Pace International Law Review

Volume 27
Issue 1 *Commercial Edition*
*Spring 2015*

Article 1

April 2015

# Criminal Responsibility for Arbitrators in Chinese Law: Perversion of Law in Commercial Arbitration

Duan Xiaosong
*Southwest University (China)*

# CRIMINAL RESPONSIBILITY FOR ARBITRATORS IN CHINESE LAW: PERVERSION OF LAW IN COMMERCIAL ARBITRATION

**Duan Xiaosong***


## ABSTRACT

This article is prompted by a recent Chinese criminal provision governing the impartiality of arbitration. The goals of the article fare to critically examine the new criminal statute created by the provision and to put forward some proposals for reform, which could be employed to resolve the tension that exists between arbitrator impartiality and deference to arbitration. Although the new provision appears to eliminate the abuse of arbitral power, it may raise more questions than it resolves. This article explores the problems and undertakes a comparative analysis of the corresponding U.S. provision, as well as an analysis of some cultural and traditional elements influencing the new criminal statute in China. Ultimately it will be argued that the concerns can be addressed by fine-tuning the rule in order to keep a balance between the previous two conflicting values. Borrowing from U.S. experience, a mechanism of judicial interpretation is proposed that could well suit China's needs because the benefits of arbitration can be retained without sacrificing the impartiality of arbitration.


## I. INTRODUCTION

China's accession into the World Trade Organization (WTO) in December 2001[1] and the growing globalization of the world economy has greatly increased international trade and

* Law lecturer, Southwest University (China); PhD candidate, Southwest University of Political Science and Law (China). The author would like to thank Judith A. McMorrow, Professor of Law, Boston College Law School, for her guidance and valuable comments throughout the research and writing process.

[1] China and the WTO, http://www.wto.org/english/thewto_e/countries_e/china_e.htm.

investment within China. In the wake of the modern explosion of international trade and transnational investment, arbitration has become "the accepted method for resolving international business disputes."[2] Arbitration has also become a preferred method for foreign parties to resolve their legal disputes in China, due in large part to the distrust these parties have in Chinese courts.[3]

In contrast, the United States has a long history of arbitration. The US Congress passed the Federal Arbitration Act (FAA) in 1925.[4] The FAA provides that if there is an arbitration clause, the court shall, on application of one of the parties, stay the trial of the action until such arbitration has been had.[5] "In recent years, U.S. courts have expanded the range of enforceable arbitration agreements to include agreements that cover areas of law previously thought to be within the exclusive domain of courts."[6]

With its acceptance and popularization,[7] international commercial arbitration now plays a very important role in settling private conflicts. Parties from different nations tend to seek arbitration in order to prevent an abundance of jurisdictional problems.[8] Unlike litigation, arbitration provides a neutral venue for international disputes and aims to ensure procedural fairness for both parties.[9]Arbitration permits parties from different countries to exercise a great deal of control over

---

[2] Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order 6 (1996).

[3] Michael I. Kaplan, *Solving the Pitfalls of Impartiality When Arbitrating in China: How the Lessons of the Soviet Union and Iran Can Provide Solutions to Western Parties Arbitrating in China*, 110 Penn St. L. Rev. 769, 779 (2006).

[4] Federal Arbitration Act, ch. 213, §§ 1-4, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–4 (2011)).

[5] 9 U.S.C. §§ 2–4 (2011).

[6] Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 Duke L.J. 1279, 1279 (2000).

[7] *See* Zhao Xiuwen, GuojishangshiZhongcaifa (**国际商事仲裁法**) [International Commercial Arbitration Law] 17 (Renmin Univ Press 2004).

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

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

how a dispute will be resolved,[10] and parties are free to tailor the proceedings to meet their needs. Specifically, parties can contract to govern all disputes by a certain set of laws or procedures.[11] It is the parties who decide the scope and content of the arbitration, define its procedures, and choose the location of the arbitration by specifying these stipulations in the arbitration agreement.[12] Most importantly, parties have the power to choose the decision maker.[13] This freedom to select the arbitrator is why arbitration has been described as "hiring your own private judge."[14] Arbitration helps parties not only realize the procedural fairness of dispute resolution, but also benefit from the predictability to their disputes, lower attorney fees, more privacy and expert decision making.[15] The finality of arbitration is another advantage, which is often attractive for its speed and cost-effectiveness.[16] Arbitral awards are final and binding, and can be enforced in the same manner as court judgments.[17] Particularly, with the well-functioning international enforcement system under the 1958 New York Convention,[18] arbitral awards are often easier to enforce than court judgments.[19] The issue of the impartiality of the arbitrator is therefore, critical to the development of arbitration rules and cannot be ignored in the process of international private dispute resolution. The legitimacy of international commercial arbitration relies heavily upon the thoroughness of arbitration institutions as well as the independence and impartiality of arbitrators.

While Chinese arbitration has seen remarkable progress in

---

[10] DEZALAY & GARTH, *supra* note 2, at 273.

[11] *See Scherk*, 417 U.S. at 518.

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

[13] IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW §3.2 (1st ed. 1995).

[14] 1 Martin Domke, Domke on Commercial Arbitration §1:01 at 1 (3d ed. 2001).

[15] *See* Amy J. Schmitz, *Ending a Mud Bowl: Ending Arbitration's Finality through Functional Analysis*, 37 Ga. L. Rev. 123, 157–60 (2002–2003).

[16] *See* Catherine Cronin-Harris, *Mainstreaming: Systematic Corporate Use of ADR*, 59 Alb. L. Rev. 847, 853–54 (1995–96).

[17] ZHAO, *supra* note 7, at 5.

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

[19] *See* Andrew T. Guzman, *Capital Market Regulation in Developing Countries: A Proposal*, 39 VA. J. INT'L L.607, 632 (1998–99).

a relatively short period of time, many problems remain. This article focuses on criminal liability for biased arbitrators. This article is largely prompted by a new criminal provision: Arbitration by "Perversion of Law" (WangfaZhongcaizui), which has been incorporated into the Criminal Law of the People's Republic of China [hereinafter Criminal Law].[20] Through Amendment VI in 2006,[21] and is designed to punish biased arbitrators for their wrongdoings. The goal of this article is to critically examine the legal regime of arbitrator impartiality in China, including this provision, and put forward some proposals for reform. Part II provides a brief description of the framework of the arbitration system in China. Part III presents a background of Arbitration by "Perversion of Law," examines the debate on the new criminal statute, compares it with some provisions of US arbitration laws, and explores the relative Chinese legal culture, tradition, and economic environment factors that underlie criminal liability of arbitrators. Part IV gives evaluations from a jurisprudential perspective and offers some reform proposals on the basis of borrowing some US experience. Finally, Part V provides a summary, along with some concluding remarks.

## Ⅱ. THE ARBITRATION SYSTEM IN CHINA

Arbitration is by nature quasi-private and procedurally more flexible than judicial systems. [22] This allows arbitrators to work quickly and more efficiently, which is very important for time-sensitive commercial arrangements. Meanwhile, it provides parties with other advantages, such as greater certainty and a higher level of expertise than the court-based system. [23]arbitration mitigates the jurisdictional disputes amongst

[20] ZhonghuaRenminGongheguoXingFa (**中华人民共和国刑法**) [Criminal Law of the People's Republic of China] (promulgated by Order No. 83 of the President of the Peoples Republic of China, Mar. 14, 1997, effective Oct. 1, 1997; revised for the eighth time on Feb 25, 2011) [hereinafter Criminal Law].

[21] ZhonghuaRenminGongheguoXingfaXiuzhengan (liu) (**中华人民共和国刑法修正案(六)**) [Amendment VI to the Criminal Law of the People's Republic of China] (promulgated by Order No, 51 of the President of the People's Republic of China., June 29, 2006, effective June 29, 2006) (China) [hereinafter The Amendment]. For a relatively detailed description of the provision, see *infra* Part III.

[22] ZHAO, *supra* note 7, at 6.

[23] *See Id.* at 36.

parties.[24] International commercial arbitration has long been regarded as an effective choice-of-forum mechanism of resolving international commercial disputes.[25] Due to the universal acceptance of the New York Convention,[26] parties cannot resolve their disputes in multiple forums if one party contests the decision of the arbitral tribunal because the convention provides for the confirmation of arbitration awards in member nations.[27]

There are two categories of arbitration in People's Republic of China: international commercial arbitration and domestic arbitration. Commercial arbitration in China started in 1956 symbolized by the establishment of the China International Economic and Trade Arbitration Commission (CIETAC),[28] formerly known as the Foreign Trade Arbitration Commission.[29] In 1959, the China Maritime Arbitration Commission (CMAC) was set up.[30] Both CIETAC and CMAC are international commercial arbitration, or foreign-related arbitration,[31] because they were designed to handle disputes arising from economic, trading, transportation, and maritime activities involving a foreign element.[32] The arbitration rules and practices of CMAC are virtually identical to those of CIETAC, so international commercial arbitration can best be demonstrated by CIETAC. In accordance with its rules, disputes arising between Chinese

---

[24] *See* Brown & Rogers, *supra note* 8, at 332.

[25] ZHAO, *supra* note 7, at 9-10.

[26] China has been a member of the Convention since 1987. *See* http://www.newyorkconvention.org/contracting-states/list-of-contracting-state.

[27]Article V of the New York Convention provides the limited reasons why parties to the Convention should not confirm an arbitration award. New York Convention, *supra* note 18, art. V.

[28] CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION [hereinafter "CIETAC"], *available at* http://www.cietac.org/index.cms (last visited Apr. 5, 2015).

[29]Arbitration Law sets forth a special chapter dealing with the legal status of international commercial arbitration in China's dispute resolution system. The history of CIETAC and their arbitration rules can be found under "About Us" and "Rules" in the CIETAC website, available at http://www.cietac.org/index.cms (last visited Apr. 5, 2015).

[30] China Maritime Arbitration Commission [hereinafter "CMAC"], *available at* http://www.cmac-sh.org/en/home.asp (last visited Apr. 5, 2015).

[31] *See* CIETAC, *supra* note 29; CMAC, *supra* note 30.

[32] *See* 1995 Arbitration Law of the People's Republic of China (promulgated by Decree No.31 of the President of the People's Republic of China, Oct. 31, 1994; revised on Aug 27, 2009), art. 65, [hereinafter Arbitration Law].

parties and/or parties from Hong Kong, Macau or Taiwan, or between Chinese-foreign joint ventures and Chinese parties, are within CIETAC's jurisdiction.[33]

In contrast, domestic arbitration has a shorter history. With the promulgation of the Arbitration Law in 1994,[34] domestic local arbitration commissions were gradually established mainly for resolving domestic economic contract disputes or cases without foreign elements.[35] In addition, there are, in theory, at least several arbitration mechanisms for domestic disputes. For instance, employment disputes, some intellectual right disputes, and securities disputes are not arbitrated pursuant to Arbitration Law, but submitted to arbitration by reason of particular laws.[36] Since the disputes are not commercial by nature and those tribunals are more like administrative organs, they do not fall within the scope of our present discussion.

However, a State Council Notice, an administrative regulation dramatically changed CIETAC's long-standing exclusive jurisdiction over foreign-related disputes.[37] Article 3 of the

---

[33] *See* CIETAC Arbitration Rules (promulgated by the China Council for the Promotion of International Trade/China Chamber of International Commerce, Feb. 3, 2012,effective May 1, 2012), art. 3, *available at* http://www.cietac.org/index.cms (follow "Rules").

[34] CIETAC, *supra* note 29*;* follow "References".

[35]For example, the Beijing Arbitration Commission (BAC) was founded on September 28, 1995, following the passage of the Arbitration Law. *See About Us*, BEIJING ARBITRATION COMMISSION, http://www.bjac.org.cn/en/about_us/index.html (last visited Aug. 24, 2012).

[36] For example, the Law of the People's Republic of China on Labor-dispute Mediation and Arbitration [ZhonghuaRenminGongheguoLaodongZhengyiTiaojieZhongcaiFa] (**中华人民共和国劳动争议调解仲裁法**) [hereinafter Labor-dispute Mediation and Arbitration Law] is applicable to the labor disputes. *See* Labor-dispute Mediation and Arbitration Law, art. 2, 5.;

TheTrademark Law of the People's Republic of China [ZhonghuaRenminGongheguoShangbiaoFa] (**中华人民共和国商标法**) [hereinafter Trademark Law] is dealing with Decisions on Registered Trademark Disputes. *See* Trademark Law, art. 41;

The Interim Regulations on the Administration of the Issuing and Trading of Stocks [GupiaoFaxingyuGuanliZanxingTiaoli] (**股票发行与交易管理暂行条例**) [hereinafter Stocks Regulations] is dealing with the disputes between securities dealing institutions or between a securities dealing institution and a security exchange. *See* Stocks Regulations, art. 80.

[37] Circular of the General Office of the State Council Regarding Some

State Council Notice provides that domestic arbitration commissions now "have the power to accept foreign-related arbitrations when the parties have agreed to submit disputes to such Arbitration Commissions."[38] On the other hand, according to the newly revised 2005 CIETAC Arbitration Rules, CIETAC can also accept cases involving domestic disputes.[39] This allows cross-pollinating between foreign-related arbitration matters with domestic arbitration commissions, and domestic disputes with CIETAC. Indeed, the ambiguity of those provisions appears to be a source of conflict.[40]

Another notable distinction between domestic and foreign-related arbitration is the difference in criteria required for judicial review of arbitral awards. The courts, known as the People's Courts,[41] can review not only procedural issues but also the legal reasoning supporting the domestic arbitral awards.[42] Conversely, in international arbitrations, the courts are not allowed to consider the legal merits to overturn an award.[43] Instead, the courts generally scrutinize procedural issues,[44] which conform to the New York Convention.[45]

Generally speaking, China's international arbitral tribunals are better established and more sophisticated than domestic arbitration.[46] It is important that they remain distinct from domestic arbitral tribunals, which do not share CIETAC's rep-

---

Problems Which Need to Be Clarified for the Implementation of the Arbitration Law of the People's Republic of China, State Council Notice (Jun. 8, 1996), *available at* http://www.cietac.org/index.cms (follow "References").

[38]Brown &Rogers, *supra* note 8, at 346.

[39]CIETAC Arbitration Rules, *supra* note 25, art. 3.

[40]*See* Brown & Rogers, *supra* note 8, at 347.

[41]In China, the courts are named People's Courts.

[42]If a party can prove that evidence on the basis of which the award was made had been forged, or the other party withheld evidence sufficient enough to have an impact on the impartiality of arbitration, the first party may submit an application for vacation of the award. *See* Arbitration Law, *supra* note 24, art. 58.

[43] ZHAO, *supra* note 7, at 18.

[44] *See* ZhonghuaRenminGongheguoMinshiSusongFa (**中华人民共和国民事诉讼法**)[Civil Procedure Law of the People's Republic of China] art. 258 (promulgated by Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1992, amended by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective Oct. 28, 2007) [hereinafter Civil Procedure Law].

[45] Similar provisions can be found in the Convention. *See* New York Convention, *supra* note 18, art. 5.

