court, new arbitration cannot begin unless there is consent from both parties); see also Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 428 (2006) (explaining that according to the Arbitration Law, parties must agree to arbitrate “of their own accord”).
 11. See JINGZHOU TAO, ARBITRATION (citing that written requirement of arbitration shall be stipulated dynamically in light of other forms of modern communication); see also So Cho Yin, *A Comparative Study of Arbitration Law in China and Hong Kong with Respect to Some Selective Areas* (2003), http://online.lgt.polyu.edu.hk/fyp/documents/bsc_03/PO_182_03.pdf (explaining that this requirement can be satisfied by means other than writing); see also *Asian Projects and Construction Update: Dispute Resolution in China* (2003), http://74.125.47.132/search?q=cache:tacllQUUyrcJ:www.mallesons.com/publications/Asian_Projects_and_Construction_Update6939182W.htm+%22China%22+and+%22arbitration+law%22+and+%22writing+requirement%22&cd=3&hl=en&ct=clnk&gl=us (illustrating that an exchange of e-mails, while not written in the usual manner, satisfied the writing requirement of arbitration).
 12. See Kun Liang, *The Comparative Analysis of the Existing Chinese and English Arbitration Systems from Arbitration Agreement Perspectives*, 13 COLUM. J. ASIAN L. 35 (1999) (noting that there are still unanswered questions concerning the amount of force to be given to an arbitration agreement’s effect on a non-signatory); see also Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgments in China*, 13 COLUM. J. ASIAN L. 35, 94 (1999) (stating that for a non-signatory, it is important to assess the nature of a Chinese judgment in terms of recognition and enforcement); see also *Attractive Arbitration: Revision of Arbitration Law in China* (2005), <http://74.125.47.132/search?q=cache:cD2Nao0fr3UJ:www.liuhule.com/column.asp%3Fid%3D157%26catid%3D5+%22China+Arbitration+Law%22+and+%221994%22+and+%22non-signatory%22&cd=6&hl=en&ct=clnk&gl=us> (discussing that the issue of effects of an arbitration agreement on non-signatory parties is being examined).
 13. See Wang Liming, *An Inquiry into Several Difficult Problems in Enacting China’s Uniform Contract Law*, 8 PAC. RIM L. & POL’Y J. 351, 381 (Keith Hand trans., 1999) (describing situations where different interpretations of written form, with respect to contracts, exist); see also WEI-QI CHEN, RECENT DEVELOPMENTS IN THE JUDICIAL INTERPRETATION ON ARBITRATION LAW IN CHINA (2007), <http://www.jurist.org.cn/doc/uclaw200705/uclaw20070508.pdf> (emphasizing that while the statute fails to describe “written forms,” the new interpretation offers a more expansive definition); see also Wei Li, *A Brief Introduction to Commercial Arbitration in China, available at* <http://eng.yzlawyer.com/cgi-bin/GInfo.dll?DispInfo&w=yingwen&nid=2356> (stating that arbitrators may draw different conclusions because of the flaws within the statute).
 14. See Kun Liang, *supra* note 12, at 35 (observing that while strict written requirement exists in the statute, there is no need for the agreement to be signed by the parties).

In addition to the “in writing” requirement for consent, substantive requirements have to be met for an arbitration agreement to be considered valid.¹⁵ As required by the second paragraph of Article 16, an agreement’s effectiveness is dependent on the existence of three conditions¹⁶ in an arbitration agreement: (1) an expression of intention to arbitrate; (2) matters for arbitration; and (3) a designated arbitration commission.¹⁷ While there is not much dispute regarding the first two conditions, the third one, a “designated arbitration commission,” has raised considerable concern and criticism for being too rigid.¹⁸ Pursuant to Article 18 of the AL: “If an arbitration agreement has failed to set forth the arbitration commission to hear the matter or has failed to define it clearly, the parties may remedy the defect by a supplementary agreement. In the absence of a valid supplementary agreement, the arbitration agreement is invalid.”¹⁹ By virtue of this provision, the choice of the arbitration commission must be specified (which excludes the possibility of ad hoc arbitration).²⁰ Moreover, it must be clearly specified or at least be made clear in a supplementary submission; otherwise the arbitration agreement will be void.²¹ As such, the most typical defects in concluding arbitration agreements in China are incorrect or inconclusive references to the choice of arbitral commission, which has been referred to as “defective or pathological arbitration clauses” in Tao’s commen-

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15. See *Züblin International GmbH v. Wuxi Woke General Engineering Rubber Co., Ltd* (Sup. People’s Ct., Jul. 8, 2004), available at http://www.prac.org/materials/2006_July_eBulletin.pdf (holding that a valid arbitration clause contains the following elements: an expression of intention to apply for arbitration, matters for arbitration, and a designated arbitral institution); see also Eu Jin Chua, *The Laws of the People’s Republic of China: An Introduction for International Investors*, 7 CHI. J. INT’L L. 133, 139 (2006) (describing that Article 16 stipulates that a valid arbitration agreement must express the parties’ intention, contain the matters for arbitration, and designate an appropriate institution); see also Marianne M. Chao et al., *White Paper: Arbitration in China* (Mar. 2004), available at http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=1603 (noting the following elements be required for a valid arbitration: an expression of intention to apply for arbitration, matters that should be referred to arbitration, and a designated arbitration commission).
 16. See Arbitration Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16, translated in 34 I.L.M. 1650, 1654 (1995) (P.R.C.) at art. 18 (quoting Article 16, which states an arbitration agreement shall contain an expression of intention to apply for arbitration, matters for arbitration and a designated arbitration commission).
 17. See QIAO XIN, *COMPARATIVE COMMERCIAL ARBITRATION (BIJIAO SHANGSHI ZHONGCAI)* 173 (Beijing: China Law Press, 2004); see also Steven Smith et al., *International Commercial Dispute Resolution*, 42 INT’L LAW. 363, 366 (2007) (commenting that China Arbitration Law requires arbitration agreements to contain certain requirements); see also Shouhua Yu, *Recognition and Enforcement of International Commercial Arbitration Awards—Focusing on Regulations and Practice in China* (2002), http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1055&context=stu_llm (noting that the three particulars must be expressly stated together or present in the arbitration agreement).
 18. See Arbitration Law, *supra* note 16, at art. 18 (quoting Article 18, which stipulates parties may reach a supplementary agreement in the absence of clear provisions, but should the parties fail to craft a supplementary agreement, it is null and void).
 19. See *id.*
 20. See *id.*
 21. See Charles Kenworthy Harer, *Arbitration Fails to Reduce Foreign Investors’ Risk in China*, 8 PAC. RIM. L. & POL’Y J. 393, 399 (1999) (commenting that an ambiguous arbitration commission can invalidate the entire arbitration agreement); see also Taroh Inoue, *Introduction to International Commercial Arbitration in China*, 36 H.K.L.J. 171, 177 (2006) (explaining that under Article 16 of the Arbitration Law the parties must specify an arbitration commission to resolve their dispute); see also Jessica Zoe Renwald, Note, *Foreign Investment Law in the People’s Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution*, 16 IND. INT’L & COMP. L. REV. 453, 472 (2006) (stating that the arbitration commission must be indicated with specificity, for an arbitration agreement to be valid under the Arbitration Law of China).

tary on the Chinese arbitration practice.²² The following case may provide an illustration on how the stringent requirement of “specificity of an arbitration commission” has worked in real life.

The claimant and respondent signed a cooperation contract in 1996. Article 39 of the contract read that “any dispute under the contract should be arbitrated under the Shanghai International Trade Promotion Commission Foreign-Related Arbitration Commission.” After the dispute arose, the parties resorted to the CIETAC Shanghai sub-commission, but the commission ruled that “since the arbitration commission agreed does not exist, and no subsequent supplementary submissions are available, the arbitration clause has to be voided under Articles 16 and 18 of the Arbitration Law, and thus the jurisdiction cannot be entertained.”²³

Indeed, there have been many reports that not only CIETAC, but also LACs suffered greatly from the “killing provisions” (Articles 16 and 18)²⁴ and that the parties’ arbitral desires can be defeated if the arbitration agreements failed to clearly provide the institutional identity.²⁵ These defects and inconsistencies may include: selecting two arbitration commissions in one contract, providing merely the place of arbitration or institutional rules without nominating the arbitration commission, quoting incorrectly the name of the arbitration commission, and other similar mistakes.²⁶ As a result of the over-rigid substantive mandates, parties are not only excluded the opportunity of using ad hoc arbitration in China,²⁷ but their intention to arbitrate could be easily denied under the Chinese distinctive “defective-led-void” mechanism

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22. See JINGZHOU TAO, *ARBITRATION LAW AND PRACTICE IN CHINA* 34, 51 (2004) (finding that arbitration agreements that do not specify an arbitral commission are defective); see also Xue Hong, *Online Dispute Resolution for E-Commerce in China: Present Practices and Future Developments*, 34 H.K.L.J. 377, 384 (2004) (noting that under the Arbitration Law of China the parties in an arbitration agreement must specify the arbitration commission); see also Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 48 (2005) (recognizing that Article 18 of the Arbitration Law specifies that arbitration agreements that do not select an arbitration commission are void).
 23. See CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, *SELECTED JURISDICTIONAL DECISIONS OF THE CIETAC* 318–19 (2004); see also Taroh Inoue, *supra* note 21, at 182 (positing that the Arbitration Law is unique in that an arbitration agreement will be held invalid if the parties fail to specify an arbitration commission); see also Joseph T. McLaughlin et al., *Planning for Commercial Dispute Resolution in Mainland China*, 16 AM. REV. INT'L ARB. 133, 144 (2005) (illustrating the rigorous standard applied to the requirement of indicating an arbitration commission).
 24. See Song Lianbin, *From Ideology to Legislation: Several Issues to Pay Attention to for Reforming the Arbitration Law*, *ARBITRATION IN BEIJING* 52 (2005); see also Eu Jin Chua, *supra* note 15, at 141–42 (discussing Article 18 and its application to CIETAC as well as other local arbitration commissions in China); see also Reinstein, *supra* note 22, at 44–48 (analyzing Article 18 in relation to CEITAC and other local arbitration commissions such as the Beijing Arbitration Commission).
 25. See Zhao Jian, *Looking Back and Looking Ahead: China's International Commercial Arbitration Crossing Centuries*, *ARBITRATION AND LAW* 51 (2001) (unverified source); see also Eu Jin Chua, *supra* note 15, at 139 (explaining that if parties to an arbitration agreement do not designate an arbitration commission in the agreement it will be deemed void); see also Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 130 (1996) (finding that an arbitral tribunal will not have jurisdiction under the Arbitration Law unless the parties have reached a qualified arbitration agreement).
 26. See discussion *infra* Part II.A.1. a–c (outlining the judicial efforts made to relieve the Arbitration Law of some of its exacting provisions).
 27. See discussion *infra* Part III.A. 1–2 (discussing China's aversion to ad hoc arbitration and the problems associated with its limited use).

in regulating arbitration agreements.²⁸ The AL fails to resolve the problems, bringing about much difficulty in arbitral practice and leaving wide room for judicial interpretations.²⁹

B. Significant Gap with International Arbitration Norms

1. Form of Consent

In examining international arbitration norms, the prevalent approach is, rather than stick to a strict signature-based form of consent, to find that the “written” requirement be satisfied as long as the communication provides sufficient proof of the written agreement.³⁰ Further, courts generally uphold the effect of the arbitration agreement as to its non-signatory parties.³¹

The ML provides the form requirement of arbitration agreements to ensure that parties have agreed to go to arbitration, but in attempts to ensure that the parties will not be dissuaded

28. See Song Lianbin et al., *Approaches to the Revision of the 1994 Arbitration Act of the PRC*, 20 J. INT'L ARB. 169, 174 (2003) (demonstrating the difficulties encountered by the inflexible provisions of the 1994 Arbitration Act); see also Li Hu, *Setting Aside an Arbitral Award in the People's Republic of China*, 12 AM. REV. INT'L ARB. 1, 9 (2001) (noting that the stringent requirements needed to form a valid arbitration agreement are an undue limitation on the development of arbitration in China); see also Li Jing, *Preservation of Evidence in China's International Commercial Arbitration: Several Considerations*, 10 VJ 145, 145 (2006) (expressing disapproval over the rigidity of the Arbitration Law).
29. See Mauricio J. Claver-Carone, *Post-Handover Recognition and Enforcement of Arbitral Awards Between Mainland China and Hong Kong SAR: 1999 Agreement vs. New York Convention*, 33 LAW & POL'Y INT'L BUS. 369, 391 (2002) (illustrating the ambiguity surrounding the Arbitration Law's treatment of ad hoc awards made outside of Mainland China); see also Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 411–12 (2006) (revealing the disparity between the Arbitration Law and judicial interpretations of local commissions' jurisdiction); see also Mark S. Hamilton, Note, *Sailing in a Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission*, 3 ASIAN-PAC. L. & POL'Y J. 10, ¶ 23 (2002) (noting that China's Arbitration Law does not provide effective rules or procedures for enforcement of awards).
30. See Peter Kucherepa, *Reviewing Trends and Proposals to Recognize Oral Agreements to Arbitrate in International Arbitration Law*, 16 AM. REV. INT'L ARB. 409, 414 (2005) (recognizing under the New York Convention there simply needs to be evidence of a consent of an agreement to arbitrate); see also Charles H. Martin, *The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law*, 16 TUL. J. INT'L & COMP. L. 467, 494 (2008) (finding that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards allows for electronic contracts); see also Olagoke O. Olatawura, *The “Privity to Arbitration” Doctrine: The Withering of the Common-Law Privity of Contract Doctrine in Arbitration Law*, 16 AM. R. INT'L ARB. 429, 465 (2005) (noting that under Nigerian laws as long as the contract references a document containing an arbitration clause, it will be enforceable).
31. See Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 237 (2006) (asserting that the Fifth Circuit Court has held that tacit agreements are sufficient to satisfy the writing requirement); see also James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469, 472 (2004) (showing that a non-signatory party may be bound to an arbitration agreement); see also Michael P. Daly, Note, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95, 103 (2007) (explaining that many international tribunals ignore the written requirement so long as there is evidence of an arbitration agreement).

from arbitration simply due to stringency of the form.³² Article 7(2) has thus been designed to encompass a broad range of circumstances.³³ Under this provision, much jurisprudence has been developed by jurisdictions that have adopted the ML, and the general theme of this jurisprudence is that the “written” requirement can be flexibly established either as a mere formality or as a rule of evidence.³⁴ This can be proved by evidence of either an arbitration agreement through conduct or by an exchange of correspondence, incorporation by reference, or through

32. See U.N. Comm'n on Int'l Trade Law, *Report of the Working Group on Arbitration on the Work of its Thirty-second Session*, ¶ 88, U.N. Doc. A/CN.9/468 (Mar. 20–31, 2000) (emphasizing that a narrow interpretation of the model law is not beneficial); see also PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS ¶ 2-014 (London Sweet & Maxwell 2000) (stating that the writing requirement has been one of the most controversial parts of the model law); see also Kucherepa, *supra* note 30, at 410 (providing that the UNCITRAL writing requirement can be optional and oral agreements to arbitrate can be binding).

33. See UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION ch. II, art. 7(2) (1994) (stating that

[t]he arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another);

see also Kucherepa, *supra* note 30, at 413 (reiterating that Article 7(2) defines the writing requirement broadly); see also William K. Slate et al., *UNCITRAL (United Nations Commission on International Trade Law), Its Workings in International Arbitration and a New Model Conciliation Law*, 6 CARDOZO J. CONFLICT RESOL. 73, 85 (2004) (declaring that the writing requirement has been broadened and adapted to conform to modern commercial practices).

34. See HENRI ALVAREZ ET AL., MODEL LAW DECISIONS: CASES APPLYING THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985–2001) 37 (2003) (positing that the writing requirement is flexibly applied, allowing for many forms of communication to constitute a writing); see also PIETER SANDERS, THE WORK OF UNCITRAL ON ARBITRATION AND CONCILIATION 68 (2d ed. 2004) (claiming that Article 7 is flexible in its requirements to accommodate for new forms of communication); see also Christoph Liebscher, *Interpretation of the Written Form Requirement Art. 7(2) UNCITRAL Model Law*, 8 INT'L ARB. L. REV. 2005, 164–69, 164 (2005) (claiming that the requirement can be established as a rule of evidence or a condition for validity); see also Jing Wang, *International Judicial Practice and the Written Form Requirement for International Arbitration Agreements*, 10 PAC. RIM. L. & POL'Y J. 375, 381 (2001) (discussing that the written requirement is beginning to waver and oral or tacit agreements will be acceptable in the future); see also Christopher Coakley, Note, *The Growing Role of Customized Consent in International Commercial Arbitration*, 29 GA. J. INT'L & COMP. L. 127, 148–49 (2000) (illustrating that the writing requirement can be flexibly established by referring to the arbitration agreement in the contract in question).

statements of claim and defense.³⁵ In this scenario, a Canadian court³⁶ has held that Article 7(2) of the ML does not require correspondence regarding the arbitration agreement to be signed by the parties.³⁷ In a similar vein, the Supreme Court of Bermuda³⁸ held that an arbitration agreement is valid if “the applicant’s written contract constituted an offer which was accepted by the respondent’s conduct. . . . ‘the acceptance need not be in writing but may be inferred by conduct.’ . . .”³⁹ Influenced by the UKAA in its domestic regime and ML in its international regime,⁴⁰ Hong Kong has construed Article 7(2) even more liberally by its legislation. Section 2AC of the Hong Kong Arbitration Ordinance⁴¹ makes it clear that “arbitration

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35. See ALVAREZ ET AL., *supra* note 34, at 37 (citing that courts overwhelmingly interpret Article 7 definitions broadly); see also SANDERS, *supra* note 34, at 68 (recognizing the exchange of briefs and incorporation by reference referring to the arbitration clause sufficient to satisfy the writing requirement); see also Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 24 GEO. WASH. INT’L L. REV. 17, 75 (2002) (recognizing that an arbitration agreement can be concluded by incorporation by reference); see also Liebscher, *supra* note 34, at 164 (showing that an arbitration agreement can be proven by an exchange of letters); see also Coakley, *supra* note 34, at 143–44 (remarking that Article 7 requires only that the questioned contract make reference to the arbitration clause).
36. Canada adopted the ML in 1988, which was among those first ML jurisdictions in the world. See *Proctor v. Schellenberg*, [2002] 164 Man. R. 2d 188, ¶ 12 (Can.) (revealing that the court considers a writing necessary to prove an arbitration clause); see also *Xerox Canada Ltd. v. MPI Technologies Inc.*, [2006] 2006 CarswellOnt 7850, ¶ 37 (admitting the writing requirement to be necessary, but concluded that the intention of the parties was to include an arbitration clause); see also *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.*, [1999] 45 O.R. 3d 183, ¶ 78 (holding that parties can enter into a valid arbitration agreement by incorporating to it by reference).
37. See *Schiff Food Products Inc. v. Naber Seed & Grain Co.*, [1996] 149 Sask. R. 54 (Can.) (suggesting that parties may be contractually bound without ever signing documents); see also *Xerox Canada Ltd.*, 2006 CarswellOnt 7850, at ¶ 37 (positing that the parties’ intentions to include an arbitration clause is valid, even absent a signed document); see also *Corporacion Transnacional de Inversiones S.A. de C.V.*, 45 O.R. 3d 183, at ¶ 78 (finding that a signed document is not necessary if the arbitration clause is incorporated by reference).
38. Bermuda adopted the ML in 1992. See *ACE Bermuda Insurance Ltd. v. Continental Casualty Company* [2007] SC Bda 12, ¶ 10 (holding that the plaintiffs are entitled to the benefit of the arbitration clause in its agreement); see also James H. Carter, *The International Commercial Arbitration Explosion: More Rules, More Laws, More Books, So What?*, 15 MICH. J. INT’L L. 785, 789 (1994) (citing that Bermuda adopted the arbitration statutes); see also Louis F. Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty-first Century: The Accelerating Pace of Common and Civil Law Convergence*, 42 TEX. INT’L L.J. 625, 631 (2007) (proclaiming that Bermuda has enacted legislation based on UNCITRAL).
39. See *Skandia International Insurance Company and Mercantile & General Reinsurance Company*, Case Law on UNCITRAL Texts, Case 127, The Supreme Court of Bermuda (Jan. 21, 1994) (displaying that there was no signed document indicating the existence of an arbitration clause, but rather it was inferred by the parties’ conduct); see also ALVAREZ ET AL., *supra* note 34, at 38–39 (citing that the arbitration provision was incorporated by reference).
40. Hong Kong adopted the ML in 1996 to govern its international regime by its revision to the Hong Kong Arbitration Ordinance. Domestic arbitrations taking place in Hong Kong still follow pretty much the UKAA. See Arbitration Ordinance (1996) Cap. 341, § 2AC(2) (H.K.) (codifying the model law into Hong Kong’s arbitration ordinance); see also Peter S. Caldwell, *Maritime Arbitration in Hong Kong*, 22 TUL. MAR. L.J. 155, 159–60 (1997) (providing Hong Kong’s new definition of what constitutes an arbitration agreement, based on the model law); see also Chuncheng Lian, *Commercial Arbitration in Hong Kong and China: A Comparative Analysis*, 18 U. PA. J. INT’L ECON. L. 297, 316 (1997) (informing that Hong Kong recognizes that an arbitration clause is separable from the contract in question).
41. See Hong Kong Arbitration Ordinance, § 2AC(4) (explaining that a writing includes “any means by which information can be recorded”).

agreement in writing” includes any means by which information can be recorded⁴² with a wide array of illustrative examples.⁴³ In particular, Section 2AC clarifies the portion of Article 7(2) of the ML that deals with “incorporation of arbitration agreements by reference.”⁴⁴ Modeled after Section 5(6) of the UKAA, the section provides that “[t]he reference in an agreement written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.”⁴⁵ Indeed, courts in Hong Kong have interpreted this provision very liberally by stating that “what the tribunal or court must determine, as a matter of construction, is whether parties intended to incorporate an arbitration agreement and there is no need for words specifically incorporating it.”⁴⁶ Likewise, the writing requirement has been construed liberally under the case law in the UK.⁴⁷ In a pair of recent cases, the English Court of Appeals concluded that an arbitration clause that was a standard condition of contract was properly incorporated by reference through an “incorporation clause” into the final contract and binding, although no specific reference was made to the arbitration clause in the incorporation provision.⁴⁸

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42. See *id.* at § 2AC(2) (stating “[t]he agreement is in writing if it is made by an exchange of written communication; or although not itself in writing, it is evidenced in writing; or although made otherwise than in writing, it is recorded in writing; or there is an exchange of written submission in arbitral or legal proceedings in which the existence of an agreement otherwise in writing is alleged by one party and not denied by the other party (waiver of objection)”).
 43. See *id.* at § 2AC(3) (defining a reference in an agreement).
 44. See *id.* (explaining what constitutes a reference within an agreement); see also Arbitration Act, 1996, c. 23, § 5(6) (U.K.) (stating that references apply to writings recorded by “any means”).
 45. See *Astel-Peiniger Joint Venture v. Argos Eng’g & Heavy Indus. Co. Ltd.*, [1995] 1 H.K.L.R. 300, 306–7 (H.C.) (explaining that the intention of the parties is determinative of the arbitration’s enforceability); see also *Lucky-Goldstar Int’l (H.K.) Ltd. v. NG Moo Kee Eng’g Ltd.* [1993] 2 H.K.L.R. 73, 73–75 (H.C.) (holding that the arbitration clause was valid because the parties intended it to be part of the contract); see also Gu Weixia, Essay and Note, *Recourse Against Arbitral Awards: How Far Can a Court Go? Supporting and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration*, 4 CHINESE J. INT’L L. 481, 490–91 (2005) (stating that courts will examine “other relevant considerations” in addition to the words of the arbitration agreement).
 46. See *XL Ins. Ltd. v. Owens Corning* (1999) 1999 WL 33114351 (H.C.) (implying that courts can examine the intention of the parties when determining whether a particular agreement existed); see also Susan L. Karamanian, *supra* note 30, at 75 (commenting that the UK Arbitration Act liberally interprets arbitration agreement requirements); see also Adam Sulkowski, *Polish Arbitration Law Analyzed and Applied to the Procedural Scenarios of Chromalloy*, 10 AM. REV. INT’L ARB. 247, 257–58 (1999) (noting that the UK liberally interprets the written requirement of arbitration agreements).
 47. See *Welex AG v. Rosa Mar. Ltd.* (2003) 2 LLOYD’S REP. 509 (A.C.) (holding that the parties intended to include an arbitration clause); see also *Sea Trade Mar. Corp. v. Hellenic Mut. War Risks Ass’n (Bermuda) Ltd.* (2006) 1 LLOYD’S REP. 280 (Q.B.) (holding that the arbitration agreement was binding against the parties).
 48. See J. Douglas Uloth & J. Hamilton Rial III, *Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far?*, 21 REV. LITIG. 593, 599–602 (2002) (listing several ways that would compel a court to extend the terms of an arbitration agreement to a non-signatory); see also Dwayne E. Williams, *Binding Non-signatories to Arbitration Agreements*, 25-SPG FRANCHISE L.J. 175, 176 (2006) (implying that courts are willing to side in favor of enforcing arbitration agreements against non-signatories); see also Keisha I. Patrick, Note, *The Tie That Doesn’t Bind: Fifth Circuit Rules That Non-signatory Agents Can’t Compel Arbitration as Individuals*, 2003 J. DISP. RESOL. 583, 587–88 (2003) (citing several courts that have held that non-signatories can be bound to arbitration agreements).

