handled by dedicated economic contract arbitration institutions established by the State Administration of Industry and Commerce at both the state and local levels.[37]

Following the economic contract arbitration model, as new commercial transactions were defined by legislation in the early 1980s, similar rules and regulations were promulgated to resolve various disputes. The sources of those laws varied from the State Council, State Planning Commission, and State Economic Commission to highly specialised agencies such as those responsible for fishing, harbours, labour, and inspection of medical products. A number of different types of arbitration organisation existed, each affiliated with a government authority at various levels, and each specialising in the arbitration of disputes arising in a particular field.

The main features of China's domestic arbitration system prior to the promulgation of the Arbitration Law may be summarised as follows:

- **Lack of independence**: the domestic arbitral institutions were attached to the administrative organs of the government;
- **Lack of party autonomy:** domestic arbitration institutions accepted arbitration applications based on administrative law and regulations rather than the parties' voluntary arbitration agreement;
- **Arbitral award without binding force**: the arbitral awards were not final and could be appealed to the people's courts.[38]

B. Foreign-related Arbitration

The foreign-related arbitration regime has its roots in the Protocol for General Conditions of Delivery of Goods signed between China and the Soviet Union in April 1950, which provides that any dispute arising from a contract should be settled through arbitration. It further provides that where the respondent is a Soviet enterprise or organisation, arbitration would be conducted in the Soviet Union. On the other hand, if the respondent was a Chinese enterprise or organisation, arbitration would be undertaken in China. In order to implement such an undertaking, it was necessary to establish a dedicated arbitral body to deal with the international disputes, separate and distinct from those established domestic arbitral bodies which were administrative in nature.[39]

Against this background, on 6 May 1954, the PRC Government Administration Council (now the State Council) issued a decision[40] to establish the FTAC (now the CIETAC). The purpose of the FTAC was to facilitate arbitration of disputes

[37] Art 2 of the Regulations on Economic Contract Arbitration of the PRC.

[38] See Jingzhou Tao, *Arbitration Law and Practice in China*, 2nd edn (The Hague, Kluwer Law International, 2008) 4.

[39] See ibid.

[40] Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of the Foreign Trade Arbitration Commission within CCPIT, issued on 6 May 1954.

that arose from contracts and transactions in foreign trade, particularly disputes between foreign firms, companies, or other economic organisations. The Decision clearly laid down the basic principles for foreign-related arbitration in China, including: (i) arbitration shall be based on the arbitration agreement between the parties; (ii) the parties have the freedom to choose the arbitrators; and (iii) the award rendered by the arbitration institution is final and the people's court shall enforce it at the request of the concerned party. Before the promulgation of the Arbitration Law, this Decision served as the first de facto arbitration regulation in China, and enabled China's international commercial arbitration practice to start harmonising with international practice during the beginning of the 1950s.

The real impetus for the development of foreign-related arbitration was the movement of reform and opening up in the late 1970s. In July 1979, the Sino-Foreign Equity Joint Venture Law was promulgated to provide foreign investors with a degree of certainty in the undertaking of commercial transactions in China.[41] This law provided for the resolution of disputes between parties to a joint venture (JV) through mediation or arbitration if consultation by the board failed.[42] Subsequently, the State Council promulgated the Regulation on the Implementation of the Sino-Foreign Equity Joint Venture Law in 1983,[43] which contains more detailed provisions with respect to dispute settlement. The Regulation provided that

> disputes arising over the interpretation or execution of the agreement, contract or articles of association between the parties to the JV shall, if possible, be settled through friendly consultation or mediation. Disputes that cannot be settled through these means may be settled through arbitration or courts.[44]

It further stipulated that

> parties to a JV shall apply for arbitration in accordance with the relevant written agreement. They may submit the dispute to the Foreign Economic and Trade Arbitration Commission of the CCPIT in accordance with its arbitration rules. With mutual consent of the parties concerned, arbitration can also be conducted before an arbitration institution in the country where the respondent party is located or through one in a third country in accordance with the arbitration institutions' rules.[45]

Similar provisions for the arbitration of disputes involving foreign elements were adopted in subsequent laws and regulations. For instance, the Foreign-related Economic Contract Law of the PRC of 1985 provided that parties may

[41] Adopted by the Second Session of the Standing Committee of the Fifth NPC on and effective as of 8 July 1979. It was subsequently revised on and effective from 15 March 2001.

[42] Art 14 of the Sino-Foreign Joint Venture Law.

[43] Issued by the State Council and became effective on 20 September 1983. It was revised on and effective from 22 July 2001.

[44] Art 109 of the Regulation on the Implementation of the Sino-Foreign Equity Joint Venture Law.

[45] Art 110 of the Regulation on the Implementation of the Sino-Foreign Equity Joint Venture Law.

submit their dispute to a Chinese arbitration institution or any other arbitration institution for arbitration in accordance with the arbitration clause provided in the contract or a written arbitration agreement reached by the parties afterwards.[46]

In March 1982, the Civil Procedure Law (for Trial Implementation) was adopted by the Standing Committee of the NPC, which included a chapter specifically dealing with foreign-related arbitration. The Civil Procedure Law was finally adopted in April 1991, by the NPC, to replace the Civil Procedure Law (for Trial Implementation). Chapter 28 of the Civil Procedure Law 1991 contains dedicated provisions pertaining to foreign-related arbitration. It clarifies that the existence of an arbitration agreement excludes the jurisdiction of the courts. Article 257 of the Civil Procedure Law 1991 provides that

> in the case of a dispute arising from the foreign economic, trade, transport or maritime activities of China, if the parties have had an arbitration clause in the contract concerned or have subsequently reached a written arbitration agreement stipulating the submission of the dispute for arbitration to foreign-related arbitration institution, or to any other arbitral body, they may not bring an action in a People's Court. If the parties have not had an arbitration clause in the contract concerned or have not subsequently reached a written arbitration agreement, they may bring an action in a People's Court.