[46] Brown & Rogers, *supra note* 8, at 340.

utation.[47] In accordance with the New York Convention, CIETAC awards are recognized and enforced in more than 140 countries.[48] CIETAC's nearly 20,000 concluded arbitration cases have involved parties from more than 70 countries and regions outside the Chinese mainland,[49] and its awards have been recognized and enforced in more than 60 countries and regions.[50] Since 1990, CIETAC's caseload has been one of the heaviest among the world's major arbitration institutions.[51]

## Ⅲ. THE NEW CRIMINAL PROVISION OF ARBITRATION BY "PERVERSION OF LAW"

On June 29, 2006, at its 22nd meeting, China's legislature, the Standing Committee of the National People's Congress adopted and promulgated an important piece of law: Amendment VI to the Criminal Law of the People's Republic of China, which is the Pervision of Law amendment.[52] Under this law, biased arbitrators are subject to criminal liability:

> Where anyone who undertakes the duties of arbitration according to law intentionally goes against the facts and law and makes any wrongful ruling in the process of arbitration, he shall be sentenced to fixed-term imprisonment of not more than three years or detention. If the circumstances are extremely serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.[53]

### *A. Background of the New "Perversion of Law" Criminal Provision*

International commercial arbitration developed as an alternative form of dispute resolution because of a fear that foreign courts would be biased in favor of local parties, yet the im-

---

[47] *Id*.

[48] *See* CIETAC, *supra* note 29 (follow "About Us" ) (last visited Apr. 20, 2015).

[49] *Id*.

[50] *Id*.

[51] *Id.*

[52] Article 20 of the Amendment inserted Article 399 (I) after Article 399 of the Criminal Law, which is titled "Arbitration by 'Perversion of Law.'" The Amendment, supra note **Error! Bookmark not defined.**, art. 20.

[53] *Id.*

partiality of international commercial arbitration itself is also important.[54] In order to guarantee the legitimacy of the arbitration process, the arbitral institution must ensure the neutrality of the arbitrator.[55] Thus, having a neutral and impartial arbitrator to resolve commercial disputes is a fundamental goal in modern arbitration. In response to this, states throughout the world enacted laws to deal with arbitrator responsibility in domestic and international arbitration.[56] Surprisingly, rather than following the policy of the developed nations, China's legal policy on partiality seems to take a slightly different track. Vacatur of judgment and refusal of implementation of an arbitral award are the universal ways to deal with partiality of international arbitration,[57] which are also used in China.[58] However, this recent Chinese statute unexpectedly imposes criminal responsibility on biased arbitrators.[59]

Chinese commercial arbitration, unlike its Western counterparts, is extremely young due to its limited history. Arbitration was introduced to China in the 1980s under a policy of institutional reform and openness to meet the needs of its rapid growing economy.[60] As an import from the West,[61] arbitration is still new to a large portion of China's population.[62] The purported legislative purpose of the new enactment is to regulate arbitrators' conduct and guarantee fairness and justice in the course of arbitration, which was once considered a legal loop-

---

[54]*See* Yu Xifu,GuojiShangshiZhongcai de SifajianduyuXiezhu（国际商事仲裁的司法监督与协助）80–81 (Intellectual Prop.Publ'gHouse 2006).

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

[56]*See* Liu Xiaohong, *QuedingZhongcaiyuanZerenZhidu de FaliSikao* (确定仲裁员责任制度的法理思考) [*Jurisprudence Analysis of the Establishment of Arbitrators' Liability*], 5HUADONGZHENGFADAXUEXUEBAO (华东政法大学学报) [J. E. CHINA U. POL. SCI. & L.] 82, 85 (2007).

[57] ZHAO, *supra* note 7, at 18.

[58] *Id*, at 20.

[59]*See* Song Lianbin, *WangfaZhongcaizuiPipan* (枉法仲裁罪批判) [A Critical Analysis of the Crime of Distortion of Arbitration Law], 62 BEIJING ZHONGCAI (北京仲裁)[ARB.BEIJING] 22, 32 (2007).

[60]CIETAC, *supra* note 29 (follow "About Us").

[61] LIU XIANGSHU, ZHONGGUOSHEWAIZHONGCAICAIJUEZHIDUYU XUELIYANJIU (中国涉外仲裁裁决制度与学理研究) [A JURISPRUDENTIAL STUDY ON THE INTERNATIONAL COMMERCIAL ARBITRAL AWARD SYSTEM OF CHINA]20 (Law Press 2001).

[62] *See Id*.

hole.[63] The new provision falls within the category of crimes regarding dereliction of duty.[64]Among those crimes, Article 399 of Chinese Criminal Law pertains to dereliction of duties of judicial personnel, which was formally named Civil and Administrative Judgment by "Perversion of Law."[65] The Criminal Law became effective in 1997[66] while the new Criminal Amendment was promulgated in 2006.[67] Now that judges face a criminal responsibility for biased rulings nine years ago, it is not reasonable for an arbitrator to escape from a similar punishment? As arbitration continues to compete with litigation, some contended that an arbitrator should be similarly liable as a judge if they bend the law.[68]

In debating the Amendment, many arbitration scholars openly objected to the inclusion of the new provision for holding arbitrators accountable because holding arbitrators criminally liable does not comply with international practices.[69] Nevertheless, the fear that arbitrators' power could be mishandled and justice could be threatened prevailed over objections to creating new criminal provisions for arbitrators. [70] Eventually, this fear about the power of arbitrators formed a sound basis for the new provision, because this worry is prominent particularly in the context of China.[71]

Unlike the Western tradition of "rule of law," China has a

---

[63] *See* Chen Zhongqian,*LunWangfaZhongcaizui de Sheli-Danghuan*(论枉法仲裁罪的设立当缓) [On To Delay Setting up the Crime of Distorting the Law of Arbitration], 7ZHONGCAIYANJIU (SPECIAL ISSUE) (仲裁研究专论) [ARB. STUD.(SPECIAL ISSUE)]1, 2 (2006).

[64] Chapter IX of Criminal Law, which covers from article 397 to article 419, is named Crimes of Dereliction of Duty. *See* Criminal Law, Chapter IX, *supra* note 20; *see also supra* note 38.

[65]In accordance with Article 399 of the Criminal Law, Any judicial officer in civil or administrative proceedings, who, intentionally runs counter to the facts and law and twists the law when rendering judgments or orders, shall assume criminal responsibility. *See* Criminal Law, *supra* note 20, art.399.

[66] Criminal Law, *supra* note 20.

[67]*See* The Amendment, *supra* note 18.

[68] Xu Li, On *WangfaZhongcaizui de LifaZhengdangxingTantao* (枉法仲裁罪的立法正当性探讨) [Research About Its Legislative Righteousness Of Crime Of Misuse of Law in Adjudication], 5FAXUEZAZHI (法学杂志) [LEGAL STUD. MAG.] 85, 88 (2009).

[69] *See* Song, *supra* note 60, at 32.

[70] *See* Xu, *supra* note 69, at 88.

[71]*See* Song, *supra* note 60, at 32–33.

unique culture often termed "rule of relationship (guanxi)."[72] Guanxi is a complex web of informal personal connections.[73] The concept is a type of gift economy that involves the "cultivation of personal networks of mutual dependence and trust."[74] Someone seeking and maintaining "guanxi" directly or indirectly with those who have an authority over social resources, no matter by what means, would have a massive advantage, as the latter would repay the former in the future according to "Rule of guanxi."[75] "Rule of guanxi," also operative in Asian societies,[76] appears to make it challenging for parties to find a mutually accepted "fair" arbitrator, and even the selection of an arbitral institution problematic, because parties distrust each other.[77] In practice, there exists the risks of arbitrators taking bribes and ruling wrongfully.[78] The worry whether the other party has "guanxi" with arbitrators makes the question of the impartiality of the arbitrators deciding their disputes much more important. This problem is disconcerting because it might lead to a cooling in commerce between China and foreign nations.[79] That is, not the outcome China would presently like to encourage.[80] Understandably, due to lack of arbitrator ethics, criminal responsibility would be called for on a biased arbitra-

---

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

[73] *See* HUANG GUANGGUO, CONFUCIAN RELATIONALISM (儒家关系主义) 9 (Peking Univ.Press 2006).

[74]*Id*, *supra* note 73.

[75]*See* HUANG, *supra* note 74, at 12.

[76] *See id*, at 4.f

[77] *See* Xuan Bingzhao& Zhou Zhibin, *WangfaZhongcaide RuzuiZhengdangxingFenxi*(枉法仲裁的入罪正当性分析)*[The Analysis of the Legitimacy of Distortion of Arbitration Law*], *in* HEXIESHEHUIXINGFADEXIANSHIWENTI (和谐社会的刑法现实问题) [THE PRACTICAL PROBLEMS OF CRIMINAL LAW IN A HARMONIOUS SOCIETY] 1758 (Li Jie et al. eds., 2007).

[78]ZhangYong & Huang Xiaohua, *LunWangfaZhongcaizuiYuShouhuizui De Jinghe* (论枉法仲裁罪与受贿罪的竞合), 5FAXUEPINGLUN (法学评论) [LAW REV.] 120, 120(2008).

[79] *See* Xu Qianquan, *ZhongcaiyuanFalvZerenZhiJiantao II* (仲裁员法律责任之检讨(下)) [The Criticism of Arbitrators Legal Responsibility II], 11ZHONGCAIYANJIU (仲裁研究) [ARB.STUDY] 26 (2006).

[80]Fan Mingchao, *ShangshiZhongcaiShiyexia de WangfaCaijuezui* (商事仲裁视野下的枉法裁决罪) [Crime of Distortion of the Law of Arbitration under the Vision of Commercial Arbitration], 27 HEBEIFAXUE (河北法学) [HEBEI LEGAL STUD.] 125, 129 (2009).

tor.[81]

A significant consequence of the new provision calling for criminal liability for biased arbitrators is that it changes the way arbitral awards are judicially reviewed.[82] The power of courts and public prosecutors will inevitably be expanded to review the merits of an arbitral award, which is beyond the standard of procedural review according to the New York Convention.[83] In the Chinese criminal justice system, one of the important aspects is the dichotomy drawn between public prosecution and private prosecution.[84] The criminal cases are under public prosecution with exceptions of three categories of less serious crimes.[85] In the public prosecution cases, the public prosecutors, named People's Procuratorates, bear the evidentiary burden before the courts.[86] In the private prosecution

[81] *See* Luo Guoqiang, *WangfaZhongcaizuiSibian* (枉法仲裁罪思辨)[Thoughts on the Crime of Distortion of the Law of Arbitration], 1ZHONGGUOXINGSHIFAZAZHI (中国刑事法杂志) [J.CHINA'S CRIM.LAW] 63, 71 (2009).

[82] *Id.*

[83] *See* New York Convention, *supra* note 18, art. V.

[84] Both public prosecution and private prosecution can result in criminal punishment. Public prosecution occurs when the proceedings are initiated by the People's Procuratorates with the People's Courts, while in privation prosecution it is the victim, the victim's legal representative, close relative, or others who are entitled to initiate the proceedings and file a criminal case to the People's Courts. *See* Chen Zexian, CONTEMPORARY CHINESE LAW 163 (2009). All cases requiring initiation of a public prosecution shall be examined for decision by the People's Procuratorates. *See* ZhonghuaRenminGongheguoXingShiSuSongFa (中华人民共和国刑事诉讼法)[Criminal Procedure Law of the People's Republic of China], art. 136 (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, amended for the second time by Nat'l People's Cong., Mar. 14, 2012) [hereinafter Criminal Procedure Law].

[85] Cases of private prosecution include the following:

> (1) cases to be handled only upon complaint;(2) cases for which the victims have evidence to prove that those are minor criminal cases; and (3) cases for which the victims have evidence to prove that the defendants should be investigated for criminal responsibility according to law because their acts have infringed upon the victim's personal or property rights, whereas, the public secu432rity organs or the People's Procuratorates do not investigate the criminal responsibility of the accused.

*See* Criminal Procedure Law, *supra* note 85, art. 170.

[86] During the course of a criminal case, the People's Procuratorates have the ability to exercise four major powers. First, they have the right to investigate criminal cases assigned to them by the law, and to take all kinds of coer-

cases, similar to civil litigation, the private prosecutor (often the victim himself) is obligated to prove the wrongdoing of the accused.[87] Since a crime of dereliction of duty, including the Perversion of Law provisions, is a public prosecution case,[88] it is the People's Procuratorates rather than the claimant who should prove the crime.[89] Before bringing the case to the court, the Procuratorates are given the chance of substantial review of the arbitral award because they need to investigate and collect evidence.[90] In turn, the court has to review the merits of the arbitration again in order to make a decision.[91] This conflicts with China's obligation of procedural review under the New York Convention.[92]

### *B. The Debate Surrounding the New Provision of Pervision of Law*

The new provision establishes the institutional framework for the creation of penal punishment on biased arbitrators. However, it raises a host of complicated questions as well, which became the subject of national debate.

#### a. The Anti-crime Arguments

Prior to the legislation, the issue of penal punishment upon a biased arbitrator had been at the heart of the discussion and received a wide range of practical and academic atten-

---

cive measures against suspects. Second, they examine cases submitted by the police organs and decide whether to approve arrest or to prosecute suspects. Third, they have the right to prosecute suspects and to protest the judgments. Last, as a law supervisory organ, they have the right to supervise all the criminal processes, including investigation, interrogation, trial and execution. *See* Wang Guiguo&John Mo, CHINESE LAW 648 (1999).

[87] The burden of proof in a private prosecution case is on the prosecutor. If he lacks criminal evidence and cannot present supplementary evidence, the People's Court shall persuade him to withdraw the private prosecution or order its rejection. *Id.* at 652; *see* also Criminal Procedure Law, *supra* note 60, art. 171(2).

[88] In cases involving crimes of corruption and dereliction of duty, the People's Procurates shall conduct the investigation and initiate a public prosecution. *See* Criminal Procedure Law, *supra* note 85,art. 136.

[89] *See* Criminal Procedure Law, *supra* note 85, art. 141.

[90] *See* Xu, *supra* note 79, at 26.

[91] *See Id*.

[92] *See supra* note 84.

tion.[93] While the new criminal statute was an effort to fill the legal gap of liability for arbitrators, many arbitration scholars have denounced the statute as having fallen short of its goal.[94] They argued that the criminal responsibility of an arbitrator is not in line with international practice, as it disregards the contractual nature of arbitration.[95] Additionally, the vague wording makes the provisions' workability of the new criminal statute problematic.[96]

Arbitration is seen first as a matter of contract, rather than a form of adjudication.9 One of the continuing debates is indeed whether contract traits rather than judicature characteristics form the cornerstone of and exercises pervading influence over arbitration.[97] Critics argue that analogizing arbitration to litigation may be arbitrary and imprecise.[98] A common objection to the new criminal statute is that it is against arbitration's nature.[99] It is important to understand that arbitration is not litigation with another name.[100] An arbitrator performs a task that resembles that of a judge, yet there are critical differences between judges and arbitrators. Arbitrators charge fees from the parties, whereas judges, as state personnel, receive wages from the state budget.[101] Further, arbitrators are often experts chosen from the same industry in which the dispute arises, and are not always required to have a legal

---

[93] *See* Lu Jing, *ZhongcaiYouxianXingshiZerenChengdan*(仲裁有限刑事责任承担) [On Limited Criminal Liability for Distortion of the Law of Arbitration], 24 ZHONGCAIYANJIU (仲裁研究) [ARB.STUDY] 82 (2010). *See* also Liu, *supra* note 42, at 89.

[94] *See* Liu, *supra* note 42, at 88–90.

[95] Chen, *supra* note 45, at 2–3.

[96] Song, *supra* note 43, at 26–31.