Moreover, the practice of extending the arbitration agreement to non-signatory third parties has been generally accepted.⁴⁹ Although the ML does not deal with the issue directly, national courts in jurisdictions that have adopted it have successfully developed the jurisprudence in favor of this extension.⁵⁰ In terms of contract assignment, the prevailing notion is that if a party has agreed to an arbitration agreement, its assignee is bound by it.⁵¹

This view of arbitration clauses and contract assignees has been endorsed by a series of cases in Germany.⁵² In one such case, the Federal Court held that the buyer of real estate is bound by the arbitration clause in a tenancy agreement covering the same property entered into by its old owner (the seller).⁵³ Likewise, Singapore⁵⁴ has supported the effect of the arbitration agreement on legal successors in a case in which the High Court decided that the receiver in an insolvency proceeding was bound by an arbitration agreement entered into by the insolvent

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49. See *Denney v. BDO Seidman*, L.L.P., 412 F.3d 58, 70 (2d Cir. 2005) (commenting that courts have previously held that an arbitration agreement can be extended to non-signatories); see also *Int'l Paper Co. v. Schwabedissen Maschiene & Anlagen GmbH*, 206 F.3d 411, 416–17 (4th Cir. 2000) (stating that it is well-established law that a non-signatory can be forced to arbitrate); see also James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469, 499 (2004) (noting that the Model Law does not “specifically deal” with arbitration regarding third party non-signatories).
50. See *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 776–77 (2d Cir. 1995) (relying on the traditional principles of agency laws that “may bind a non-signatory to an arbitration agreement”); see also Hosking, *supra* note 49, at 496–500 (emphasizing that while there is no specific rule on point, the courts generally hold that arbitration agreements are prima facie assigned with the rest of the contract); see also Michael P. Daly, Note, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95, 102 (2007) (commenting that an assignee to a contract that includes an arbitration agreement may be bound by the terms of the arbitration agreement).
51. See Andrea Vincze, *Arbitration Clause—Is It Transferred to the Assignee?*, NORDIC J. COM. L., 1, 3 (2008), available at www.njcl.fi/1_2003/article4.pdf (discussing the transferability of arbitration obligations in various ML jurisdictions). *But see* *Lachmar v. Trunkline LNG Co.*, 753 F.2d 8, 9–10 (1985) (holding that an assignee is not bound by an assignor's duty to arbitrate unless he expressly agrees to be so bound). See generally ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 151 (4th ed. 2004) (noting that the effect of the assignment of an arbitration clause will depend on the laws under which the contract was made).
52. See REDFERN ET AL., *supra* note 51, at 151 (noting that German courts presume arbitration agreements are automatically transferred to an assignee); see also FRANZ SCHWARZ & HANNO WEHLAND, *THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: INTERNATIONAL ARBITRATION* 2007 175 (2007) (asserting that under German law assignees are bound to arbitration agreements contained in the assigned contract); see also Vincze, *supra* note 51, at 3 (discussing the decision by the German Federal Constitutional Court which held that arbitration clauses are automatically transferred).
53. See Daniel Busse, *Privity to an Arbitration Agreement*, 8(3) INT'L ARB. L. REV. 95, 97 (2005) (noting the effect of arbitration clauses on third parties in Germany); see also Norbert Horn, *The Arbitration Agreement in Light of Case Law of the UNCITRAL Model Law*, 8(5) INT'L ARB. L. REV. 146, 148 (2005) (discussing two cases handed down by the German Federal Court which held that legal successors to a contract are bound by arbitration agreements contained therein); see also Stefan Kroll, *German Court Enforces Domestic Award Against a Third-Party Non-signatory to the Arbitration Agreement*, Case Comment, 10(2) INT'L ARB. L. REV. N18, N18–19 (2007) (positing that the application of arbitration clauses on non-signatory third parties is a matter of contract interpretation).
54. See International Arbitration Act § 3(1) (Jan. 27, 1995) (Singapore), available at <http://statutes.agc.gov.sg> (adopting the Model Law in Singapore); see also Gordon Smith et al., *The UNCITRAL Model Law and the Parties' Chosen Arbitration Rules*, 6 VINDOBONA J. INT'L COM. L. & ARB. 194, 195–96 (2002) (discussing Singapore as a Model Law country); see also Jack Lee & Tsen-Ta, *Separability, Competence—Competence and the Arbitrator's Jurisdiction in Singapore*, 7 SINGAPORE ACAD. L.J. 421, 435 (1995) (noting the enactment of the International Arbitration Act that codifies the Model Law).

debtor.⁵⁵ Moreover, a court in Canada confirms that an agent of a party giving consent to arbitration can bind its principal if the main contract where the arbitration clause appears binds the principal as well.⁵⁶ The validity of arbitration agreement in the circumstances of agency relationship is also recognized in Hong Kong⁵⁷ and Austria.⁵⁸ Additionally, the “long-arm” effect of arbitration agreements on the non-signatory third party is confirmed under cases interpreting the UKAA.⁵⁹ A couple of recent cases in the English Court of Appeals held that the validity of an arbitration agreement will be presumed in contract assignment and in subrogation unless there is a clear restriction in the arbitration agreement stating that the arbitration clause cannot be transferred.⁶⁰

2. Specificity as to Arbitral Institution

With respect to the substantive content provisions for an arbitration agreement to be valid, under the prevailing practice in the international arbitration community, an agreement is valid if the parties provide the scope of arbitrable disputes (arbitrability) and show their inten-

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55. See Rajesh Muttah & Michael Hwang, Case Comment, *Singapore: Incorporation of Arbitration Clause Requires Clear and Specific Reference*, 3(3) INT'L ARB. L. REV. N42, N42–43 (2000) (examining the holding of *Concordia Agritrade Pte Ltd v. Cornelder Hoogewerff Pte Ltd*).
 56. See *Automatic Systems v. E.S. Fox* [1994] 12 B.C.L.R.2d 148 (Can.) (remitting the decision as to the validity of the arbitration agreement to the Ontario Court of Justice). See generally *Automatic Systems v. Bracknell*, [1994] 113 D.L.R. 449 (Can.) (holding that the strong legislative preference for arbitration should be overcome only by strong language in a contract to preclude it); see generally *Benner & Assoc. v. Northern Lights Distrib.* [1995] 22 B.C.L.R.2d 79 (Can.) (explaining that a court will look to the intent of the parties to determine the proper construction of an arbitration clause).
 57. See *Chung Siu Hong v. Primequine Corp.* [1999] H.K.C.U. 1211, (C.F.I.) (holding that parties will be held to arbitration where the express provisions of the contract require it).
 58. See Christian Koller & Natascha Tunkel, *An Outline of the New Austrian Arbitration Act Based on UNCITRAL Model Law*, 10 VINDOBONA J. OF INT'L COMM. L. & ARB. 27, 44 (2006) (indicating that the UNCITRAL Model Law has full force and effect in Austria as of July 1, 2006); see also Vera van Houtte et al., *What's New in European Arbitration?*, 61 DISP. RESOL. J. 8, 9 (2006) (indicating that the Austrian arbitration act adopted the Model Law and applies to cases commencing on or after July 1, 2006); see also *The New Austrian Arbitration Act* (Graf, Maxl & Pitkowitz, Vienna, Austria) Feb. 2006, at 1 (discussing the scope of the application of the model law in the Austrian Arbitration Act).
 59. See WENDY MILES & KATE DAVIS, *THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: INTERNATIONAL ARBITRATION* 2007 110 (2007) (acknowledging that although England is hesitant to compel non-signatories to arbitration, certain legal theories such as agency and alter ego principles may be successfully advanced). But see *Peterson Farms v. C & M Farming* [2004] N.P.C. 13 (Eng.) (rejecting the group of countries' doctrine to compel a non-signatory party to arbitration); but see *London v. Sancheti* [2008] EWCA (Civ) 1283 (Eng.) (holding that a subsidiary claiming the benefit of an arbitration agreement to which it was not a party was entitled to a stay of court proceedings in favor of arbitration).
 60. See *Wealands v. CLC Contractors* [1999] 2 Lloyd's Rep. 739 (A.C.) (ruling in favor of arbitration in third party proceedings where the third parties were covered by the arbitration clause); see also *X Ltd v. Y Ltd* [2005] BUILDING LAW REP. 342, reprinted in *ARBITRATION LAW: FROM 1996 UK ARBITRATION ACT TO INTERNATIONAL COMMERCIAL ARBITRATION* (China Law Press, 2006); see also *Update: Legal Notes on Construction Matters* (Manches LLP, London, UK), Winter 2005, at 32 (examining whether contribution, misrepresentation and negligent misstatement fell within the ambit of the arbitration clause).

tion to arbitrate.⁶¹ Beyond these core ingredients, there are some other considerations that may be included, such as the institution chosen, place of arbitration, method of appointment and qualification of the arbitrators, and the applicable law, among others.⁶²

These provisions guiding an arbitration agreement's substantive content are clearly shown in Articles 7(1) and 8(1) of the ML. Article 7(1) stipulates that parties should put into their arbitration agreement all or certain disputes they want to subject to arbitration.⁶³ In addition, pursuant to Article 8(1), the court shall refer parties to arbitration unless it finds the agreement is null and void, inoperative, or incapable of being performed.⁶⁴ Thus, under the ML framework, an "arbitration institution" has been suggested for inclusion as one of the relevant considerations rather than an indispensable element for valid construction.⁶⁵ The Working Group of the ML thought they should not set out separate grounds for the validity of the arbitral agreement apart from the "intention to arbitrate" and "scope of arbitration," mainly because the for-

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61. The prevailing notion is that there are two essentials which should be contained in every effective arbitration agreement: (1) the agreement to arbitrate (intent to arbitrate) and (2) the scope of the agreement (arbitrability). See REDFERN ET AL., *supra* note 51, at 3-4 (outlining the historical development of the arbitration process as one of willing parties); see also LIU XIAOHONG, JURISPRUDENCE AND EMPIRICAL RESEARCH OF INTERNATIONAL COMMERCIAL ARBITRATION (Guoji Shangshi Zhongcai Xieyi de Fali yu Shizheng Yanjiu) 51-2, 57-9 (2005); see also Julian D.M. Lew, *Arbitration Agreement: Form and Character*, in ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION 55 (Sarcevic ed., 1989) (noting that the intention to arbitrate is an essential element of an arbitration); see also Robert F. Windfohr & Anne Burnet Windfohr, *The Arbitrability Question Itself*, 10 AM. REV. INT'L ARB. 287, 354-55 (1999) (referencing the importance of the intent of the parties to enter into the arbitration process).
62. See Lew, *supra* note 61, at 55 (establishing that arbitration agreements typically take into account procedural elements such as jurisdiction, applicable law, and selection of arbitrators); see also Thomas S. Breckenridge, *International Arbitration: A Historical Perspective and Practice Guide Connecting Four Emerging World Cultures: China, Mexico, Nigeria, and Saudi Arabia*, 17 AM. REV. INT'L ARB. 183, 227-28 (2006) (noting that the method of selecting arbitrators is typically included in the arbitration agreement); see also Kenneth R. Davis, *A Proposed Framework for Reviewing Punitive Damages Awards of Commercial Arbitrators*, 58 ALB. L. REV. 55, 69 n.117 (1994) (commenting that the arbitrator is usually bound by the choice of law in the arbitration agreement).
63. See U.N. Comm'n on Int'l Commercial Arb., *UNCITRAL Model Law on International Commercial Arbitration*, art. 7, U.N. Doc. A/40/17, annex I and A/61/17, annex I (July 7, 2006) available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (defining an arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in respect of a legal relationship, whether contractual or not).
64. See *id.* at art. 8 (stating that a court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds the agreement is null and void, inoperative or incapable of being performed); see also Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent Is Not "Clear and Unmistakable"*, 17 AM. REV. INT'L ARB. 545, 568 (2006) (citing instances where British Courts have found arbitration agreements null and void); see also Richard H. Kreindler, *"Arbitral Forum Shopping": Observations on Recent Developments in International Commercial and Investment Arbitration*, 16 AM. REV. INT'L ARB. 157, 164 (2005) (establishing that courts can proceed with their own actions if they find an arbitration agreement null and void).
65. See Paul A. Gelinias, *"Arbitration Clauses: Achieving Effectiveness,"* in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENT AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION: ICCA CONGRESS SERIES NO.9 47 (Albert van den Berg, ed., 1998) (offering support for the inclusion of the expertise of arbitrators in constructing arbitration agreements); see also Toby Landau, *Composition and Establishment of the Tribunal: Articles 14 to 36*, 9 AM. REV. INT'L ARB. 45, 46 (1998) (noting that clauses in the arbitration agreement dealing with arbitrators are often carefully constructed); see also Tom Stilwell, *Correcting Errors: Imperfect Awards in Texas Arbitration*, 58 BAYLOR L. REV. 467, 521 (2006) (establishing that arbitration agreements often adopt the standards of conduct of the arbitrating body).

mulation of an exhaustive list would cause many defective arbitration agreements and lead to lengthy litigation challenging jurisdiction both at the outset and during award enforcement.⁶⁶ The ML prefers the “intent over defect” rule of interpretation, which does not follow the strict textual interpretation and upholds the parties’ drafting autonomy as much as possible.⁶⁷

Under the ML jurisprudence, the adopting jurisdictions have generally made considerable efforts to give effect to the parties’ agreement to arbitrate and intentions rather than stick to the seemingly uncertain language on arbitration institution.⁶⁸ And the national courts have always attempted to uphold an arbitration clause, unless the uncertainty is such that it is difficult to make any sense of it under Article 8(1).⁶⁹ The Court of Appeal in Hamburg gave effect to an arbitration clause that simply used the language, “Arbitration-Hamburg Institution.”⁷⁰ The German Federal Court subsequently pointed out that an arbitration agreement can validly refer to two different courts of arbitration and the claimant will be given the choice between the two options.⁷¹ An extreme case showing the tendency of courts to interpret an agreement in favor of finding a technically defective arbitration agreement valid in the ML jurisdictions is in *Lucky-Goldstar v. Ng Moo Kee Engineering*, where the High Court of Hong Kong held the arbitration clause was valid even though it said “arbitration in a third country and in accordance

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66. See U.N. Comm’n on Int’l Trade Law, *Report of the Working Group on International Contract Practices on the Work of Its Third Session*, ¶ 25, U.N. Doc. A/CN.9/216 (Feb. 16–26, 1982) (establishing that the question of validity of an arbitration agreement will be left up to applicable law rather than an international standard); see also PETER BINDER, *INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS* ¶ 2-014 (London Sweet & Maxwell 2000) at 53; see also Stephen R. Bond, “How to Draft an Arbitration Clause,” 6 J. OF INT’L ARB., 65 (1989); see also Lew, *supra* note 61, at 55 (noting that the intention to arbitrate is an essential element of an arbitration).
67. See JULIAN D.M. LEW ET AL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 138 (2003) (emphasizing intent over defect in assessing the validity of an arbitration agreement); see also Davis, *supra* note 62, at 74 (commenting that the arbitrator is usually bound by the choice of law in the arbitration agreement); see also Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L. J. 105, 121–22 (1997) (noting that courts are reluctant to adopt form arbitration clauses contrary to party intent).
68. See Martin Davies, *Court Ordered Interim Measures in Aid of International Commercial Arbitration*, 17 AM. REV. INT’L ARB. 299, 323–24 (2006) (citing disagreement in German courts as to whether parties’ intent controlled jurisdiction); see also Peter Kucherepa, *Reviewing Trends and Proposals to Recognize Oral Agreements to Arbitrate in International Arbitration Law*, 16 AM. REV. INT’L ARB. 409, 415–16 (2005) (noting that the High Court of Hong Kong has held that parties’ intent must be evinced in writing and correspondence); see also Elizabeth Shackelford, Note, *Party Autonomy and Regional Harmonization of Rules in International Commercial Arbitration*, 67 U. PITT. L. REV. 897, 900 (2006) (commenting that considerations of original parties’ intent are paramount in establishing the jurisdiction of an arbitration tribunal).
69. See ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 3–69 (4th ed. 2004) (noting that courts try to uphold arbitration clauses unless they make no sense); see also Alan S. Kaplinsky & Mark Levin, *Consumer Financial Services Arbitration: Last Year’s Trend Has Become This Year’s Mainstay*, 54 BUS. LAW. 1405, 1405 n.15 (1999) (emphasizing that courts are often eager to uphold arbitration clauses); see also Amy J. Schmitz, *Mobile-Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm*, 20 OHIO ST. J. ON DISP. RESOL. 291, 314–15 (2005) (noting the courts’ preference for upholding arbitration clauses whenever possible).
70. See Hanseatisches Oberlandesgericht Hamburg [OLGZ] [Trial Court for Select Civil Matters], January 24, 2003, Germany.
71. See Norbert Horn, *The Arbitration Agreement in Light of Case Law of the UNCITRAL Model Law*, 8(5) INT’L ARB. L. REV. 146, 150 (expressing that courts have a tendency to carry out a favorable interpretation of defective causes and the German Federal Court found a valid agreement where it referred to two different courts of arbitration).

with the rules of International Arbitration Association.”⁷² The High Court found that the arbitration clause sufficiently indicated the parties’ intention to arbitrate.⁷³ In the words of Justice Kaplan, “The arbitration agreement was not inoperative or incapable of being performed since arbitration could be held in any country other than the countries where the parties had their places of business.”⁷⁴

The UK has taken a similar approach, and English courts tend to give the widest interpretation of defective arbitration agreements and to grant the tribunal full jurisdiction except in cases of hopeless confusion.⁷⁵ Section 3 of the 1996 UKAA requires the parties only to subject their disputes to an arbitration panel in a particular place (“arbitral seat”) or under specific rules (“procedural law”).⁷⁶ Under the English law, the choice of the procedural law of arbitration would imply the country in which the arbitration has its seat,⁷⁷ and the selection of either will be sufficient to show the parties’ intention to arbitrate.⁷⁸ If neither the seat nor the procedural law has been agreed to, the effect of the arbitration agreement will be determined after looking

72. See *Lucky-Goldstar*, 2 H.K.L.R. at 74 (articulating that the court found in favor of a valid arbitration agreement and that the plaintiffs were fortunate to have a forum to arbitrate in).

73. See *id.* at 76 (holding that it was perfectly clear that the parties intended to arbitrate any disputes that might arise under the contract).

74. See *id.* at 74 (reasoning that the arbitration clause cannot be said to be inoperative or incapable of being performed).

75. See George Burn & Elizabeth Grubb, *Insolvency and Arbitration in English Law*, INT. A.L.R. 8(4), 124, 128 (2005) (providing that English courts have broad and wide discretion to do what is right and fair in the circumstances to determine validity in the claim); see also Horn, *supra* note 71, at 150 (arguing that the English courts had a wide interpretation of arbitration agreements in favor of validity because courts would look to the intention of the parties to determine validity even though two different courts were writing the agreement); see also Domenico Di Pietro, *The Influence of the New Law on Arbitration Agreements and Arbitrato Irrituale*, INT. A.L.R. 10(1), 18, 18 (2007) (suggesting that other countries have adopted liberal arbitration provisions such as England which has displaced traditional venues such as France and Switzerland since the adoption of the English Arbitration Act of 1996).

76. See U.K. Arbitration Act, 1996 (providing that the arbitral seat is designated (a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers to fix the seat, or (c) by the arbitral tribunal if so authorized by the parties, or determined, in absence of any such designation, having regard to the parties’ agreement and all the relevant circumstances).

77. See *ABB Lummums Global LTD v. Keppel Fels Ltd* (1999), 2 LLOYD’S REP. 24 (Q.B.D.) (maintaining that if the parties do make an express choice of procedural law to govern their arbitration, the court looks to the place for arbitration which governs the procedural law); see also *Union of India v. McDonnell Douglas Corp.* (1993) 2 Lloyd’s Rep. 48 (Q.B.D.) (concluding that choosing London as the “seat” is not just the place of arbitration, it also means the choice of law to govern the arbitration proceedings); see also Gu Weixia & Joshua A. Lindenbaum, *The NYPE 93 Arbitration Clause: Where Ends the Open-End?*, 37 J. MAR. L. & COM. 245, 249 (2006) (rationalizing that England regards it as essential for an arbitration to have a geographical location to which arbitration is tried and in the absence of agreement, it prescribes the procedural law of the arbitration).

78. See Derek P. Auchin, *The Liberal Interpretation of Defective Arbitration Clauses in International Commercial Contracts: A Sensible Approach*, A.L.R. 2007, 10(6), 206, 211 (2007) (arguing that once the parties have made their intention to arbitrate perfectly plain it is sufficient to find arbitration); see also Horn, *supra* note 71, at 150 (arguing that the English courts had a wide interpretation of arbitration agreements in favor of validity because courts would look to the intention of the parties to determine validity, even though two different courts were writing the agreement); see also William Tetley, *Good Faith in Contract: Particularly in the Contracts of Arbitration*, 35 J. MAR. L. & COM. 561, 614 (2004) (asserting that arbitration agreements usually refer to arbitration in London or New York, where the disputes are governed by the procedural law of the place of arbitration).

at the parties' agreement and all the relevant circumstances.⁷⁹ In a pair of recent cases, the arbitration clauses contained in the charter were extremely abbreviated such that they consisted of only the words "Arbitration-London."⁸⁰ Nevertheless, the courts were unwilling to deny the effect due to uncertainty; rather, they "expanded" the clause in accordance with the parties' "presumed" intentions.⁸¹

The "specificity to arbitral institution" has never been required as a cardinal factor for a determination of validity in international arbitration practice.⁸² However, difficulties might arise in an institutional arbitration jurisdiction such as China, where a stringent restriction on the party's drafting autonomy has been imposed by the creation of a requirement to designate clearly and unequivocally the name of the arbitral institution, which is rare practice among modern arbitration regimes.⁸³ On the one hand, the Chinese provision puts too heavy a bur-

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79. See U.K. Arbitration Act (providing that the arbitral seat is designated (a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers to fix the seat, or (c) by the arbitral tribunal if so authorized by the parties, or determined, in absence of any such designation, having regard to the parties' agreement and all the relevant circumstances); see also Auchi, *supra* note 78, at 213 (asserting that a prerequisite to the arbitration clauses incorporation is where all the circumstances are clear that the parties intended to embrace such a clause); see also Shivani Singhai, *Independence and Impartiality of Arbitrators*, INT. A.L.R. 2008, 11(3), 124, 127 (2008) (maintaining that the court should consider the relevant circumstances and apply the real danger test to determine whether there was a valid arbitration clause).
80. See *Tritonia Shipping Inc v. South Nelson Forest Prod. Corp.* (1996), 1 Lloyd's Rep. 114, 114 (C.A.) (holding that the arbitration clause was not too vague and short to be intelligible when it states arbitration shall be held in London); see also *Dubai Islamic Bank PJSC v. Paymentech Merchant Serv., Inc.* (2001), 1 Lloyd's Rep 65, 67 (Q.B.D.) (asserting that the factors pointing to England as the seat was that the appeal took place in London and all the administrative work was done there).
81. See CLARE AMBROSE & KAREN MAXWELL, *LONDON MARITIME ARBITRATION* 30 (2d ed. 2002); see also *Tritonia Shipping Inc.*, 1 Lloyd's Rep. at 116 (discussing the interpretive powers of the court); see also *Dubai Islamic Bank PJSC*, Lloyd's Rep. at 70 (establishing that court is allowed wide interpretation to determine the seat of arbitration); see also Gu Weixia & Lindenbaum, *supra* note 77, at 249 (informing that courts will expand brief arbitration clauses according to the parties' intent).
82. This approach has been concluded through research on the most authoritative textbooks on international commercial arbitration. See W. LAURENCE CRAIG ET AL., *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 81–83 (2d ed. 1990) (using examples to show that it is helpful for parties to choose the laws for their arbitration); see also PHILIPPE FOUCHARD ET AL., *FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* 262–63 (2d ed. 1999) (displaying the flexibility allowed toward arbitration agreements); see also JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 138, 165–72 (2003) (outlining the elements of the arbitration agreement); see also ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 151, 165–68 (4th ed. 2004), (explaining unless there is uncertainty to the degree the arbitration agreement is difficult to understand, courts will still uphold the agreement).
83. See Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16, 18 translated in 34 I.L.M. 1650, 1654 (1995) (P.R.C.) (outlining the specifics of China's Arbitration Law); see also Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 139 (2006) (summarizing the restrictions embodied in articles 16 and 18 in the Arbitration Law). See generally Ashby Jones & Andrew Batson, *Concerns About China Arbitration Rise*, WALL ST. J., May 9, 2008, at B.1 (reporting problems with the Chinese system of arbitration that are considered riskier than Western arbitration).

den on the validity of all arbitration agreements; on the other hand, it fails to provide solutions to fixing arbitration agreements that are defective in this regard.⁸⁴

II. Judicial Efforts to Relax the Legislative Rigidity

Because of the over-rigidity and inherent deficiency of the AL in recognizing the validity of arbitration agreements, the judiciary has stepped in to address the practical problems stemming from the stringent requirement. Since the promulgation of the AL, approximately 30 interpretative documents have been released by the SPC regarding the handling of arbitration cases,⁸⁵ which constitutes an important source of the legal framework of Chinese arbitration. With respect to the “defective” arbitration agreements, judicial replies (*pifu*) and opinions (*yijian*) have centered upon how to broaden the scope of the formal “written requirement” and liberalize the “institutional ambiguity” in substance.⁸⁶ In the meantime, although the official judicial interpretative power is vested only in the SPC, some LHPCs in more economically well-developed areas have also made their contributions to regulatory development in this regard.⁸⁷ Given the remarkable numbers of the replies and opinions issued by both the central and local judiciary, this section details the developments in chronological order from 2006, which is considered the turning point, when the SPC promulgated the very impressive “unified judicial interpretation on arbitration law” based on its accumulated experience over more than a decade.⁸⁸

84. See Eu Jin Chua, *supra* note 83, at 139 (explaining the burden of proof and reasons for voiding agreements under Articles 16 and 18 in the Arbitration Law); see also Eu Jin Chua et al., *Arbitration in the PRC*, CHINA L. & PRAC. (London), May 2005, at 1 (noting that if Article 16 of the Arbitration Law is not fully complied with, arbitration can be frustrating). See generally Jerome A. Cohen, *Time to Fix China's Arbitration*, 168 FAR E. ECON. REV. 31, 32 (2005) (discussing structural problems in China's arbitration system that lead to unfairness).