1.3.2 After the Implementation of the Arbitration Law

The Arbitration Law was adopted at the 9th Session of the Standing Committee of the eighth NPC of the PRC on 31 August 1994 and came into force on 1 September 1995. The Arbitration Law represents a historical milestone in the development of arbitration in China. The driving force behind the birth of the Arbitration Law was the desire to diminish administrative interference in the domestic arbitration system, and the attempt to create a new nationwide arbitration system in China.[47]

The Arbitration Law sets the basic principles for the development of arbitration. These principles lay the foundations for the development of arbitration in China in conformity with transnational standards:

- **Party autonomy** (*dang shi ren yi si zi zhi*): the parties' submission to arbitration shall be made 'on the basis of both parties' free will and an arbitration agreement reached between them';[48] the parties are free to agree to arbitration, to choose the arbitration institution,[49] and to appoint arbitrators;[50]

[46] Art 37 of the Foreign-related Economic Contract Law.
[47] See Daniel R Fung and Shengchang Wang (eds), *Arbitration in China: A Practical Guide*, vol 1 (Hong Kong, Sweet & Maxwell Asia, 2004) 14.
[48] Art 4 of the Arbitration Law.
[49] Art 6 of the Arbitration Law.
[50] Art 31 of the Arbitration Law.

- **Courts have no jurisdiction when there is a valid arbitration agreement** (*huo cai huo shen*): the people's court shall not accept the case if there is an arbitration agreement between the parties, unless the arbitration agreement is null and void.[51] Under this principle, where the parties have reached an arbitration agreement before or after the disputes arise, they are bound to submit the dispute to arbitration, and not to the people's court;
- **Independence of arbitration** (*du li zhong cai*): this principle refers to the independence of arbitration institutions, namely, arbitration institutions shall be independent from administrative organs; there shall be no subordinate relationships between the arbitration institutions and the administrative organs, or between the different arbitration institutions; and[52]
- **Arbitral awards are final** (*yi cai zhong ju*): the court or other arbitration institutions shall not accept a case where the arbitral award has been rendered.[53] This is in contrast with the old system of '*yi cai liang shen*', which allowed parties the right to appeal after the arbitral award was made.

As a significant step forward, the Arbitration Law also requires the reorganisation of former domestic arbitration bodies under administrative organs, and the establishment of a significant number of new arbitration institutions all over the country. These new arbitration institutions are to be 'independent of administrative bodies having no subordinate relationship with administrative authorities'.[54] The Notice of the General Office of the State Council of 1996 empowered domestic arbitration institutions to handle domestic arbitrations as well as foreign-related arbitrations that the parties submit to them by agreement.[55] On the other hand, in response to the competition from domestic arbitration institutions, the CIETAC Arbitration Rules of 2000 extended the CIETAC's jurisdiction to purely domestic disputes that parties submit to by agreement. In fact, domestic cases have become a substantial part of CIETAC's caseload. Therefore, it makes little sense today for arbitral institutions to be classified into domestic arbitration institutions or foreign-related arbitration institutions, as every Chinese arbitration institution can accept both domestic and foreign-related arbitration cases, subject only to the parties' agreement.

1.4 TYPES OF ARBITRATION IN CHINA

1.4.1 Classification of Arbitration in the Arbitration Law and Civil Procedure Law

Generally, there are three types of arbitration in China: 'domestic arbitration', 'foreign-related arbitration' and 'foreign arbitration'. Chapter VII of the

[51] Art 5 of the Arbitration Law.
[52] Art 14 of the Arbitration Law.
[53] Art 9 of the Arbitration Law.
[54] Art 14 of the Arbitration Law.
[55] Notice of State Council No 22, as of 6 June 1996.

been made at that place'. The effect of this provision is to emphasise that the final making of the award constitutes a legal act. In other words, the arbitral proceedings need not be carried out at the place designated as the legal seat of arbitration, and the making of the award may be completed through deliberations held at various places, by telephone or correspondence. In addition, the award does not have to be signed by the arbitrators physically gathering at the same place.[70]

In England, in *Peruana*,[71] Lord Justice Kerr of the Court of Appeal emphasises the distinction between the legal localisation of an arbitration on the one hand and the appropriate or convenient geographical locality for arbitration hearings on the other hand. The *Peruana* decision further states that the legal seat of arbitration remains the same even if the physical place changes from time to time, unless the parties agree to change it. Section 3 of the English Arbitration Act 1996 expressly states that the seat in the meaning of the Act is a legal, juridical connection.

The Swiss Supreme Court has also stressed the legal nature of the place or seat and its distinction from the physical hearing of arbitration:

> By choosing a Swiss legal domicile for the arbitral tribunal, the parties manifestly intended to submit their dispute to Swiss arbitration law, not to provide for an exclusive location for meetings among arbitrators at the place of arbitration . . . [T]he determination of a given place of arbitration is of significance to the extent that the award is deemed to be rendered at such place. It is irrelevant that a hearing was effectively held or that the award was effectively issued there.[72]

The legal nature of the seat of arbitration is also recognised in most major arbitration rules. These rules confirm the parties' freedom to choose the place of arbitration and the possibility of holding meetings and hearings elsewhere.[73]

In China, however, the concept of the seat of arbitration is neither defined in the Arbitration Law nor the Civil Procedure Law. Instead of referring to the 'seat of arbitration' when classifying the different categories of awards, the Civil Procedure Law distinguishes the different regimes for enforcement of awards based on the nature of arbitration institutions. These different regimes include, 'an arbitration institution established according to the (Chinese) law';[74] an award made by 'the foreign-related arbitration institution of the PRC';[75] and an

[70] Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, para 40.