[97] Xu Qianquan, *WangfaZhongcaizuiZhiPipan* (枉法仲裁罪之批判)[ A Criticism of the Law-bending Arbitration], 3 GuangxiMinzuXueyuanXuebaoZhexueShehuixue Ban (广西民族学院学报哲学社会学版) [J.GUANGXI UNIV. FOR NATIONALITIES, ED.FOR PHIL.& SOC.]120, 120–21 (2006).

[98] As a matter of contract, arbitration is influenced by the respective bargaining strength of each party. Thus, party-appointed arbitrators are a reflection of the parties' positions in the dispute. *See* Rau, *supra* note _, at 511;*see also* Chen Zhongqian, *LunWangfaZhongcaizui de Rending I*(论枉法裁决罪的认定(上)) [On When Should the Court Find a Violation of Arbitration Law I], 24 ZHONGCAIYANJIU (仲裁研究) [ARB.STUDY] 72, 76 (2011).

[99] Chen, *supra* note 98, at 77.

[100] *See* Xu, *supra* note 68, at 121.

[101] *See Id.*

education.[102] Rooted within international trade, disputants have chosen arbitration to settle controversies for hundreds of years.[103]It is the participants who shape the arbitration, which is then recognized by a state's legal system through various private dispute resolutions.[104]The rationale behind arbitration is the doctrine of party autonomy: parties' consent to address issues through arbitration should be respected and enforced, such that neither of the parties can initiate judicial proceedings before the arbitration takes place.[105]

Opponents of the new criminal statute also argue that the judicial policy should not allow public intervention in the private domain when parties have mutually agreed to exercise their autonomy to arbitrate.[106]Under this view, arbitrators' authority comes from the authorization of the parties instead of a state because the private parties have the natural right of self-regulation. Therefore, the nature of arbitration should be deemed a product of contract between the parties and the arbitrators rather than a form of judicature, and as a legal service rather than a form of judicial power.[107]This is particularly important, as one goal of international arbitration is to limit state influence on the dispute resolution process between and among international parties. Otherwise, the expected benefits of arbitration would be dramatically reduced.[108]

Additionally, critics doubt that the new enactment is workable because of the ambiguity of the provisions.[109] It is highly likely that in practice the new enactment would not function as expected, because the language in Amendment (VI) offered little guidance as to what particular conducts constitute this crime.[110] For instance, the first challenge is how to establish that the accused is covered by the new criminal provisions.[111] Although the person who commits the crime is referred to as "anyone who undertakes the duties of arbitration

---

[102] *See* Song, *supra* note 43, at 33,35.
[103] *See* LIU, *supra* note 62, at 2–3.
[104] *Id*.
[105] Chen, *supra* note 98, at 73.
[106] *Id.* at 76.
[107] *Id.*
[108] *See* Song, *supra* note 59, at 36.
[109] *See Id.*, at 26-31.
[110] *Id.* at 35.
[111] *Id.* at 30-31.

according to law," the definition of "anyone" is far from clear.[112]Without exception, the description covers both arbitrators and any other personnel working in arbitration commissions.[113]It has caused some practical difficulties.[114] For example, an arbitral award is often made on the basis of the majority opinion among the arbitrators, and dissenters need not provide a signature on the award.[115] Suppose some arbitrators showed signs of bias, and others appeared objective.[116] It would be unjust if an arbitrator who disagreed and refused to sign was included as "anyone" and found guilty of Arbitration by "Perversion of Law."[117]

Third, defining "intentionally" is another fundamental question. Neither Amendment VI itself nor the Arbitration Law provides detailed rules about how "intentionally" should be ascertained.[118]By including this word, it appeared to have precluded a "negligent" act.[119]But it is very difficult, if not impossible, to draw a line between an arbitrator's "intentional" disregard of law and a "negligent" mistake in the process of handling a case, because it is not easy for the court to discern

---

[112] *See* Xu, *supra* note 79, at 25.

[113] *See, e.g.,* Brown & Rogers, *supra* note 24, art. 31. (discussing "anyone" can also refer to the chairman of an arbitration commission in accordance with the provision. Whereas the parties concerned agree that the arbitration tribunal shall be composed of three arbitrators, each of them shall choose one arbitrator or the appointment to the chairman of the arbitration commission, with the third arbitrator jointly chosen by the parties concerned or appointed by the chairman of the arbitration commission jointly entrusted by the two parties. The third arbitrator shall be the chief arbitrator).

[114] Xu, *supra* note 79, at 25.

[115] *See* Brown & Rogers, *supra* note 8, arts. 53–54.

[116] *See* Chen, *supra* note 63, at 78.

[117] *See Id*.

[118] *See* Song, *supra* note 59, at 29–30 (For the argument that the Arbitration Law provided no guidance for the application of the new enactment).

[119] *See* Criminal (Commercial Arbitration Law?) Law, *supra* note 17, arts. 14–15 (An intentional crime is a crime committed with clear knowledge that the act will cause socially dangerous consequences, and hopes for or is indifferent to those consequences. Intentional crimes always result in criminal liability. However, a negligent crime occurs when an act or should foresee that his act may cause socially dangerous consequences but continues in the action out of carelessness. Alternatively, a negligent crime occurs when the actor has foreseen the consequences but erroneously assumes he can prevent them, resulting in such consequences. Criminal liability is imposed for negligent crimes only when the law so stipulates.).

an arbitrator's intentions.[120]In practice, what satisfies "intentionally" is subject to interpretation.[121]

Fourth, the problem is particularly severe and disconcerting in explaining the expression "goes against the facts and law."[122]The word "and" is used in the provision "intentionally goes against the facts and law." Its use indicates that the crime exists only when both of the two conditions, "goes against the facts" and "goes against the law," are satisfied.[123]The new enactment is silent about whether a crime exists when only one condition is fulfilled.[124]

As previously shown, both CIETAC and domestic arbitration commissions have jurisdiction over international or foreign-related disputes. Following international practice, parties often choose what law they want to govern interpretation and enforcement of their agreement.[125]Sometimes, in amicable arbitration or *ad hoc* arbitration, no applicable law is selected and arbitrators are empowered to disregard the strictures of legal rules in search of more equitable resolutions to disputes.[126]Therefore, what specific law do they refer to in these situations? If the applicable law is a foreign law, it is questionable whether Chinese courts have the competent jurisdiction to make a decision that an arbitral award "goes against" a foreign law.[127]Admittedly, such a decision on a foreign law would constitute an infringement of sovereignty of a foreign country, in violation of basic international principles.[128]

Further confusion arises with respect to the clause "if the circumstances are extremely serious" without detailed criteria of those "serious circumstances".[129]The new enactment is silent on this crucial and controversial area, which makes it difficult

---

[120] *See* Song, *supra* note 59, at 29-30. *See* also Liu, *supra* note 93, at 84.

[121] *Id.* at 29.63

[122] *See* Chen, *supra* note 98, at 78.98

[123] Fan, *supra* note 80, at 127.

[124] *Id.*

[125] *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 518 (1974).

[126] *See* Liu, *supra* note 103, at 5.

[127] *See* Song, *supra* note 43, at 35.

[128] Zhang Junying, *ShangshizhongcaiWangfaxingwei de Xingshiguizhi-Yanjiu* (商事仲裁枉法行为的刑事规制研究)[*Study on the Criminal Rule of Perversion of Law in Commercial Arbitration*], 4 SHANGCHANGXIANDAIHUA (商场现代化) [MARKET MODERNIZATION] 311, 311 (2007).

[129] Song, *supra* note 43, at 31.

for courts to use the provision in deciding what "circumstances" would be "extremely serious."[130]

The new criminal statute may also be incompatible with China's international obligations.[131]As previously outlined, China adopts a "two-track" approach in judicial review of arbitral awards, under which Chinese courts are not permitted to review any of the legal merits or reasoning except procedural issues in international arbitration.[132] But bringing in a verdict from arbitration by "Perversion of Law" requires first of all a substantial judicial review of the arbitral award?[133] Courts must request the arbitration panel to provide reasons justifying its decision in order to judge whether criminal conduct exists, but arbitral awards are often rendered without explanation of the reasoning or even a complete record of the proceedings.[134] Furthermore, a domestic arbitration commission now has jurisdiction over both domestic and foreign-related disputes. An arbitrator of a domestic arbitration commission handling domestic and foreign-related cases must utilize different criteria for judicial review.[135]An international arbitrator, who may be held criminally liable under domestic criteria, could be immune to penal punishment under international standards.[136]In de-

---

[130] *Id*.

[131] *See* Huang Hui, *LunWangfaZhongcaiZuiZhi "Wangfa" Xing* (论枉法仲裁罪之枉法性) [The "Perverting" Nature of Law-bending Arbitration], 4SICHUANDAXUEXUEBAO (四川大学学报) [J.SICHUAN UNIV.] 120,124 (2010).

[132] *See* Civil Procedure Law, *supra* note 34, art.274; Arbitration Law, *supra* note 24, art.58.

[133] For a discussion of the specific difficulties brought by the two-track system, *see* Huang, *supra* note 100, at 124.

[134] A written arbitral award shall specify the arbitration claim, the facts of the dispute, the grounds for the award, the result of the award, the apportionment of the arbitration costs, and the date of the award. The parties can agree to not specify the facts of the dispute and the grounds for the award in a written arbitral award. A written arbitral award shall be signed by the arbitrators and affixed with the seal of the arbitration commission. Arbitrators with different opinions on the arbitral award may or may not sign the award. *See* Arbitration Law, *supra* note 24, art. 54.

[135] *See* Huang, *supra* note 131, at 125.

[136] While domestic arbitration is subject to judicial review of facts, arbitral decision-making in international commercial arbitration is immune from substantive scrutiny after an award is made. International arbitrators actually do not have a chance to be convicted of "Perversion of Law." On the other hand, if they could be found guilty of this crime, the courts would have to re-

termining whether an arbitrator is guilty, the courts must scrutinize the merits and reasoning used in arbitration proceedings. However, in accordance with the New York Convention, the courts of member states may only review the procedural issues of international commercial arbitration.[137] It is not likely for international arbitrators to be convicted of the crime, which makes judicial review a deterrent only for domestic arbitrators.[138] A responsible and capable arbitrator would be overly cautious and understandably reluctant to risk accepting appointment, which might cause the decline of the quality of arbitration and eventually do harm to the development of arbitration as well as the efforts of rule of law in China.[139]

The language of the amendment is too vague and simplistic to provide any concrete guidelines in practice, there is only a theoretical possibility that a biased arbitrator would be caught and convicted of the crime.[140]After all, corruption occurs in subtle manners and open partiality is very rare. The new law remains theoretical only since it is difficult to apply in practice.[141] Nevertheless, the Amendment has been criticized as being over-inclusive.[142] Some opine that it only provides moral force and there are already enough rules that prevent arbitrator misconduct.[143]The existing remedies include application for the withdrawal and replacement of an arbitrator, application for vacation of the award, denial of enforcement of the award, notification of re-arbitrating by the tribunal, and rejection of the application.[144]Occasionally, even penal punishment can be

---

view the merits and reasoning in arbitration proceedings first, which means a violation of China's obligation under the New York Convention that courts of member states are only entitled to reviewing the procedural issues of international commercial arbitration. *See* New York Convention, *supra* note 18, art. V

[137] *See supra* note 84.

[138] *See* Chen, *supra* note98, at 78.

[139] *See* Song, *supra* note 60, at 35–38.

[140] *See Id.*, at 35, 36.

[141] *See Id.*, at 36.

[142] *See* Lu, *supra* note 93, at 82, 85.

[143] *See* Xu, *supra* note 68, at 122-23.

[144] According to the Arbitration Law, arbitration shall be carried out independently and free from interference by administrative authorities, social organizations, or individuals; where an arbitrator has privately met a party or agent or has accepted an invitation or gift from such party or agent, he must withdraw and his name shall be removed from the list of arbitrators; where arbitrators demanded and/or accepted bribes, practiced graft or made

used.[145]Similar provisions can hardly be found in most other jurisdictions.[146]

In sum, the anti-crime arguments criticize the new provision for its failure to conform with either the nature of arbitration or the international trend of minimal judicial intervention.[147]In addition, criticism is more fairly aimed at the new provision's poor wording and lack of guidance, which are also regarded as the fatal flaws of the new criminal statute.

**b. The Pro-crime Arguments**

Despite such criticisms, concern for corruption and arbitrator misconduct justifies the use of criminal punishment.[148] Many criminal academics and practitioners support the use of penal punishment on arbitrators.[149]People's Procuratorates, for example, have been strong advocates of the new criminal statute.[150]The idea that no arbitrator should misuse his power to go against facts and laws intentionally comes from the notion that both arbitration and litigation are the means to resolve civil disputes and they are in essence the same[151]Regardless of

an arbitral award that perverted the law, a party may submit an application for vacation of the award. *See* Arbitration Law, *supra* note 24, arts.8, 34, 38, 58. Moreover, where one or several arbitrators committed embezzlement, accepted bribes or practiced graft, or made an award that perverted the law, people's courts shall rule to deny execution of the arbitral award. *See* Civil Procedure Law, *supra* note 34, arts. 213, 258.

[145] For example, although an arbitrator who accepts a bribe cannot be charged with bribery because he is not state personnel, he may be accused of non-state personnel bribery or commercial bribery. *See* Criminal Law, *supra* note 17, art. 163.

[146] One similar crime is found in 1935 "Criminal Law of Republic of China" (Taiwan), Article 124, which stipulated the crime Decision by Perversion of Law. But to date, no case has occurred. Therefore, some commentators aggressively contend that this fact proves that arbitrator misconduct is a severe social problem only in the drafters' imaginations. *See* Huang, *supra* note 131, at 126.131

[147] *See Id.* at 123.

[148] *See* Xu, *supra* note 69, at 88.

[149] Han Yonghong, *GuanyuWangfaZhongcaiZhiSikao: JiyuXianshi De Sijiao*, (关于枉法仲裁之思考：基于现实的视角) [Reflection on Criminal Liability of Arbitrators: A realistic Perspective] 26 HAINAN DAXUE XUEBAO RENWEN SHEHUIKEXUE BAN (海南大学学报人文社会学版) [HUMANITIES & SOCIAL SCIENCES JOURNAL OF HAINAMUNIVERSITY ]144, 145 (2008)(China).

[150] *Id.*

[151] *See* Xu, *supra* note 49, at 88.

which law governs, the rule appears to be universally accepted that the bias or partiality of an arbitrator whom the parties expected to be neutral is good cause for invalidating the arbitration award.[152] Further, the new provision would encourage high standards of integrity and lasting confidence in arbitration proceedings.[153]The pro-crime arguments focus mainly on the social harm of arbitrator misbehavior and the quasi-judicial nature of arbitration.[154] Some contend that the lack of workability is not a real problem because it can be remedied by providing more detailed rules.[155] It is also believed that the new criminal statute fits within the reality of China's current economic and social situation.[156]

Since all adjudicators should be neutral when making a decision, the social harm of corruption and misconduct in arbitration is as serious as in litigation, which is regulated under the 1997 criminal law as well.[157]As with most legal debates, the issue of the appropriateness of a penalty could not be sensibly examined without taking into account the conduct's social harm. In China, social harm is widely believed to be a relevant factor in choosing to promulgate a criminal statute.[158]The concept of giving more consideration to the maintenance of social stability has long been accepted.[159]An arbitral award is a final binding decision equal to and potentially more final than that of the judiciary, because an arbitral award is not subject to any

---

[152] 4 AM. JUR.2D PROOF OF FACTS § 709 (1975).