85. See Appendix in SELECTED JURISDICTIONAL DECISIONS BY THE CIETAC 601–33 (CIETAC ed., 2004); see also Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 413 (2006) (establishing that the Supreme People's Court has issued over a dozen interpretations of the Arbitration Law); see also Andrew Aglionby, *An Arbitration Clause Safety Net*, FINANCIAL TIMES (London), Apr. 12, 2006, at 10 (describing how the Supreme People's Court is interpreting the Arbitration Law). See generally John Choong, *Clarifying the PRC Arbitration Law: Questions and Answers*, CHINA L. & PRAC. (London), Nov. 2006, at 1 (announcing the release of the Supreme People's Court's interpretation of the Arbitration Law).

86. See Li Hu, *Setting Aside an Arbitral Award in the People's Republic of China*, 12 AM. REV. INT'L ARB. 1, 9–10 (2001) (discussing the limitations of the writing requirement and how it may be expanded in the future); see also Andrew Aglionby, *supra* note 85, at 10 (reporting that the Supreme People's Court is making efforts to broaden the Arbitration Law). See generally 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, 346 (1997) (describing the limitations and criticisms of Article 16 of the Arbitration Law).

87. See Jian Zhou, *supra* note 85, at 408 (informing that the lower courts in China are deciding cases that traditionally would be decided by the Supreme People's Court); see also Haung Jin & Du Huanfang, *Chinese Judicial Practice in Private International Law: 2003*, 7 CHINESE J. INT'L L. 227, ¶ 31–32 (2008) (exemplifying the trend of lower Chinese courts interpreting arbitration law and the higher courts rejection of the trend). See generally David T. Wang, Comment, *Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System*, 48 SANTA CLARA L. REV. 649, 650–52 (2008) (clarifying the levels of the court system in China).

88. See discussion *infra* in part III.B. of this Article.

A. The First Decade: From 1995 to 2005

This part of the discussion concerns the judicial interpretations on defective arbitration agreements by both the SPC and LHPCs in the period from 1995 to 2005. Moreover, it reads between the lines of these interpretative documents to explore the difference in approach of the central and local judiciaries toward the drafting autonomy of arbitration and underlying reasons for the difference.

1. Interpretative Documents by the SPC

On “Non-Signatory Third Party”

a. Incorporation by reference

For contracts where arbitration agreements are not directly included, incorporation by referring to an existing document that contains an arbitral clause has been recognized as satisfying the “written” requirement under Article 16 of the AL.⁸⁹ This was explicitly affirmed by the 1996 SPC reply in the *Sino-Mongolian* case,⁹⁰ where the contract provided that “matters not covered in the contract shall be governed by the Joint Conditions of the Delivery Protocol between China and Mongolia”⁹¹ in which arbitration was provided as the means of dispute resolution.⁹²

89. As Wang Shengchang put it,

In complex transactions involving numerous contracts based on standard terms and conditions, it is sometimes found that a standard or *borrowed* arbitration agreement has been used. This means that the parties, familiar with a provision for arbitration agreement contained in another document, *simply introduce that provision into their contract by reference to it*, as it stands.

See WANG SHENGCHANG, *RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA* 77, 78 (1997) (*emphasis added*) (defining the term “incorporation by reference”). See generally Li Hu, *supra* note 86, at 9–10 (mentioning how the written requirement could be expanded); see generally Gu Weixia, Essay and Note, *Recourse Against Arbitral Awards: How Far Can a Court Go? Supporting and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration*, 4 CHINESE J. INT’L L. 481, 489 (2005) (discussing how limiting a strict writing requirement is to arbitrations).

90. See SPC Reply on the Manner of Determining Jurisdiction in a Sino-Mongolian Contract That Fails to Provide for Arbitration Directly (issued by the Sup. People’s Ct., Dec. 14, 1996) 1996 Fa Han No. 177 (P.R.C.) (affirming the 1996 Supreme People’s Court reply in the *Sino-Mongolian* case).

91. See The Protocol on Mutual Joint Conditions for the Delivery of Goods Between Trade Entities of the Two Countries Agreed by MOFTEC of the People’s Republic of China and the Department of International Economy and Supply of the People’s Republic of Mongolia (Nov. 8, 1988) (P.R.C.) (stating that matters not covered in the contract shall be governed by the Joint Conditions of the Delivery Protocol between China and Mongolia).

92. See TANG DEHUA & SUN XIUJIN, *ZHONGCAIFA JI PEITAO GUIDING XINSHI XINJIE* [or *ARBITRATION LAW AND NEW JUDICIAL INTERPRETATIONS*] 152–53 (Beijing, People’s Court Publ’g 2003) (P.R.C.) (stating that arbitration is provided as the means of dispute resolution).

b. Contract Assignment

Prior to the promulgation of the CL,⁹³ the judiciary and arbitration commissions were divided on how to give effect to arbitration agreements in cases of contract assignment.⁹⁴ The People's courts held that, notwithstanding the assignment, the arbitration agreement included would be binding only on the assignor and could not automatically extend to the assignee.⁹⁵ However, CIETAC generally preferred the more liberal approach of finding that once a contract had been assigned, any arbitration agreement therein contained was assigned as well.⁹⁶ Given the conflicting views and practices, the SPC issued its judicial opinions via a reply to the Hubei Higher People's Court in 1999 (the SPC Hubei Reply).⁹⁷ The SPC pointed to Article 80 of the newly promulgated CL, which provides that the assignee will acquire all accessory rights related to the main contractual rights following the assignment.⁹⁸ Therefore, any arbitration agreement contained in the original contract would be binding on the assignee as part of

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93. See Contract Law (promulgated by the Second Session of the Ninth Nat'l People's Cong., March 15, 1999, effective Oct. 1, 1999), art. 11, available at http://novexcn.com/contract_law_99.html.
94. See JINGZHOU TAO, *ARBITRATION LAW AND PRACTICE IN CHINA* 34, 40 (2004) (explaining that the Arbitration Law fails to address the ramifications when a contracting party assigns its rights to a third party); see also JINGZHOU TAO, *RESOLVING BUSINESS DISPUTES IN CHINA* 2802, 3004 (2005) (stating that the Arbitration Law fails to address the binding force of an arbitration agreement in the circumstance of contract assignment). See generally Brown & Rogers, *supra* note 86, at 329 (elaborating that arbitration in China's emerging marketplace is still subject to many of the limitations that plague China's court system).
95. See S.P.C. Case Comments on the *S.P.C. Reply to the Zhejiang Higher People's Court* (Mar. 19, 1997), *ARBITRATION LAW AND NEW INTERPRETATIONS ON RELEVANT REGULATIONS* 202 (compiled in Tang & Sun 2003) (asserting that the assigned arbitration agreement would be binding only on the assignor and not extend automatically to the assignee); see also JINGZHOU TAO, *BUSINESS*, *supra* note 94, at 3004 (explaining that the Contract Law allows for binding a binding assignment of an arbitration agreement). See generally The Basics of Arbitration in China, CHINA BRIEFING, <http://www.china-briefing.com/news/2008/09/03/arbitration-in-china-the-basics.html> (establishing the fundamentals of arbitration in China).
96. See CIETAC Case Comments on *Validity of the Arbitration Agreement Following the Contract Assignment*, *SELECTED JURISDICTIONAL DECISIONS BY THE CIETAC* 116–22 (CIETAC 2004) (expressing the CIETAC generally preferred a more liberal approach with respect to contract assignments of arbitration agreements); see also JINGZHOU TAO, *ARBITRATION*, *supra* note 94, at 40 (stating that Chinese arbitration institutions generally preferred the view that once a contract had been assigned, any arbitration provision therein contained was similarly assigned). See generally Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 424 (2006) (explaining that CIETAC represented China's first step in providing international commercial arbitration services).
97. See Case Report by Wang Shengchang, *Zhongcai Xieyi ji qi Youxiaoxing Queding [Arbitration Agreement and the Confirmation of Its Validity]*, HAIXIA LIANG'AN JINGMAO ZHONGCAI YANTAOHUI WENJI 18–20 [SYMPOSIUM ESSAYS ON ECONOMIC TRADE ARBITRATION ACROSS THE TAIWAN STRAITS 18–20] (2001) (stating that the Supreme People's Court issued an opinion to resolve the conflicting views and practices regarding arbitration assignment). See generally ANNE WAGNER & SOPHIE CACCIAGUIDI-FAHY, *OBSCURITY AND CLARITY IN THE LAW* 121 (2008) (explaining that judicial interpretation in China takes many forms, including replies); see generally The Supreme People's Court, THE PEOPLE'S DAILY ONLINE, <http://english.people.com.cn/data/organs/court.html> (asserting that the Supreme People's Court is the highest judicial organ in China).
98. See Contract Law, *supra* note 93, at art. 80 (stating that the assignor should notify the other contracting parties of the assignment for assignment of the rights). *But see id.* at art. 84 (declaring that the assignor needs to obtain the consent of the other contracting party in addition to notifying them). See generally A.J. VAN DEN BERG, *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 30 (2005) (asserting that the Supreme People's Court has suggested that it may take a more liberal view in construing the validity of arbitration agreements).

the accessory rights transferred.⁹⁹ Eventually, it was held that the arbitration clause was equally binding on the third-party assignee, despite the lack of a separate written arbitration agreement signed by the assignee.¹⁰⁰ The Reply has received warm welcome by those who study international arbitration and practitioners as a significant development of the SPC in enhancing arbitral parties' wishes.¹⁰¹

c. Bill of Lading (B/L)

In the maritime industry, arbitration is invariably triggered where the bill of lading incorporates an arbitration clause in the charter under which it is issued.¹⁰² However, when a ship owner issues the bill, the holder is not required to sign on it, leaving the effect of the arbitral

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99. See JINGZHOU TAO, ARBITRATION, *supra* note 94, at 40 (indicating that this view was also shared by CIETAC and had been endorsed at the workshop on the determination of validity of arbitration agreement jointly sponsored by the SPC, the Beijing Higher People's Court, the Beijing Intermediate People's Court and CIETAC, which was held in December 1997); see also Haung Jin & Du Huanfang, *Chinese Judicial Practice in Private International Law: 2003*, 7 CHINESE J. INT'L L. 255 (2008) (referencing Wuhan Zhongyuan kejiiao Ltd. v. Hong Kong Longhai (Group) Ltd., the SPC reversed the Henan Higher People's Court, stating that a third party was bound by the arbitration clause of the original contract). See generally William Krause, *Do You Want to Step Outside? An Overview of Outline Alternative Dispute Resolution*, 19 J. MARSHALL J. COMPUTER & INFO. L. 457, 477-79 (2001) (describing the problems of the binding effects of arbitration law).
100. See Wang Shengchang, *supra* note 97, at 15-18 (detailing a similar case found in the SPC reply to the Henan Higher People's Court where it held that the Xinquan Company (the XC) assigned its rights to the Liaoning Company (the "LC") and had informed the Henan Company (the HC)); see also "The Supreme People's Court Reply Letter Concerning the Question over the Effect of an Arbitration Clause in the Bill of Lading in the Case of an International Shipping Dispute Between Fujian Province Production Data Consolidated Corporation and Golden Pigeon Shipping Company Limited" (P.R.C.), translated in 2 ARBITRATION IN CHINA: A PRACTICAL GUIDE 463 (Kenneth C.K. Chow trans., Jerome A. Cohen, Neil Kaplan, and Peter Malanczuk eds., 2004) [hereinafter S.P.C. Reply Letter] (holding that the arbitration clause is binding on both parties).
101. See Gu Weixia, *Thinking about the Application of Subrogation in China's Commercial Arbitration (Guanyu Daiwei Qingqiuquan zai Zhongguo Shangshi Zhongcai zhong Yingyong de Sikao)*, in ARBITRATION AND LAW (ZHONGCAI YU FALV) 88 (2004); see also Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 155 (2006) (indicating that the Supreme People's Court is hosting discussions with academics and practitioners); see also Jason Pien, Note, *Creditor Rights and Enforcement of International Commercial Arbitral Awards in China*, 45 COLUM J. TRANSNAT'L L. 586, 587 (2007) (enumerating the benefits of the arbitral enforcement process, including the fact that it has been a topic of interest to Chinese and non-Chinese academics).
102. See H. Edwin Anderson III, *Applicable Arbitration Rules for Maritime Disputes In Australia and Hong Kong*, 6 U.S.F. MAR. L.J. 387, 387-88 (1994) (noting that arbitration is the method most often used to resolve charter party disputes); see also Simon G. Zinger, *Navigating the Russian Shipping Industry: Making the Most of International and Russian Law for Successful Arbitration Against Russian Parties*, 8 U.S.F. MAR. L.J. 141, 142 (1995) (indicating that bills of lading require arbitration in the home country of the ship owner). See generally PHILIP YANG, SHIPPING PRACTICE 570-71 (Y.M. Lin ed., Dalian Maritime University Press, 1995) (presenting general information of the arbitration clause in the charter parties and bills of lading); see generally Adewale A. Olawoyin, *Safeguarding Arbitral Integrity in Nigeria: Potential Conflict Between Legislative Policies and Foreign Arbitration Clauses in Bills of Lading*, 17 AM. REV. INT'L ARB. 239, 245 (2006) (outlining the difference between a foreign jurisdiction clause and a foreign arbitration clause).

clause contained within it in doubt.¹⁰³ Moreover, the bills are transferable documents.¹⁰⁴ This raises questions with regard to the binding effect of the original arbitral clause on any subsequent holders.¹⁰⁵ The SPC, in its reply to the Guangdong Higher People's Court, recognized the effect of the arbitration clause to an eventual B/L holder.¹⁰⁶ It pointed out that, "[a]lthough the appealing party did not sign the bill, it had expressly agreed to the arbitration clause contained therein. Hence the arbitration agreement should be valid and binding upon both the carrier and the B/L holder."¹⁰⁷ The affirmation engendered more confidence in the Chinese system of arbitration by maritime practitioners.¹⁰⁸ However, since its effect must be conditioned upon the "holder's express consent," parties are still very much wary that their intention to arbitrate could be denied absent such requirement.¹⁰⁹

On "Unclear Arbitration Commission"

a. Selecting Two Arbitration Commissions

In its reply to the Shandong Higher People's Court, the SPC declared that arbitration agreements were valid where the parties provided for submission of their dispute to "either the

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103. See PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS 76 (London Sweet & Maxwell 2000) (identifying unsigned arbitration clauses in bills of lading as a prominent situation); see also Caslav Pejovic, *The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law*, 31 J. MAR. L. & COM. 379, 380 (2000) (noting that bills of lading are sometimes signed by the charterer or agent without the shipmaster's authority); see also Georgios I. Zekos, *The Contractual Role of Documents Issued Under the CMI Draft Instrument on Transport Law 2001*, 35 J. MAR. L. & COM. 99, 104 (2004) (elucidating the inconsistency in terminology).
104. See GEORGE W. EDWARDS, FOREIGN COMMERCIAL CREDITS: A STUDY IN THE FINANCING OF FOREIGN TRADE 233 (1922) (referencing *Lickbarrow v. Mason*, which decided that bills of lading were transferable); see also EMMANUEL T. LARYEA, PAPERLESS TRADE: OPPORTUNITIES, CHALLENGES AND SOLUTIONS 69 (2002) (explaining that a bill of lading is transferable); see also Stasia M. Williams, *Something Old, Something New: The Bill of Lading in the Days of EDI*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 555, 562 (1991) (defining "negotiability" of the bill of lading as "transferability").
105. See LARYEA, *supra* note 104, at 69 (transferring a bill of lading transfers the right of possession but not necessarily the ownership of the goods); see also Felix H. Chan, Analysis, *A Plea for Certainty: Legal and Practice Problems in the Presentation of Non-Negotiable Bills of Lading*, 29 HONG KONG L.J. 44, 45 (1999) (delineating the difference between a straight bill of lading and a negotiable bill of lading and the confusion the differences create); see also George F. Chandler, *Maritime Electronic Commerce for the Twenty-First Century*, 22 TUL. MAR. L.J. 463, 469-470 (1998) (describing the difference in rights given to subsequent holders of negotiable bills of lading and straight bills of lading).
106. See S.P.C. Reply Letter, *supra* note 100, at 463 (holding that the court should no longer accept any prosecution by the parties).
107. See *id.* (indicating that the nation's court should "recognize the effect of such ad hoc arbitration clause").
108. See *id.*
109. See Li Hai, *Guanya Tidan Zhongcai Tiakuan Xiaoli Ruogan Wenti de Sikao* [Thinking About the Several Questions Regarding the Validity of the Arbitration Clause in the Bill of Lading], in ZHONGCAI YU FALV [ARBITRATION AND LAW] (2005) (P.R.C.).

CIETAC or the Qingdao Arbitration Commission.”¹¹⁰ The SPC confirmed that such an arbitration clause was certain and operative, entitling the party to initiate arbitral proceedings before either of the two agreed arbitration institutions.¹¹¹

b. Selecting Both Arbitration and Litigation

The SPC, in its reply to the Guangdong Higher People’s Court, held that the parties’ intention to arbitrate was unclear under such arbitration agreement, and the arbitration clause shall be void under the Chinese law unless parties subsequently reached a separate agreement to submit their disputes to a specific arbitration institution.¹¹²

c. Referring to a Non-existent Arbitration Commission

The SPC, in a pair of cases, replied to the Zhejiang and Sichuan Higher People’s Courts that agreements that referred to non-existent arbitration commissions shall be invalid unless the parties reached a supplementary agreement specifying clearly the relevant arbitration institution where the disputes were to be submitted.¹¹³

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110. See S.P.C. Reply to Questions Concerning the Validity of an Arbitration Clause in Which Two Arbitrations Inst. Are Simultaneously Selected (Sup. People’s Ct., Dec. 12, 1996) (P.R.C.) [hereinafter S.P.C. Reply to Questions]; see also S.P.C. Reply Letter, *supra* note 100, at 463 (summarizing the decision in the case, holding that an arbitration agreement specifying two commissions is not invalid, provided that the parties agree on the commission ultimately used); see also Steamship Mutual, *China—Validity of Arbitration Agreements*, <http://www.simsl.com/ChinaArbitration0107.asp> (last visited Mar. 23, 2009) (showing how prominent shipping and carrier companies have become aware of and have recognized Chinese arbitration practices).
 111. See SHAOYING CHEN ET AL., 1 SERIES ON CONTEMPORARY CHINESE LAW §9:7 (affirming that Chinese arbitration practices permit parties to specify more than one commission for dispute resolution, but require consensus in selection when a dispute arises); see also *Interpretation on Several Issues Concerning the Application of the <PRC Arbitration Law> 4500/06.08.23*, CHINA L. & PRAC., Oct. 1, 2006, at 91 [hereinafter *Application of P.R.C. Arb. L.*] (reporting that, as of 2006, the most commonly used arbitral commissions in China were the Beijing Arbitration Commission [BAC] and the China International Economic and Trade Arbitration Commission [CIETAC]); see also Jessica Zoe Renwald, Note, *Foreign Investment Law in the People’s Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution*, 16 IND. INT’L & COMP. L. REV. 453, 473 (2006) (providing segments of the SPC Interpretation of the Arbitration Law, including the consensus requirement for selecting an arbitration commission from those specified in arbitral agreements).
 112. See S.P.C. Reply to the Validity of the Arbitration Agreement Which Agrees to Both Arbitration and Litig. (Sup. People’s Ct., Apr. 18, 1996) (P.R.C.); see also Charles Kenworthy Harer, *Arbitration Fails to Reduce Foreign Investors’ Risk in China*, 8 PAC. RIM. L. & POL’Y J. 393, 399–400 (1999) (1999) (specifying that the requirements for a valid arbitration agreement are: a clear intent to arbitrate, statement of the issues subject to arbitration, and clear selection of an arbitration commission); see also *Arbitration in the PRC: New Revisions Have Been Made to CIETAC’s Arbitration Rules. How Have the New Revisions Further Facilitated the Recourse to PRC Arbitration?*, CHINA L. & PRAC., May 1, 2005, at 19 (restating the three requirements for a valid arbitration agreement under Chinese Arbitration Law).
 113. See S.P.C. Reply to the Judicial Dispute of a Sin-Foreign Contract between a Yiwu Hotel and a Hong Kong Co (Zhejiang Higher People’s Ct., Sept. 9, 1996) (P.R.C.); see also S.P.C. Reply to the Validity of the Arbitration Agreement Agreeing on an Unclear Arbitration Commission (Sichuan Higher People’s Ct., Oct. 10, 1996) (P.R.C.).

d. Incorrect Name of Arbitration Commission

The SPC held that if the name of the selected arbitration commission was erroneously recorded in the arbitration agreement, the agreement may still be valid, provided that the correct name of the commission could be readily ascertained.¹¹⁴ This holding was applied to a CIETAC case to give effect to an agreement that incorrectly referred to CIETAC as “China International Trade Arbitration Commission” (missing the word “Economic”).¹¹⁵

e. Specifying the Place of Arbitration Only

The validity of such an agreement was first considered by CIETAC in 1995.¹¹⁶ Since then, three relevant interpretative documents have been issued by the SPC.¹¹⁷ The judicial opinions, however, have changed drastically. In 1997, the SPC opined that where the parties fail to include a specific arbitration commission but have provided the place of arbitration, such arbi-

114. See SHAOYING CHEN ET AL., *supra* note 111 (enumerating instances in which Chinese courts will recognize a valid arbitral agreement despite errors or ambiguities in the specification of an arbitration commission); *see also Application of P.R.C. Arb. L.*, *supra* note 111, at 91 (stating that Article 4 of the SPC Interpretation expressly permits a court to recognize selection of an arbitral commission, despite ambiguity, provided that the commission’s name is readily ascertainable); *see also Steamship Mutual*, *supra* note 110 (explaining that the contingencies granted by the SPC are based on a policy of upholding the parties’ intentions where the agreement is “sufficiently clear and enforceable”).

115. See S.P.C. Reply Regarding a Case in Which the Validity of the Arbitration Clause Remained Unaffected by the Omission of Words from the Name of the Arbitration Inst. Therein (Sup. People’s Ct., Apr. 2, 1998) (P.R.C.) [hereinafter S.P.C. Omission of Words].

116. See The Supreme People’s Court Reply Letter Concerning the Question over the Effect of an Arbitration Clause in the Bill of Lading in the Case of an International Shipping Dispute Between Fujian Province Production Data Consolidated Corporation and Golden Pigeon Shipping Company Limited (P.R.C.), translated in 2 ARBITRATION IN CHINA: A PRACTICAL GUIDE 463, 469 (Kenneth C.K. Chow trans., Jerome A. Cohen, Neil Kaplan, and Peter Malanczuk eds., 2004) (highlighting the decision in the Chu Kwok Fai case, where the court rejected an arbitral agreement which specified the city for arbitration, but failed to select an actual commission); *see also* Li Hu, *Setting Aside an Arbitral Award in the People’s Republic of China*, 12 AM. REV. INT’L ARB. 1, 10 (2001) (positing that the strict requirement for selecting an arbitral commission has been interpreted as a bar on ad hoc arbitration proceedings under Chinese Arbitration Law); *see also* Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 438 (2006) (recalling an analogous case, in which the agreement specified London as the location for arbitration, but failed to specify an actual commission for hearing).