[71] *Naviera Amazonica Peruana SA v Compañia Internacional de Seguros del Peru* (1988) 1 *Lloyd's Rep* 116.

[72] *Bundesgericht, I Zivilabteilung, T AG v H Company* (Swiss Supreme Court, 24 March 1997), 15 ASA Bulletin 2 (1997) *329–30*.

[73] For instance, Art 18 of the ICC Rules (2012); Art 16 of the London Court of International Arbitration Rules; Art 13 of the International Dispute Resolution Procedures Rules of the AAA (2009); Art 18 of the Singapore Arbitration Rules; Art 1(3) of the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Federal Economic Chamber Vienna; Art 22 of the Rules of the Netherlands Arbitration Institute.

[74] Art 237 of the Civil Procedure Law 2012.

[75] Art 274 of the Civil Procedure Law 2012.

award made by 'a foreign arbitration institution'.[76] The lack of recognition of the concept of seat, and the ambiguous classification of awards in China, has caused much confusion in judicial practice. For instance, Chinese courts have encountered great difficulty in the recognition and enforcement of arbitral awards rendered by foreign arbitration institutions with the seat in China.[77]

The Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relation (Conflict of Laws 2011)[78] makes reference to 'the seat of arbitration'. Unfortunately, it connects the law applicable to the arbitration agreement with either 'the place where the arbitration institution is located' or 'the seat of arbitration' in the absence of the parties' choice, which has caused further confusion.[79] One positive step is the definition of the seat of arbitration under the CIETAC Rules 2012, which distinguishes the concept of the seat of arbitration with the place of oral hearing[80] and provides that the arbitral award shall be deemed as being made at the place of arbitration.[81] It also recognises the parties' freedom to choose the place of arbitration.[82] Where the parties have not agreed on the seat of arbitration, the previous CIETAC Rules deem it to be the city where the CIETAC (or any of its sub-commissions) is located, namely a place inside mainland China. The 2012 Rules now allow CIETAC to decide that the seat shall be a city other than the location of the CIETAC, which could be a city outside mainland China.[83] However, this institutional rule, being contractual in nature, has not yet caused the legislation or attitude of the judiciary to change on this issue. In judicial practice, the location of the arbitration institution, rather than the seat of arbitration, is still considered to be relevant in determining the nationality of the arbitral award.[84]

1.4.3 Dual System in the Current Legal Regime

Despite the elimination of the historical classification of domestic and foreign-related arbitration based on the authority of arbitration institutions, a dual system is maintained for arbitration conducted in China based on the nature of the dispute. Foreign-related arbitration is less strictly controlled than domestic arbitration. The distinction between the two systems has

[76] Art 283 of the Civil Procedure Law 2012.

[77] See ch 2, s 2.2.2-C below.

[78] Adopted at the 17th Session of the Standing Committee of the 11th NPC on 28 October 2010, and effective from 1 April 2011.

[79] Art 18 provides that: 'the parties may by agreement choose the law applicable to their arbitration agreement. Absent any choice by the parties, the law of the place where the arbitration institution locates or the law of the seat of arbitration shall be applied'.

[80] Arts 7 and 34 of the CIETAC Rules 2012.

[81] Art 7(3) of the CIETAC Rules 2012.

[82] Art 7(1) of the CIETAC Rules 2012.

[83] Art 7(2) of the CIETAC Rules 2012.

[84] Exiang Wan, vice president of the SPC, speech at the 50th anniversary of the New York Convention in Beijing, 2008.

arbitration agreement is independent from the validity of the main contract. This principle is generally referred to as the 'separability',[4] 'severability',[5] or 'autonomy'[6] of the arbitration agreement.

2.1.1 Transnational Standards

The principle of severability has now been widely recognised in national legal systems and is also expressly provided for under the Model Law.

In France, this principle has long been established. In the 1963 *Gosset* decision, the Cour de cassation held that:

> in international arbitration, the arbitration agreement, whether concluded separately or included in the contract to which it relates, shall, save in exceptional circumstances . . ., have full legal autonomy and shall not be affected by the fact that the aforementioned contract may be invalid.[7]

Subsequently, the principle has been consistently reaffirmed by the French courts,[8] but the courts have abandoned the reservation regarding 'exceptional circumstances', which had never been applied in practice.

In Switzerland, the severability of the arbitration agreement is also expressly set out in the Swiss PIL 1987, which provides that 'the validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid'.[9]

The most significant development in the principle of severability of the arbitration agreement came in 1985, with the adoption of the Model Law. Article 16(1) of the Model Law provides that

> an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Academy of International Law (1989), vol 217, part V; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 198–214; Pierre Mayer, 'The Limits of Severability of the Arbitration Clause' in Albert Jan van den Berg (ed), *ICCA Congress Series no 9* (The Hague, Kluwer Law International, 1999) 261–67.

[4] See Nigel Blackaby et al, *Redfern and Hunter on International Arbitration*, 5th edn (Oxford, Oxford University Press, 2009) 117–21.

[5] Mayer, 'The Limits of Severability of the Arbitration Clause', 261–67.

[6] See Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 198–217.

[7] Cour de cassation, 1 civil chamber, 7 May 1963, *Gosset*: *Juris-Classeur périodique (La semaine juridique)* 1963 II 13405, and Bertold Goldman's note; *Journal du droit international (Clunet)* (1964) 82, and Jean-Denis Bredin's note; *Revue critique de droit international privé* (1963) 615, and Henry Motulsky's note; *Recueil Dalloz* (1963) 545, and Jean Robert's note.