[153] *See* Chen Wei, *WangfaZhongcaizuiZhuisuFangshiZhiBiangengjiTichang* (枉法仲裁罪追诉方式之变更及提倡) [The Change and Advocation of Prosecution of Arbitration by Perversion of Law], 4ZHONGGUOXINGSHIFAZAZHI (中国刑事法杂志) [MAG.ON CHINA'S CRIM.SCI.] 57 (2008)(China).

[154] *See* Xu, *supra* note 69, at 88.

[155] Luo, *supra* note 81, at 64.

[156] *See* Chen, *supra* note 155, at 58-59.

[157] A judge who, intentionally runs counter to the facts and law and twists the law when rendering judgments or orders assumes criminal responsibility. *See* Criminal Law, *supra* note 17, art. 399.

[158] *See* Xia Siyang et al., *WangfaZhongcaiGaibugaiShouXingfaTiaozheng*(枉法仲裁该不该受刑法调整)[Is the Crime Arbitration by Perversion of Law Appropriate] JIANCHARIBAO (检察日报) [PROCURATORIALDAILY], Jan. 23, 2006 at A6.

[159] Yang Mi, *LunZhongguoChuantongWenhuade Tezhi Dui ZhonghuaFaxide Yingxiang*(论中国传统文化的特质对中华法系的影响)[The Impact of the Characteristics of Traditional Chinese Culture on Chinese Legal System], 33 HARBIN XUEYUANXUEBAO (哈尔滨学院学报) [J.HARBIN U.] 58, 60 (2012).

appellate review.[160]Arbitrators are usually free to use their own personal knowledge in making the decision and are not obliged to follow rules of evidence.[161] Meanwhile, courts are generally deferential to an arbitral award and would not review the legal merits to overturn it.[162] These features leave the door open to abuse of arbitral powers.[163] In reality, arbitrators have an incentive to render an unfair award if they will benefit from bribes or other personal benefits.[164]Arbitrators can earn hundreds of thousands to sometimes over a million dollars from a single arbitration.[165]In the case of bribery, partiality in arbitration could result in actual injury to the complaining party and social justice would then be greatly harmed.[166]By promulgating the new offence, the law establishes what might be a credible penalty regime imposed on a biased arbitrator, even though the cases of Arbitration by "Perversion of Law" are relatively rare.[167] It should be kept in mind that "no crime without law; no penalty without law" is one of the generally accepted principles of criminal law in most jurisdictions.[168]

Another powerful pro-criminalization argument is that arbitration is quasi-judicial in nature,[169] and thus should be held

---

[160] LIU XIAOHONG ET AL.,GUOJISHANGSHIZHONGCAIZHUANTIYANJIU (国际商事仲裁专题研究) [A MONOGRAPHIC STUDY ON INTERNATIONAL COMMERCIAL ARBITRATION LAW ]432 (2009).

[161] *See* Burchell v. Marsh, 17 How. 344, 15 L.Ed. 96; Springs Cotton Mills v. Buster Boy Suit Co., 88 N.Y.S.2d 295, 298, *aff'd* 89 N.E.2d 877 (N.Y.); American Almond Products Co. v. Consolidated Pecan Sales Co., 144 F.2d 448 (2d Cir. 1944); The Guldborg, 1 F.Supp. 380 (S.D.N.Y. 1932).

[162] ZHAO, *supra* note 7, at 18.

[163] *See* Luo, *supra* note 82, at 69.

[164] *See* Xu, *supra* note 49, at 88.153

[165] John Yukio Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH.J. INT'L L. 1,1–3 (1999).

[166] *See* Wang Jianbo, *XingfaXiuzhengan Liu DiershitiaoWangfaZhongcai Zui De Lijie Yu Shiyong* (刑法修正案（六）第二十条枉法仲裁罪的理解与适用)[Understanding the Application of Article XX of the Amendments to the Criminal Law (VI): Distortion of Arbitration Law], 1GUANGZHOUSHIGONGANGUANLIGANBUXUEYUANXUEBAO (广州市公安管理干部学院学报) [J.GUANGZHOU POLICE ADMIN.C.]47, 47 (2007).

[167] *See* Xu, *supra* note 69, at 88. 153

[168] *See* Luo, *supra* note82, at 65.

[169] Xu, *supra* note 69, at 86.

to similar standards as the judiciary.[170] For example, it is an indisputable fact that arbitration resembles litigation and remains intimately dependent on a national legal system.[171] Arbitrators are expected to act like judges who will do justice to all parties and guarantee them a fair hearing and a just award.[172] More importantly, there is an expectation that arbitral awards, like judgments, are to be enforced by national courts.[173]Thus, arbitration cannot be viewed merely as a contract of legal services, but the power to make a judicial decision, which falls within the authority of the judicature.[174]Respecting parties' intent to arbitrate under the doctrine of party autonomy does not imply a respect for an arbitrator's freedom to disregard the law.[175]While an arbitrator is a private judge, to be a "judge" means to be empowered to make a decision in accordance with the law instead of going against it.[176] Undoubtedly, parties' genuine intent is not to select a biased arbitrator and accept his award by "perversion of law."[177]

Since the lack of workability issue can be addressed technically, it should not be used as a justification to deny the validity of the new criminal provision.[178]It is not concerned with whether arbitrator misconduct should be regulated by criminal law, but rather how such misconduct can be regulated.[179]While the new provision is far from developed, especially with respect to its workability, it seems unreasonable to reject the criminal statute based solely on this shortcoming.[180] After all, most crimes in Chinese criminal law are virtually non-enforceable without further detailed rules.[181]This concern could be better met by providing detailed rules on the statute through judicial interpretation[182] to make it more workable, rather than aban-

---

[170] *Id*. at 88.
[171] *Id*. at 86.
[172] *See* Chen, *supra* note 155, at 58.
[173] *See* Xu, *supra* note 69, at 86.
[174] *See* Liu, *supra* note 57, at 86.
[175] *See* Xu, *supra* note 69, at 86.
[176] Liu, *supra* note 57, at 86.
[177] Xu, *supra* note 69, at 86.
[178] Luo, *supra* note 82, at 64.
[179] *See* Xuan, *supra* note 125, at 1759.
[180] Luo, *supra* note 82, at 64.
[181] Xu, *supra* note 49, at 87.
[182] Judicial interpretation in China is not a precedent based system, but involves workable rules enacted by the highest judicial authority, i.e., the

doning the statute altogether.[183]Even with a measure of skepticism, it is reasonable to make an exception and argue that the new provision will take an active role in response to corruption in arbitration.[184]Having established the validity of the criminal statute, the court can proceed to articulate a judicial standard for imposing liability on arbitrators who violate the statute. This change is a necessary step to address the appearance of partiality and will ensure the new enactment is one that contributes to China's arbitration framework.[185]

The criminal provision is appropriate given the present stage of economic development in China.[186]Due to the underdevelopment of market economies and the short history of arbitration, absolute party autonomy in some Asian countries and districts—such as Japan,[187] South Korea,[188] and Taiwan[189]—appear not to work well resulting from lack of enforcement, making it necessary to govern arbitration with strict laws.[190] In addition, while such laws have been attacked for being contrary to international practice, some contend that arbitration would benefit from the imposition of more severe punishments to decrease the possibility of arbitral misuse.[191]It would ensure the healthy development of arbitration and make China an attractive place for international arbitration.[192]A better development of arbitration in those regions appears to be achieved

Supreme People's Court or the Supreme People's Procuratorates, with the view of applying a particular statute. Such rules are enacted in accord with a practical understanding of the statute. Procedurally, this manner of interpretation is more flexible and often acts as a valuable tool to avoid the ambiguity and awkwardness of a piece of legislation. Inevitably, though, there will be some deviation from the legislation's intent. For a detailed discussion of the idea that the judicial interpretation is to some degree betraying the legislation, *see* Chen Jiaxin, *ChuyiZuigaorenminfayuande SifajieshiWeifaxianxiang* (**当议最高人民法院的司法解释违法现象**), 5 GUANGXI ZHENGFAGUANLIGANBUXUEYUANXUEBA (**广西政法管理干部学院学报**) [J. GUANGXI ADMIN. CADRE INST.POL.& L.] 43, 44 (2011).

[183] Luo, *supra* note 82, at 64.

[184] *See* Chen, *supra* note 153, at 59.

[185] *See* Luo, *supra* note 82, at 66.

[186] *See Id.*

[187] *See* Luo, *supra* note 82, at 70.

[188] *See Id.*

[189] *See Id.*

[190] *See Id.*

[191] Chen, *supra* note 155, at 58.

[192] *See* Luo, *supra* note82, at 72.

through the support of public power.[193]Those countries do not have to wait hundreds of years to "naturally" raise professional quality of arbitrators, establish a code of arbitrator ethics, and cultivate social trust in arbitration.[194]Moreover, given social and cultural differences,[195] it would be inadequate for China to follow the same route of regulating arbitrator conduct as the West. The development of arbitration can be promoted by means of legislation, making full use of the advantages from both the common law and continental law systems.[196]

The qualification of arbitrators is also a key factor in introducing the new criminal statute. Building a highly qualified team of arbitrators is extremely difficult, given that China's market economy has not had much time to develop.[197]Unlike judges, arbitrators are not required to obtain any legal training or pass any professional examinations before performing their duties.[198]Arbitral awards are sometimes rendered in favor of the party with "guanxi."[199] It is certain the situation would be much worse if there were not such a strict requirement regarding the impartiality of arbitrators.[200]

In sum, the strength of the pro-crime arguments has come to be recognized by legislators. A powerful argument is the analogy drawn between the social harm of judicial corruption and that of arbitrator misconduct. If a judge who acts with bias and perverts the law assumes criminal responsibility, why should a "private judge" be immune from similar punishment? Arbitrators are no less susceptible to corruption than professional judicial personnel.[201]At the very least, the new criminal statute appears to embody the principle that like cases must be treated alike.[202]Admittedly, the pro-crime arguments are not without criticism. It is universally held that arbitration is dif-

---

[193] *Id*. at 71.

[194] *See Id.*

[195] *See Id.*

[196]*Id.* at 72.

[197] *See Id.* at 71.

[198] Xu, *supra* note 49, at 88.

[199] The increased risk that Western parties may incur in this aspect of relations with Chinese parties increases the importance of ensuring the impartiality of the arbitrators deciding their disputes. *See* Kaplan, *supra* note 2, at 781.

[200] *See* Xuan, *supra* note 125, at 1758.

[201] Xu, *supra* note 49, at 88.

[202] *Id*.

ferent from litigation; the former has historically been a dispute resolution mechanism for transactions that implicate only private law.[203] Thus, the power of arbitrators should not be deemed to be the same as that of judges. Apart from the inappropriate analogy, the lack of workability is a good argument that invites serious consideration. Of greatest concern is the conflict between China's domestic law and its international obligations. Unfortunately, in practice the new provision is not likely to serve its purported function.[204]Thus, it urgently needs to be restructured.

### *C. Situating the Chinese Debate with the US Experience on Impartiality of Arbitrators*

In sharp contrast to the current Chinese approach, which has minimal provisions concerning arbitrator neutrality but a sharply punitive criminal statute if there is bias "by perversion of law," the U.S. approach has been quite different. As early as 1632, Massachusetts became the first colony to adopt laws supporting arbitration as a means of dispute resolution.[205]The analysis of arbitral impartiality in the United States relies on an analogy to judicial impartiality. Arbitrators are viewed in the same light as judges and therefore must be held to the same standards of impartiality as are imposed on judges.[206] As a judge is immune to civil and criminal liability for his wrong rulings,[207]an arbitrator does not have to assume any legal responsibility for a wrong arbitral award either.[208] The usual remedies for an arbitrator's unfairness include removal of the arbitrator and vacatur of the award.[209] The FAA provides that

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

[204] *See* Song, *supra* note 43, at 36.

[205]In 1925, the Federal Arbitration Act (FAA) was enacted. The statute was in recognition of the benefits of arbitration and established a national policy favoring arbitration. *See* Steven A. Certilman, *This Is a Brief History of Arbitration in the United States*, 3 NEW YORK DISP.RES.LAW.10, 10–12 (2010).

[206] Commonwealth Coatings Corp. v. Cont'lCas. Co., 393 U.S. 145, 148–49 (1968).

[207] Stump v. Sparkman, 435 U.S. 349, 355–56 (1978).

[208] Liu, *supra* note 57, at 85.

[209] *See* New York Convention, *supra* note 18, art. V.

an arbitration award may be vacated "[w]here there was evident partiality or corruption in the arbitrators, or either of them."[210]To show "evident partiality" by an arbitrator under the FAA, a party either must establish specific facts indicating actual bias toward or against a party, or show that the arbitrator failed to disclose to the parties information that creates a reasonable impression of bias.[211]This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.[212]Nevertheless, "arbitration differs from adjudication, among many other ways, because the 'appearance of partiality' ground of disqualification for judges does not apply to arbitrators; only evident partiality, not appearances or risks, spoils an award."[213]

U.S. courts have established four factors to determine if a claimant has demonstrated evident partiality:

> (1) any personal interest, pecuniary or otherwise, the arbitrator has in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of the relationship to the arbitration; and(4) the proximity in time between the relationship and the arbitration proceeding.[214]

When considering each factor, the court should determine whether the asserted bias is direct, definite, and capable of demonstration, rather than remote, uncertain, or speculative, and whether the facts are sufficient to indicate the arbitrator's improper motives.[215]A later decision by the Supreme Court expressed disfavor with any notion that the slightest pecuniary interest would constitute evident partiality.[216]

---

[210] 9 U.S.C.§ 10(a)(2) (2011);*see also* UNIF.ARBITRATION ACT § 12(a)(2) (1956); UNIF.ARBITRATION ACT§ 23(a)(2)(A)–(B) (2000).

[211] 9 U.S.C.§ 10(a)(2); Lagstein v. Certain Underwriters at Lloyd's, London, 607F.3d 634, 645–46 (9th Cir. 2010).

[212] *Commonwealth Coatings*, 393 U.S. at 150.

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

[214] Consol. Coal Co. v. Local 1643, United Mine Workers of Am., 48 F.3d 125, 130 (4th Cir. 1995).

[215] ANR Coal Co., Inc. v. Cogentrix of N.Carolina, Inc., 173 F.3d 493, 500 (4th Cir. 1999).

[216] Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 n.3 (1986); *see also In re* Equimed, Inc., 2006 WL1865011, at *5 (E.D. Pa. June 30, 2006) (remote

As discussed above, many arbitral tribunals have a three-arbitrator panel.[217] Under the common arrangement, each party designates one arbitrator (party arbitrators or non-neutral arbitrators)[218] and the parties collectively select a third (neutral arbitrator).[219] Party arbitrators are not expected to be as impartial as neutral arbitrators.[220] "Evident partiality" is a ground for vacatur only for neutral arbitrators, because non-neutral arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them.[221]In other words, "absent overt corruption or misconduct in the arbitration itself, no arbitrator appointed by a party may be challenged on the ground of his relationship to that party."[222]Furthermore, a party with constructive knowledge of the potential partiality of an arbitrator may waive its right to challenge an arbitration award based on evident partiality if it fails to object to the arbitrator's appointment or the arbitrator's failure to make disclosures until after an award is issued.[223]

Vacatur of an arbitration award is appropriate under the FAA only in exceedingly narrow circumstances, such as when arbitrators are partial or corrupt, or when an arbitration panel manifestly disregards, rather than merely erroneously interprets, the law.[224]An arbitration award can only be vacated on one of four exclusive statutory grounds:

> (1) corruption, fraud, or misconduct in procuring the award; (2) partiality of an arbitrator appointed as a neutral; (3) an overstepping by the arbitrators of their authority or such imperfect

and trivial relationship does not exhibit the required appearance of bias).