117. See 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, 387 (1997) (displaying that terms that were ambiguous were interpreted to provide clarity); *see also* Benjamine P. Fishburne III & Chungheng Lian, *Commercial Arbitration in Hong Kong and China: A Comparative Analysis*, 18 U. PA. J. INT’L ECON. L. 297, 310–11 (1997) (showing that the Supreme People’s Court issued interpretations to clarify meaning of certain key terms); *see also* Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL’Y J. 403, 413 (2006) (indicating that the Supreme People’s Court has issued many judicial interpretations relating to arbitration criteria).

tration clause will be void.¹¹⁸ As such, the expression that “any dispute between the parties shall be resolved by the arbitration institution in Beijing” will be regarded as a void clause.¹¹⁹ Later, a similar scenario arose before the Hebei Higher People’s Court, where the arbitration clause provided that “any dispute arising out of the contract shall be submitted to the arbitration institution in Shijiazhuang.”¹²⁰ The SPC, in this case, relaxed their stance a bit by stating that “although the name of the arbitral institution is not specified, since there is only one arbitration commission in the given city, i.e., the Shijiazhuang Arbitration Commission, the arbitration clause is certain in this context and therefore should be enforceable and valid.”¹²¹ It shall be noted that notwithstanding the similar wording in the two cases, the circumstances were different. In the former case, there were more than two arbitration commissions in Beijing while there was only one such commission at the time in Shijiazhuang.¹²² Therefore, the underlying policy remains that even if the institution is not clearly spelled out, the arbitration agreement would be valid as long as the arbitral institution is ascertainable or can be inferred with some degree of certainty from the surrounding circumstances.¹²³ Unfortunately, the SPC stepped back from the approach of ascertainable inference and returned to the blanket denial approach. In its later reply to the Shandong Higher People’s Court,¹²⁴ it opined that by “[s]pecifying the place of arbitration without nominating the arbitral commission, then unless the parties can reach a supplementary agreement on the choice of the commission, their arbitration agreement shall be held void, so that the court will have jurisdiction over the disputed matter.”¹²⁵

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118. See Eu Jin Chua, *The Laws of the People’s Republic of China: An Introduction for International Investors*, 7 CHI. J. INT’L L. 133, 139 (2006) (stating that an agreement must designate a specific institution for arbitration in order for the agreement to be valid); see also Joseph T. McLaughlin et al., *Planning for Commercial Dispute Resolution in Mainland China*, 16 AM. REV. INT’L ARB. 133, 144–45 (2005) (posting the notion that if an arbitration commission is not specified in the clause, then the Chinese court will not enforce it); see also Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People’s Republic of China*, 16 IND. INT’L & COMP. L. REV. 37, 48 (2005) (indicating that a necessary component for a valid agreement is the place of arbitration).
 119. S.P.C. Reply on the Validity of an Arbitration Clause with Selected Arbitration Venue but No Arbitration Institution, Fa Han [1997] No. 36, issued by the SPC on 19 March 1997.
 120. See *id.*
 121. See S.P.C. Reply to the Hebei Higher People’s Court on the Validity of an Arbitration Agreement, Fa Jing [1998] No. 287, issued by the SPC on July 6, 1998. [hereinafter S.P.C. Reply to Hebei] (unverified source); see also Harer, *supra* note 112, at 399 (showing that if the commission tribunal is not listed in the agreement, it can be determined at a later time). See generally Jane Volz & Robert Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 902 (1996) (enumerating some of the arbitration commissions that exist in China).
 122. See Harer, *supra* note 112 at 399.
 123. See S.P.C. Case Comments on the S.P.C. Reply to the Zhejiang Higher People’s Court (Mar. 19, 1997), ARBITRATION LAW AND NEW INTERPRETATIONS ON RELEVANT REGULATIONS 202 (compiled in Tang & Sun 2003); see also TANG DEHUA & SUN XIUJUN, ZHONGCAIFA JI PEITAO GUIDING XINSHI XINJIE [ARBITRATION LAW AND NEW JUDICIAL INTERPRETATIONS (OR ARBITRATION LAW AND NEW INTERPRETATIONS ON RELEVANT REGULATIONS)] 202 (Beijing, People’s Court Publ’g 2003) (P.R.C.); see also Charles Kenworthy Harer, *Arbitration Fails to Reduce Foreign Investors’ Risk in China*, 8 PAC. RIM. L. & POL’Y J. 393, 399 (1999) (explaining mentioning the specific commission in the agreement is not a necessary component in determining if the agreement is valid); see also Milo Molfa, *Pathological Arbitration Clauses and the Conflict of Laws*, 37 HONG KONG L. J. 161, 164 (2007) (displaying that the circumstances of the situation are considered to determine which arbitration commission shall preside over the matter).
 124. See S.P.C. Reply on Several Issues of Ascertaining the Validity of the Arbitration Agreement, Fa Shi [1998] No. 27, issued by the SPC on October 21, 1998.
 125. See *id.*

Given the above illustrations, it is evident that during the period from 1995 to 2005, the SPC, through its issuance of over 20 pieces of interpretative documents, has resolved a lot of practical obstacles to determining the validity of defective arbitration agreements in light of both the formal and substantial defects that were unresolved by the AL. But concerns still exist as to the SPC's shortcomings in terms of providing clarification on the means of "written form" other than "signing" in the arbitral practice, particularly written forms such as waiver of objection, and in agency relationships.¹²⁶ There are further concerns with respect to SPC's swinging attitude on the designation of "unclear arbitration commission." Significant gaps remain in international practice with respect to an arbitration agreement that provides for institutional arbitration without unequivocally quoting the name of the institution.¹²⁷ Lastly, there has been inconsistency among the judicial opinions where the agreements "specify the place of arbitration only," with the foregoing being one such example. In facing the challenges unsettled by the SPC, some LHPCs have developed more liberal approaches with their own local judicial opinions.¹²⁸

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126. See McLaughlin et al., *supra* note 118, at 142 (providing examples as to how there is a shortage of certain explanations by the SPC); see also Xian Chu Zhang, *Chinese Law: The Agreement Between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects*, 29 HONG KONG L.J. 463, 469–70 (1999) (illustrating a way where there has been vagueness with explanations). See generally Eu Jin Chua, *Legal Implications of a Rising China: The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 134 (2006) [hereinafter Eu Jin Chua, *Legal Implications*] (explaining how the SPC is responsible for providing explanations on certain terms in arbitral practice).
127. See Eu Jin Chua, *Legal Implications*, *supra* note 126, at 139 (stating that an arbitration institution, although no named, should be designated); see also Katherine L. Lynch, *Chinese Law: The New Arbitration Law*, 26 HONG KONG L.J. 104, 106 (1996) (purporting that where there is a need, an institution shall be established); see also Mauricio J. Claver-Carone, *Post-Handover Recognition and Enforcement of Arbitral Awards Between Mainland China and Hong Kong SAR: 1999 Agreement vs. New York Convention*, 33 LAW & POL'Y INT'L BUS. 369, 379 (2002) (providing insight to the fact that there is an unclear arbitration commission on the part of the SPC).
128. See *Apple & Eve, LLC v. Yantai N. Andre Juice Co.*, 499 F. Supp. 2d 245, 250 (E.D.N.Y. June 20, 2007) (providing an example regarding the place of arbitration within the ambit of the arbitration laws of China); see also WANG SHENGCHANG, *RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA* 77, 126–27 (demonstrating a flexible approach with issues such as location); see also Joseph T. McLaughlin et al., *supra* note 118, at 140 (showing how arbitration is more flexible, and thereby more liberal approached with judicial opinions issued).

2. Judicial Opinions by the LHPCs

a. The “Beijing Opinion,” 1999

In 1999, the Economic Trial Division of the Beijing Higher People’s Court (the BHC) issued its opinions regarding the determination of a petition to ascertain the validity of an arbitration agreement (the Beijing Opinion).¹²⁹ The Beijing Opinion was designed to provide guidance to the intermediate and district people’s courts in Beijing on handling such petitions, and comprised a series of questions and answers frequently faced by these courts.¹³⁰ Among all the opinions issued, Articles 1 and 2 specifically addressed the effect of an arbitration agreement on a non-signatory third party in the agency context.¹³¹

Article 1 of the Opinion stipulates that where an arbitral agreement is concluded by an agent with no authority or an agent that is exceeding its authority, the agreement will not be binding on the principal.¹³² If, in any of the foregoing circumstances, a third party submits an application for arbitration on the basis of such an arbitration agreement, the agreement shall be voided between the principal and the third party and the arbitration commission will have no

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129. See Opinion on Some Issues Regarding the Determination of an Application for Ascertaining the Validity of an Arbitration Agreement, and Motions to Revoke an Arbitration Award (issued by the Beijing Higher People’s Ct., Dec. 3, 1999) [hereinafter *Ascertaining Arbitration Validity*] (providing the doctrines within the “Beijing Opinion” that concern the determination of a petition for obtaining the validity of an arbitration agreement).
130. See Charles Zhen Qu, *The Representative Power of the Shareholders’ General Meeting Under Chinese Law*, 17 PAC. RIM L. & POL’Y 295, 304 (2008) (demonstrating that the Beijing Higher People’s Court provides guidelines to the lower courts); see also Gu Weixia, *Judicial Review over Arbitration in China: Assessing the Extent of Latest Pro-Arbitration Move by the Supreme People’s Court in the People’s Republic of China*, 23–24 (University of Hong Kong, Working Paper), available at http://works.bepress.com/context/weixia_gu/article/1000/type/native/viewcontent/ [hereinafter Gu Weixia, Working Paper] (positing that the Beijing Opinion provided guidance and authority in determining certain questions regarding arbitration). See generally Eu Jin Chua, *Legal Implications*, *supra* note 126, at 134 (explaining how the SPC is responsible for providing for explanations on certain terms in arbitral practice).
131. See *Ascertaining Arbitration Validity*, *supra* note 129 (enumerating the explanations to the following issues: (1) validity of arbitration agreement in the agency relationship; (2) the effect of arbitration agreement upon investor and investee in the JV contract; (3) the validity of arbitration agreement when both arbitration and litigation are provided; (4) the validity of arbitration agreement when two arbitration commissions are provided; (5) independence of arbitral clause when the main contract is non-existent; (6) independence of arbitration agreement made under duress or undue influence; (7) invalidity of ad hoc arbitration agreement; (8) the scope of arbitration agreement; (9) the procedure of jurisdictional challenge handled by the court; (10) the validity of arbitration agreement in cases of “incorporation by reference.”); see also Gu Weixia, Working Paper, *supra* note 130 (displaying how the Opinions provide guidance to the lower courts in Beijing). See generally Dr. John Mo, *Legality of the Presumed Waiver in Arbitration Proceedings under Chinese Law*, 29 INT’L BUS. LAW 21, 25 (2001) (addressing how the Opinions issued provide answers to questions frequently faced by courts in Beijing).
132. See Jerome A. Cohen & John E. Lange, *The Chinese Legal System: A Primer for Investors*, 17 N.Y.L. SCH. J. INT’L & COMP. L. 345, 354 (1997) (defining the roles of principals and agents); see also Gu Weixia, Working Paper, *supra* note 130 (addressing some binding obligations on signatories). See generally Kate O’Hanlon, *Enforcement of Foreign Arbitration Award*, THE INDEPENDENT (LONDON), Feb. 2, 1999, at 7 (providing information with regard to how awards should be enforced in arbitration).

jurisdiction unless a supplementary agreement is reached.¹³³ Article 2 goes on to provide that in an arbitration agreement signed by a foreign agent, the agreement will not be binding upon the domestic principal and the third party.¹³⁴

The BHC guidance, however, fails to take into account whether a third party has actual knowledge of the existence of an agency relationship as the newly promulgated CL notes.¹³⁵ In accordance with Articles 402 and 403 of the CL, the validity of the contract signed by the agent shall be binding on the principal depending on whether the third party reasonably knows about the agency relationship between the agent and principal at the conclusion of the contract.¹³⁶ If the third party has such knowledge, the arbitration agreement shall be binding upon the principal;¹³⁷ while in cases of an undisclosed principal, the third party could invoke the arbitration agreement against either the principal or the agent.¹³⁸ In both cases, the arbitration agreement should extend to bind the principal.

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133. See Ascertaining Arbitration Validity, *supra* note 129, at art. 1 (stating that an arbitration agreement will be deemed void between a principal and a third party and that an arbitration commission will have no jurisdiction unless a supplementary agreement is reached); see also Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 973 (2001) (illustrating the third party's role within the ambit of arbitration in China); see also Bryant Yuan Fu Yang & Diane Chen Dai, *Tipping the Scale to Bring a Balanced Approach: Evidence Disclosure in Chinese International Arbitration*, 17 PAC. RIM L. & POL'Y 41, 60 (2008) (presenting a situation where a third party would be involved).
134. See Ascertaining Arbitration Validity, *supra* note 129, at art. 2 (providing that the arbitration agreement signed by the foreign agent will not be binding upon the domestic principal and the third party); see also JINGZHOU TAO, *ARBITRATION LAW AND PRACTICE IN CHINA* 34, 58–59 (2004) (indicating the effect of a signed arbitration agreement on a third party); see also Wang Shengchang, *Enforcement of Foreign Arbitral Awards in the People's Republic of China*, in *IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS & AWARDS* 461, 477–78 (Albert Jan van den Berg ed., 1999) (providing that the arbitration agreement signed by a foreign party will not bind a third party).
135. See Contract Law (promulgated by the Second Session of the Ninth Nat'l People's Cong., March 15, 1999, effective Oct. 1, 1999), art. 11, available at http://novexcn.com/contract_law_99.html (listing the date of issue of the law as March 15, 1999 and the implementation date as October 1, 1999); see also Feng Chen, *The New Era of Chinese Contract Law: History, Development, and a Comparative Analysis*, 27 BROOK. J. INT'L L. 153, 154 (2001) (explaining how the Chinese legislature intended the new Contract Law to bring uniformity and certainty to the previous contract system); see also Wang Liming & Xu Chuanxi, *Fundamental Principles of China's Contract Law*, 13 COLUM. J. ASIAN L. 1, 1 (1999) (noting the promulgation of the Contract Law as both a major development in contractual law and a major step toward the enactment of the Chinese Civil Code); see also John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L L. 329, 334 (2006) (positing that the main reason for China's recent promulgation of the Contract Law in 1999 was in an effort to join the WTO).
136. See Contract Law, *supra* note 135 (detailing the law regarding an agent's act binding on the principal); see also Lutz-Christian Wolff & Bing Ling, *The Risk of Mixed Laws: The Example of Indirect Agency Under Chinese Contract Law*, 15 COLUM. J. ASIAN L. 173, 181 (2002) (indicating how Articles 402 and 403 dictate the contract rules on indirect agency).
137. See Contract Law, *supra* note 135 (regulating the agency of an unnamed principal); see also Guodong Xu, *Structures of the Three Major Civil Code Projects in Today's China*, 19 TUL. EUR. & CIV. L.F. 37, 52 (2004) (noting that Article 402's concept of indirect agency is shared by Western nations like the United States and the United Kingdom); see also Zhang Yuqing, *Agency Under the New Contract Law of the People's Republic of China*, 5 UNIFORM L. REV. 441, 447–48 (2000) (explaining that the main issue in Article 402 is determining the third party's knowledge of an agency relationship when the contract was formed).
138. See Contract Law, *supra* note 135 (regulating the agency relationship of an undisclosed principal).

In conclusion, despite its attempt to remedy the practical problems in arbitral practice, the Beijing Opinion fails to address the newly promulgated CL with respect to the rights and obligations surrounding the agency relationship when regulating the effect of arbitration agreements. Thus, the Beijing Opinion may not be satisfactory in filling in the practical gap on the relevant arbitral issues despite the fact that it parallels the positions of the local judiciary in developing the arbitration jurisprudence and practice.¹³⁹

b. The “Shanghai Opinion” 2001

Two years later, the Shanghai Higher People’s Court (the SHC), in light of the developments brought by the new CL, promulgated its own opinions to further explore the issues unresolved in the SPC interpretations (the Shanghai Opinion).¹⁴⁰ The Shanghai Opinion covers a number of important issues in arbitral practice, and Articles 2 and 5 specifically address the practical difficulties arising from defective arbitration agreements.¹⁴¹

Article 2 of the Shanghai Opinion clarifies the proper judicial approach with respect to the determination of the validity of an arbitration agreement if it makes inaccurate reference to the arbitration commission.¹⁴² The SHC opines that because parties usually have limited understanding of the arbitration system and arbitral institutions, it is not uncommon that they refer

139. See Carlos de Vera, *Arbitrating Harmony: “Med-Arb” and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 193 (2004) (explaining that the slow development of arbitration jurisprudence in China can be tied to deeply rooted cultural traditions that favor mediation over arbitration); see also Eu Jin Chua & Kathryn Sanger, *Arbitration in the PRC*, P.R.C. L. & PRACTICE, May 2005, at 1 (stating that as foreign investment continues to grow in China, so will the need for China to develop its arbitration system); see also Ashby Jones & Andrew Batson, *Concerns About China Arbitration Rise*, WALL ST. J., May 9, 2008, at B.1 (reporting that many Western attorneys are still wary of China’s inexperienced arbitration mechanisms).

140. See Shanghai Shi gaoji renmin fayuan guanyu zhixing “Zhonghua Renmin Gongheguo zhongcai fa” ruogan wenti de chuli yijian [Opinion of the Shanghai High People’s Court on the Handling of Certain Issues Relating to Implementation of the “Arbitration Law of the People’s Republic of China”] (adopted Jan. 3, 2001) (P.R.C.) translated in ARBITRATION IN CHINA: A PRACTICAL GUIDE, VOLUME 2, at 523–31 (Daniel R. Fung et al. eds., 2004) [hereinafter S.H.P.C. Implementation of Arbitration Law] (addressing numerous issues regarding the arbitration law of China).

141. See ARBITRATION IN CHINA: A PRACTICAL GUIDE, VOLUME 1, at 39 (Daniel R. Fung, et al. eds., 2004) (promulgating 13 different issues regarding the implementation of the arbitration law in China); see also JINGZHOU TAO, ARBITRATION, *supra* note 134, at 54 (showing that the Shanghai Opinion adopted a relatively moderate approach to treating possibly defective arbitration agreements.); see also Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL’Y J. 403, 411–12 (2006) (reporting that the legal opinions on arbitration by the Shanghai and Beijing Higher People’s Courts were recently adopted by the Supreme People’s Court); see also Jason Pien, Note, *Creditor Rights and Enforcement of International Commercial Arbitral Awards in China*, 45 COLUM. J. TRANSNAT’L L. 586, 608 (2007) (stating that the Shanghai Opinion, while not binding, has not been disputed by other legislative and judicial institutions).

142. See S.H.P.C. Implementation of Arbitration Law, *supra* note 140, at art. 2 (allowing an arbitration agreement clause to be valid to the extent that the wording and logic are not ambiguous); see also JINGZHOU TAO, ARBITRATION, *supra* note 134, at 54 (explaining that the Shanghai Opinion allows a technically defective arbitration agreement to be valid if the identity of the specific arbitration institution could be deduced or inferred from the document); see also Taroh Inoue, *Introduction to International Commercial Arbitration in China*, 36 H.K.L.J. 171, 182 (2006) (stating that the Chinese arbitration law is unique in that the parties must choose a specific arbitration commission in their arbitration agreement or it is considered invalid)

to an arbitration commission inaccurately in their arbitral agreements.¹⁴³ In such cases, as long as the identity of the commission is ascertainable from the surrounding facts, the court should uphold the effect of the arbitration agreement.¹⁴⁴ For better understanding, the Shanghai Opinion then gives some examples of defective draftsmanship referring to arbitral institutions in Shanghai in which its validity can be saved by the context.¹⁴⁵ This may include agreements using the language such as “Shanghai Arbitration Institution,” “Shanghai Arbitration Organization,” “arbitration by the relevant department in Shanghai,” and “arbitration in Shanghai,” to name a few.¹⁴⁶ Because there are two arbitral institutions in Shanghai, the party will be deemed to have selected both the Shanghai Arbitration Commission (the SAC) and the CIETAC Shanghai sub-commission under the Shanghai Opinion.¹⁴⁷ Hence, according to a previous SPC reply, the arbitration agreement is certain and enforceable if parties would agree to submit their disputes to either institution.¹⁴⁸

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143. See Sonia Chan, *The End of Trial and Error*, ASIALAW, Oct. 2008, at 1 (recalling the reluctance of foreign parties to arbitrate in China due to its high probability of unreliability and unfairness); see also Evelyn Iritani, *A Local Firm's Baffling Trip Through China's Arbitration System; Origon Group Finds That the Country's Method of Resolving Disputes Still Lack Openness*, L.A. TIMES, Dec. 26, 2003, at C1 (detailing one company's difficulties and unfamiliarity with the problematic Chinese arbitration system); see also Joseph Kahn, *Dispute Leaves U.S. Executive in Chinese Legal Netherworld*, N.Y. TIMES, Nov. 1, 2005, at A1 (reporting that the Chinese courts and arbitration panels are still plagued with uncertainties, corruption, and a lack of transparency).
144. See S.H.P.C., Implementation of Arbitration Law, *supra* note 140 (establishing that arbitration agreements can still be valid, even if they don't disclose the location); see also Interpretation of the S.P.C. Concerning Some Issues on Application of The Arbitration Law of The People's Republic of China (promulgated by the Judicial Committee of the S.P.C., Dec. 26, 2005, effective Sept. 8, 2006) art. 3 (P.R.C.) [hereinafter Interpretation of the Arbitration Law] (noting that even when the arbitration site is not clearly stated, if it is discernable from the surrounding circumstances, then agreement is still valid); see also JINGZHOU TAO, ARBITRATION, *supra* note 134, at 54 (stating that the Shanghai Higher People's Court used a more moderate approach upholding arbitration agreements that did not clearly identify a specific institution).
145. See *Interpretation on Several Issues Concerning the Application of the <PRC Arbitration Law> 4500/06.08.23*, CHINA L. & PRAC., Oct. 1, 2006, at art. 3–8, at (describing the different situations in which an arbitration agreement will still be valid); see also S.P.C. Reply to Questions Concerning the Validity of an Arbitration Clause in Which Two Arbitrations Inst. Are Simultaneously Selected (Sup. People's Ct., Dec. 12, 1996) (P.R.C.) (explaining that an arbitration clause will still be valid even when two institutions are selected if they can be verified by the circumstances); see also S.P.C. Reply Regarding a Case in Which the Validity of the Arbitration Clause Remained Unaffected by the Omission of Words from the Name of the Arbitration Inst. Therein (Sup. People's Ct., Apr. 2, 1998) (P.R.C.) (stating that an arbitration clause is still valid even when it is not entirely clear what institution is being named).
146. See Wang and Qu, *Several Comments on the Shanghai Opinion 2001*, in CIETAC, ARBITRATION AND LAW YEARBOOK OF 2001 407–8 (ZHONGCAI YU FALV 2001 NIANKAN) (2002); see also Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 142 (2006) (commenting on the differences in the domestic and foreign arbitration institutions); see also David T. Wang, Comment, *Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System*, 48 SANTA CLARA L. REV. 649, 664–65 (2008) (articulating the two different types of institution branches used in arbitration).
147. See Wang and Qu, *supra* note 146, at 407–8; see also *China International Economic and Trade Arbitration Commission*, 1 CONTEMP. CHINESE LAW: CHINESE INT'L ECON. LAW § 9:13, (2008) (describing how the Beijing and Shanghai headquarters became integrated into the South China Subcommission); see also Winston Stromberg, *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV. 1337, 1356–7 (2007) (discussing the two branches of the CIETAC institution, located in Shanghai and Shenzhen).
148. See S.P.C. Reply to Questions, *supra* note 145.