[8] See Cour de cassation, 1 civil chamber, 18 May 1971, *Impex* (first decision): *Journal du droit international (Clunet)* (1972) 62, and Bruno Oppetit's note; *Revue de l'arbitrage* (1972) 2, and Philippe Kahn's note; Cour de cassation, 1 civil chamber, 4 July 1972, *Hecht*: *Journal du droit international (Clunet)* (1972) 843, and Bruno Oppetit's note; *Revue critique de droit international privé* (1974) 89, and Patrice Level's note; *Revue de l'arbitrage* (1974) 89; Cour de cassation, 1 civil chamber, 14 December 1983, *Epoux Convert v Droga*: *Revue de l'arbitrage* (1984) 483, and Marie-Claire Rondeau-Rivier's note.

[9] Art 178(3) of the Swiss PIL 1987.

The wording was maintained in the amendments adopted in 2006. A number of jurisdictions have implemented arbitration legislation based on the Model Law. As a result, the principle of severability has become widely accepted.

In line with this trend, this principle was also acknowledged in England, despite its longstanding hostility to the rule. In *Harbour v Kansa*, the severability of an arbitration agreement was fully recognised.[10] Subsequently, this case law was codified in the English Arbitration Act 1996, which has expressly set forth the principle of severability:

> Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.[11]

Given the transnational recognition of the principle of severability, it can now be considered as 'a true transnational rule of international commercial arbitration'.[12]

2.1.2 Law and Practice in China

In China, the Arbitration Law recognises the principle of severability of the arbitration agreement. In practice, however, the core of the principle has not always been fully appreciated by the courts at all levels in different regions in China. Some courts interpreted the principle of severability with a limited scope (A). Some courts wrongly applied the principle as requiring the proof of a separate acceptance of the arbitration agreement in case of assignment of the main contract, and had wrongly denied the binding effect of the arbitration clause on the transferee (B).

A. Application of the Autonomy of the Arbitration Agreement with a Limited Scope

Prior to the promulgation of the Arbitration Law 1988, the Shanghai HPC held in *China National Technical v Swiss Industrial*[13] that as the contract was found to be void ab initio due to fraud, the arbitration clause was also void.

[10] *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* (1992), 1 *Lloyd's Rep* 81.

[11] Section 7 of the English Arbitration Act 1996.

[12] See Blessing, 'Globalization (and Harmonization?) of Arbitration', 83–84; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* 12.

[13] *China National Technical v Swiss Industrial Resources Company Incorporated*, reproduced *in Selected Cases of the SPC* (1989) No 1, 26–27.

is considering an end to the practice of appointing CIETAC staff as arbitrators completely in the near future, so as to bring CIETAC arbitration into further compliance with transnational standards.[64]

Concerns have also been raised about the appearance of imbalance in the arbitral tribunal. Unlike the ICC Rules, the CIETAC Rules do not exclude a person from the nationality of a party from being confirmed or appointed as the sole arbitrator or the chairman of the arbitral tribunal. Previous versions of the CIETAC Rules provided for the default power of the CIETAC Chairman to appoint the chairman of the arbitral tribunal if no agreement was reached by the parties. This default power has raised concerns because, as Mr Tao Jingzhou observed, 'the Chairman usually, with very few exceptions, appoints Chinese nationals as [the] presiding arbitrator'.[65] As a matter of fact, only a small portion of foreign arbitrators on the panel have actually served as arbitrators in CIETAC proceedings. In 2006, for instance, foreign panelists were appointed to sit as arbitrators in only about 10 per cent of the CIETAC's foreign-related cases.[66] If the Chinese party has already appointed a Chinese national (which is usually the case), there will be two Chinese arbitrators sitting on the panel. The fact that two of the three arbitrators share the same cultural, linguistic and legal background as one of the disputing parties may create an appearance of imbalance in the arbitral tribunal.

The main reason for the CIETAC's reluctance to appoint foreign arbitrators is the financial restraints, as the remuneration is often too low for foreign arbitrators.[67] Some arbitrators accept the CIETAC's appointment in order to keep abreast of recent developments in Chinese arbitration. However, other foreign nationals nominated by the Chairman of CIETAC are known to have declined appointments due to the level of compensation. To deal with the difficulty, Mr Yu Jianlong detailed current practice in terms of appointment of foreign arbitrators:

> For appointment of a non-Chinese arbitrator or tribunal chair (presiding arbitrator), the Secretariat collects from parties an additional amount defined as 'actual expense', usually ranging from US$ 6,000 to US$ 12,000 according to the geographical location of the foreign arbitrator being appointed. The 'actual expense' will be paid to the foreign arbitrator as in a lump sum to cover both his or her remuneration and actual expenses (travel and lodging) for attending the oral hearing(s).[68]

This practice does not appear to be a perfect solution. It means that the party nominating a foreign arbitrator must pay an extra fee in advance (although these fees will be considered in the allocation of costs in the final award). The requirement of such an advance may be a disincentive for parties to nominate a foreign arbitrator. More importantly, the different treatment may put the foreign arbitrator's impartiality into question, knowing that the party appointing him has paid

[64] Moser and Yu, 'CIETAC and its Work – An Interview with Vice Chairman Yu Jianlong', 564.
[65] Tao, *Arbitration Law and Practice in China*, 123.
[66] Yu, 'The Arbitrators' Mandate: Private Judge, Service-Provider or Both?', 561.
[67] An interview with a CIETAC official at the CIETAC, in Beijing, on 27 March 2007.
[68] Moser and Yu, 'CIETAC and its Work – An Interview with Vice Chairman Yu Jianlong', 559–60.