[217] A panel of two arbitrators is seldom used because if the arbitrators disagree, there is no way of reaching a majority. *See* Thomas J. Stipanowich & Peter H. Kaskell, Commercial Arbitration at Its Best 90 (2001).

[218] Olga K. Byrne, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-appointed Arbitrators on a Tripartite Panel,* 30 FORDHAM URB. L.J. 1815,1819 (2003).

[219] *Id*.

[220] *See Id*. at 1816.

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

[222] Anderson v. Nichols, 359 S.E.2d 117, 124 (W. Va. 1987).

[223] JCI Commc'ns, Inc. v. Int'l Bhd. of Elec. Workers, Local 103, 324 F.3d 42, 52 (1st Cir.2003).

[224] 9 U.S.C.§ 10 (2011); Metromedia Energy, Inc. v. Enserch Energy Servs., Inc., 409 F.3d 574, 578 (3dCir. 2005), *cert. denied*, 546 U.S. 1089 (2006).

> execution of it that a final and definite award upon the subject matter submitted was not made; (4) a failure to follow the procedure of this [Arbitration Code], unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection; or the arbitrator's manifest disregard of the law.[225]

A financial interest in the outcome of the arbitration or a direct relationship with a party are relevant considerations when determining whether an arbitrator's relationship is material to the arbitration at issue, for purposes of determining whether failure to disclose a conflict of interest warrants vacatur of an award under the FAA.[226]

An arbitrator has the obligation to disclose to the parties any interest or bias and failing to do so might constitute "evident partiality,"[227] though no specific provision pertaining to disclosure has been established in U.S. laws.[228]In addition, peculiar industry practices and norms are considered in determining whether an arbitration award is subject to vacatur, particularly with an arbitrator's full and timely disclosures regarding business relationships with the parties.[229]Under the evident partiality standard, arbitrators are held to a less strict disclosure regime than the appearance of partiality standard that applies to judges.[230]According to the revised Uniform Arbitration Act, an arbitrator has a continuing duty to disclose any fact he learns after his appointment if a reasonable person would consider it likely to affect the impartiality of the arbitrator.[231]The arbitrator also has a duty to disqualify himself or herself upon discovery of sufficient reasons for such action, in

---

[225] GA. CODE ANN. § 9-9-13(b) (West 2003);*see also* 9 U.S.C. § 10(a); *Metromedia Energy, Inc.*, 409 F.3d at 578; Progressive Data Sys. v. Jefferson Randolph Corp., 568 S.E.2d 474, 475 (Ga. 2002).

[226] 9 U.S.C. § 10;Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire & Marine Ins. Co., 732 F. Supp.2d 293, 307 (S.D.N.Y. 2010).

[227] *See* Ruth V. Glick & Laura J. Stipanowich, *Arbitrator Disclosure in the Internet Age*, 67 DISP. RESOL. J., 22, 23 (2012).

[228]*Id.*

[229] Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 647–48 (6th Cir. 2005).

[230]*See* Claudia T. Salomon, Juan M. Alcalá, Camilo Cardozo, *Arbitrator's Disclosure Standards: the Uncertainty Continues*, 63-OCT DISP. RESOL. J. 76, 82 (2008)

[231]*See* UNIF. ARBITRATION ACT § 12(b) (2000).

order to avoid prejudicing an effective arbitration.[232] This self-disqualification of the arbitrator is required under the Rules of the American Arbitration Association (AAA). The rules require any person appointed or to be appointed as an arbitrator to disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence. The circumstances include any bias or any financial or personal interest in the result of the arbitration or any past or present relationships with the parties or their representatives.[233]

In principle, arbitrators are not required to explain an arbitration award and their silence cannot be used to infer grounds for vacating an award.[234]A party seeking vacatur of an arbitration award on grounds of evident partiality has the burden of proof;[235] to meet this burden, the party must demonstrate that a reasonable person would conclude that an arbitrator was partial to the other party to the arbitration.[236]Specifically, the party that alleges that an arbitration award was procured by corruption, fraud, or other undue means must:

> (1) establish the fraud by clear and convincing evidence; (2) demonstrate that the fraud was not discoverable by the exercise of due diligence before or during the arbitration hearing; and (3) demonstrate that the fraud was materially related to an issue in the arbitration.[237]

Generally, a controversy of merits between parties to arbitration cannot be challenged as an allegation of evident partiality or corruption by the losing party.[238] It is largely for this reason that the merits of an award are not subject to judicial

---

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

[233]*See* AM.ARBITRATIONASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES,R-16(a) (2009).

[234]Robbins v. Day, 954 F.2d 679, 684 (11th Cir. 1992).

[235] *See* George L. Blum, J.D., *Setting Aside Arbitration Award on Ground of Interest or Bias of Arbitrators—Torts,* 64 A.L.R.5TH 475, § 2[b] Summary and comment— Practice pointers (1998).

[236] ANR Coal Co. v. Cogentrix of N. Carolina, Inc., 173 F.3d 493, 500 (4th Cir. 1999).

[237]FLA. STAT. ANN§ 682.13(1)(a) (West 1997); Davenport v. Dimitrijevic, 857 So.2d 957, 961 (Fla. Dist. Ct. App. 2003).

[238] Moncharsh v Heily & Blasé, 832 P.2d 899 (1992).

review.[239]Courts will not review the validity of the arbitrator's reasoning, and may not review the sufficiency of the evidence supporting an arbitrator's award.[240] Thus, the general rule is that an arbitrator's decision cannot be reviewed for errors of fact or law.[241]In addition, California's legislature has reduced the risk to the parties by providing for judicial review only "in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process."[242]

The U.S. approach works for a well-developed legal system with a strong rule of law model, but it is less clear that it would work well for China's arbitration system. Perhaps it is because the Chinese understanding of corruption, fraud, or misconduct is still evolving. Corruption has been long regarded as one of the most serious crimes in China. Penal punishment, even death penalty has been applied to state officials found guilty of accepting bribes.[243] Due to the long history of Confucianism influence of moral teaching, local officials were not only state personnel appointed by the central government, but were also ideally expected to be models and educators on a moral level, so they had another name, "father-and-mother officials."[244] That is why corruption became a felony where the officials' rule was not as good as their name suggested.[245] In addition, arbitration awards have a stronger history of publication in the west than in China,[246] which makes it more difficult to hide or disguise a distortion of law.[247] To fully understand why the Chinese approach of a criminal statute is a rational choice, we need to step back and place the arbitration process in the context of the his-

---

[239]*See* Moncharsh v. Heily & Blase, 832 P.2d 899, 916 (Cal. 1992).

[240] *Id.*

[241]*Id.* at 904.

[242]*Id.* at 905.

[243]The death penalty appears to be a harsh penalty for a non-violent crime like bribery, particularly from a Western perspective, but in ancient China, death penalties once accounted for 40% of the total laws in the dynasty of Beiwei (北魏). *See* Yang, *supra* note 160, at 60; Criminal Law, *supra* note 17, arts. 383, 385.

[244] *See* LIANG ZHIPING, XINBOSIRENXINZHA (新波斯人信札) [THE NEW PERSIAN LETTERS] 91–99 (China Legal Publishing House 2000).

[245] *See* Han Xiaolian, *ZhongguoChuangtongFalüZhidu de XingfahuaJiqiChengyinFenxi*(中国传统法律制度的刑法化及其成因分析) [Analysis of the Criminalization of the Traditional Chinese Legal System], 6FAZHIYUSHEHUI(法制与社会) [LEGAL SYS.& SOC'Y] 33 (2007).

[246] *See* Luo, *supra* note 81, at 70-72.

[247] *Id.*

tory of the Chinese legal system.

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

In order to fully comprehend the criminal provision of arbitrator responsibility, it is necessary to obtain some perspectives on the historical development of Chinese legal system as a whole as it functions in practice. The contemporary Chinese legal system is still heavily burdened or influenced by traditional forces. Without a fundamental knowledge of the Chinese legal tradition, a plain reading of the new provision might lead the reader to make a misguided attempt to apply his own ethnocentric experiences to a quite distinct legal system. This section undertakes an analysis of some cultural and traditional elements influencing the new criminal statute, and demonstrates some probable reasons for the new statute from a historical perspective. This author argues that a criminal law-oriented legal culture, a civil law tradition, and an underdevelopment of market economy in China contribute to the penal responsibility of arbitrators.

#### a. Chinese Legal Culture

A law must operate in a cultural context and be impacted by the culture around it; yet that culture is in turn affected by the operation of law.[248]Arbitration that falls under perversion of law has become a new criminal provision due to various social and cultural elements. Chinese legal culture, which differs greatly from those of Western countries, is at the heart of the issue. The dominance of Confucian thinking influenced Chinese attitudes toward law.[249] The basic philosophy underlying ancient Chinese law is a belief in harmony, which leads officials to deal with legal cases in terms of a "situation to be restored" rather than in terms of "individuals seeking justice."[250]Any re-

[248] *See* Yang, *supra* note 244.

[249] *See* Han Xiaolian, *supra* note 245, at 34.

[250] *See* HeWeifang, *ZhongguoGudaiSifaPanjuedeFenggeyuJingsheng–YiSongdaiPanjueweiJibenYijujianyuYingguoBijiao*(中国古代司法判决的风格与精神 – 以宋代判决为基本依据兼与英国比较)[The

course by citizens to legal process was regarded as a disturbance of harmony and a shame not only for both parties, but also for their families, relatives, and clans.[251] People became accustomed to endure almost anything rather than go to law, and avoided private litigation as much as possible.[252]

In accordance with this theory, two prominent characteristics in the Chinese legal system have to be mentioned regarding China's ancient legal system. One is that the law was only a tool of government policy and all legislation was criminal law, named Xing.[253]Xing, similar in meaning to "war" in old Chinese, originated from the state policy of violence and both constitute two sides of the coin.[254] Xing is concerning an internal policy of violence, while "war" represents a foreign policy.[255]The law was equated with violence, and there was no bifurcation between criminal and civil law. The state took little interest in large areas of society, notably the areas of contract and commercial law: sales, loans, and banking.[256] These areas could be regulated, and were regulated if any state interest became involved.[257] Thus, in the eyes of an average Chinese citizen, law for a long period of time has just meant one thing: punishment.[258]Historically, because the Emperor was concerned primarily with maintaining order, his attention, and the attention of local bureaucrats, was only incidentally drawn to what

---

Style and Spirit of Judicial Judgment in Ancient China – Based on the Judgments in Song Dynasty and a Comparative Study with English Law], 6 ZHONGGUOSHEHUIKEXUE (中国社会科学)[SOC.SCI.CHINA] 206 (1990).

[251] A clan was a grouping of families with a common surname, claiming descent from a common ancestor.*See* FEIXIAOTONG, XIANGTUZHONGGUOSHENGYUZHIDU (乡土中国生育制度) [RURAL CHINA & THE INSTITUTIONS FOR REPRODUCTION] 54–56 (1998).

[252] *Id.* at 57.

[253]*See* Liang Zhiping, *Zhongguofa de Guoqu, XianzaiyuWeilai: YigeWenhua de Jiantao* (中国法的过去，现在与未来：一个文化的检讨) [The Past, Present and Future of Chinese Law: A Review from the Perspective of Culture], 2 BIJIAOFAYANGJIU (比较法研究) [J. COMP. L.] 19 (1987).

[254] *See* Liang Zhiping, *GudaiFa: WenhuaChayi Yu Chuantong*(古代法：文化差异与传统) [The Differences and Integration of Ancient Legal Cultures], 3 DUSHU (读书)[READING] 50 (1987), *available at* http://club.kdnet.net/dispbbs.asp?boardid=2&id=430346.

[255] *Id.*

[256] *See* Han Xiaolian, *supra* note 246, at 34.

[257] *See* William C. Jones et al., Law of the PRC iii 9-10 (Dec. 28, 1993) (unpublished manuscript)(on file with author).

[258] Liang Zhiping, *LunLifaWenhua*(论礼法文化) [On the Culture of Legislation], 2TIANJIN SHEHUIKEXUE (天津社会科学) [TIANJIN SOC.SCI.]24 (1989).

would be called civil matters today.[259]

The other prominent characteristic of the Chinese legal system is that the law was actually regarded as an accessory to moral education, and claims of morality were always held superior to those of law.[260]For instance, natural harmony would best be preserved if men behaved in accordance with the teaching of morality, "Li," which recognized the inequality of persons on account of social status, age, gender and local kinship ties.[261] Li, used in conjunction with Xing, includes a set of moral standards of conduct in different situations appropriate to persons with high social status.[262]These standards shaped the attitudes that were considered to be morally correct and were regarded as the ideal for relationships in society.[263] If ordinary people could be taught Li by precept, example, and symbolic ritual, there would have been no need for anything like Xing.[264] But for those refractory persons who failed to make their behavior conform to Li, punishments had to be prescribed in the form of penal law.[265]Therefore, the distinction between law and morality was sometimes indeterminate in practice.[266]

There was no category of public law and private law in early Chinese codification.[267] Most of these codes focused on punishment for administrative breaches of bureaucratic procedure or for conduct considered disruptive to social order.[268]These laws were all public by nature even though they were commonly applied in private fields.[269]Despite being penal in form, the provisions of the codes covered all private matters. For instance, the codes covered loan conflicts, marriage, and succession, which is classified as "civil" law under Western jurispru-

[259] *See* Han Xiaolian, *supra* note 245, at 34.

[260] *See* THE NEW PERSIAN LETTERS, *supra* note 245, at 95.

[261] *See* Liang, *supra* note 259, at 23.

[262] Id.

[263] *See* THE NEW PERSIAN LETTERS, *supra* note 245, at 88-91.

[264] *Id.* at 95.

[265] Liang, *supra* note 261, at 28.

[266] *See* THE NEW PERSIAN LETTERS, *supra* note 245, at 96.

[267] *See* Liang, *supra* note 254, at 52.

[268] *Cf.*GEORGE JAMIESON, CHINESE FAMILY AND COMMERCIAL LAW 10B (1921). ("[O]ver half the [Ching] Code is devoted to the regulation of the official activities of government officials.").

[269] LIANG, *supra* note 246, at 53.

dence.[270] In fact, there were few commercial disputes in ancient China, which were solved by laws.[271]

The criminal law-favored and morality-oriented tradition was the mainspring of China's ancient legal system and method of law enforcement.[272]Of the two, the criminal law-favored is probably the most important element, as "law" and criminal law have generally been considered equivalent in the historical context of China.[273] The criminal law-favored tradition also embodied the need for state rule at that time, which resulted in centralization of state power.[274] Accordingly, the traditional pattern of Chinese government was authoritarian and bureaucratic.[275] Unlike its western counterpart, there was no concept of "checks and balances" or "separation of powers" in China.[276] Moreover, courts have always been a functional arm of the Chinese bureaucracy.[277] When the concentration of power in a society enlarges, inevitably the criminal legal system becomes more developed.[278]

When the notion of centralization of state power is so dominant that the state and collective interests surpass those of individuals, any infringement of private rights could be interpreted and deemed as damaging to social order and state interests.[279]The state and the people will clearly express their attitude towards wrongdoers in the form of revenge and pun-

---

[270] LIANG, *supra* note 246, at 22.