Article 5 of the Shanghai Opinion addresses whether an arbitration agreement binds its legal successor when the original party signing the agreement has been merged, divided, or terminated.¹⁴⁹ The Shanghai Opinion based its legal authority on the newly promulgated CL and its provisions on legal transfer and assignment.¹⁵⁰ Pursuant to Article 90 of the CL, the transferee shall be bound by the original contractual rights and obligations following the transfer unless otherwise agreed.¹⁵¹ The SHC thus explains that where there is a valid arbitration agreement, any reorganization of the original contracting party that leads to an assignment of the rights and obligations (including merger, division, or termination) will bind the original contracting party's legal successor unless parties agreed otherwise.¹⁵²

The Shanghai Opinion has been given a lot of commendations for its timely interacting with the development of the CL.¹⁵³ Moreover, the pragmatic approach taken by the SHC prioritizes the parties' intention to arbitrate by referring to the surrounding circumstances of the arbitration agreement. Dr. Wang Shengchang concludes that the Shanghai Opinion pioneers the efforts of local judiciaries in giving judicial preference to parties' drafting autonomy.¹⁵⁴

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149. See Wang and Qu, *supra* note 146, at 402; see also Interpretation of the Arbitration Law, *supra* note 144, at art. 5 (concluding that when a party is merged the successor is still bound by the agreement); see also JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 39 (2004) (stating that in mergers, the newly formed party or company will still be bound by the old arbitration agreement).
 150. See Contract Law (promulgated by the Second Session of the Ninth Nat'l People's Cong., March 15, 1999, effective Oct. 1, 1999), art. 11, available at http://novexc.com/contract_law_99.html (citing that the law gives the power for parties to agree to terms through consultation such as arbitration); see also Wang Liming & Xu Chuangxi, *Fundamental Principles of China's Contract Law*, 13 COLUM. J. ASIAN L. 1, 12 (1999) (discussing that in China's contract law parties have a right to consultation as a part of the principles of equality and freedom to contract); see also Feng Xu, *The Emergence of Temporary Staffing Agencies in China*, 30 COMP. LAB. L. & POL'Y J. 431, 450 (2009) (acknowledging that the China contract and labor law allows there to be a consultation between parties in order to make agreements).
 151. See Contract Law, *supra* note 150 (determining that where a party is merged after the contract's formation that the merged party will hold the same rights and obligations of the former parties under the contract); see also JINGZHOU TAO, RESOLVING BUSINESS DISPUTES IN CHINA 2802, 3003 (2005) (describing the process of merging companies adopting the old companies' rights and abilities in contracts); see also Stephen Hsu, *Contract Law of the People's Republic of China*, 16 MINN. J. INT'L L. 115, 150 (2007) (clarifying that when a merger takes place the newly formed party assumes the rights and duties of the former parties).
 152. See Wang and Qu, *supra* note 146, at 402; see also Interpretation of the Arbitration Law, *supra* note 144, at art. 5 (citing that the law states a new agreement must be formed if new parties are involved); see also Steven Smith et al., *International Commercial Dispute Resolution*, 42 INT'L LAW. 363, 366 (2007) (explaining that if new parties are formed, the law provides for a remedy and therefore the original clause is not enforceable).
 153. See Wang & Qu, *supra* note 146, at 407, 407–08; see also Xianwu Zeng, *Can a Foreign Company Contract Out of a Chinese Court? A Comparison of the American and Chinese Legal Systems Regarding the Enforceability of the Arbitration Clause in a Commercial Contract*, 8 CHINA L. REP. 85, 85 (1994) (discussing the development of Chinese contract law); see also Mark C. Lewis, Note, *Contract Law in the People's Republic of China—Rule or Tool? Can the PRC's Foreign Economic Contract Law Be Administered According to the Rule of Law?*, 30 VAND. J. TRANSNAT'L L. 495, 503–10 (1997) (detailing China's shift from an instrumentalist view of law that served the government's interest to a decentralized market and the theory of choice of law for contracting parties).
 154. See WANG SHENGCHANG, RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA 78–79 (explaining that parties to an arbitration agreement must express their intention to apply for arbitration in order for such an agreement to be valid); see also Wang Shengchang, *Zhongcai Xieyi ji qi Youxiaoxing Queding [Arbitration Agreement and the Confirmation of Its Validity]*, HAIXIA LIANG'AN JINGMAO ZHONGCAI YANTAOHUI WENJI 18–20 [SYMPOSIUM ESSAYS ON ECONOMIC TRADE ARBITRATION ACROSS THE TAIWAN STRAITS 11] (2001),

3. Reading Between the Lines

As discussed previously, the provisions of the AL fail to resolve the rigidity of the validity requirements for effective arbitration agreements.¹⁵⁵ Consequently, in tackling the legislative rigidity and to fill in the practical gap, the work has been left to the courts, with the most major improvements contributed by the SPC, augmented by the LHPCs.¹⁵⁶

In interpreting the requirement on form, remarkable improvements have been made to expand the “signature-based written” requirement.¹⁵⁷ Besides endorsing the form of consent by “incorporation by reference,” the SPC has also recognized the effect of arbitration agreement in some situations involving contract assignment and some maritime bills.¹⁵⁸ By doing so, the SPC has been seen as a swinging pendulum of strict textual adherence under the AL to a

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155. See WANG SHENGHANG, *supra* note 154, at 11; see also JINGZHOU TAO, BUSINESS, *supra* note 151, at 4003 (highlighting the CIETAC provision allowing for supplementary submission agreements to remedy defective existing agreements). See generally Jingzhou Tao, *The Role of Local Courts In Chinese Arbitration Procedures: Judicial Intervention—Friend, Enemy, or Just Alien?*, in DOING BUSINESS IN CHINA: RESOLVING THE CHALLENGES IN TODAY'S ENVIRONMENT 291 (PLI Corp. L. & Practice, Course Handbook Series No. 13438, 2007) (noting the nature of court intervention in Chinese arbitration proceedings and their determination by the Arbitration Laws of China and the nature, domestic or foreign, of the proceedings).
156. See Philippe Fouchard, *Suggestions to Improve the International Efficacy of Arbitral Awards*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 601, 612 (Int'l Council for Com. Arb. Congress, Series No. 9, 1999) (discussing the important role courts play, both nationally and locally, in assisting arbitrations); see also JOHN SHIJIAN MO, ARBITRATION LAW IN CHINA, 66–67 (2001) (proclaiming the Supreme People's Court's power to supervise, and its limited power to determine the validity of an arbitral agreement); see also JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 31 (2004) (describing the relationship between arbitration and the courts of China and noting the Supreme People's Court's issuance of important judicial interpretations of Arbitration Law).
157. See MO, *supra* note 156, at 88–89 (detailing the written requirements of arbitration agreements as contracts, which may be in the form of a letter or electronic message, and indicating that a signature is probably not mandated); see also JINGZHOU TAO, ARBITRATION *supra* note 156, at 33–34 (discussing written form requirements of arbitration agreements but noting that a signature is not statutorily required in China as it is under the New York Convention); see also ARBITRATION LAWS OF CHINA 55–56 (The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China ed. 1997) (outlining the types, forms, and requirements of arbitration agreements but failing to mention a signature requirement).
158. See Zhu Jianlin, *CIETAC: Validity of Arbitration Agreements in China*, INT. A.L.R. 1998, 1(4), N66 (1998) (quoting a discussion in which CIETAC and the Supreme People's Court clarified that arbitration agreements would remain valid in the event of legal contract assignment); see also Haung Jin & Du Huanfang, *Chinese Judicial Practice in Private International Law: 2003*, 7 CHINESE J. INT'L L. 255 (discussing several contract assignment cases where the higher courts held assignees bound to written arbitration agreements where the original clause was not expressly excluded or modified); see also Liu Yuwu, *China: Assignment of Arbitration Clause*, INT. A.L.R. 2001, 4(2), n11-12 (2001) (summarizing a Supreme People's Court's finding that assignees bound by an original arbitration clause are thereby subject to dispute resolution under the Foreign Trade Arbitration Commission of China).

more intentions-based interpretation.¹⁵⁹ The LHPCs go even further; they give effect to arbitration agreements where contractual parties have undergone reorganizations.¹⁶⁰

When it comes to the substantive requirement, an even longer list of judicial documents has been recorded to clarify the uncertainty of “designated arbitration commission.”¹⁶¹ In this respect, the SPC seems to allow an arbitration agreement to be deemed valid even if concurrent arbitral institutions have been nominated.¹⁶² However, the bottom line is that the institution must be clearly ascertainable from the parties’ drafting, and moreover, a supplementary agreement must be reached to appoint one institution.¹⁶³ By comparison, the judicial approach taken by the LHPCs seems more pro-arbitration in that it not only acknowledges the validity of agreements that incorrectly refer to arbitral commissions, but also lays down the solutions should there be any jurisdictional conflict due to the choice of two commissions.¹⁶⁴ That said,

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159. See José Alejandro Carballo Leyda, *A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan?*, 6 CHINESE J. INT'L L. 345, 351 (2007) (observing Chinese courts’ focus on “substance, justice, fairness and equity”); see also Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 411–12 (2006) (demonstrating China’s progressive attitude towards international arbitration). See generally Huang Jin & Du Huan Fang, *supra* note 158, at 647 (charting Supreme People’s Court’s choice of law decisions and exercise of jurisdiction, and noting that they decided almost half of the cases by party autonomy).
160. See ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 152 (4th ed. 2004) (referencing the general rule that arbitration agreements are still effective for contract successors); see also Karl-Heinz Böckstiegel, *Summary of Discussion in the Third Working Group, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION* 433, 435 (Int’l Council for Com. Arb. Congress, Series No. 9, 1999) (quoting Professor Wang Sheng Chang’s report illustrating China’s preference for enforcement of arbitration agreements); see also Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People’s Republic of China*, 1 ASIAN-PAC. L. & POL'Y J. 12, 59–61 (2000) (commenting on China’s lack of a unified fraudulent transfer or conveyance statute which would allow for enforcement of arbitration agreements under such circumstances).
161. See *ARBITRATION LAWS OF CHINA*, *supra* note 157, at 56–57 (explaining that a designated arbitration commission is a mandatory element under Chinese Arbitration Law); see also Roger Best, *The Resolution of China Disputes*, 3 INT. A.L.R. 2000 1, 4 (2000) (observing that CIETAC has a monopoly due to China’s mandated designation of an arbitration commission); see also Mauricio J. Claver-Carone, *Post-Handover Recognition and Enforcement of Arbitral Awards Between Mainland China and Hong Kong SAR: 1999 Agreement vs. New York Convention*, 33 LAW & POL'Y INT'L BUS. 369, 390–91 (2002) (quoting Article 16 of China’s Arbitration Law, which requires arbitration agreements to contain a designated arbitration commission).
162. See Katherine L. Lynch, *Chinese Law: The New Arbitration Law*, 26 HONG KONG L.J. 104, 106 (1996) (explaining the creation of arbitration commissions by the SPC where necessary); see also Patricia Pattison & Daniel Heron, *The Mountains Are High and the Emperor Is Far Away: Sanctity of Contract in China*, 40 AM. BUS. L.J. 459, 503 (2003) (outlining the establishment of the China Arbitration Association and its purpose to supervise arbitration commissions); see also Peerenboom, *supra* note 160, at 9 (noting how the courts are answerable to the local government and are viewed as government administrators).
163. See Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes: Drafting An Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941, 947 (1996) (declaring that there has been a growth in the availability of arbitration institutions in China); see also Joseph T. McLaughlin et al., *Planning for Commercial Dispute Resolution in Mainland China*, 16 AM. REV. INT'L ARB. 133, 141 (2005) (recognizing the difficulty in drafting clauses under the Arbitration Law to identify an arbitration commission); see also Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 428 (2006) (addressing the principle that arbitration institutions are independent from each other).
164. See Li Xuebing, *The Recognition and Enforcement of Foreign Arbitral Awards or Foreign Judgments in China, available at* http://www.vmaa.org/docs/Li%20Xuebing_Nov1605_Seminar.doc (analyzing the impact of the Shanghai Opinion on the implementation of the Arbitration Law of the People’s Republic of China).

Article 2 of the Shanghai Opinion has been widely regarded as a bold stride of the local judiciary to show greater respect to the parties' arbitral intention.¹⁶⁵

In reading between the lines of these judicial documents, we find that despite the fact that there is no clear legal basis for the LHPCs to exercise judicial interpretative power, they do issue judicial opinions, and these opinions tend to influence arbitral jurisprudence and practice.¹⁶⁶ This is because decentralization in the course of pursuing economic reforms has fueled local judicial efforts to develop their own practice in implementing the national rules according to their own needs.¹⁶⁷ As such, the lack of national guidance in certain aspects creates some room for local organizations to expand their own role. It deserves to be noted that although judicial guidelines at both the central and local levels have shown significant progress in liberalizing parties' drafting autonomy, the local judiciary has been generally more liberal and "benevolent" in allowing the honoring of the defective agreements. They strive to save the defectively drafted agreements as much as possible by referring to extraneous evidence and by reading in a selection of arbitration commission for the parties even when only the place of arbitration is mentioned.¹⁶⁸ This may be explained by the fact that more pressure to liberalize has been put on the judicial front lines, i.e., the local judiciary, particularly those in economically well-developed areas where the practice of commercial arbitration has developed into a more advantageous practice. The two judicial opinions issued by the BHC and SHC therefore have resulted

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165. See Wang and Qu, "Several Comments on the Shanghai Opinion 2001," in CIETAC, ARBITRATION AND LAW YEARBOOK OF 2001 407–8 (ZHONGCAI YU FALV 2001 NIANKAN) (2002); see also Katherine L. Lynch, *Chinese Law: The New Arbitration Law*, 26 H.K.L.J. 104, 108 (1996) (describing that the purpose of Article 2 is to discuss how the rights of contract disputes between parties are arbitrable); see also Zhao Xiuwen & Kloppenberg, *supra* note 163, at 428 (revealing that China's Arbitration Law promotes party autonomy in choosing an arbitration commission).
166. See 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, 345–46 (1997) (commenting on the disturbing exercise of jurisdiction by the People's Court in an arbitration dispute); see also Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539, 560 (1995) (indicating the roles of the judiciary in the People's Republic of China Arbitration Courts); see also Carlos de Vera, *Arbitrating Harmony: "Med-Arb" and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 161–62 (2004) (detailing the process by which some jurisdictions provide for enforcement of a settlement agreement apart from mediation).
167. See Hu Kangsheng, *Speech at the Seminar "Resolving Differences in China,"* in ZHONGCAI YU FALV 2001 NIANKAN [ARBITRATION AND LAW YEARBOOK OF 2001] at 7 (CIETAC ed., 2002); see also Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China from a U.S. Judgment Creditor's Perspective*, 36 GEO. WASH. INT'L L. REV. 757, 782 (2004) (remarking how China is moving to improve the efficacy of judgment enforcement in China's judicial system); see also William Heye, Note, *Forum Selection for International Dispute Resolution in China—Chinese Courts vs. CIETAC*, 27 HASTINGS INT'L COMP. L. REV. 535, 535–36 (2004) (discussing the jurisdiction of Chinese courts for litigation purposes).
168. See Li Xuebing, *supra* note 164 (analyzing the impact of the Shanghai Opinion on the implementation of the Arbitration Law of the People's Republic of China).

in resounding compliments from both the judiciary and arbitration community.¹⁶⁹ The Shanghai Opinion in 2001 was particularly well received for having cleared up quite a few practical uncertainties.¹⁷⁰ In CIETAC's words, "The Shanghai Opinion has made crucial contributions to the development of arbitration in China by the local judiciary and these guidelines impact the arbitral practice not only in Shanghai but also the entire country."¹⁷¹

However, gaps remain after comparing international arbitration norms. For example, judicial documents at both the central and provincial levels fail to satisfactorily reflect the relevant changes taking place in other important Chinese legislatures such as the CL.¹⁷² The inconsistencies include, for example, the effects of arbitration agreements on non-signatory third parties in the context of an agency relationship.¹⁷³ Moreover, from time to time, all those judicial opinions appear to be sporadic pieces of documents before the public.¹⁷⁴ They may not be consistent with each other in a number of instances and perhaps conflict with each other, which

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169. See Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 38 (2005) (reviewing the Chinese legislature's attempt to address the longstanding problems with foreign parties in the court system); see also Jane Volz & Robert Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 904 (1996) (addressing arbitration within China's People's Court); see also Li Hu, *Setting Aside an Arbitral Award in the People's Republic of China*, 12 AM. REV. INT'L ARB. 1, 16 (2001) (stating the difficulties of the former arbitration system in China).
170. See McLaughlin et al., *supra* note 163, at 140 (emphasizing the reputation of China's arbitration commission by the American Chamber of Commerce after 2001); see also George O. White III, *Foreigners at the Gate: Sweeping Revolutionary Changes on the Central Kingdom's Landscape—Foreign Direct Investment Regulations & Dispute Resolution Mechanisms in the People's Republic of China*, 3 RICH. J. GLOBAL L. & BUS. 95, 136 (2003) (detailing the progress of China's arbitration courts since 1990); see also Jessica Zoe Renwald, Note, *Foreign Investment Law in the People's Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution*, 16 IND. INT'L & COMP. L. REV. 453, 474 (2006) (describing the advantages to arbitrating in an international arbitration commission in China).
171. See Wang & Qu, *supra* note 165, at 407–8. See generally David T. Wang, Comment, *Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System*, 48 SANTA CLARA L. REV. 649, 650–52 (2008) (discussing how the new federal court system in China seeks to improve the enforcement of arbitral awards).
172. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, CHINA IN THE WORLD ECONOMY: THE DOMESTIC POLICY CHANGES 365 (2002) (stating that China's current regulation reform focuses on improving the implementation of its lawmaking); see also JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK 54 (2005) (informing that the National People's Republic of China has recognized a delay between the promulgation and implementation of their laws); see also Shirley S. Cho, Note, *Continuing Economic Reform in the People's Republic of China: Bankruptcy Legislation Leads the Way*, 19 HASTINGS INT'L & COMP. L. REV. 739, 749–50 (1996) (describing China's cautious approach to implementing its laws and regulations, characterized by trial periods in select localities that create inconsistent judicial documents).
173. See The Beijing Opinion on Some Issues Regarding the Determination of an Application for Ascertaining the Validity of an Arbitration Agreement, and Motions to Revoke an Arbitration Award (promulgated by the Beijing High Court Dec. 3, 1999) (P.R.C.); see also *Cosmoteck Mumessillik Ve Ticaret Ltd. Sirkketi v. Cosmoteck U.S.A.*, 942 F. Supp. 757, 760 (D. Conn. 1996) (applying the idea that non-signatory parties can be bound by arbitration agreements to international arbitrations).
174. See ZIMMERMAN, *supra* note 172, at 36 (postulating that the modern Chinese legal system is influenced by Legalism, which does not emphasize the importance of accurately recording crimes or punishments); see also Nanping Liu, *Trick or Treat: Legal Reasoning in the Shadow of Corruption in the People's Republic of China*, 34 N.C. J. INT'L L. & COM. REG. 179, 225 (2008) (accusing Chinese judges of issuing unclear and irrational opinions because they omit certain facts from their decisions); see also Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 68 (2001) (claiming that no formal or official system for reporting cases or judicial opinions exists in China).

makes them very difficult to reference in arbitral practice.¹⁷⁵ As such, a unified judicial interpretative document compiling all these opinions from various levels would better serve the practical needs of various arbitral organizations.

B. Critical Turning Since 2006: Unified SPC Interpretation on Arbitration

In its latest attempt, a decade later, the SPC spearheaded the reform by issuing its unified interpretation on Chinese arbitration, the “Interpretation on Certain Issues Relating to the Application of the PRC Arbitration Law” (the SPC Interpretation), as effective in September 2006.¹⁷⁶ The SPC Interpretation has been based significantly on the two Draft Provisions previously issued by itself in 2003 and 2004 respectively, namely, “Several Regulations on How the People’s Courts Handle Foreign-Related Arbitration and Foreign Arbitration Cases” (the “Foreign-Related Draft”)¹⁷⁷ and “Interpretations to Several Issues on the Application of the Arbitration Law” (the “Domestic Draft”).¹⁷⁸

As far as the regulation of arbitration agreements is concerned,¹⁷⁹ the newly issued SPC Interpretation appears to be a good summary of the relevant provisions contained in the CL and various SPC and LHPC judicial opinions on the topic.¹⁸⁰ It codifies the existing arbitra-

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175. See ICCA INTERNATIONAL ARBITRATION CONGRESS, *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 67–68 (Albert Jan van den Berg ed., 2005) (positing that China’s inconsistent laws and judicial decisions are the cause of its difficulties in applying arbitration decisions); see also Thuy Le Tran, Comment, *Vietnam: Can an Effective Arbitration System Exist?*, 20 LOY. L.A. INT’L & COMP. L. J. 361, 383 (1998) (commenting that China’s Arbitration Law allows Chinese courts to refuse to enforce arbitration awards); see also Wang, *supra* note 171, at 660 (opining that Chinese arbitration law is plagued by institutional differences and extra-judicial influences, which result in the non-enforcement of arbitration awards).
176. See Interpretation on Certain Issues Relating to the Application of the PRC Arbitration Law (promulgated by the Supreme People’s Court, Aug. 23, 2006, effective Aug. 23, 2006), translated in ISINOLAW (last visited Mar. 21, 2009) (P.R.C.) (answering questions about China’s Arbitration Law and its domestic application).
177. See *Interpretation on Several Issues Concerning the Application of the <PRC Arbitration Law>* 4500/06.08.23, CHINA L. & PRAC., Oct. 1, 2006, at 91; see also Letter from Zhang Jinxian, Judge of the Supreme People’s Court, to Ellen S. Reinstein (Nov. 12, 2004) (on file with www.chinaiprlaw.com), available at <http://www.chinaiprlaw.com/english/answers/answer27.htm> (acknowledging that in February 2002, the SPC released an interpretation on its Arbitration Law as applied to foreign arbitral awards).
178. See *Application of P.R.C. Arb. L.*, *supra* note 177; see also WEI-QI CHEN, RECENT DEVELOPMENTS IN THE JUDICIAL INTERPRETATION ON ARBITRATION LAW IN CHINA (2007), at 58, <http://www.jurist.org.cn/doc/uclaw200705/uclaw20070508.pdf> a58, (affirming that the Interpretation on Arbitration Law, released in 2006 was based on a Draft Provision which was published on the Court’s website on July 22, 2004).
179. See *Certain Issues*, *supra* note 176; see also John Choong, *Clarifying the PRC Arbitration Law: Questions and Answers*, CHINA L. & PRAC., Nov. 2006, available at <http://www.chinalawandpractice.com/Article/1691932/Channel/9930/Clarifying-the-PRC-Arbitration-Law-Questions-and-Answers.html> (revealing that arbitration agreement and arbitral awards are the two aspects of this interpretation.)
180. See *China: Interpreting the PRC Arbitration Law*, ANGELA WANG & CO., Jan. 24, 2007, <http://www.mondaq.com/article.asp?articleid=45778> (providing that the Interpretation clarified past ambiguities associated with arbitration agreements). See generally Chen Jian, *Latest Developments in Commercial Arbitration*, BUSINESS FORUM CHINA, http://www.bfchina.de/index.php?Itemid=27&contentid=318&id=209&option=com_content&task=view (explaining that the Interpretation is pro-arbitration and provides clarification on how the arbitration law should be interpreted); see generally Graeme Johnston & Steve Kou, *The Latest Incremental Reform of Chinese Arbitration Law*, ASIAN DISP. REV. 13 (Jan. 2007) (asserting that some portions of the SPC Interpretation took into account prior SPC interpretations).

tion rules and practices and provides further clarification to certain issues that, in the past, have led to technical challenges to arbitration agreements.¹⁸¹ At the same time, however, it steps backward from the pro-validity initiatives in some cases cited to in the two Drafts and leaves other important issues unanswered.

1. Two Previous SPC Draft Provisions

For the purpose of the present review of the 2006 SPC Interpretation, its previous two Draft Provisions are of particular relevance and will be referred to throughout this section as a comparative base in outlining both the improvements and problems of the latest SPC approach toward arbitration.

a. Broad Meaning of “Written Agreement”

Both the Foreign-Related and Domestic Drafts comprehensively cover the increased flexibility of the traditionally strict writing requirement for arbitration agreements.

First, the provisions are consistent with the CL in that the determination of whether an agreement is in writing is determined in accordance with Article 11 of the CL,¹⁸² which states that “any signed form capable of tangibly representing its contents, such as written instruments, letters and electrically or electronically transmitted documents,” qualifies as a writing that makes the agreement valid.¹⁸³ Article 16 of the Foreign-Related Draft contains an exceptional deviation from the traditional “signature-based writing” rule by providing that a valid arbitration agreement will be deemed to have been made where one party commences arbitral proceedings and the other party joins in the proceeding without jurisdictional objection and files a substantive defense. This creation of the “waiver of objection” standard is similar to the practice of “exchange of statements of claim and defense”¹⁸⁴ under the ML.