extra fees for the appointment.[69] Eventually, the fee schedule of the CIETAC should be adjusted to conform to transnational standards, in order to attract more foreign arbitrators to serve on its panels. In light of the criticisms, the CIETAC has improved its appointment procedure concerning the presiding arbitrator since its Rules of 2005, by allowing each party to recommend one to three arbitrators as candidates for the presiding arbitrator. Where there is only one common candidate on the lists, such candidate will act as the presiding arbitrator jointly appointed by the parties. Where there is more than one common candidate on the lists, the Chairman of the CIETAC will choose a presiding arbitrator from among the common candidates based on the specific nature of the case. Where no common candidate is listed, the Chairman of the CIETAC will make an appointment from outside of the lists of recommended arbitrators.[70] This novel approach is intended to limit the CIETAC's role in the appointment of the presiding arbitrator, which is expected to 'help deflect persistent criticisms that CIETAC's role in the selection of the Chairman under the 2000 Rules allowed it to "stack" tribunal membership in favour of Chinese nationals'.[71] Another improvement was made in Article 28 of the CIETAC Rules 2012, which describes the criteria which the Chairman of CIETAC may take into consideration when appointing arbitrators in the absence of party agreement. In addition to the applicable law, the seat of arbitration, language of the arbitration (and any other factors considered to be relevant), the Chairman can also take into account the 'nationalities of the parties'. However, the new rules do not require that the presiding or sole arbitrator is of a different nationality to the parties.

To summarise, the above comparison demonstrates the overwhelming restrictions on party autonomy in the process of constitution of the arbitral tribunal in China. The Chinese legislature considers that dispute resolution relates to 'social order' and is 'public' in nature. As a result, the state controls the channels for the appointment of arbitrators by imposing statutory requirements as to the qualifications of arbitrators and authorising arbitration institutions to set up compulsory panel lists, so as to ensure the quality of arbitrators.[72] Such attitude is reflected in a high degree of 'control' in Chinese legislation over arbitration. This institutional control over party autonomy goes against the general idea that the parties control and the institutions facilitate:

> If a minimum of trust is to be maintained between the parties and their judges in international arbitration, the appointment of arbitrators must be left to the parties. It is up to them to exercise that right or, if they so choose, to delegate it to an arbitral institution.[73]

[69] This issue was addressed by two of the interviewees during the research trip in 2007.
[70] See Art 22(3) of the CIETAC Rules 2005 and Art 25(3) of the CIETAC Rules 2012.
[71] Michael Moser and Peter Yuen, 'The New CIETAC Arbitration Rules' (2005) 21 *Arbitration International*, 391–403.
[72] See 乔欣, 《仲裁权研究-仲裁程序公正与权利保障》 (北京, 法律出版社, 2001) 第三章 (Xin Qiao, The Research on Power of Arbitration – The Due Process of Arbitration and the Right Protection (Beijing, Legal Press, 2001) ch 3).
[73] Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 453.

4.1 TRANSNATIONAL STANDARDS

International enforceability conferred on arbitral awards by national legal systems would be inconceivable without some form of guarantee that state courts may review the award if a party has a good reason to be aggrieved by the arbitration and the way in which the award was rendered. This guarantee inspires the confidence of the parties in the arbitration process.

Generally, if dissatisfied with an award and unwilling to accept its effect voluntarily, an unsuccessful party may (i) challenge the award in the courts of the place where the award was made; and/or (ii) wait until the successful party initiates enforcement proceedings before a court, at which stage it can seek to resist enforcement. To put it in other terms, the judicial review of awards occurs both at the seat of arbitration (where, as a general rule, actions to set aside will take place) (section 4.1.2); and in all countries where enforcement of the award may be sought (section 4.1.1).

4.1.1 Recognition and Enforcement of Arbitral Awards

The effect of the international conventions has been to secure a considerable degree of uniformity in the recognition and enforcement of awards around the world.[4] The New York Convention was the result of an international effort to make arbitration a more efficient means of resolving international disputes. It facilitates and safeguards the enforcement of arbitration agreements and arbitral awards, and in doing so it serves international trade and commerce. Since the New York Convention became available for ratification in 1958, 146 nations have ratified or acceded to it.[5] The New York Convention significantly simplifies the enforcement of foreign awards and harmonises national rules for the enforcement of foreign awards.[6] It is thus considered as 'the most successful international instrument in the field of arbitration, and perhaps could lay down the most effective instance of international legislation in the entire history of commercial law'.[7] Thanks to the publication of the ICCA Yearbook Commercial Arbitration since 1976, an effective worldwide system of reporting cases applying the Convention has contributed to the application of the New York Convention in an 'increasingly unified and harmonized fashion'.[8] On 3 July 2012, the UNCITRAL announced the launch of an online platform which supplements the forthcoming Guide on the New York Convention. Professor

[4] Hunter et al, *Redfern and Hunter on International Arbitration*, para 11.36.

[5] For a list of signatories to the New York Convention, see www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[6] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, para 26-21.

[7] Michael Mustill, 'Arbitration: History and Background' (1989) 6 *Journal of International Arbitration* 2, 49.

[8] ICCA, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, 6.

Emmanuel Gaillard, Professor George Bermann and their research teams, with the support of UNCITRAL, has established a website to make the information gathered in preparation of the Guide on the New York Convention publicly available. The website constitutes a platform which reflects the evolution of case law on the New York Convention[9].

Article III of the New York Convention provides clearly that 'each contracting state shall recognise arbitration awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied on'. In addition, Article III mandates that '(. . .) there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards'. Article V of the New York Convention gives an 'exhaustive' list of grounds for refusal to enforce arbitral awards that *may* be invoked by national courts. Enforcement may be refused 'only if' the party against whom the award is invoked is able to prove one of the grounds listed in Article V(1), or if the court finds that the enforcement of the award would violate its (international) public policy (Article V(2)). Except for the public policy ground, the second look at the award during the enforcement stage is confined to the procedural issues listed in Article V(1). The New York Convention does not allow a re-examination of the merits of the award because of a mistake of fact or law by the arbitral tribunal.[10] The overall objective of the New York Convention is the facilitation of the enforcement of the award. This objective reflects a pro-enforcement bias. Accordingly, the grounds enumerated in Article V must be construed *narrowly* by national courts.