[271] *See* Han Xiaolian, *supra* note 245, at 34

[272]*See* Liang, *supra* note 196, at 20; He Weifang, *ZhongguoGudaiSifade SandaChuantongJiqidui Dangdaide Yingxiang*(中国古代司法的三大传统及其对当代的影响) [The Three Miracles of the Integration of Ancient Chinese Judiciary and Their Impact on Modern China], 3HENAN ZHENGFAGUANLIGANBUXUEYUANXUEBAO (河南政法管理干部学院学报) [J.HENAN ADMIN.INST.POL.& L.]2 (2005), *available at* http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=30490.

[273] Wang Luyu, *ZhongguoChuantongFalüWenhuade XingzhizhuyiTezheng* (中国传统法律文化的刑治主义特征) [A Characteristic of Chinese Traditional Legal Culture: Focus on Criminal Sanction], 6 FAZHIYUSHEHUI (法制与社会) [LEGAL SYS.&SOC'Y] 28 (2008).

[274] *Id.* at 29.

[275] LIANG, *supra* note 247, at 54.

[276] *See Id.* at 49-53.

[277] *See* LIANG, *supra* note 247, at 54,61.

[278] *Id.* at 68.

[279] *See* Tan Zhongzheng, *XingfaJieruShangshiZhongcai de LillunFansi*(刑法介入商事仲裁的理论反思) [A Theoretical Reflection on the Involvement of Criminal law Through Criminalization of Distortion of Arbitration Law], 71 BEIJING ZHONGCAI (北京仲裁) [ARB.BEIJING]64,68 (2010).

ishment.[280]The scope of public matters was therefore greatly expanded and it is unsurprising that all laws in ancient Chinese society were criminal laws, or at least, laws with criminal elements.[281]This attitude better explains why the partiality of arbitrators becomes a social concern and criminal punishment—instead of breach of contract or damages—is eventually considered as a remedy to address the problem.[282]

At the dawn of the 20th century, a legal reform by the Qing Dynasty, the last imperial dynasty, aimed at imitating Western legal systems.[283] It was generally recognized that if China was to play a worthy part in world affairs, the Chinese would have to bring their law in line with the modern system of the West.[284] The most distinguished change was the separation of civil laws from criminal laws.[285]However, the whole development of modern law in China was hampered by the inability of the regime to create a satisfactory pattern of supporting institutions.[286]At the very least, the principle of law reform was accepted, but much still needed to be done.[287]To date, the ancient Chinese legal tradition continues to impact the legal process in at least two aspects. First, lawmakers are inclined to employ criminal laws to maintain stability in large areas of social life.[288]This feature, a distinctive Chinese characteristic, is still strong and might remain so in the foreseeable future.[289] Meanwhile, criminal provisions often contain many moral statements.[290]Second, due to lack of a tradition of private rule

---

[280] *Id.*

[281] Zhang Zhongqiu,ZhongxiFalüBijiaoYanjiu (中西法律文化比较研究) [Comparative Studies of Chinese and Western Legal Cultures] 96 (Law Press 2009).

[282] *See* Tan, *supra* note 277, at 78.

[283] Yang Xiaoli, *DuiQingmoFalvYizhideSikaoyuJiejian*(对清末法律移植的思考与借鉴) [A Thought and Reference on the Legal Reform in Lafte Qing Dynasty], 1 LILUNDAOKAN (理论导刊) [JOURNAL OF SOCIALIST THEORY GUIDE]110,110 (2010).

[284] *Id.*

[285] Zeng Xianyi, ZhongguoFazhi Shi (中国法制史) [Chinese Legal History] 214 (China Renmin Univ.Press 2009).

[286] *See* ZHANG JINFAN, ZHONGGUOFAZHISHI(中国法制史) [The Legal History of China] 290 (China Legal Publ'g House 2007)

[287] *See Id*. at 299.

[288] Wang, *supra* note 274, at 28.

[289] Tan, *supra* note 280, at 77-78.

[290] *See* Xiao& Zhu, *supra* note **Error! Bookmark not defined.**, at 49.

of law, average people have less trust in private rights and are more accustomed to turning to state power for their sense of security.[291]

Law is generally thought to be a passive instrument whose operation can be either promoted or impeded by culture.[292]The distinction between Eastern and Western legal cultures seems much more pronounced than the distinctions among different Western legal cultures. The categories and functions of laws vary even more across cultures. It is difficult to fill the gaps between different legal cultures which originated from different legal traditions. Taking those diametrically opposed traditions into account, the Chinese arbitration system is within the larger framework of China's national legal system and it evolves with that national system. With no Western rule of law tradition on one side, and a strong influence from local criminal law-favored and morality-oriented tradition on the other, it appears that penal responsibility of arbitrators is not only the best choice in the eyes of Chinese authorities but also desirable for the vast majority of people.[293]This is not surprising given the ambivalent value of criminal law for modern China.

**b. Civil Law Tradition**

It was only a century ago that China started systematically codifying civil laws.[294] Following the Legal Reform of Qing Dynasty, for the first time a division between civil and criminal law was substituted for the traditional classification according to administrative departments.[295] A civil code was introduced, based on the legal codes of Germany and Japan,[296] which now has a direct offspring in Taiwan.[297]Legal ideas were directly copied from one legal system to the other.[298]Legislators were

---

[291] *See* Han Yonghong, *supra* note 149, at 146.

[292] *Id*. at 226.

[293] Wang, *supra* note 288, at 29.

[294] *See* Yang, *supra* note 284, at 111.

[295] *See* ZHANG, *supra* note 277, at 291.

[296] Yang, *supra* note 284, at 111.

[297] Chang-FaLo, The Legal Culture and System of Taiwan 3 (2006).

[298] Xu Aiguo, *DaluFaxivu ZhongguoChuantongfade Zhuanxing*(大陆法系与中国传统法的转型) [Continental Legal System and the Transformation of Chinese Traditional Law], 186SHEHUIKEXUEJIKAN (社会科学季刊) [SOC. SCI. J.], 47 (2010).

content with formalism and law-making.[299] For this reason, it is often believed that the contemporary Chinese legal system is attributed to the civil law influence.[300]

One of the enduring differences between the common and civil law systems is with respect to what is actual law. If the law is only defined as statutes, then "law" in China means something much different than it does in the United States. It is well-known that in common law countries, case law is commonly believed to be the main source of the law,[301] whereas in civil law countries, the law is primarily based on statutes.[302] The latter jurisdictions have put emphasis on legislation, and people find themselves with more interests in statute-making than dispute resolution.[303]Civil law judges are thus described as "mechanically appl[ying] legislative provisions to given fact situations."[304] This feature embodies the deductive method of the civil law system,[305] which is distinct from the inductive one of common law.[306] Some jurisdictions have introduced the deductive method into domestic legal systems, as happened in China.[307]In civil law countries, a dichotomy often exists between "paper law,"[308] or the law in published regulations,[309] and a law in action.[310] This dichotomy seems more exaggerated in China than in other countries.[311]As arbitration is a significant part of the system of justice on which Chinese society re-

[299] *See Id*. at 50.

[300] *Id*. at 47.

[301] *See* Yang, *supra* note 284, at 110.

[302] Xu, *supra* note 298, at 50.

[303] *Id*. at 47.

[304] Mitchel de S.-O.-I'E. Lasser, Judicial (Self-) Portraits: Judicial Discourse In The French Legal System, 104 YALE L.J. 1325, 1334(1995).

[305] Pierre A. Karrer, *The Civil Law and Common Law Divide: An International Arbitrator Tells it like He Sees it,* 63-APR DISP. RESOL. J. 72, 75 (2008).

[306] *Id*.

[307] Xu, *supra* note 229, at 49.

[308] *Id.* at 51.

[309] *Id.*

[310] *Id.*

[311] William Alford, *Chinese Living Law: An Interview with Professor William Alford*, 7 ARIZ. J. INT'L & COMP. L. 135, 136 (1989) ("I think that in every society, including our own, there is a distance between formal and actual law. This distance may be especially obvious in the People's Republic of China.").

lies,[312] it is not surprising that the legislature believes that it is in the public interest to establish a generally accepted enactment to regulate arbitration. If punishments are to act as deterrents it is important to have them systematized and published so that arbitrators would know fully what the consequences of wrong-doing would be. It is unclear to what extent the criminal provision of arbitrator responsibility reflects the status quo in China. However, much of China's formal law does not generally reflect practice and has not been developed with an eye to existing social realities.[313]This results in certain "regulated" areas being unregulated in practice.[314] The overconfidence in the power of legislation in China helps explain the new provision regardless of the significant gap between the law *de facto* and the law *de jure*. Although officially enacted, the new provision does not yet represent actual practice in China, and can hardly be expected to function well.

Another noteworthy aspect is the influence of the role of the judge in different legal systems. Civil law adjudicators should mechanically follow the law (statutes), rather than "create" the law. [315] Parties go to court only to resolve disputes in the civil law system where statutory law, and in particular the civil codes, are not interpreted but are rather simply applied by judges to determine the outcome of cases.[316]While civil law judges have broad managerial powers, they are expected to apply the law in an almost mechanical way, remaining a controlled instrument of the legislature.[317]In fact, there is no room for judges' participation in the creation or transformation of legal rules.[318]Conversely, it is readily acknowledged that in the United States, parties seek to achieve changes in the law, and judges make law.[319] The task of a common law judge is to evaluate counsels' competing arguments about hyper-factual

---

[312] *See* Xuan & Zhou , *supra* note 78, at 1757-58.

[313] *See* Jones et al., *supra* note 257, at 166.

[314] *See* Luo, *supra* note 81, at 64.

[315] Mitchel de S.-O.-I'E. Lasser, Judicial (Self-) Portraits: Judicial Discourse In The French Legal System, 104 YALE L.J. 1325, 1334 (1995).

[316] *Id.*

[317] *See* John Henry Merryman, The Civil Law Tradition 34–38 (2d ed. 1985).

[318] *Id.*

[319] *See* Alexander M. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1962) (arguing that judges make law even though they are not elected as legislatures).

analogies and subtle distinctions in prior decisional law.[320]Through following precedent, judges can break from precedent to create new rules or standards when necessary.[321] They have express law-making and policy-creating functions.[322]

In addition, many civil law judges consider it an important part of their job to help the parties reach an amicable settlement.[323] Judges in the common law system are comparatively passive in their fact-finding role.[324] Notably, civil law judges have more chances to engage in "perversion of law." Without doubt, their impartiality duties need not be, and cannot be, the same as those of common law judges. A common law judge is not accountable for his decision, even if unfair, or of any loss the parties may thereby incur.[325] Nor is an arbitrator, who is deemed to be a quasi-judge.[326] Decisions that deviate from the law would not be considered an inappropriate violation of impartiality obligations in the common law system.[327] Since a U.S. judge has the power to make law, he could hardly be charged with "disregard of law."[328] Crimes like adjudicators' "perversion of law" appear to be found only in Asian countries with a civil law tradition.[329]Interestingly, arbitration is not developed in those countries, which also seem lack of experience and international insights.[330]Arbitration by "Perversion of Law" has, to some extent, been a reflection of this orientation.

---

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

[321] *See* Luo, *supra* note 81, at 70.

[322] See *generally*, Stephen Guest, *The Role of Courts in the Making of Policy,* 25 U. QUEENSL. L. J. 307 (2006).

[323] Karrer, *supra* note 308, at 81.

[324] Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 105 (2005).

[325] Chen, *supra* note 155, at 56.

[326] *Id.*

[327] *See, e.g.*, N.H. SUP.CT. R. 2.2 cmt. 3 ("When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.").

[328] *See* Rogers, *supra* note 324, at 105.

[329] Luo, *supra* note 81, at 69.81

[330] *See* Song, *supra* note 43, at 34.

**c. Underdevelopment of Market Economy**

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

Unlike a market economy, which is a society of strangers, the agricultural society of ancient China was a society of acquaintances.[340] In this society, traditional moral education played a more important role than law.[341] Confucian thought, emphasizing harmony and inequality among people of different social statuses,[342] had a meaningful influence on government and individual behavior. There was a strong sense of extended

---

[331] *See* FEI, *supra* note 251, at 6–7.

[332] Wang, *supra* note 276, at 29.

[333] *See* ZHANG, *supra* note 218, at 53.

[334] *See Id.*

[335] *Id.*

[336] *Id.* at 268.

[337] *See* Xu, *supra* note 301, at 48.

[338] *See* Mao Jiaqi, *WanqingYixiangShehuiChangqiLuohoude Zhengjie*(晚清以降社会长期落后的症结)[The Crucial Reasons for the Social Backwardness of China from the Late Qing Dynasty], 2 XUZHOU SHIFANDAXUEXUEBAO(徐州师范大学学报)[J. XUZHOU NORMAL U.(PHIL.& SOC.SCI.ED.)] 71, 73 (2010).

[339] *See* Wang, *supra* note 288, at 29.

[340] FEI, *supra* note 251, at 10.

[341] *See* THE NEW PERSIAN LETTERS, *supra* note 245, at 86-87.

[342] *Id.* at 89-90,146.

family and continuity between father and son, ancestors and self, and the dead and the living.[343]Moreover, in a much simpler and closer society, it is much easier to enforce complete subordination of the individual to the state, exalt the absolute authority of the ruler and regiment all citizens by the merciless enforcement of a brutal code of law and punishments.[344]

As shown in its history, China suffered a lot from the suppression of the market economy. It produced a poisonous atmosphere rather quickly.[345]Although it dominated the world for many hundreds of years, Chinese civilization ultimately fell far behind during the Ming dynasty, from 1368 to 1644.[346]Chinese people began to engage in significant foreign trade during the mid-sixteenth and seventeenth century.[347] Astonishingly, no laws pertaining to trade developed during this time, and foreign trade did not create enthusiasm in commerce.[348] As trade increased, foreign businesses and their governments came to exert an accelerating amount of influence over Chinese affairs.[349]China lost many aspects of its sovereignty to foreign powers after a series of wars.[350]The comprehensive attempts to create a formal legal system governing commerce began only in 1979.[351] A large body of laws and regulations has been enacted with the aim of creating rules that would support an economy based on market incentives, while retaining the basic principles of socialism.[352]Despite the movement toward market economics, real change was a gradual process and the Chinese economy still remains, to some extent, under state

[343] *See Id.* at 38–41.

[344] *Id.*

[345] *See* Mao, *supra* note 339, at 75.

[346] Lu Hanchao, *ZhongguoHeshiKaishiLuohouyuXifang*(中国何时开始落后于西方)[When Did China Fall Behind the West], 25 QINGHUADAXUEXUEBAO(清华大学学报)[J.TSINGHUA U.(PHIL.& SOC.SCI.)],8 (2010).

[347] Mao, *supra* note 339, at 73.

[348] *See Id.* at 71,73.

[349] *See* Xu, *supra* note 229, at 48.

[350] *See Id.*

[351] *See* James Hugo Friend, *Foreword the Rocky Road toward the Rule of Law in China: 1979-2000*, 20 NW. J. INT'L L. & BUS. 369, 379, 382 (2000).