To resolve the practical uncertainty raised by the BHC, the Foreign-Related Draft addressed the effect of arbitration agreements on agency relations, and provides, in Article 21, that the agreement will not bind the principal if it is concluded by an agent without authorized

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181. See *China: Interpreting the PRC Arbitration Law*, *supra* note 180 (asserting that the SPC’s Interpretation helped clarify Chinese arbitration law); see also Andrew Jeffries & Peter Thorp, *A New Interpretation on the Application of Arbitration Law in China*, ALLEN & OVERY, Sept. 20, 2006, <http://www.allenoverly.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&contentSubTypeID=7944&itemID=46114&countryID=18856&preLangID=18531> (explaining that the Interpretation should result in consistent rulings from the courts on arbitration matters). See generally Johnston & Kou, *supra* note 180 (expressing that the SPC’s Interpretation was useful).
182. See *Application of P.R.C. Arb. L.*, *supra* note 177, at art. 25 (proclaiming that an arbitration agreement is valid when the disputing parties agree to submit their dispute to arbitration under Articles 34 and 256 of the Civil Procedure Law).
183. See Contract Law (promulgated by the Second Session of the Ninth Nat’l People’s Cong., March 15, 1999, effective Oct. 1, 1999), art. 11, available at http://novexc.com/contract_law_99.html (providing the definition of a writing under the Contract Law).
184. See UNCITRAL Model Law on International Commercial Arbitration ch. II, art. 7(2) (1994) (asserting that the arbitration agreement must be in writing in order to be valid); see also PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS at 59 (London Sweet & Maxwell 2000) (explaining that an arbitration agreement is valid so long as it is in writing).

power, ultra vires or after the power expires.¹⁸⁵ However, in accordance with CL provisions, the arbitration agreement signed by the agent will be established between the principal and the third party as long as the substantive contract per se binds the principal; this will be based on whether the third party has actual knowledge of the agency relationship at the conclusion of the arbitration agreement with the agent.¹⁸⁶

Both drafts further articulate that the succession or transfer of the legal rights and obligations of a party in a contract that contains an arbitration clause leads to the transfer of the arbitration agreement. This expansive view on “written form of consent” has been endorsed by the SPC before¹⁸⁷ and has been codified in Articles 28 (succession), 29 (assignment), and 31 (subrogation) of the Foreign-Related Draft as well as Articles 1 (succession) and 2 (assignment) of the Domestic Draft¹⁸⁸ unless the third party assignee or successor disagrees with or proves that he was unaware of the arbitration clause at the time of assignment or succession.¹⁸⁹

Finally, Article 30 of the Foreign-Related Draft deals with the transfer of arbitration agreements in the context of charter parties and Bs/L. It states that an arbitral clause contained in a charterparty shall be deemed to be incorporated and therefore binding on the B/L holder, provided the incorporation is expressly stated on the face of the bill and the arbitral clause is valid.¹⁹⁰ It is notable that over a decade, the SPC seemed to soften its tone a bit as the express consent by the bill holder is no longer required. However, it might still be arguable that an express statement on the “face” of the bill appears restrictive in that it could deny maritime arbitration cases where the statement of incorporation may not be made “express” enough or made within the lines of the bill.¹⁹¹

185. See Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, art. 21 (promulgated by the Supreme People's Court, Dec. 31, 2003, effective Dec. 31, 2003) (P.R.C.) (stating a principal is not bound by the arbitration agreement unless he authorizes an agent to act on his behalf).

186. See Contract Law, *supra* note 183, at art. 402–3 (detailing the roles of the agent, principle, and third party in a contract situation).

187. See Case Report by Wang Shengchang, *Zhongcai Xieyi ji qi Youxiaoxing Queding [Arbitration Agreement and the Confirmation of Its Validity]*, HAIXIA LIANG'AN JINGMAO ZHONGCAI YANTAOHUI WENJI 18–20 [SYMPOSIUM ESSAYS ON ECONOMIC TRADE ARBITRATION ACROSS THE TAIWAN STRAITS 18–20] (2001) 15–20; see also Wang and Qu, “Several Comments on the Shanghai Opinion 2001,” in CIETAC, ARBITRATION AND LAW YEAR-BOOK OF 2001 407–8 (ZHONGCAI YU FALV 2001 NIANKAN) (2002).

188. See Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 185, at arts. 28–29, 31; see also Interpretations to Several Issues on the Application of the Arbitration Law, arts. 1–2 (issued by the Supreme People's Court, July 22, 2004) (P.R.C.).

189. See Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 185, at art. 29(2).

190. See *id.* at art. 30; see also Jessica Zoe Renwald, Note, *Foreign Investment Law in the People's Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution*, 16 IND. INT'L & COMP. L. REV. 453, 472 (2006).

191. See Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 141 (2006) (discussing that arbitration agreements in China must have clear guidelines or they are considered void); see also Li Hai, *Guanya Tidan Zhongcai Tiakuan Xiaoli Ruogan Wenti de Sikao [Thinking About the Several Questions Regarding the Validity of the Arbitration Clause in the Bill of Lading]* (ZHONGCAI YU FALV [ARBITRATION AND LAW] (2005) (P.R.C.) at 92.

b. Curable Instances of “Ambiguous Arbitration Institution”

In the beginning, both of the two draft provisions replace the use of the term “arbitration commission” (*zhongcaiweiyuanhui*) in the AL with “arbitration institution (*zhongcaijigou*).”¹⁹² It is interesting to note that except for the use of the word “commission” in China, most arbitral institutions abroad adopt different titles which imply that they are institutional arbitration service providers.¹⁹³ Pursuant to the CL, parties to a contract with foreign parties¹⁹⁴ are allowed to agree to submit their disputes to arbitration either within or outside China.¹⁹⁵ They are thus allowed to choose institutional arbitration abroad even if the governing law of their arbitration agreement is AL.¹⁹⁶ As such, it is absurd to reject the validity of arbitration agreements when often strict adherence to the term “commissions” is actually impossible. It may also be said that the SPC hopes to address other concerns such as the rigid adherence to the term “arbitration commission” and hence to move Chinese arbitral regulations more parallel to international arbitration terms and uses. Beyond the wording change, three main aspects of reforms are brought by the two drafts with respect to liberalizing the rigidity of the “designated arbitration commission” standard under the AL.¹⁹⁷

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192. See Several Issues Regarding the Handling by the People’s Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 185, at arts. 22–26; see also Interpretations to Several Issues on the Application of the Arbitration Law, *supra* note 188, at art. 2.
193. See Hong Kong International Arbitration Center, http://www.hkiac.org/HKIAC/HKIAC_English/main.html (last visited Mar. 20, 2009) (referencing the arbitration institution in Hong Kong); see also London Court of International Arbitration (LCIA), <http://www.lcia-arbitration.com/> (last visited Mar. 20, 2009) (referencing the arbitration institution in England); see also American Arbitration Association, <http://www.adr.org/> (last visited Mar. 20, 2009) (referencing the arbitration institution in America).
194. See Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL’Y J. 403, 444 (2006) (reiterating the judicial criteria for a foreign related dispute). See generally General Principles of Civil Law (promulgated by President of the People’s Republic of China on Apr. 12, 1986, effective Jan. 1, 1987) (P.R.C.), available at <http://www.law-bridge.net/english/LAW/20065/1322572053247.html> (discussing the civil laws of the People’s Republic of China and specifically how they deal with foreigners).
195. See Contract Law (promulgated by the Second Session of the Ninth Nat’l People’s Cong., March 15, 1999, effective Oct. 1, 1999), art. 128, available at http://novexcn.com/contract_law_99.html (stating that the parties may go to either the Chinese arbitration or outside arbitration for their disputes); see also JINGZHOU TAO, ARBITRATION LAW AND PRACTICE IN CHINA 8 (2004) (asserting that the reform in Chinese law has allowed for arbitration both inside and outside of China); see also Gary J. Dernelle, *Direct Foreign Investment and Contractual Relations in the Peoples Republic of China*, 6 DEPAUL BUS. L.J. 331, 359 (1994) (contending that the Chinese Foreign Economic Contract Law allows for arbitration dispute resolution in other forums outside China).
196. See JINGZHOU TAO, ARBITRATION, *supra* note 195, at 56 (postulating that ad hoc arbitration agreements between nations that allow for arbitration outside of China are valid); see also Mark Sidel, *The Acceptance of Emerging American Law Abroad: Could “Maritime RICO” Work in the People’s Republic of China*, 12 TUL. MAR. L.J. 99, 107 (1987) (arguing that under the New York Convention, China agreed to recognize foreign arbitral decisions).
197. See Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People’s Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 132 (1996) (claiming that there have been significant breakthroughs in international arbitration in China); see also Zhao Xiuwen & Kloppenber, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 449–50 (2006) (identifying the three major reforms that should take place in arbitration law in China). See generally Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People’s Republic of China*, 16 IND. INT’L & COMP. L. REV. 37, 48 (2005) (stressing the reforms in Chinese law regarding arbitration).

First, Articles 22 through 26 of the Foreign-Related Draft and Articles 5 through 7 of the Domestic Draft detail the circumstances under which arbitration agreements should be voided under Articles 16 and 18 of the AL, yet would be curable in arbitral practice. This may include cases such as an agreement providing for arbitration “by two or more arbitral institutions.”¹⁹⁸ Further, both Drafts articulate that if an arbitration agreement provides for arbitration at a certain place but fails to designate a specific arbitral institution, the agreement is not invalidated by the fact that more than one institution exists at the place of arbitration.¹⁹⁹ Although it fails to clarify which institution in the arbitral place is the proper one, the reasonable assumption is that without any supplementary agreement specifying the exact institution, the principle of “first come, first served” will be applied so that the arbitral institution that first receives an application for arbitration seizes jurisdiction over that arbitration agreement.²⁰⁰ In addition, where the parties make incorrect reference to an arbitral institution but its proper identity can still be ascertained by reference to the surrounding context, the courts should find the agreement valid and decline its jurisdiction over the dispute.²⁰¹ Similarly, where an arbitration clause makes reference only to the rules of a specific arbitral institution, the court may refer the matter to arbitration under that institution whose rules are referred to.²⁰²

The second aspect concerns the scenario where the parties opt for both arbitration and litigation. Following a previous SPC opinion, Article 20(4) of the Foreign-Related Draft provided

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198. See *Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations*, at art. 22 (promulgated by the Supreme People's Court, Dec. 31, 2003, effective Dec. 31, 2003) (P.R.C.) (providing an example of a type of an agreement that would be curable and not voidable under the new measures); see also *Application of the P.R.C. Arb. L.*, *supra* note 111, at art. 5 (citing how providing for arbitration by two or multiple arbitral institutions would not be voidable).
199. See *Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations*, *supra* note 199, at art. 23 (discussing how arbitration agreements are not rendered invalid due to leaving out certain details); see also *Application of the P.R.C. Arb. L.*, *supra* note 111, at art. 5 (discussing how an arbitration agreement is valid even if more than one institution exists at the place of arbitration).
200. See Shanghai Shi gaoji renmin fayuan guanyu zhixing “Zhonghua Renmin Gongheguo zhongcai fa” ruogan wenti de chuli yijian [Opinion of the Shanghai High People's Court on the Handling of Certain Issues Relating to Implementation of the “Arbitration Law of the People's Republic of China”] (adopted Jan. 3, 2001) (P.R.C.) translated in *ARBITRATION IN CHINA: A PRACTICAL GUIDE, VOLUME 2*, at art. 5 (Daniel R. Fung et al. eds., 2004) (discussing how if a particular jurisdiction is not designated, the arbitral institution which first receives an application for arbitration will be the one to seize jurisdiction); see also Wang and Qu, “*Several Comments on the Shanghai Opinion 2001*,” in *CIETAC, ARBITRATION AND LAW YEARBOOK OF 2001 407–8* (ZHONGCAI YU FALV 2001 NIANKAN) (2002) (describing the “first come, first served” principle that is used to determine a specific jurisdiction).
201. See *Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations*, *supra* note 198, at art. 24 (describing a circumstance where the courts should decide the jurisdiction in a dispute rather than the parties); see also *Interpretation on Several Issues Concerning the Application of the <PRC Arbitration Law> 4500/06.08.23*, CHINA L. & PRAC., Oct. 1, 2006, art. 6 (stating that courts should decline jurisdiction where parties make incorrect reference to an arbitral institution).
202. See *Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations*, *supra* note 198, at art. 26 (discussing what a court may do when an arbitration clause refers only to the rules of a specific arbitral institution); see also Jessica Zoe Renwald, Note, *Foreign Investment Law in the People's Republic of China: What to Expect from Enterprise Establishment to Dispute Resolution*, 16 *IND. INT'L & COMP. L. REV.* 453, 472 (2006) (describing how a “chosen arbitration commission” must be indicated specifically).

that such arbitration agreements were invalid.²⁰³ The approach in the Foreign-Related Draft, however, conflicts with that of the Domestic Draft, which provides, under Article 7, that such agreements will not be voided and that the case will be adjudicated in whichever, the arbitral institution or the court, adjudicatory body files the application first.²⁰⁴ The liberal approach in the Domestic Draft is welcomed by the practitioners as the more realistic interpretative technique and more pro-arbitration stance of the SPC.²⁰⁵

Lastly, Article 20(6) of the Foreign-Related Draft deals with the controversial issue of ad hoc arbitration agreements in China. It seems that the SPC now relaxes its traditional stance by providing an exception under Article 27 of the Foreign-Related Draft to allow the ad hoc agreement in some cases.²⁰⁶ The Article 27 exception consists of two parts: first, both parties to the arbitration agreement must be nationals of member states to the 1958 New York Convention (NYC); second, the laws of both countries must not prohibit ad hoc arbitrations.²⁰⁷ Since the SPC has held that ad hoc arbitrations are not permitted in China,²⁰⁸ then pursuant to the second limb of the Article 27 exceptions, an ad hoc arbitration agreement between a Chinese party and a foreign party may nevertheless be voided. As such, on its face, the rule dramatically reduces the ability of the parties to a Sino-foreign contract to conduct ad hoc arbitrations. Additionally, the SPC seems to lean toward arbitration agreements that provide for ad hoc arbitrations outside China.²⁰⁹ The potential impact of Article 27 is nonetheless far-reaching as it is the future goal for ad hoc arbitral practice in China. The Draft Provisions were expected to be formally recognized with this partial recognition of ad hoc arbitration agreements. However, that formal recognition did not occur, leaving the status of ad hoc arbitration agreements still an open-ended question in the Chinese arbitration system, as the following sections will discuss.

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203. See Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-related Arbitrations and Foreign Arbitrations, *supra* note 198, at art. 20(4) (explaining agreements are invalid where the parties opt for both arbitration and litigation).
 204. See *Application of the P.R.C. Arb. L.*, *supra* note 201, at art. 7 (citing the Domestic Draft, which provides that agreements where parties opt for both arbitration and litigation will not be voided, as opposed to the Foreign-Related Draft).
 205. See Alex Burkett, *China's Two-Dimensional Skies: The "Chineseness" of Aviation Law in China and How It Helps Us Understand Chinese Law*, 16 J. TRANSNAT'L L. & POL'Y 251, 261 (2007) (providing examples of the liberal thinking and legal philosophy used in trade agreements); see also Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 454 (2006) (describing how a liberal approach would be more beneficial to foreign practitioners).
 206. See Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, *supra* note 198, at art. 27 (discussing how the ad hoc agreement is allowed in some cases under the Foreign-Related Draft).
 207. See *id.* (discussing the exception for ad hoc arbitrations).
 208. See People's Insurance Company of China, Guangzhou Branch v. Guangdong Guanghe Power Company Ltd. (Ming Si Zhong Zi No. 29, 2003); see also Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 18, translated in 34 I.L.M. 1650, 1654 (1995) (P.R.C.) (outlining grounds when an arbitration agreement will be invalid).
 209. See SUN NANSHEN, JURISDICTIONAL CONFLICTS IN THE JUDICIAL REVIEW OF FOREIGN-RELATED ARBITRATIONS (2004); see also Xiaowen Qiu, Note & Comment, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China*, 11 AM. REV. INT'L ARB. 607, 608 (2000) (enumerating ways in which foreign and domestic awards are treated differently).

2. Unified Judicial Interpretation on Arbitration

The unified SPC Interpretation of 2006, on the basis of the two Drafts previously issued, is the latest attempt by the SPC to clarify its positions on a number of contentiously defective arbitration agreements. Compared with the two Drafts, both encouraging a general preference toward confirming arbitration agreement and discouraging moving away from liberalization are reflected in this latest SPC codification.

a. Confirming the Broad Meaning of “Written Agreement”

The 2006 Interpretation generally confirms the liberal approach of the two Drafts on the writing formality. Consistent with Article 15 of the Foreign-Related Draft, Article 1 of the Interpretation aligns the definition of written form with Article 11 of the CL.²¹⁰ Article 11 then confirms acceptance of consent to arbitration by way of incorporation by reference. It provides that where a contract specifically stipulates that an arbitration clause in another contract or document shall be applied to resolve disputes under the contract at issue, the parties shall refer the dispute to arbitration in accordance with such clause.²¹¹ Although the wording is not entirely clear, it appears that a general reference to such contract or document will be sufficient, which is in accordance with an earlier SPC reply.²¹²

With respect to the effect of arbitration agreements upon non-signatory third parties in contractual transfer (succession, assignment, and subrogation), the interpretation is generally in line with the approach taken in its Draft Provisions that the arbitration agreement shall be binding on the party to whom contractual rights are assigned, transferred, or subrogated.²¹³ However, it goes on to provide a significant exception, other than those already mentioned in the drafts—the arbitration agreement will not be binding if the transferee is unaware of the existence of a separate arbitration agreement at the time of transfer or assignment.²¹⁴ It thus introduces a presumptive rule that the arbitration agreement will be binding on the transferee or assignee, but can be rebutted by showing a lack of knowledge, although the exact scope of “lack of awareness” is unclear. For example, to what extent is the transferee or assignee’s implied or constructive knowledge of the existence of arbitration agreement relevant? The SPC fails to provide any further guidelines, leaving the practice vague on that point. Additionally, some other controversial non-signatory third party cases, in the agency and bill of lading contexts,

210. See Interpretation on Certain Issues Relating to the Application of the PRC Arbitration Law (promulgated by the Supreme People’s Court, Aug. 23, 2006, effective Aug. 23, 2006), translated in ISINOLAW (last visited Mar. 21, 2009) (P.R.C.), at art. 1 (describing what constitutes a writing for an arbitration agreement).

211. See *id.* art. 11 (outlining how incorporation by reference is handled in arbitration).

212. See SPC Reply on the Manner of Determining Jurisdiction in a Sino-Mongolian Contract That Fails to Provide for Arbitration Directly (issued by the Sup. People’s Ct., Dec. 14, 1996) 1996 Fa Han No. 177 (P.R.C.) (affirming the 1996 Supreme People’s Court reply in the Sino-Mongolian case; see also John Choong, *Clarifying the PRC Arbitration Law: Questions and Answers*, CHINA L. & PRAC. (London), Nov. 2006 at 22 (arguing that it is common practice to refer to and incorporate standard terms set out in another document).

213. See Certain Issues, *supra* note 210, at arts. 8, 9 (detailing how third parties are to be treated in an arbitration).

214. See *id.* at art. 9 (shifting the burden to object to an arbitration agreement to the transferee if he does not want it to be binding).

have been omitted that had previously been addressed in the Foreign-Related Draft.²¹⁵ The provisional omission leads to greater uncertainty of the regulatory regime and causes the arbitral practice to be inconsistent on these issues.

b. Stepping Backward on “Curable Arbitration Institution”

The unified SPC Interpretation confirms the two drafts’ usage of the term “arbitration institution.” With respect to guidelines for substantive validity, Articles 3 through 7 of the Interpretation deal specifically with curable instances of a vague yet ascertainable arbitral institution as required under Articles 16 and 18 of the AL.²¹⁶ Most notably, Article 4 of the Interpretation provides under its second part that “if the arbitration institution can be ascertained pursuant to the arbitration rules which have been agreed by the parties to be applicable, the arbitration agreement is valid.”²¹⁷ It is clear from most institutional arbitration rules which institution the rules refer to. It thus appears sufficient that if parties in China agree on institutional arbitration rules such as those of the ICC and HKIAC, then that is sufficient to uphold arbitration under that institution.²¹⁸ Such an approach is consistent with Article 26 of the previously issued Foreign-Related Draft²¹⁹ and Article 4(3) of the recently revised CIETAC Rules.²²⁰

The Interpretation, in response to Article 5 of the Domestic Draft and Article 22 of the Foreign-Related Draft, clarifies the scenario where two or more arbitration institutions have been concurrently identified. To the disappointment of arbitration scholars and practitioners, it

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215. See Several Issues Regarding the Handling by the People’s Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, art. 21, 30 (promulgated by the Supreme People’s Court, Dec. 31, 2003, effective Dec. 31, 2003) (P.R.C.).
 216. See David T. Wang, Comment, *Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System*, 48 SANTA CLARA L. REV. 649, 665 (2008) (stating that the SPC Interpretation conformed to the usage of the arbitration institution in the Draft). See generally Jingzhou Tao, *The Role of Local Courts In Chinese Arbitration Procedures: Judicial Intervention—Friend, Enemy, or Just Alien?*, in *DOING BUSINESS IN CHINA: RESOLVING THE CHALLENGES IN TODAY’S ENVIRONMENT* 297 (PLI Corp. L. & Practice, Course Handbook Series No. 13438, 2007) (acknowledging the use of an arbitration institution by the Chinese courts).
 217. See Certain Issues, *supra* note 210, at art. 4 (explaining that the arbitration agreement must specify the arbitration rules that are to apply, not just in the event of a dispute).
 218. See China International Economic and Trade Commission, *supra* note 23; see also Jingzhou Tao, *supra* note 216, at 297 (acknowledging that Chinese courts may only intervene in the third stage, if an enforcement procedure is initiated concerning a foreign arbitral award). See generally Ren Qiujuan et al., *Review of Chinese Reviews: Selected Articles Recently Published in Chinese (Part 6)*, 5 CHINESE J. INT’L L. 787 (2006) (asserting that the ICC plays a huge role in the Chinese arbitration process).
 219. See Several Issues Regarding the Handling by the People’s Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations, at art. 26 (promulgated by the Supreme People’s Court, Dec. 31, 2003, effective Dec. 31, 2003) (P.R.C.). See generally Gu Weixia, Essay and Note, *Recourse Against Arbitral Awards: How Far Can a Court Go? Supporting and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration*, 4 CHINESE J. INT’L L. 481, at 490 (2005) (examining how the Foreign Related Draft provides for institutional arbitration).
 220. See China International Economic and Trade Arbitration Commission Arbitration Rules, art. 4.3 (adopted by the China Council for the Promotion of Int’l Trade/China Chamber of Int’l Com., Jan. 11, 2005, effective May 1, 2005) (P.R.C.), available at <http://www.cietac.org.cn/english/rules/rules.htm> (stating that under these Rules, where parties agree to refer disputes to arbitration without providing the name of an arbitration institution, they are deemed to have agreed to refer the dispute to arbitration by the CIETAC).

pronounces under Article 5 that such agreements will be deemed invalid.²²¹ The SPC steps backward from the liberal attempt previously taken under both Drafts which provided that such agreements would nonetheless be considered effective and enforceable.²²² The backward step is further reflected by Article 6, which, in a similar vein to Article 5, denies the effect of arbitration agreements with concurrent arbitral jurisdictions resulting out of the parties' stipulation to the place of arbitration only. This negates the aforementioned pro-validity approaches under both Drafts in which all possible arbitration institutions in the specifically named place may assume jurisdiction.²²³

What is also worth noting is the provision for validity arising from those "split arbitration agreements," which refer disputes either to arbitration institution or to a court.²²⁴ Article 7 of the Interpretation, contrary to the liberal approach previously taken under Article 7 of the Domestic Draft,²²⁵ announces the invalidity of such agreements, unless one party commences arbitration and the other party does not object prior to the tribunal's first hearing.²²⁶ In so providing, the SPC suggests that the so-called split agreements or clauses—often favored by foreign financial institutions—will not be enforced in China, at least to the extent that they are governed by the Chinese law.²²⁷

As noted above, Article 4 of the Interpretation helps, to some extent, alleviate the requirement that an arbitration institution such as the ICC International Court of Arbitration has to be specifically designated in an arbitral agreement.²²⁸ However, to the great dismay of interna-

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221. See Cao Jianming, *Comprehensive Strengthening of Intellectual Property Adjudication Will Provide Powerful Judicial Guarantees for Constructing an Innovation-Based Country and Harmonious Society*, 18 PAC. RIM L. & POL'Y J. 97, 98 (2009) (explaining that the SPC has substantive, far-reaching effects on arbitration agreements).
222. See *Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations*, *supra* note 219, at art. 22; see also Interpretations to Several Issues on the Application of the Arbitration Law, *supra* note 219, at art. 5. See generally Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT'L J. CONST. L. 215, 220 (2009) (stating that the SPC has tightened up Chinese courts' interpretation of laws).
223. See *Several Issues Regarding the Handling by the People's Courts of Cases Involving Foreign-Related Arbitrations and Foreign Arbitrations*, *supra* note 219, at art. 23; see also Interpretations to Several Issues on the Application of the Arbitration Law, *supra* note 222, at art. 5. See generally Ying Chen, Article, *China's One-Child Policy and Its Violations of Women's and Children's Rights*, 22 N.Y. INT'L L. REV. 1, n.127 (2009) (discussing the status of arbitration institutions and their jurisdictions).
224. See Ying Chen, *supra* note 223 (setting forth the procedure in the event of an arbitration disagreement).
225. See Interpretations to Several Issues on the Application of the Arbitration Law, *supra* note 222, at art. 7.
226. See Interpretations to Several Issues on the Application of the Arbitration Law, *supra* note 222, at art. 7; see also Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 16, translated in 34 I.L.M. 1650, 1654 (1995) (P.R.C.) (verifying that objections are valid if made only prior to first hearing).
227. See Louise Barrington, *Arbitration in China*, 756 PRACTISING L. INST. CORP. 385, 394 (2007) (noting the Supreme People's Court's decision invalidating "split clauses"); see also Michael J. Moser, *Arbitrating Business Disputes in Today's China*, 1626 PRACTISING L. INST. CORP. 249, 254 (2007) (noting the importance of careful drafting of arbitration clauses).
228. See Fiona D'Souza, *The Recognition and Enforcement of Commercial Arbitral Awards in the People's Republic of China*, 30 FORDHAM INT'L L.J. 1318, 1322 (2007) (noting the limits to the ICC's power in China); see also Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 48 (2005) (reporting that the Chinese arbitration clauses under the ICC are valid and enforceable).

tional arbitration practitioners, the new judicial explanation does no more to confirm the validity of ad hoc arbitration agreements, than Article 27 of the Foreign-Related Draft did;²²⁹ nor has it clarified the status of foreign arbitral institutions sitting in China, as the previous interpretations failed to do.²³⁰ Pursuant to Article 31, the Interpretation will supersede all regulations, notices, replies, and opinions issued by the SPC to the extent that there are any inconsistencies between provisions contained therein and in the Interpretation.²³¹ It is thus unlikely that arbiters can still refer to Article 27 of the Foreign-Related Draft specifically with reference to ad hoc arbitration. In particular, it remains questionable whether an ad hoc arbitration agreement in China may still be admissible where both of the Article 27 exceptions under the Foreign-Related Draft are satisfied.