It should be emphasised that the New York Convention does not create a uniform standard for enforcement. Rather, it sets the *minimum standards* that the national courts must respect to facilitate recognition and enforcement of foreign arbitral awards. The 'most favourable regime' principle expressed in Article VII(1) of the New York Convention means that the Convention does not prevent the Contracting States from restricting the grounds for refusal enumerated in Article V and thereby creating a more favourable law for enforcement. A good example of a more favourable law for enforcement is that of France, which, for instance, allows enforcement of a foreign award even if it is set aside in its country of origin.[11] In fact, foreign awards have for years been enforced in France without reference to the New York Convention, given that French law itself is more favourable to enforcement than is Article V of the New York Convention.[12] In the discussions of transnational standards, we will focus primarily on the minimum standards set out in the New York Convention.

[9] See www.newyorkconvention1958.org.

[10] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, para 26–66; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 983.

[11] See s 4.1.1-A.c(ii) below.

[12] Jan Paulsson, 'Towards Minimum Standards of Enforcement: Feasibility of a Model Law' in Albert Jan van den Berg (ed), *ICCA Congress Series no 9* (The Hague, Kluwer Law International, 1999).

A. Grounds which Must be Raised by the Party Resisting Recognition or Enforcement

a. Incapacity or Invalid Arbitration Agreement (Article V(1)(a) of the New York Convention)

Article V(1)(a) of the New York Convention provides that:

> the parties to the agreement were, according to the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

This provision allows refusal of recognition and enforcement on the grounds that the arbitration agreement on which the award is based is invalid, whether as a result of the incapacity of a party or because circumstances such as mistake or duress invalidate the consent to arbitrate.

b. No Proper Notice of Appointment of Arbitrator or of the Proceedings; Lack of Due Process (Article V(1)(b) of the New York Convention)

Article V(1)(b) of the New York Convention allows recognition or enforcement to be refused if it is established that:

> [t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

This ground is directed at ensuring that the arbitration itself is properly conducted, with proper notice to the parties and procedural fairness. It requires the arbitrator to conduct the arbitration in such a manner that each party has a fair opportunity to present its case. It is often taken into account by the arbitrator in decisions with respect to the production and admission of evidence, the scheduling of hearings and the time allowed for direct and cross-examination of witnesses. In general, the arbitrators have broad discretion as to how they may conduct proceedings, and this defence has been narrowly construed.

c. Ultra Vires (Article V(1)(c) of the New York Convention)

Under Article V(1)(c) of the New York Convention, recognition or enforcement of an arbitral award may be refused if it is established that:

> [t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced.

What is at issue under this ground is not the existence of the arbitration agreement but the scope of the arbitral tribunal's jurisdiction and authority over the dispute. There are essentially two situations in which this ground may be invoked. First, if the arbitrators exceed the scope of a valid arbitration agreement – rendering an award relating to differences beyond the ambit of such agreement – enforcement may be refused for want of jurisdiction. Second, should the arbitrators act within the scope of the valid arbitration agreement but exceed their authority by dealing with claims that the parties have not submitted to them, enforcement may be refused for transgression of the arbitrators' mandate.[13] This ground reflects the principle that the arbitral tribunal only has the jurisdiction to decide the issues that the parties have agreed to submit to it for determination.[14] When it is alleged that the tribunal exceeded its jurisdiction in some respects, but not in others, the courts have discretion to grant partial enforcement of an award. In such a situation, even if partial excess of authority is proved, that part of the award that concerns matters submitted to arbitration may be saved and enforced.[15]

d. Composition of Tribunal or Procedure not in Accordance with Arbitration Agreement or the Relevant Law (Article V(1)(d) of the New York Convention)

Article V(1)(d) of the New York Convention allows recognition or enforcement to be refused if it is established that:

> the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

This ground provides two types of potential violations, concerning (i) the composition of the arbitral tribunal; and (ii) the arbitral procedure.

The first option of Article V(1)(d) is applicable if a party is deprived of its right to appoint an arbitrator or to have its case decided by an arbitral tribunal whose composition reflects the parties' agreement. Cases where one party refuses to appoint an arbitrator and the arbitrator is then appointed by a court, or where arbitrators are successfully challenged and replaced in accordance with the applicable rules chosen by the parties and the applicable law, would not succeed under this ground.[16]

[13] Mercédeh Azeredo da Silveira and Laurent Lévy, 'Transgression of the Arbitrators' Authority: Article V(a)(c) of the New York Convention' in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (London, Cameron May, 2008) 641.

[14] ICCA, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, 93; Robert B von Mehren, 'Enforcement of Foreign Arbitral Awards in the United States' (1998) 1 *International Arbitration Law Review* 6, 202.

[15] Hunter et al, *Redfern and Hunter on International Arbitration*, para 11.79; ICCA, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, 94.

[16] ICCA, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, 95.