[352] *See* Liang Zhiping, *Zhongguotesede FazhiRuheKeneng*("中国特色"的法治如何可能) [How is it Possible to Have a Rule of Law with Chinese Characteristics], 3 WENHUAZONGHENG (文化纵横) [BEIJING CULTURAL REV.], 31–32 (2011).

trol.[353]Since an economy based even partly on market principles requires significant decentralization of economic decision-making,[354] there are conflicts with the centralized state power in Chinese legal culture. One must keep in mind that China is a country without a tradition of governance by law.[355]

Arbitration is widely believed to be an inherently private system of dispute resolution and a product of a market economy.[356]This perception is supported to some extent by the history of arbitration and the degree of parties' control in shaping arbitration proceedings.[357]However, it cannot be taken for granted that arbitration in China has the same background of a market economy as that in the West.[358]China's commercial environment is significantly different than the West. Chinese arbitration lacks the purported popularity, custom and ability of private governance that American arbitration provides due to the incomplete development of China's market my.[359]While China is transitioning from a centrally planned economy to a market-oriented economy, the latter is extremely young, having just been formally proposed in the 1990s.[360] There were few arbitrators in the pool with comprehensive knowledge of and experiences in trade, maritime, economics, and law. The immaturity of the market economy and the socialist central planning-featured tradition provide arbitration with less soil for growth.

---

[353] *See* Ji Weidong, *ZhongguoFawenhuade Tuibian Yu NeizaiMaodun* (中国法文化的蜕变与内在矛盾) [The Metamorphosis of Chinese Legal Culture and its Internal Contradiction], 4 BIJIAOFAYANJIU(比较法研究) [J. COMP. L.], 8 (1987).

[354] See, e.g., Donald C. Clarke, Regulation and Its Discontents: Understanding Economic Law in China, 28 STAN. J. INT'L L. 283, 285-86 (1992); Robb M. LaKritz, Comment, Taming a 5,000 Year-Old Dragon: Toward a Theory of Legal Development in Post-Mao China, 11 EMORY INT'L L. REV. 237, 256 (1997); Mark C. Lewis, 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 (1997).

[355] *See* Friend, *supra* note 354, at 379.

[356] *See* Commonwealth Coatings Corp. v. Cont'lCas. Co., 393 U.S. 145, 150 (1968) (White, J., concurring).

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

[358] Wang, *supra* note 288, at 29.

[359] *See* Xu, *supra* note 68, at 120–21.

[360] *See* Stanley Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years,* 20 NW. J. INT'L L. & BUS. 383, 387,405 (2000).

It is important to note that the development of arbitration in China is not due to the maturity of its market economy and the principle of party autonomy, but as a result of government promotion. Although arbitration commissions are proclaimed to be administratively independent from both the local and national governmental units in accordance with Arbitration Law,[361]in fact, they are far from truly independent. Most of them are in some respects linked to various administrative authorities in that their existence depends on the manner and degree to which they are supported by the local Chinese governments.[362]It is unsurprising that arbitrators are thus easily viewed as government officials,[363] and the standard of arbitrator impartiality is naturally expected to be the same as that of judges. Furthermore, there is no such a thing in China as a code of ethics of arbitrators.[364] Therefore, regulation of arbitrators can hardly be realized through a common practice, market rules of competition, or reputation. On the contrary, regulation must be dependent upon state power and a criminal provision. Nevertheless, the criminal provision cannot completely replace the code of ethics of arbitrators.

## IV. EVALUATIONS ON THE NEW CRIMINAL STATUTE AND PROPOSALS FOR REFORM

China's arbitrator liability system diverges in some respects from both civil law and common law in order to accommodate its peculiar cultural context. One rather unexpected move by the Chinese legislature was that it imposed criminal responsibility on biased arbitrators, which is rarely found in the rest of the world.[365] Arbitration is efficient, inexpensive, and harmonious. However, the Chinese legislative attitude towards arbitration, shown in the new criminal statute, seems

[361]Arbitration commissions shall be independent from administrative authorities and shall have no subordinate relationships with administrative authorities. There shall also be no subordinate relationships between arbitration commissions themselves; *see* Arbitration Law, *supra* note 24, art.14.

[362]For example, the People's Governments of the municipalities shall arrange relevant departments and chambers of commerce to organize and establish arbitration commissions in a unified manner; *see id.*art.10.

[363] Xu, *supra* note 69, at 88.

[364] *See* Luo, *supra* note 82, at 71.

[365] *See* Xu, *supra* note 68, at 122

to be unfriendly to arbitrators and discourages deference to arbitration. As wide discretion is left to the parties, their attorneys, and the arbitrators to fashion the procedure as they wish without any judicial interference,[366] it is possible for arbitrators to "betray" the trust of the parties and rule against the ] the applicable law. To prevent the misconduct of a biased arbitrator, holding him criminally responsible appears to be the best alternative due to the emphasis on criminal law in the Chinese legal culture. This part undertakes some evaluations based on the aforementioned analysis of the new criminal statute, demonstrating that "when arbitrators step into judges' shoes, they seem to be wearing them on the wrong feet."[367]In addition, it shows that besides criminal responsibility, there are some better ways to regulate arbitrator misconduct. Some possible solutions have also been proposed with the purpose of removing the limitations of the new provision and making it function well.

### *A. Evaluations on the New Criminal Provision*

With the new enactment, the task of ensuring arbitrator neutrality in China presents a number of possible barriers, both in perception and reality. While a new criminal provision has been articulated, its purported effect is questionable, because if what may constitute it is very uncertain, the true enforcement might not be available. Additionally, the ambiguity of the provision will undoubtedly impact arbitrators' power of discretional evaluation of evidence as well as offer the opportunity of misuse itself by the judicial authority. That might infringe the legal rights and interests of the arbitrator and the parties. In discussing the new enactment, this part argues that the Chinese legislature made an inappropriate analogy when enacting the law, without carefully examining the harsh consequences of a criminal penalty. This results in expanded public power with arbitration and increased social cost. Confusion and chaos is eventually unavoidable.

---

[366]*See* CPR COMMISSION ON THE FUTURE OF ARBITRATION, COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 281–85 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001).

[367]Rogers, *supra* note 327, at 57.

**a. Inappropriate Analogy**

The Chinese legislature made an inappropriate analogy between the role of arbitrators and that of judges, in which the former are considered virtually identical to the latter.[368] Some scholars have claimed that if there was a necessity to create a new criminal provision dealing with arbitrator misconduct, it would be better phrased as fraud or infringement upon property, on the basis of contract, rather than a crime of dereliction of duty.[369]

To ensure impartiality, it is imperative for China to regulate the biased arbitrators. The law makers, however, address the concern with a more severe means than may be necessary—criminal liability.[370] The law makers probably believe that all adjudicators should be neutral when making a decision[371] and arbitrators should behave as impartially as judges, which confuses the distinction between arbitration and litigation.[372]

"Despite the resemblance between arbitration proceedings and court proceedings, it is important to keep in mind that the former is the result of a private contract while the latter arises from the state's authority to resolve disputes and to compel compliance."[373]Arbitrators, as private actors, "perform their function for private gain."[374]Consequently, blindly transplanting the criminal provision of Judicial Personnel of "Perversion of Law" and applying it to arbitrators is an ineffective method to achieve the social goals.[375]

**b. High Cost to Dispute Resolution**

With the new criminal provision there is going to be increasing chances for state intervention with arbitration. Thus, the cost of dispute resolution through arbitration has then been

[368] *See* Liu, *supra* note 57, at 87.
[369]*See* Huang, *supra* note131, at 123.
[370] Liu, *supra* note 57, at 89-90.
[371] Xu, *supra* note 69, at 88.
[372] Liu, *supra* note 57, at 89.
[373] Guzman, *supra* note 6, at 1302–03.
[374] *Id.* at 1303.
[375] *See* Song, *supra* note 43, at 33–34.

improperly raised.[376] As Arbitration by "Perversion of Law" has been provided under the category of crimes of dereliction of duty, the suit should be filed by the People's Procuratorates instead of the complainant.[377] The crime of dereliction of duty, which the state personnel who exercise state power may commit under the current Chinese law, involve a public prosecution case.[378] Therefore, the People's Procuratorates have been first of all granted the power to review the findings of facts and application of laws in arbitration with a view to prove the crime before the court.[379] Further, in order to determine whether a "biased" arbitrator has gone "against facts and laws" and render a ruling, the People's Courts have to examine and investigate the substantial parts of an arbitral award again,[380] which is equivalent to a retrial.[381] That inquiry, however, challenges the finality of arbitration. The courts' power of judicial review has been improperly expanded. For many disputants, although the resolution is in the name of arbitration, it is the court's ruling that ultimately resolves the case. Arbitration itself serves no important purpose.[382] The cost of dispute resolution has been increased because the new statute seems to impose an additional level of litigation. The new offence appears to be moving farther away from the principle of deference to arbitral rulings.

**c. Dilemma**

The Chinese legal system exposes the new enactment to embarrassment. The legislature has put itself and the judicial authority into a dilemma, in that the review of the merits of

---

[376] *See* Xu, *supra* note 99, at 124.

[377] *Supra* note 89; *See also* Criminal Procedure Law, *supra* note 85,art. 136.

[378] *Id.*

[379] The People's Procuratorates shall be responsible for procuratorial work, authorizing approval of arrests, conducting investigation and initiating public prosecution of cases directly accepted by the procuratorial organs. Crimes of dereliction of duty shall be placed on file for investigation by the People's Procuratorates. *See* Criminal Procedure Law, *supra* note 85,art. 3, 18.

[380] The People's Courts shall be responsible for adjudication. Criminal Procedure Law, *supra* note 85,art. 3.

[381] Fan, *supra* note 81, at 129.

[382] *See Id*.

arbitration is not in conformity with China's international convention obligations,[383] whereas waiver of criminal responsibility of biased arbitrators is against China's criminal statute. If international commercial arbitration is not subject to substantive scrutiny in China (that is a fact nowadays)[384], then it fails to provide sufficient supervision of arbitral rulings. In fact, international commercial arbitrators are not likely to be convicted of the offence and only domestic arbitrators could be held guilty.[385] This looks like discrimination towards domestic arbitrators, which may damage the integrity of China's criminal justice system. On the other hand, to guarantee equal prosecution, the People's Procuratorates would have to review the merits and reasoning of international arbitration proceedings, which constitutes a violation of the New York Convention.

Without detailed rules, the crime of Arbitration by "Perversion of Law" is of little practical value. Besides what has been mentioned earlier,[386] the new law has not been defined well enough and there is still much ambiguity. Sometimes an arbitral award is rendered through mediation,[387] which is not required to be in accordance with law. In such a case, it is very difficult to determine whether there is "arbitrator going against the law."[388]Furthermore, a foreign law is commonly applied in international commercial arbitration. It is not appropriate for a Chinese court to make a decision concerning the interpretation of a foreign law, which may constitute an infringement of foreign sovereignty in violation of the basic principle of international law,[389] since the foreign law is enacted and should only

[383] *Id.*

[384] Zhao, *supra* note 7, at 18.

[385] Huang, *supra* note 133, at 124.

[386] *See infra* Part III. B. a.

[387] Arbitration Law, *supra* note 24, art. 51 ("An arbitration tribunal may mediate before giving an award. An arbitration tribunal shall mediate where both parties voluntarily seek mediation. Where mediation is unsuccessful, an award shall be made in a timely manner. Where mediation leads to an agreement, the arbitration tribunal shall prepare a written mediation statement or a written arbitral award on the basis of the result of the agreement. Written mediation statements and arbitral awards shall have equal legal effect.").

[388] *See* Huang, *supra* note 133, at 124.298

[389] Fan, *supra* note 81, at 127.

be interpreted by the foreign authority.[390]Moreover, the determination of foreign law is another problem, on account of the complexities of different languages, inaccurate understanding of the laws, and varying legislative intent.[391]Therefore, Chinese judicial organs' inherited way of thinking in terms of domestic law might bring about real "verdict by perversion of law."[392] In addition, an arbitrator is criminally liable only when his or her conduct is "intentional," but the law is silent on the arbitrator's liability for "negligence" resulting from a lack of professional care and due diligence. More importantly, it provides no clue to distinguish an "intentional" act from a "negligent" behavior. Another absurd situation could occur if a foreign arbitral award has been recognized and enforced by a Chinese court, but later one of the Chinese arbitrators is found guilty of Arbitration by "Perversion of Law".[393]

**d. Harsh Consequences**

While many critics argue that the penal punishment of arbitrators is inconsistent with international practice,[394] they fail to further explain why similar legislations cannot be found in most jurisdictions.[395] The criminal penalty can result in harsh consequences to the individual, his or her family, and indirectly to society as a whole.[396] A state should avoid misusing a criminal penalty or tailoring the penalty to avoid excessive, ineffective, or costly penalties.[397] In a modern society, with the focus being moved towards citizens' rights and interests, civil laws play a more important role than criminal laws.[398]Criminal laws should be cautiously applied, as lawmakers should attempt to procure maximum social benefits—effective preven-

[390] From an international law perspective, the power to interpret law is part of sovereignty, which can only be exercised by a national authority. *See* LIANG XI, GUOJIFA (国际法) [INTERNATIONAL LAW] 99 (Wuhan Univ. Press 2011).

[391] Huang, *supra* note 133, at 124.

[392] *Id.*

[393] *Id.* at 124–25.

[394] Song, *supra* note 60, at 33; Xu, *supra* note 80, at 26; Huang, *supra* note 133, at 123.

[395] *See* Chen, *supra* note 45, at 2–3

[396] *See* Han Yonghong, *supra* note 149, at 146.

[397] Tan, *supra* note 282, at 68.

[398] *See Id.*at 68-69.

tion and control of misconducts at the expense of minimum social pay—by use of less or no criminal penalties.[399] Even though it is submitted that China should address the issue of arbitrator impartiality, it cannot put this inclination to an unlimited extent without considering the potential harms associated with penal punishment. This ultimately reflects a national cognition of the nature of arbitration and the extent of transfer of public power to the arbitral right. Some scholars are even worried that the new law might be easily misused which, in turn, would deter many foreign candidates that otherwise would have been appointed as arbitrators.[400]It is like a double-edged sword, which might harm both the state and the individual. States should avoid employing the criminal law as much as possible, and the criminal law remedy can only be considered as a last resort.[401] The previous function of criminal liability discussed above may be replaced by some other means of social regulation, such as a code of ethics or civil liability for arbitrators.[402] Unfortunately, both the civil law tradition and arbitration experience in China do not yet provide a strong foundation for these other non-criminal means of controlling arbitrator misconduct.

**e. Market Forces**

Arbitration develops along with the market economy, and market forces seem to function effectively and play a more important role than legal rules.[403]Any change of institution must be prudential, especially regarding criminal law, even if confidence in the criminal law is one of the most rooted political faiths in China. Chinese lawmakers seem to think that an imperfect __what__ is better than no _what___ given the lack of market rules, the absence of industry regulation, a code of arbitrator ethics, and civil liability, without realizing that the cure is worse than the illness. In fact, "[e]nsuring the enforcement of standards and providing meaningful remedies to those injured by arbitral misconduct is equally as important as articu-

[399] *See Id.* at 68.
[400] *See* Fan, *supra* note 81, at 129.
[401] Chen, *supra* note 64, at 4.
[402] *See* Huang, *supra* note 133, at 125.
[403] *See* Chen, *supra* note 63, at 3.

lating standards of conduct and professional ethics for arbitrators and provider institutions."[404]Thus, arbitral institutions should enforce conduct standards enacted in the form of codes of ethics.[405]More importantly, the conduct standards, norms, rules and guidelines governing arbitrators' professional conduct must be detailed rather than merely abstract concepts.