3. Comments on the Latest SPC Approach

After more than a decade of experience in interpreting defective arbitration agreements, the 2006 SPC Interpretation may be considered a systematic summary of the past sporadic judicial replies, notices, opinions, and guidelines. More importantly, due to its de facto rule-making power in China, the SPC Interpretation has dual significance. First, it serves as quasi-legislative attempt to bridge the gap between the AL and international arbitration norms on the topic. Second, it shows the evolving degree of judicial preference of people's courts to respect the parties' drafting autonomy in arbitration.

To sum up, the Interpretation attempts to unify the overlapping and even conflicting provisions in both Drafts so as to merge the two tracks.²³² Disappointingly, it moves away from the pro-validity approach taken in the two Drafts on the substantive validity requirement, although it generally conforms to the expansive understanding of "written" formality previously adopted. As illustrated before, before the unified Interpretation is officially adopted, it should consider the more liberal interpretative technique endorsed in the Draft Provisions where surrounding circumstances are taken into account in ascertaining the parties' intent to arbitrate. As such, the two Drafts have indicated a significant preference by judiciary for arbitration and they appear to respect the principle of party autonomy generally. However, it appears that under some provisions of the current approach, the practice of "designated arbitration institution" still adheres to the rigid textual interpretation without taking into consideration further facts to preserve the parties' arbitral wishes. In particular, Articles 5, 6, and 7 of the unified Interpretation can be unduly restrictive in some cases. Compared with international

229. See Several Regulations on How the People's Courts Handle Foreign-Related Arbitration and Foreign Arbitration Cases, art. 27.

230. See Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. at 133, n. 26 (2006), (clarifying that article 27 affects ad hoc arbitrations by making them ineffective within China); see also Michael J. Moser, *The New CIETAC Arbitration Rules—Two Steps Forward, Still More to Go*, 1626 PRACTISING L. INST. CORP. 235, 245 (2007) (illuminating that foreign entities in China are considered domestic for arbitration purposes).

231. See Interpretation on Certain Issues Relating to the Application of the PRC Arbitration Law (promulgated by the Supreme People's Court, Aug. 23, 2006, effective Aug. 23, 2006), translated in ISINOLAW (last visited Mar. 21, 2009) (P.R.C.), art. 31.

232. See Several Regulations on How the People's Courts Handle Foreign-Related Arbitration and Foreign Arbitration Cases, *supra* note 229, at art. 22–25, 28–29; see also Interpretations to Several Issues on the Application of the Arbitration Law, *supra* note 222, at art. 1, 2, 5, 6, 14.

arbitration norms, the general rule should give effect to the parties' arbitral intention as much as possible. As such, even if two arbitral institutions or both arbitration and court litigation have been referenced in the arbitration agreement, that should not render the agreement *ipso facto* invalid. Instead, as some leading international arbitrators suggest, the latest approach by the SPC is too stringent and fails to adopt more liberal interpretation techniques:

It is strange that the SPC now steps backward from its Foreign-related Draft where a principle of effective interpretation used to be adopted. However, if there is a clear desire to submit the dispute to arbitration, such a desire should, as far as possible, be given effect to, by seeking to construe the clause in such a way as to render it effective.²³³

The unexpected answer to some of the most controversial issues on the specificity of arbitral institutions may suggest a restrictive approach on the part of the SPC in accommodating the parties' drafting autonomy. However, in a recent symposium focusing on the provisional gap between the Interpretation and its previous two Drafts, an SPC official stated that "[t]here are many different views on the two Drafts after their opening to the public for comments and the current text is the just result for balancing these views."²³⁴ It might be arguable that the SPC is worried about liberalizing this traditional legislative rigidity too quickly and going too far beyond the AL text. Hence, a compromise has been put forward by the judiciary in treating arbitration the way it has after carefully balancing the inflexibility of the current regime and full-scale liberalization.

There are also a few other contentious issues that the latest unified Interpretation fails to address. Among them is whether to recognize the validity of arbitration agreements providing for ad hoc arbitration and foreign arbitration in China. As outlined in previous discussions, for the first time in the history of arbitration in China, ad hoc arbitration is provided under Article 27 of the Foreign-Related Draft. The provision has been seen as a revolutionary progress and was widely expected to be formally adopted as part of the SPC's agenda, so as to create a more arbitration-friendly environment for foreign business. This, however, did not occur, which leaves the practice of ad hoc arbitration standing at the crossroads of the SPC-led reform of Chinese arbitration. It could be argued either that the SPC has finally decided to give up recognizing agreements providing for ad hoc arbitration in China entirely, even when the demanding exceptions under Article 27 of the Foreign-Related Draft have been satisfied, or that the Article 27 exceptions still cannot be fit into the Chinese model of arbitration.²³⁵ Moreover, the SPC's failure to address the effect of arbitration agreements that select the ICC arbitration in China could arguably be because the ICC Court does not fit properly within the meaning of

233. See <http://www.jonesday.com/search/search.aspx?qu=arbitration&limit=pubpdfs>.

234. See Dongchuan Luo, Vice-Head of the Research Inst. of the Supreme Peoples' Court, Speech at the Joint Conference Co-organized by the Civil Division and Research Institute of the Supreme Peoples' Court, CIETAC and CMAC: SPC Interpretation on the Application of the Arbitration Law (Dec. 15, 2006). See generally Choong, *Clarifying the PRC Arbitration Law: Questions and Answers*, CHINA L. & PRAC. 22 (London), Nov. 2006 (emphasizing that the recent interpretations of the PRC arbitration law indicate the large strides PRC judges have made toward more generally accepted international practices).

235. See Arbitration Law, *supra* note 226, at art. 27.

“arbitration commission” under the AL—nor is there any clear legal mechanism for enforcing the resulting ICC (or other foreign institutional) award in China.²³⁶ Although the SPC may not be able to solve all these problems, Dr. Moser, a lawyer at an widely known international law firm, suggests that its omission on these highly contentious issues in the latest Interpretation reflects judicial concerns about the current institutional monopoly in Chinese arbitration, which will be the focus of the section below.²³⁷

III. Problems of Ad Hoc Arbitration in China

In light of the Chinese government’s continued reluctance to recognize ad hoc arbitration, the following discussion will first analyze the fundamental reason for rejecting this liberalization of the process. The second part examines the success of an ad hoc arbitration case against the current regulatory framework before this section ends with proposals for legislative recognition and the possible political challenges entailed.

A. Institutional Monopoly in Chinese Arbitration

Although almost all countries permit ad hoc arbitration in their national arbitration legislation, in the history of commercial arbitration in China, ad hoc arbitration has never been ratified by the legislation or protected in practice.²³⁸ The regulatory obstacles have most recently involved the omission of the issue in the 2006 unified SPC Interpretation on arbitration and a case in 2003 in which the SPC struck down an arbitration clause providing for ad hoc arbitration in China.²³⁹ This section attempts to explain the institutional monopoly from the perspective of the state’s overwhelming desire to control arbitration in China. The actual impact of such a monopoly in China (both theoretically and practically) will also be addressed in this part.

236. See An Chen, Symposium, *Is Enforcement of Arbitral Awards an Issue for Consideration and Improvement?—The Case of China* (Dec. 12, 2005) (noting in the UN sponsored conference that there are no provisions with which to recognize or enforce arbitration awards); see also José Alejandro Carballo Leyda, *A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan?*, 6 CHINESE J. INTL L. 345, 347 (2007) (stating that China’s 1994 Arbitration Law does not have any tool by which to compel payment of arbitral awards); see also Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People’s Republic of China*, 1 ASIAN-PAC. L. & POL’Y J. 12, 20 (2000) (explaining that China’s relatively new legal system lacks mechanisms with which to legally enforce an arbitral award).

237. See Michael J. Moser, Speech at the Symposium Co-organized by the Hong Kong International Arbitration Center and the German Institution of Arbitration: Developments in the Settlement of International Commercial and Investment Disputes—Chinese and German Perspectives (Dec. 8, 2006). See generally Moser, *supra* note 227, at 254 (elaborating on the guiding rules promulgated by the Supreme People’s Court alongside recent changes to CIETAC’s arbitration rules).

238. See Reinstein, *supra* note 228, at 48–49 (commenting that China has never officially recognized or sanctioned arbitral awards issued by an unrecognized arbitral institution); see also Eu Jin Chua, *The Law of the People’s Republic of China: An Introduction for International Investors*, 7 CHI. J. INT’L L. 133, 139 (2006), (finding that the Arbitration Law contains no provision as to establish the legality of ad hoc arbitration).

239. See People’s Insurance Company of China, Guangzhou Branch v. Guangdong Guanghe Power Company Ltd. (Ming Si Zhong Zi No. 29, 2003); see also Michael J. Moser, *Commentary on Arbitration and Conciliation Concerning China*, in NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND 89, 91 (A. J. van den Berg ed., 2005) (citing *People’s Insurance* as an importance case in which the Supreme People’s Court struck down an arbitration clause assigning ad hoc arbitration in China).

1. Problems of State Control

Determined to achieve a breakthrough in the economic reform, China started to practice a “socialist market economy” since 1992.²⁴⁰ The socialist market economy has been described both as a major improvement to the previous planned economy and an “inherent dichotomy” by the legal scholars.²⁴¹ On the one hand, the reform brings the prospect of greater managerial autonomy in market transactions and increases the diversity of economic factors.²⁴² Hence, unlike the planned economy where the driving force was government production orders, in a market economy, the market players have the freedom to make decisions for themselves.²⁴³ On the other hand, in order to ensure that China’s market develops according to the Party ideology and policy, the establishment of a socialist market economy in China has been the declared objective and the focus of the Party State’s efforts to boost socioeconomic development.²⁴⁴ State intervention and control is therefore decisive in the regulation of the market and to maintain the Party policy of centralized censorship despite rising recognition that reform requires more freedom for economic actors and their transactions.²⁴⁵ The legal implication of the transition from a planned to a socialist market economy has been understood as the conception of

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240. See XIAN FA amend. 2, § 7 (1993) (P.R.C.) (proclaiming that China will begin instituting a socialist market economy); see also Yingyi Qian & Jinglian Wu, *China’s Transition to a Market Economy: How Far Across the River?*, in HOW FAR ACROSS THE RIVER? CHINESE POLICY REFORM AT THE MILLENNIUM 31, 36 (Nicholas C. Hope, Dennis Tao Yang & Mu Yang Li eds., 2003) (opining that the Fourteenth Party Congress’s big ideological breakthrough was adopting the socialist market economy as the goal of reform); see also Charles Harvie, *Economic Transition: What Can Be Learned from China’s Experience?*, 26 INT’L J. SOC. ECON. 1091, 1108 (1999) (finding that Deng Xiaoping’s goal of creating a socialist market economy was formally endorsed by its incorporation into China’s constitution).
241. See BECKY CHIU & MERVYN LEWIS, REFORMING CHINA’S STATE-OWNED ENTERPRISES AND BANKS 41 (2006) (asserting that while China’s reform under the socialist market economy has been successful, the theory itself is a paradox); see also Jianfu Chen, *Market Economy and the Internationalisation of Civil and Commercial Law in the People’s Republic of China*, in LAW, CAPITALISM AND POWER IN ASIA 58, 61–62 (Kanishka Jayasuriya ed., 1999) (expressing the view that the theory is somewhat symbolic yet it will open the doors for legal development).
242. See Fan Gang, *Is the Transition Under Control? Gradualism and Macroeconomic Policy*, in THE CHINESE ECONOMY 73, 75 (Michel Fouquin & Françoise Lemoine eds., 1998) (detailing the accelerated decentralization and deregulation of the socialist market economy reform movement); see also William H. Simon, *The Legal Structure of the Chinese “Socialist Market” Enterprise*, 21 IOWA J. CORP. L. 267, 298 (1996) (reporting that the socialist market economy is shifting toward corporatization and capitalist models). See generally He Guanghui, *Reform of the Chinese Economic Structure (Zhongguo Jingji Tizhi Gaige)*, FBIS DAILY REPORT CHINA, Mar. 23, 1990, at 21.
243. See Zhang Wenxian, *Shichang Jingji yu Xiandai Fazhi Jingshen [Market Economy and the Spirit of Modern Law]*, 6 ZHONGGUO FAXUE [CHINESE LEGAL SCIENCE] (1994); see also Wang Zhengbang, *Shichang Jingji Nai Fazhi Jingji [The Modern Market Economy as a Rule of Law Economy]*, 25 STUDIES IN LAW [FAXUE YANJIU] (1994); see also *Expand Investment System to Suit Changes*, FIN. TIMES, Jan. 13, 2009 (describing the difference between a planned economy and a market economy).
244. See Zhang Wenxian, *Guanyu Hongguanjingji Tiaokong jiqi Falv yu Zhengce de Sikao [Reflections on Macroeconomic Control and Its Law and Policy]*, 1 ZHONGWAI FAXUE [PEKING UNIVERSITY LAW JOURNAL] 3 (1994); see also Jianfu Chen, *The Transformation of Chinese Law—from Formal to Substantial*, 37 HONG KONG L.J. 689, 692 (2007) (describing the changes which took place with the establishment of a socialist market economy); see also *The Right Direction*, FIN. TIMES, Dec. 19, 2008 (discussing the replacement of the planned economy with that of a market economy).
245. See Wang Baoshu, *Shehuizhuyi Shichangjingji yu Minshangfa Yanjiu [The Socialist Market Economy and Research in Economic Law]*, 3 ZHONGGUO FAXUE [CHINESE LEGAL SCIENCE] 20 (1993); see also John O. Haley, *Competition Policy for East Asia*, 3 WASH. U. GLOBAL STUD. L. REV. 277, 282 (2004) (describing the impact of state control of the market in maintaining centralized censorship).

a relationship between an economic base and a social superstructure within the Party State, which is called the “high-level institutionalized commodity economy” under Party ideology.²⁴⁶ As such, during the market transition, state agencies still wish to exercise considerable control over market activities for the sake of predictability and stability to preserve socialism, which includes controlling the State’s means of dispute resolution.

State control of arbitration has been achieved by controlling the *outcome* of arbitration during the transitional period. By adopting an institutional arbitration system in China, these arbitration institutions are made state agencies subject to control by the Party leadership. For example, prior to the AL becoming effective in 1995, arbitration cases involving domestic business disputes were handled by the Economic Contract Arbitration Commissions (the ECACs) within the Administrations of the Industry and Commerce around China, through a system of mandatory jurisdiction.²⁴⁷ Technology disputes were heard by the Technology Contract Arbitration Commissions (the TCACs) attached to the Bureau of Science and Technology of the local people’s government.²⁴⁸ The ECACs and TCACs were subordinate to the governmental departments at various levels, so they were subject to governmental scrutiny of their dispute resolutions.²⁴⁹ This historical preference for using arbitration in China, such as the ECACs, is because these are administrative adjudication systems that are easy to control under Chinese style top-down administrative governance. Foreign-related arbitrations were then handled by the foreign-related arbitration institutions, namely CIETAC and CMAC, which, although technically called independent social organizations of foreign trade, received subsidies from the State Council for their businesses, and the way they handled disputes with foreign parties was inspected by the Central Government.²⁵⁰ In the realm of pre-AL arbitration, only specific insti-

246. See Albert H.Y. Chen, *The Developing Theory of Law and Market Economy in Contemporary China*, in LEGAL DEVELOPMENTS IN CHINA: MARKET ECONOMY AND LAW 5–6 (Wang Guiguo & Wei Zhenyin eds., 1996); see also Jianfu Chen, *supra* note 244, at 709–12 (explaining the legal implications of the economic change).

247. See Regulations of the People’s Republic of China on the Arbitration of Disputes over Economic Contracts, Art. 2 (effective Aug. 22, 1983) available at <http://www.asianlii.org/cn/legis/cen/laws/rotaodoc656/> (last visited Mar. 24, 2009) (listing the parties responsible for arbitrating economic contracts).

248. See Provisional Regulations Concerning the Administration of Organization for Technology Contract Arbitration Institutions, Article 2; see also Yuan Cheng, *Legal Protection of Trade Secrets in the People’s Republic of China*, 5 PAC. RIM. L. & POL’Y J. 261, 292–93 (1996) (discussing the scope of the Technology Contract Arbitration Commission).

249. See Pat Chew-LaFitte, *The Resolution of Transnational Commercial Disputes in the People’s Republic of China: A Guide for U.S. Practitioners*, 8 YALE J. WORLD PUB. ORD. 236, 269 (1982) (describing China’s dispute resolution preferences); see also Chun Gu, *The Applicable Law and Dispute Settlement in East-West Trade*, 46 U. TORONTO FAC. L. REV. 96, 125 (1988) (explaining dispute resolution practices in China); see also James A.R. Nafziger & Ruan Jiafang, *Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes*, 23 WIL-LAMETTE L. REV. 619, 623–4 (1987) (discussing the Chinese preference for less formal varieties of dispute resolution).

250. See JIANG XIANMING & LI GANGGUI, ZHONGGUO ZHONGCAIFA YANJIU [STUDY OF CHINESE ARBITRATION LAW] 28 (1996); see also Jason Pien, Note, *Creditor Rights and Enforcement of International Commercial Arbitral Awards in China*, 45 COLUM. J. TRANSNAT’L L. 586, 588–89 (2007) (describing the function of CIETAC and CMAC in China).

tutions could conduct arbitration in China and thus, it is clear how China was able to control the outcome of the arbitration.²⁵¹

The institutional monopoly has been affirmed in the AL, which is most obviously reflected in Articles 16 and 18 relating to the rigid specificity to the arbitration commission in arbitration agreements. For the purpose of regulating these Chinese arbitration commissions, Chapter II of the AL makes special provisions for their establishment²⁵² and structure.²⁵³ The re-organized Local Arbitration Commissions (the LACs) have thus replaced the previous ECACs and TCACs and they have been set up at the prefecture level across the country in accordance with the AL. CIETAC and CMAC retained their status as foreign-related arbitration institutions in China as separately addressed in Chapter VII of the AL²⁵⁴ despite the subsequent merging of jurisdictions between the two types of arbitration commissions.²⁵⁵

State control has however been extended to the post-AL stage where, through a “1995 State Council Notice,”²⁵⁶ the newly established LACs are required to be registered with the local Department of Justice (the DOJ) and attached to the Legislative Affairs Office (the LAO) of the local people’s government. Hence, LAC’s dispute resolution work is made part of the

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251. See China International Economic and Trade Arbitration Commission Arbitration Rules, art. 4.3 (adopted by the China Council for the Promotion of Int’l Trade/China Chamber of Int’l Com., Jan. 11, 2005, effective May 1, 2005) (P.R.C.), at art. 1, available at <http://www.cietac.org.cn/english/rules/rules.htm> (detailing the rules of the CIETAC); see also Gillian Triggs, *Confucius and Consensus: International Law in the Asian Pacific*, 21 MELB. U. L. REV. 650, 660–1 (1997) (discussing the control over the outcome of arbitrations by certain institutions).
252. See Arbitration Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective Sept. 1, 1995), at art. 10, 11, translated in 34 I.L.M. 1650, 1654 (1995) (P.R.C.) (requiring arbitration commissions to be registered with the administrative department of justice of the applicable province, region, or municipality directly under the Central Government and listing the qualifications required for an arbitration commission).
253. See *id.* at art. 12 (calling for an arbitration commission to have one chairman, two to four vice chairmen and between seven and eleven commission members).
254. See *id.* at art. 66 (providing that foreign-related arbitration commissions may be created in the China International Chamber of Commerce and will be composed of one chairman, several deputy chairmen, and several members).
255. See 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 at ¶ 3 (issued by the St. Council, June 8, 1996), available at <http://www.asianlii.org/cn/legis/cen/laws/cotgootscrspwntbcftioal1194> (permitting local arbitration commissions to accept foreign-related cases at the concerned parties’ discretion); see also China International Economic and Trade Arbitration Commission, *Introduction: Works in 1998* at ¶ 2, available at http://www.cietac.org.cn/english/introduction/intro_2.htm (last visited Mar. 23, 2009) (allowing disputes arising between foreign investment enterprises operating in China to be heard by the arbitration commissions); see also Joseph T. McLaughlin et al., *Planning for Commercial Dispute Resolution in Mainland China*, 16 AM. REV. INT’L ARB. 133, 143 (2005) (asserting that legal reforms in 1996 enabled local Chinese arbitration commissions to hear international arbitrations).
256. See Circular of the General Office of the State Council Regarding Further Strengthening the Reorganization of Arbitration Institutions, *supra* note 255, at ¶ 1 (requiring local governments to assist in the reorganization of arbitration institutions); see also McLaughlin et al., *supra* note 255, 142 (expressing the differences in both the governing law and standard of judicial review between domestic and international arbitrations); see also Xian Chu Zhang, *Chinese Law: The Agreement Between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects*, 29 H.K. L.J. 463, 478 (1999) (claiming that local arbitration commissions are becoming increasingly independent from the government).

legal administration under the locality.²⁵⁷ Moreover, the re-organization of personnel and finance of these LACs is led by many governmental departments of the locality.²⁵⁸ Finally, it is emphasized in the Notice that the LACs are to “help the government resolve business disputes and thus to achieve socioeconomic stability in the locality for the construction of a socialist market economy for the entire country.”²⁵⁹ As such, the outcome of arbitration by the LACs shall be accountable to the local political and administrative interests, given the basis of their establishment and their stated function to help with local administration and economic stability. This connection is buoyed by the local government’s use of its LACs to resolve disputes to play upon a localization sentiment in matching the outcome to the local economic interests. On the other hand, CIETAC and CMAC remain accountable to the State Council in dealing with foreign-related disputes, particularly when the disputes involved assets of SOEs,²⁶⁰ although in general they have more foreign arbitrators and are subject to less interference by the government in their decision-making processes.²⁶¹

According to this logic, it is easy to see how any arbitration conducted by a non-Chinese arbitral institution may invite the possibility of unexpected outcomes for the government. It will thus be considered as outside the realm of state control and hence a deviation from the overall means toward achieving socioeconomic stability. Furthermore, traditional Chinese respect for the power of the government emphasizes the role of institutions rather than individuals and hence pushes the government to adhere to an institutional style of arbitration.²⁶²

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257. See Circular of the General Office of the State Council Regarding Further Strengthening the Reorganization of Arbitration Institutions, *supra* note 255, at ¶ 1 (stating that existing arbitration commissions would be subject to an administrative department and established in communities directly under the central government); see also Ignazio Castellucci, *Rule of Law with Chinese Characteristics*, 13 ANN. SURV. INT’L & COMP. L. 35, 60 (2007) (recognizing that China’s politically oriented legal systems influence arbitration and court proceedings and whether judgments are enforced).
258. See Circular of the General Office of the State Council Regarding Further Strengthening the Reorganization of Arbitration Institutions, *supra* note 255, at ¶ 1 (acknowledging that government leaders must be in charge of reorganization and responsible for implementing the reorganization process); see also 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, 342 (1997) (commenting on the influence of local governments on the arbitration process and the enforcement of awards); see also Xian Chu Zhang, *supra* note 256, at 481 (noting the influence or control of local government over arbitration proceedings).
259. See Ignazio Castellucci, *supra* note 257, at 60 (noting the increased enforcement of international arbitration awards due to the needs of international business activities); see also Vai Io Lo, *Resolution of Civil Disputes in China*, 18 UCLA PAC. BASIN L.J. 117, 129 (2001) (asserting that the Arbitration Law established the China Arbitration Association to supervise arbitration commissions and create uniform rules for arbitration commissions to apply).
260. See Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539, 549 (1995) (stating that the 1994 arbitration laws gave parties the right to decide who would arbitrate their case and where it would be heard); see also Jason Pien, Note, *Creditor Rights and Enforcement of International Commercial Arbitral Awards in China*, 45 COLUM J. TRANSNAT’L L. 586, 602 (2007) (claiming that local governments pressure courts not to enforce arbitration judgments against state-owned enterprises that provide employment and other benefits to the local economy).
261. See MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE 76 (2001) (indicating that CIETAC’s Panel of Arbitrators consists of more than 400 arbitrators from 24 countries); see also William K. Slate II, *International Arbitration: Do Institutions Make a Difference?*, 31 WAKE FOREST L. REV. 41, 63 (1996) (positing that one of the key goals of arbitration is to minimize judicial involvement).
262. See Kang Ming, *Ad Hoc Arbitration in China*, INT. A.L.R. 2003, 6(6), 200 (2003) (listing reasons why ad hoc arbitration is not incorporated into the Act).