> In case arbitrators take the initiative to order such a meeting to discuss possibilities of a settlement it seems to me that it is not excluded that arbitrators would invite the parties to use one of the available means of ADR to settle their dispute. Such an invitation is not outside the mission of the arbitrators. Arbitration is a service industry in the interest of the parties. Why should arbitrators not suggest, in appropriate cases, to use one of the available means of ADR?[6]

Furthermore, the arbitrator does not formulate his or her decision in one instant; rather, he or she forms a view gradually during the arbitration process. The views formed by the arbitrator are provisional and evolve as the proceedings advance. 'Why should the arbitrator leave the parties in the dark about this evolution and surprise them at the end with his award?'[7] Engaging in settlement discussions may allow the arbitrator, before rendering a final decision, to discuss the case with the parties or at least identify to the parties the points on which the arbitrator has difficulties in accepting the parties' positions. Practice has shown that the approach is welcomed even by counsel and arbitrators from a cultural background where such discussions are not admitted or practised.[8]

B. *Free Will and Voluntariness of the Parties*

Another justification for the arbitrators to facilitate settlement is based on the parties' freedom of choice.[9] Party autonomy is the essence of arbitration. If the parties want the arbitrators to carry out a conciliatory role, to use caucus in mediation, or to put their arbitration hats back on if the mediation fails, such choices should be respected. Professor Tang Houzhi, a strong advocate for arb-med, made the following statements at the International Council for Commercial Arbitration (ICCA) conference in Beijing in 2004:

> Conciliation, like arbitration, is private business. Its basis is the agreement of the parties and its essence is the parties' autonomy (the freewill and voluntariness of the parties). If the parties want conciliation to be conducted by arbitrators in the arbitration proceedings, if the parties agree to have 'caucus' without disclosing from one party to the other party all the information received by the arbitration tribunal (the arbitrators-turned-conciliators) in the course of caucusing, if the parties wish to have the same person to act as an arbitrator and at the same time as a conciliator or first act as a conciliator and later as an arbitrator and vice versa, how could a third person (a lawyer, a law-maker, a judge, a law professor, etc.) say this is not appropriate and unfair to the parties and this is running counter to 'natural justice'? . . . The third person may not worry about this because this is just what the parties want and this is not contrary to 'public policy' or 'public order' or 'public interests'.[10]

[6] ibid.
[7] Schneider, 'Combining Arbitration with Conciliation', 76.
[8] ibid.
[9] See, for instance, Tang, 'Is There an Expending Culture that Favors Combining Arbitration with Conciliation or Other ADR Procedures?', 113; Berger, 'Integration of Mediation Elements into Arbitration: Hybrid Procedures and "Intuitive' Mediation by International Arbitrators', 387–403; Lew, 'Multi-Institutionals Conciliation and the Reconciliation of Different Legal Cultures', 421–29.

In addition, the combined approach may give the parties a greater psychological satisfaction than a decided outcome. It offers the parties more control over the process than they would have in pure arbitration, giving the parties the feeling of having been heard. Moreover, due its greater flexibility (as compared to pure arbitration), arb-med has the capacity of reaching solutions that are more acceptable to all parties involved. In an arb-med process, the parties may focus on current issues and future interest-based solutions instead of solely discussing past events and the allocation of blame.

C. *Efficiency of Dispute Resolution*

Furthermore, settlement facilitation by arbitrators can be a useful tool to enhance the efficiency of arbitration and improve the administration of justice.[11] One of the decisive advantages that arbitration has over regular courts is 'the possibility of achieving an economically sound settlement which does justice to the parties' interests and expectations'.[12] Therefore, it is argued that 'arbitration must never be considered as excluding from its purview the settlement of a dispute before the arbitrator, because this is of the essence of the spirit of arbitration'.[13]

Sir Michael Kerr argued that the future of dispute resolution lies in ADR, as it is faster, simpler, and conducive to higher success rates and better results for the parties. Mediation does not decide what is 'right' or 'wrong' according to the law, which requires complex legal proceedings to conduct a thorough analysis of the commercial disputes before resolving the disputes. The time spent on the thorough investigation is often not worthwhile, except for exceptional cases. Mediation, on the other hand, may produce a satisfactory result acceptable to both parties.[14] With respect to costs, Sir Michael Kerr referred to the statement by the head of the legal department of Shell Company: 'the biggest cost of arbitration is the loss of operation and management time'. These costs may become unbearable as arbitration is as time consuming as litigation to achieve the 'correct' result – to distinguish 'right' and 'wrong' according to the law. Modern business management has thus been trying to avoid overly complicated processes, and to replace them with faster and easier methods of ADR.[15]

[10] Tang, 'Is There an Expending Culture that Favors Combining Arbitration with Conciliation or Other ADR Procedures?', 113.
[11] Kaufmann-Kohler, 'When Arbitrators Facilitate Settlement: Towards a Transnational Standard', 205.
[12] Berger, 'Integration of Mediation Elements into Arbitration: Hybrid Procedures and "Intuitive' Mediation by International Arbitrators', 387–403.
[13] ibid.
[14] Michael Kerr, 'Reflections on 50 Years' Involvement in Dispute Resolution' (1998) 64 *Arbitration*, 175.
[15] ibid.

In this respect, the use of mediation in the proceedings encompasses all the benefits which are usually attributed to *settled*, rather than *decided*, outcomes, such as cost savings, efficiency gains, and the maintenance of a friendly cooperative relationship between the disputing parties. Combining the two processes also improves efficiency.[16] First, in the event that mediation fails or was only partially successful, the parties need not educate another neutral fact-finder, with the inevitable duplication of work, additional expenses, and delays. The neutral party who has been serving as mediator already knows much, if not all, of the information she or he will need to make a decision, and will have a broader range of options to consider, given the focus on the future interests of the parties. Second, in an arb-med process, the arbitrator is the master of the timing of the proceedings, and is in the best position to choose the appropriate moment in the course of the proceedings to offer the tribunal's services for settlement purposes. Third, settlement agreements entered into by the parties in stand-alone mediation proceedings are enforceable only as private contracts. By contrast, arb-med may produce a directly enforceable instrument: a settlement agreement entered into in the course of a pending arbitration may form part of a consent award and become enforceable under the New York Convention. Finally, the Chinese experience also shows that mediation conducted in the course of arbitration proceedings is more likely to be successful than if the mediation is conducted separately.[17] Even if no settlement is reached, a combined proceeding may enable the parties to narrow their disputes substantially during the mediation phase, often leaving only a few remaining issues to be arbitrated. By agreeing to arbitrate the remaining issues, the parties can preserve the fruits of their partial agreements. Indeed,

> the more complex the dispute – in terms of subject matter, numbers of issues, numbers of parties, numbers of related proceedings, numbers of relationships among the parties and their affiliates, and the like – the greater may be the need, and concomitant benefits, of facilitated settlement discussions.[18]

6.1.2 Opponents of Arb-Med

Criticism of arb-med boils down to the following three aspects: (A) the mission of arbitrators to render a binding decision; (B) a risk of failure to achieve due process and natural justice; and (C) impartiality of arbitrators.