The basic role of arbitration is a sort of legal service, which is, in essence, the market participants' self-regulation and unofficial dispute resolution system without state intervention.[406]Thus, the issue of quality of service is critical and a common criterion is necessary for the healthy development of the market.[407]If it is lower than the standard of the market, and the service provider cannot be expelled, the results would be a decrease in quality of service and a collapse of the market in the end.[408]In terms of arbitrator impartiality, it is reasonable and fair to make a biased arbitrator—the provider of poor quality service—assume some liability. The core issue here is not whether the biased arbitrator should be liable, but how and to what extent he or she should be liable. There are some market forces that discourage arbitrator misconduct.[409]Arbitrators, wishing to attract business, have an incentive to develop a reputation of impartiality. Arbitrators' actions may be restricted by custom, conscience, and concerns such as caring for one's reputation, risks of law-breaking or being sympathetic to the victims so that they are obedient to the law, even though there is no legal punishment.[410]

### *B. Proposals for Reform*

As outlined earlier, the newly established criminal liability regime for arbitrators in China is riddled with problems. The current regime can be described as a legislator-based system,

---

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

[405] *See* Rogers, *supra* note 367, at 58.

[406] *See* Lu, *supra* note 93, at 85.

[407] *See* Fan, *supra* note80, at 126.

[408] *See Id*.

[409] Deng Ruiping & YiYan,*ShangshiZhongcaiZhiduJianlun* (商事仲裁制度简论) [On Commercial Arbitration], 11 CHONGQINGDAXUEXUEBAO (重庆大学学报) [J.CHONGQING UNIV.]117 (2005).

[410] *See* Chen, *supra* note 64, at 3–4.

which is characterized by paternalism and rigidity.[411]It appears that impartiality of arbitration and deference to arbitral rulings are two conflicting values. This problem is particularly severe and disconcerting in China. The simplistic approach of the new criminal enactment needs to be reformed because it is unable to achieve the goal of arbitrator impartiality. It is reasonable to expect that detailed rules will emerge in the future. This does not suggest, however, that China should wholly abandon the use of the new law.

In discussing the reform of the regime, a better method for realizing the goal is through a judicial interpretation of the criminal statute, which can benefit from the U.S. experience of deference to arbitration. In general, it must be kept in mind that "although the arbitrator performs a task that resembles that of a judge, there are critical differences between judges and arbitrators."[412]The goal of a judicial interpretation is to design an effective mechanism to ensure fairness and justice in the course of arbitration and, at the same time, give deference to an arbitral award. In restructuring the criminal provision of a biased arbitrator, four aspects need to be taken into consideration: private prosecution, criminal liability for the neutral arbitrator, civil liability, and a detailed definition of the criminal provision.

**a. Private Prosecution**

To place an important check, Arbitration by "Perversion of Law" would be better interpreted as providing a private cause of action. Rather than relying on heavy-handed public prosecution, judicial interpretation can make the new criminal provision rely on private parties themselves to exercise their private right of action if there is arbitrator misbehavior. The complainant, instead of the People's Procuratorates, should accuse the "biased" arbitrator of the crime and bear the burden of proof.[413] A comparable U.S. provision requires that a party seeking va-

[411]*See* Tan, *supra* note 215, at 77–78.

[412] Guzman, *supra* note 6, at 1302–03.

[413] If criminal evidence is lacking and the private prosecutor cannot present supplementary evidence, the court shall persuade him to withdraw his prosecution or order its rejection. Criminal Procedure Law, *supra* note 85,art. 171.

catur of an arbitration award on the grounds of evident partiality must demonstrate "that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration."[414]After such a reform, the People's Procuratorates would no longer have the power to prosecute an arbitrator. Converting the prosecution from a governmental power into a party's right could limit the potential for misuse of the criminal provision, since it is more difficult for a complainant—who has limited power to collect evidence compared to the People's Procuratorates—to demonstrate a violation in court.[415] The more difficult it is for the complainant to bring an action, the higher the threshold rises to implement the new criminal provision.[416] Thus, there exist less potential for the misuse of the provision. In addition, the U.S. experience in proof of corruption, fraud, and other undue means can be referenced in structuring the private prosecution.

One potential concern regarding private prosecution is that it would promote too much litigation.[417] Some critics worry that if losing parties in arbitration are able to sue the arbitrator, they will frequently misuse the right.[418] This concern is misplaced, and it does not necessarily lead to a flood of litigation. As the losing party bears a heavy burden to establish specific facts that indicate improper motives on the part of the arbitrator, he has more difficulties collecting evidence than in a public prosecution. Without sufficient evidence, the losing party will recognize that his probability of success in a suit against the arbitrator is low. A party that has lost in arbitration will also expect to lose before the courts. Often, the losing party fulfills the arbitral award voluntarily. Only a small fraction of all parties with disputes make a court filing, and only a small percentage of those that are actually filed go to trial.[419]

---

[414] ANR Coal Co. v. Cogentrix of N.C., 173 F.3d 493, 500 (4th Cir. 1999).

[415] *See* Chen, *supra* note 155, at 62–63.

[416] *See Id*.

[417] *Id.* at 63.

[418] *See Id*. at 56.

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

**b. Criminal Liability only for the Neutral Arbitrator**

The most popular method for appointing arbitrators to an arbitral panel in international disputes is for each side to appoint one arbitrator, with a third arbitrator appointed either by the two selected arbitrators or by the arbitration commission (or another appointing authority).[420]Non-neutral arbitrators are long considered agents of the parties in many jurisdictions.[421] In the U.S., it is acceptable that non-neutral arbitrators are not expected to be impartial and only the neutral arbitrator is required to be "neutral."[422] The most important aspect of an arbitrator's impartiality is the duty of information disclosure,[423] especially the information concerning a peculiar interest or identity.[424]

A significant issue, which needs to be clarified, is whether the non-neutral arbitrators assume the same penal responsibility as the neutral arbitrator.[425] For example, if an arbitral award is rendered on the basis of the opinion of majority, and the arbitrators who make the decision are accused of the crime, it is not fair for the non-neutral arbitrator to face the same punishment, because he is not supposed to be "neutral."[426]Non-neutral arbitrators sometimes are selected because a party or its counsel anticipates that an arbitrator of a particular type will react favorably to the arguments that party plans to present, which, as a potential receptivity, is one of the advantages of arbitration.[427]What non-neutral arbitrators say should have no more weight than what the neutral arbitrator says. Unfortunately, nothing in the current Chinese law provides either a distinction in liabilities among different arbitrators or a detailed working procedure of the new criminal statute concern-

[420]Guzman, *supra* note 6, at 1279, 1303.

[421] Nathan Isaacs, *Two Views on Commercial Arbitration*, 40 HARV. L. REV. 929, 934-35 (1927).

[422] Byrne, *supra* note 221, at 1816.

[423]*See* Laurence Shore, *Disclosure and Impartiality: an Arbitrator's Responsibility vis-à-vis Legal Standards*, 57-APR DISP. RESOL. J. 32, 35 (2002)

[424]*See* Salomon, *supra* note 179, at 80-81.

[425] *See* Fan, *supra* note 81, at 127.

[426] *Id.*

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

ing the disclosure duty.[428]

To ensure a smoother transition and structural adjustment, attention should be paid to the distinction between arbitrators on the panel, as they have different incentives in arbitral proceedings. Exploration of the incentives that make the arbitrator free from partiality, exercise good faith and due diligence contributes to our understanding of the roles of panel members in commercial arbitration. There seems to be no good reason why all arbitrators should be required to be identically impartial since they have varied ways of appointment. Notably, some flexibility is necessary. A clarification should be made in future judicial interpretation such that only the neutral arbitrator should be criminally liable for Arbitration by "Perversion of Law." Such clarification would have a positive impact, especially when China is in a critical stage of encouraging the development of arbitration.

**c. Civil Liability**

Rights carry with them corresponding responsibilities, and civil liability may be introduced in structuring China's future arbitration regime. As discussed earlier, arbitration has largely been an alternative process for resolving disputes under private law.[429]It is presumed that parties to an arbitration agreement have agreed to bear the risk of the arbitrator's mistake in return for a quick, inexpensive, and conclusive resolution to their dispute.[430]"[A]n arbitration proceeding is more properly viewed as the product of contract."[431]All contractual agreements include the obligation to perform in good faith.[432]Where an arbitrator acts partially, it betrays the principle of good faith and constitutes a breach of contract,[433] which gives the injured party the right to sue the biased arbitrator for

---

[428]*See* Zhang, *supra* note 128, at 311.

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

[430] *See* Xu, *supra* note 112, at 39.

[431] Guzman, *supra* note 6, at 1316.

[432] *See* U.C.C. § 1-304 (1999).

[433] Deng &Yi, *supra* note 410, at 116.

that breach.[434] If the court determines that arbitrator misconduct existed in a case, the aggrieved party should be entitled to damages.[435] The arbitrator could demand additional payment up front to compensate for the civil liability that he could face after the arbitration, which would be costly enough to make arbitration less appealing. In order to attract customers, arbitrators compete not only through the quality of their decisions and the desirability of their procedures, but also on price.[436]A single transaction can ruin an arbitrator's reputation. This, in turn, would give impartial arbitrators a price advantage, as many arbitrators are repeat players.

From a policy perspective, it might even be desirable to hold arbitration commissions jointly liable for arbitrator misconduct. It represents a transfer of the risk of liability from the arbitrator to the commission, which is forced to internalize the costs of liability—causing it to monitor the behavior of its arbitrators. Assuming that arbitration commissions seek to attract business, arbitrators and arbitration commissions will seek to develop a reputation for impartiality. If an arbitrator commits Arbitration by "Perversion of Law" on account of pecuniary interest, which would be the situation in most cases, it certainly will have some impact on both the arbitrator and the arbitration commission's reputation. They are no longer able to develop reputations for honest dealing. For fear of losing the job, the arbitrator, therefore, would have no reason to do anything other than attempt to act impartially in the same circumstances and in the same fashion as judges in the relevant jurisdiction. Arbitrators' current incentive to corrupt is replaced by an incentive to avoid unnecessary litigation. As a whole, the civil liability approach would impose a duty on the arbitrator to handle cases in the same impartial fashion as would a national court. Admittedly, there will still be some cases in which the risk of bias remains, but a large share of the potential instances of bias will be eliminated.

[434] *Id.*
[435] *Id.*
[436]Guzman, *supra* note 6, at 1328.

### d. Detailed Definitions

With carefully defining the conditions of the criminal provision by listing some of the specific situations, future judicial interpretation can help make the enactment more workable. The more detailed it is, the more authority the enactment has. Taking into account the relationship between the spirit of arbitration and the purpose of legislation in practice, the judicial authority may start from the stance of respecting the contract nature of arbitration and make some appropriate adjustments when interpreting the law. For instance, the criminal provision can be more restricted to domestic arbitration than international commercial arbitration. The "law" should not include foreign law, because the criminal law is a public law and should be strictly limited to a particular territory. Also, the nature of arbitration requires more discretion than litigation and the criterion of an arbitrator's "Perversion of Law" should be inferior to those of a judge.[437]Thus, he award does not go against the fundamental principles of the civil and commercial law, such as party autonomy, good faith and public policy, substantially as well as equal hearing and admission of evidence procedurally.

## V . CONCLUSION

It has been recognized that arbitration rulings must be subject to some judicial review to ensure that an arbitral proceeding has been operative within a state's legal framework.[438]This supports the conclusion that the judicial authority should act as a watchdog in supervising arbitrators and provide a remedy when necessary. According to the pro-criminalization arguments, arbitrators and judges are both subsets of a larger category of adjudicators. Adjudicators should act in the common good. The social harm of their "Perversion of Law" is the same, and the notion of impartiality is

[437] In accordance with Arbitration Law, disputes shall be resolved through arbitration on the basis of the facts, in compliance with the law, and in an equitable and reasonable manner. While Civil Procedure Law provides that in trying civil cases, a People's Court must take the facts as the basis and the law as the standard. Clearly, the requirement of "in compliance with the law" is inferior to that of "the law as the standard." *See* Arbitration Law, *supra* note 32, art.7; Civil Procedure Law, *supra* note 44, art. 7.

[438]Deng &Yi, *supra* note 410, at 117.

transferable between these two adjudicatory contexts. The pro-criminalization arguments render arbitrator ethics nothing but an imitation of judicial standards. Although there are some technical problems, such as poor workability, the new enactment is not simply a deviation from international practice. It manifests a diverse need at different stages of social development. However, anti-criminalization critics believe that the roles of the two adjudicators are different in that the arbitrator is generally regarded as a private actor while litigation is always a public activity. Moreover, the arbitral award may be made without explanation of reasons and even a complete record of proceedings. Its merits and reasoning are generally not subject to judicial review. In other words, substantive issue such as finding of merits and application of laws in arbitration proceedings cannot be examined.[439]That is also why such a criminal provision is hardly found in most other jurisdictions. In addition, the awkwardness resulting from the bad wording is difficult, even impossible, to solve. The new provision causes a tension between arbitration impartiality and deference to arbitral rulings. Meanwhile, the ambiguity of the provision makes it hard to function. To reform the criminal statute, a better solution is to use judicial interpretation that borrows some U.S. experience. Judicial Interpretation acts as an effective mechanism to ensure both impartiality and deference to arbitration without abandoning the new enactment. It seems that arbitration could get sufficient protection while, at the same time, necessary flexibility is preserved for deterring a biased arbitrator.

The debate over the criminal statute remains largely inconclusive and, as such, will continue in the foreseeable future, along with relevant empirical studies. Proponents of the new provision argue that the justice of arbitration and protection of the rights and interests of parties can be achieved in practice through the regulation of arbitration with state interference,[440] whereas its opponents are against public intervention and believe that the previous goals can only be realized through the development of arbitration itself.[441] The possibility of criminal

[439]*See* Huang, *supra* note 133, at 124.
[440] Luo, *supra* note 81, at 71.
[441] Chen, *supra* note 64, at 4.

conviction would presumably deter biased arbitrators. While such deterrence is a net social good, there is another risk: abuse of the statute by prosecutors. The prosecutor, by threatening to bring a criminal prosecution unless the arbitrator rules a certain way, could undermine the independence of the arbitration process.

China has been seeking this balance for years; on the one hand, arbitrators should be required to assume liabilities in light of arbitral justice for losses of parties incurred from their deliberate or negligent misconducts in arbitration. On the other hand, to realize the efficiency of arbitration, arbitrators should be granted certain immunity when performing their duties. This is necessary for the arbitrators to be free from improper interference and offence. How to keep the balance depends not only on the understanding of the nature of arbitration and the roles of arbitrators, but also on the current situation of development of arbitration under a number of certain social conditions, such as social identification of arbitration and the overall qualification of arbitrators. This, by its nature, reflects the different attitude towards arbitration. The diversity of culture, tradition, and condition among different nations plays a very important role in the distinction of policy adoption and law making in each nation. China may take specific measures in conformity with its own context to support arbitration, so long as those measures of being deferential to an arbitral award are applied for the independence and protection of the legal rights of parties.