2. Non-recognition of Ad Hoc Arbitration

The AL endorses institutional arbitration and does not expressly forbid the practice of ad hoc arbitration in China. Notwithstanding the foregoing, this article argues that this legal effect is prohibited by the State.²⁶³ First, an arbitration agreement containing an ad hoc arbitration provision is not valid with respect to the “designation of an arbitral institution,” one of the required components of a valid arbitration agreement under Chinese law.²⁶⁴ Second, an award made by ad hoc arbitration process in China will be set aside or denied enforcement following an invalid arbitration agreement under Articles 58, 63, 70, and 71 of the AL.²⁶⁵ Indeed, in the recent case of *People’s Insurance Company of China, Guangzhou v. Guanghope Power* in 2003, the SPC struck down an arbitration clause providing for ad hoc arbitration in China.²⁶⁶

The absence of ad hoc arbitration in the AL gives rise to both theoretical and practical problems. First, Article I, Section 2 of the 1958 New York Convention on Recognition and Enforcement of Arbitral Awards (the NY Convention) provides that arbitral awards shall include not only institutional awards but also ad hoc awards. As a member state to the NY Convention, Chinese courts are obliged to recognize and enforce all arbitral awards rendered in other contracting states, including those obtained through ad hoc arbitration.²⁶⁷ By contrast, ad hoc awards rendered in China cannot be recognized or enforced either in China or another member state. Chinese courts have declared ad hoc arbitration agreements void if the applicable law is the AL. Furthermore, the courts of other contracting states to the NY Convention may refuse to enforce an ad hoc arbitral award that is issued in China because it constitutes an

263. See JOHN SHIJIAN MO, *ARBITRATION LAW IN CHINA*, 56 (2001) (2001) (outlining the status of ad hoc arbitration in China based on whether the arbitration occurred in or outside of China); see also JINGZHOU TAO, *RESOLVING BUSINESS DISPUTES IN CHINA* at 203 (2005) (concluding that the legislature fully considered ad hoc arbitration when drafting the AL but ultimately chose institutional arbitration).

264. See ICCA INTERNATIONAL ARBITRATION CONGRESS, *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 105 (Albert Jan van den Berg ed., 2005) (emphasizing that an ad hoc arbitration agreement between a foreign party and a party from China would be invalid regardless of whether the agreement is proper under its governing law); see also Eu Jin Chau, *The Laws of the People’s Republic of China: An Introduction for International Investors*, *supra* note 15, at 141 (confirming that an ad hoc arbitration agreement will be invalid in China if it fails to specify an arbitration commission).

265. See Mauricio J. Claver-Carone, *Post-Handover Recognition and Enforcement of Arbitral Awards Between Mainland China and Hong Kong SAR: 1999 Agreement vs. New York Convention*, 33 *LAW & POL’Y INT’L BUS.* 369, 391 (explaining that if parties to an ad hoc arbitration agreement agree that Chinese law will govern their dispute, the agreement will not be enforced since Chinese Law does not allow ad hoc arbitration); see also Li Hu, *Setting Aside an Arbitral Award in the People’s Republic of China*, 12 *AM. REV. INT’L ARB.* 1, 11 (2001) (stressing that Article 58(2) of the AL will set aside an arbitration agreement if the arbitration institution exceeds its authority).

266. *People’s Insurance Company of China, Guangzhou v. Guanghope Power et al.* (Min Si Zhang Zi No. 29 of 2003).

267. See *INVESTMENT IN GREATER CHINA: OPPORTUNITIES & CHALLENGES FOR INVESTORS* (2005) 278 (reiterating that China ratified the NYC and became a member in 1986); see also JINGZHOU TAO, *RESOLVING BUSINESS DISPUTES IN CHINA*, *supra* note 263, at 5604 (explaining that under the reciprocity reservation, China will only enforce foreign awards made in member states of the convention); see also JAMES M. ZIMMERMAN, *CHINA LAW DESKBOOK* 864 (2005) (noting that China imposed a commercial reservation before ratifying the NYC, and, as a direct result does not enforce noncommercial arbitration awards).

invalid arbitration agreement under Article V, Section 1(a) of the NY Convention.²⁶⁸ In Hong Kong, ad hoc arbitration is very popular and ad hoc arbitral awards rendered in Hong Kong can be enforced in Mainland China, but the reverse is not true.²⁶⁹ The current system gives rise to inconsistencies in arbitration practice in the people's courts with regard to the enforcement of both arbitration agreements and arbitral awards.

Also, despite the advantages of institutional arbitration,²⁷⁰ arbitrating disputes solely through institutions limits the freedom of parties to determine the boundaries of their dispute resolution and thus violates the principle of party autonomy.²⁷¹ Under Chinese arbitral regulations, since the 1996 State Council Notice (and subsequent CIETAC Rules revision in 1998), parties may choose to either submit their disputes to a local commission or a non-local commission, i.e., CIETAC or CMAC. In practice, however, parties usually submit their disputes to the arbitration commission where they are located.²⁷² Apart from the geographic convenience, more often than not, the influence from the local government on the drafting of standardized arbitration agreements contributes to the localization of arbitral choices, which severely restricts the parties' autonomy and interest.²⁷³

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268. See United Nations Conference on International Commercial Arbitration, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 U.N.T.S. 38, art. B, Sec. 1(a) (June 10, 1985) (declaring that recognition and enforcement of the award may be refused where the agreement is invalid).
269. See RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 84 n.215 (1997) (noting that China has also entered into agreements on mutual recognition with five other countries); see also Claver-Carone, *supra* note 265, at 388 (discussing the 1999 Agreement on the Mutual Recognition and Enforcement of Arbitral Awards and noting the primary effect of the agreement is that the NYC no longer applies to the arbitral awards between Hong Kong and China); see also José Alejandro Carballo Leyda, *A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and Taiwan?*, 6 CHINESE J. INT'L L. 345, 345, ¶51 (2007) (explaining that although China does not enforce ad hoc arbitration awards made domestically, they must, in accordance with the convention, accept ad hoc awards made in Hong Kong).
270. See Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China*, 16 IND. INT'L & COMP. L. REV. 37, 47 (2005) (stating that CIETAC or BAC, pre-set arbitration rules and expertise in arbitration under Chinese law greatly benefit parties who arbitrate with them).
271. See WANG SHENGCHANG, RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA 17 (1997) (stating that the principle of party autonomy is violated when institutions solely arbitrate disputes).
272. See Hua Chen, *China and Its Arbitration System in Foreign Trade*, 68 U. DET. L. REV. 457, 469 (1991) (stating that parties that agree to arbitrate may choose to arbitrate their claims at the local Chinese commission where the defendant is located); see also Taroh Inoue, *Introduction to International Commercial Arbitration in China*, 36 H.K.L.J. 171, 173 (2006) (stipulating that Chinese law expressly provides that a party to arbitration may choose between an arbitration by a local Chinese commission or by an international Chinese arbitration institution such as the CIETAC).
273. See Wang Wenying, *Distinct Features of Arbitration in China: A Historical Perspective*, J. INT'L. ARB. 67, 123 (2006) (stating that some local governments frequently use so-called "red-headed documents" to request that local enterprises and companies modify their standard contracts which contain an arbitration clause solely designating the local arbitration commissions).

And there remains uncertainty with respect to the legal status of ad hoc arbitration agreements completed outside China that the latest SPC Interpretation fails to address in its previous Foreign-Related Draft. As previously mentioned, ad hoc awards may run the risk of being denied recognition and enforcement by the people's court if the Chinese law serves as governing law between the disputing parties.

3. Non-recognition of Foreign Arbitration in China

With respect to the arbitration conducted by foreign arbitral institutions, the AL neither explicitly permits nor prohibits this practice from taking place in China.²⁷⁴ The issue has been addressed frequently, with particular focus on whether an arbitration following the rules of the International Chamber of Commerce (the ICC) Court of Arbitration can be lawfully conducted within China and produces an enforceable award.²⁷⁵ Notwithstanding the international consensus that the ICC Court of Arbitration is a lawful arbitration institution,²⁷⁶ it does not seem to comport with the provisions on "arbitration institution" under the AL.

Chapter II of the AL deals specifically with local arbitration commissions, sets out the requirements for the establishment of such commissions, and makes quite clear that they are to be organized by the local people's governments, registered with the local department of justice,²⁷⁷ conform to a number of constitutional requirements,²⁷⁸ and be subject to supervision by the local legal administration.²⁷⁹ Chapter VII further provides for the establishment of the foreign-related arbitration commissions by the China Chamber of International Commerce. The organization of such commission must also conform to the requirements set out in Chap-

274. See Eu Jin Chua, *supra* note 264, at 140–5 (stating that under Article 128 of Chinese Contract Law, parties to a contract may choose between a local Chinese arbitral institution or a foreign arbitral institution).

275. See ICCA INTERNATIONAL ARBITRATION CONGRESS, *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* (Albert Jan van den Berg ed., 2005) (discussing whether China can lawfully conduct arbitrations which follow the rules of the International Chamber of Commerce); see also Benjamin P. Fishburne & Chuncheng Lian, *Commercial Arbitration in Hong Kong and China: A Comparative Analysis*, 18 U. PA. J. INT'L ECON. L. 287, 331 (1997) (stipulating that because China has agreed to the ICC, a party involved in an arbitration in a foreign country may seek enforcement of the arbitral award in China).

276. See Robert Briner, *Arbitration in China Seen from the Viewpoint of the International Court of Arbitration of the International Chamber of Commerce*, in *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 12 (2005) (stating that while the international community agrees that the ICC Court of Arbitration is a valid arbitration institution, Chinese Arbitration Law does not recognize this court as a means for settlement dispute in China).

277. See Arbitration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 10, translated in 34 I.L.M. 1650, 1654 (1995) (P.R.C.) (noting that chapter 2 of the arbitration law provides the requirements for the creation of a local arbitration commission).

278. See *id.* at arts. 10, 12 (noting that chapter 2 of the arbitration law mandates that after a local arbitration commissions has been established, it must register with the Chinese Department of Justice).

279. See *id.* at art. 15 (providing that the standard of operation for the China Arbitration Association is self-regulation of the arbitration commissions).

ter II, referenced above.²⁸⁰ Accordingly, as a foreign arbitration institution, it is difficult to see how the ICC can be conformed to these provisions. The current system seems to close the door to not only ad hoc arbitration, but also institutional arbitration conducted by foreign arbitral bodies.

In the words of Professor Song Lianbin of the Wuhan University, arbitration in China is monopolized by Chinese arbitral institutions.²⁸¹ Such institutional monopoly, however, entails inherent risks. The existence of only one form of arbitration in China tends to make the Chinese arbitral commissions excessively bureaucratic. The fact that most arbitrations in China are conducted by government-supported commissions gives rise to the risk of administrative influence and insufficient transparency.²⁸² Chinese arbitration commissions and the lack of competitive pressures from external arbitral bodies are likely to lead to complacency about current practices. Ultimately, arbitral institutions will lose their competitive edge against the potential liberalized Chinese arbitration market as China moves toward providing greater market access for legal services in connection with the ongoing WTO negotiations.²⁸³

B. Formal Mediation, Actual Arbitration

Despite the questionable basis in law, the following case is one in which ad hoc arbitration was accomplished without changing the current legal framework. Sinotrans Dalian Company (Sinotrans) a charterer, entered into a time charter with the ship owner Hainan Dongda Shipping Company (Dongda) on October 20, 1998. The arbitration clause in the contract provided that “[a]ll disputes arising out of the contract shall be arbitrated in Beijing.” Both companies were located in Dalian. A dispute arose and Dongda asked Hu Zhengliang, a law professor at the Dalian Maritime University and a Beijing CMAC panel-arbitrator, to assist in resolving the dispute. Subsequently, Sinotrans also requested that Mr. Hu arbitrate the dispute. On May 18, 1999, the parties agreed to allow the dispute to be arbitrated by Mr. Hu. Mr. Hu asked for both parties’ submissions. He then requested Wang Jianping, a professor at the Dalian Maritime University with a specialty in navigation technology, to give an expert report

280. See *id.* at art. 65 (stating that all provisions of this article will control the steps taken in arbitrating disputes arising from foreign economic interactions).

281. See Song Lianbin, *From Ideology to Legislation: Several Issues to Pay Attention to for Reforming the Arbitration Law*, ARBITRATION IN BEIJING 6–7 (2005); see also PHILIPPE FOUCHARD ET AL., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 161 (2d ed. 1999) (commenting that although many countries are receptive to international norms and have relinquished some control in the arbitration process, China continues to maintain a de facto monopoly).

282. See Gu Weixia, *The China-Styled Closed Panel System in Arbitral Tribunal Formation: Analysis of Chinese Adaptation into Globalization*, 25(1) J. INT’L ARB. 121, 121–49 (2008). See generally GARY BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS 53 (2006) (commenting on China’s realization of a greater need in transparency in arbitration proceedings has led them to periodically change their procedures).

283. See LANCE TAYLOR, EXTERNAL LIBERALIZATION IN ASIA, POST-SOCIALIST EUROPE, AND BRAZIL 385 (2006) (describing the ongoing efforts of China and other ASEAN countries in liberalizing trade); see also John Mo, *Reform of Chinese Arbitration System after the WTO*, in 41 CHINA LAW (2003) (noting that as part of the commitments to the market access under Annex 9, the arbitration market may need to be liberalized); see also Wang Shengchang, *The Arbitration Law after China’s Accession to the WTO*, in 37 CHINA LAW (2002); see also Paul Gellert, *Regionalization and the Foray on Primary Goods: From Managed Free(r) Markets: Transnational and Regional Governance of Asian Timber*, 610 ANNALS 246, 251 (2007) (commenting that China’s attempts at trade liberalization are an attempt to compete with NAFTA’s strong economic presence).

of the navigation database provided by the parties. On July 10, 1999, Mr. Hu drafted and delivered to the parties his decision by way of a document entitled “An Opinion on Mediation.” Both parties honored the decision.²⁸⁴ Although it was formally titled “An Opinion on Mediation” in essence, the document was an ad hoc arbitral award.

First, there was an intention to arbitrate rather than mediate. Apart from the original arbitration clause enclosed in the charterparty, after the dispute arose, both parties chose ad hoc arbitration in Dalian rather than the institutional arbitration at the CMAC in Beijing.²⁸⁵ It was reasonably foreseeable that the ad hoc arbitration in Dalian offered the following advantages: (1) both parties were located in Dalian; it was convenient and cost-effective to conduct the arbitration in Dalian rather than in CMAC in Beijing; and (2) Mr. Hu was familiar with maritime arbitration and was known to both parties.²⁸⁶

More importantly, neither party considered the resolution as “mediation” at any stage. It is notable that the word “arbitration” rather than “mediation” was utilized by both parties in their correspondences. More importantly, Mr. Hu is an arbitrator under the CMAC. In the process, Mr. Hu made no attempt to mediate in the traditional sense that would imply that he persuaded the parties to reach a mutually agreeable compromise. Rather, he relied on his professional knowledge of maritime law, an expert’s opinion and relevant legal provisions and shipping customs to deal with the dispute by following the arbitral procedure. The “Opinion” was independent of both parties’ desires and contained orders rather than suggestions.²⁸⁷

We must wonder then, why the title “Opinion on Mediation” was used. According to Kang Ming, Vice Secretary-General of the CIETAC, although it was expected that the parties would honor Mr. Hu’s decisions, a risk still remained that the losing party might not do so due

284. See Kang Ming, *Ad Hoc Arbitration in China*, INT. A.L.R. 2003, 6(6), 168 (2003).

285. See Ellen Reinstein, *Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People’s Republic of China*, 16 IND. INT’L & COMP. L. REV. 37, 51–4 (2005) (positing that due to corruption, arbitral awards are difficult to enforce). See generally China Maritime Arbitration Commission Arbitration Rules, *Chapter 2 Arbitration Proceedings*, <http://www.cmac-sh.org/en/rules.asp> (last visited Mar. 30, 2009) (outlining the rights accorded to foreign nationals during arbitration of maritime disputes).

286. See KANG MING, *A STUDY ON COMMERCIAL ARBITRATION SERVICE 210–12* (China Law Press, 2004); see also Thomas S. Breckenridge, *International Arbitration: A Historical Perspective and Practice Guide Connecting Four Emerging World Cultures: China, Mexico, Nigeria, and Saudi Arabia*, 17 AM. REV. INT’L ARB. 183, 195 (2006) (commenting that disputes in China would find a more satisfactory resolution if disputing parties negotiate without third-party arbitrators).

287. See Wang Shengchang, *The Relation between Arbitration and Mediation*, in CHINA LAW 49 (2004) (commenting that the major difference between arbitration and mediation is that the procedure of the former is independent from both parties; however, it still requires a measure of cooperation from both parties); see also Jun Ge, *Mediation, Arbitration and Litigation: Dispute Resolution in the People’s Republic of China*, 15 UCLA PAC. BASIN L.J. 122, 132–33 (1996) (noting that the changes in China’s arbitration rules reflects a move towards greater international cooperation); see also Xiaowen Qiu, Note & Comment, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China*, 11 AM. REV. INT’L ARB. 607, 627–29 (2000) (demonstrating the difficulties in enforcing arbitral agreements in China despite the changes in the law).

to the lack of enforcement mechanism for ad hoc arbitration in China.²⁸⁸ As such, if this had happened, the winning party would not have been able to enforce the award since it was the outcome of ad hoc arbitration. The word “mediation” was therefore used as a strategy to avoid the risk of non-enforcement of ad hoc arbitral award.

C. Proposal for Legislative Recognition and Its Political Challenges

Despite the successful result of the case reported above, it is worth noting that attempting a successful ad hoc arbitration—under the “pretense” of mediation—is technical maneuvering in order to circumvent legal requirements, or, more accurately, a kind of “fashioning of practical remedies without violating the current legal framework.”²⁸⁹ Given the fact that ad hoc arbitration has not yet been widely accepted in China, the practice of “formal mediation, actual arbitration” might be arguably acceptable while waiting for the AL to be amended.²⁹⁰ However, in the long run, in order to align the Chinese arbitration system with international norms, legislative recognition will be required to codify support for the practice of ad hoc arbitration in China. Likewise, foreign arbitration should be allowed in China and be written into the amendment of the AL. The merits for legalizing the ad hoc arbitration and foreign arbitration in China are evident. Parties can enjoy more choices of arbitration providers if they can choose either institutional or ad hoc arbitration, and arbitration could be conducted by both Chinese and foreign arbitral bodies. Moreover, given the current bureaucratic practice of local arbitration commissions, the introduction of ad hoc arbitration seems particularly necessary to provide an alternative to the administratively tainted institutional arbitration in China (providing the parties a way to avoid administrative interference) or pressure the local commissions to be better qualified and more transparent in catering to market demand rather than administrative needs.²⁹¹

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288. See BEN BEAUMONT ET AL., CHINESE INTERNATIONAL COMMERCIAL ARBITRATION 121–2 (1994) (explaining that while China will recognize an arbitral award rendered under the New York Convention, enforcement of any other arbitral award will occur only if there is reciprocity or precedent); see also Eu Jin Chua, *Legal Implications of a Rising China: The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 141 (2006) (emphasizing that the Arbitration Law contains no reference or provision for *ad hoc* arbitration, thus, although it is not forbidden, there are no clear rules for it in China).
289. See LIU XIAOHONG, JURISPRUDENCE AND EMPIRICAL RESEARCH OF INTERNATIONAL COMMERCIAL ARBITRATION (Guoji Shangshi Zhongcai Xieyi de Fali yu Shizheng Yanjiu) 51–52, 88 (2005); see also Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration*, 93 NW. U. L. REV. 453, 511 (1999) (stressing that cultural traditions compel attempts to mediate before resorting to the formal adjudicatory process of arbitration).
290. See WANG SHENGCHANG, RESOLVING DISPUTES IN THE PRC: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA 29 (1997) (stating that the Arbitration Law does not outright prohibit the use of ad hoc arbitration, although its use is discouraged).
291. See ARBITRATION LAWS OF CHINA 87 (The Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China ed. 1997) (noting that while foreign cases receive unbiased and efficient arbitration proceedings, discrimination plagues domestic arbitration); see also Eu Jin Chua, *supra* note 288, at 142 (maintaining that CIETAC has been criticized for failing to implement a transparent arbitral regime); see also William Heye, Note, *Forum Selection for International Dispute Resolution in China—Chinese Courts vs. CIETAC*, 27 HASTINGS INT'L COMP. L. REV. 535, 549 (2004) (recognizing that although strict impartiality and transparency are important in the West, China is struggling to find a balance between attaining a harmonious and a predictable and proper outcome).

However, even after we tout the benefits of legalizing the practice of ad hoc arbitration, one has to realize the political problem of state control remains a much more serious challenge to its inclusion in the revised AL. Politicians tend to avoid ad hoc arbitrations inclusion in the AL by blaming Chinese economic conditions. Ad hoc arbitration also requires the highest degree of good faith²⁹² in its execution because the burden is placed on the parties to organize and administer the arbitration and if problems arise, such as intentional delays by the parties or arbitrators, the assistance of an arbitration institution or an independent appointing authority are not available.²⁹³

As such, the argument has been made that the fledging level of fiduciary duties in the socialist market transition is still unable to maintain the high degree of good faith required for ad hoc arbitration. Likewise, the argument has been made that the predictability of ad hoc dispute resolution will be hard to guarantee so it will thus be detrimental to socioeconomic stability and therefore be detrimental to China's immature market system.²⁹⁴ These arguments have been put forth by one Chinese top legislative official responsible for AL legislation. Liu Maoliang, Vice Chief of the Legislative Affairs Office of the State Council, expressed recently that "ad hoc arbitration should go slow in China until we have a more developed and mature market economy."²⁹⁵ This argument makes the development of ad hoc arbitration in China a nullity, as the Chinese leadership has made it clear very recently that China will remain a developing country for the long term.²⁹⁶ In conclusion, it is clear that there is much more political resistance than economic restraint when it comes to allowing ad hoc arbitration and foreign arbitration in China and any future implementation of these international arbitral norms will depend on liberalization of not only the market economy but also the political atmosphere.

292. See William Tetley, *Good Faith in Contract: Particularly in the Contracts of Arbitration*, 35 J. MAR. L. & COM. 561, 594 (2004) (observing that in an ad hoc arbitration, good faith is imperative for the its success).

293. See Wang Liming & Xu Chuanxi, *Fundamental Principles of China's Contract Law*, 13 COLUM. J. ASIAN L. 1, 16 (1999) (clarifying that the principle of good faith is extremely important in Chinese culture).

294. See Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 436 (2006) (expressing the belief that the incompatibility between the Arbitral Law of China and international standards for ad hoc arbitration could undercut the conclusiveness of arbitral awards).

295. See Liu Maoliang, *Ad Hoc Arbitration Should Be Slow for Implementation in China*, 54 ARB. BEIJING Q. 8, 8–12 (2005); see also Ellen Reinstein, *supra* note 285, at 64 (commenting that unless the Chinese government is willing to submit itself to the legal system and lose some cases, it will face insurmountable odds in its attempt to establish a trustworthy market economy).

296. See Wen Jiabao, Chinese Premier, 2007 *Lunar New Year Address: Several Issues on the Historic Tasks and Foreign Policies that China Face in the Initial Period of Socialism* (Feb 26 2007), in XINHUA NEWS NET, http://news.xinhuanet.com/politics/2007-02/26/content_5775212.htm (last visited Mar. 19, 2009); see also Patrick H. Hu, Note, *The China 301 on Market Access: A Preclude to GATT Membership?*, 3 MINN. J. GLOBAL TRADE 131, 155 (1994) (opining that trade with China will continue to present problems beyond commercial expectations).