[16] Kaufmann-Kohler, 'When Arbitrators Facilitate Settlement: Towards a Transnational Standard', 197.

[17] See Wang, 'Combination of Arbitration with Conciliation and Remittance of Awards – with Special Reference to the Asia-Oceania Region', 51–66.

[18] David Plant, 'ADR and Arbitration' in Lawrence Newman and Richard Hill (ed), *The Leading Arbitrators' Guide to International Arbitration* (New York, JurisNet, LLC, 2008) 263.

A. Mission of Arbitrators to Render a Binding Decision

If the role of arbitrators is considered as solely to assure that the arbitral process results in an *enforceable* award arrived at in a fair way, then promoting settlement would fall beyond the mission of the arbitrators. Michael Collins QC, for instance, holds the view that the arbitrators' obligations are to resolve disputes by a process of adjudication, and to produce a binding decision which finally determines the legal rights of the parties.[19] He does not object to the practice that an international arbitrator should 'encourage settlement whenever the opportunity to do so presents itself'. This encouragement, he believes, should take the form either of inviting the parties to discuss the matter among themselves, or to engage in mediation, or both. However, the encouragement should not,

> except in very rare circumstances, involve the arbitrator playing a personal role in the settlement discussions, or assuming the role of a mediator; and they should do so only once the ground rules have been clearly established, and the written consent of the parties obtained.[20]

B. Due Process and Natural Justice

The main argument against arbitrators facilitating settlement is the risk of a breach of due process and natural justice. Fundamental to the notion of natural justice is the right to know and be able to answer an opponent's case. The rule of due process governing fair hearing of disputes on the merits forbids ex parte communications with the decision maker. However, the process of mediation often involves a separate meeting between the mediator and each party (caucusing). During these caucuses, information communicated confidentially to the mediator is not known to the opposing party, and is not subject to a response or clarification by the opposing party. As a consequence, the other party may be deprived of its due process right to rebut that information.[21]

C. Impartiality of Arbitrators

Another drawback to the combined approach is the fear that, in the event that the settlement fails and the arbitration continues, the impartiality of the mediator-turned-arbitrator may be affected because of the confidential information he or she obtained during the mediation phase that is not part of the record. By the same token, there is the concern that if the parties anticipate that the mediator may revert to being an arbitrator and decide the case if the mediation fails,

[19] Collins, 'Do International Arbitral Tribunals Have Any Obligations to Encourage Settlement of the Disputes Before Them?', 333–43.

[20] ibid.

[21] See Kaufmann-Kohler, 'When Arbitrators Facilitate Settlement: Towards a Transnational Standard', 197; Emilia Onyema, 'The Use of Med-Arb in International Commercial Dispute Resolution' (2001) 12 *American Review of International Arbitration* 3–4, 415.

Contract for Organisation of Arbitration between the Parties and Arbitration Institutions

An initial contract of organisation is concluded between the parties and the arbitral institution. By publishing its arbitration rules, the arbitral institution puts out a permanent offer to contract, aimed at an undetermined group of persons (those potential litigants operating in the field or fields covered by the institution), and made upon fixed conditions. By concluding their arbitration agreement and referring to the institution's rules, the parties accept that offer and agree to empower their chosen institution to organise and oversee the arbitration in the event that a dispute arises between them. When the request for arbitration is submitted to the institution and it begins to organise the proceedings, the contract is perfected.[9]

Contract of Arbitral Collaboration between the Arbitration Institution and Arbitrators

There is also a contract of arbitral collaboration between the arbitral institution and the arbitrators, where each party independently promises to perform services for the benefit of the other, and particularly for the benefit of third parties (the parties to the arbitration).[10] The institution appoints or confirms the appointment of the arbitrators after verifying their suitability; it agrees to play an organisational and administrative role in the arbitration proceedings; it undertakes to reimburse the arbitrators' expenses and to pay the arbitrators' fees. As for the arbitrators, by accepting the appointment they agree to conduct the arbitration proceeding under the auspices of, and in accordance with, the rules of the institution. They agree that the institution shall exercise its functions under those rules, such as its powers to challenge or remove an arbitrator, grant extensions of time, monitor the proceedings, examine a draft version of the award before it is rendered, and determine the arbitrators' fees.

Contract of Arbitration between the Parties and Arbitrators

Finally, the involvement of an arbitral institution does not affect the contractual relationship between the parties and the arbitrators. The parties agree that the arbitrators should carry out a judicial role to resolve their disputes. Arbitrators' rights and obligations are not fundamentally different according to whether they are dealing with or without arbitration institutions, although the way in which those rights and obligations are exercised is affected by the presence and the rules of the institution. The arbitrators consent to their appointment by

[9] Clay, *L'arbitre*, para 1066 et seq; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, para 1103-10.

[10] Clay, *L'arbitre*, para 1055; Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, para 1111.

signing the submission agreement, by drawing up terms of reference, or by any manifestation of an intention to perform the functions conferred on them by the parties.

Judicial Nature of Arbitration: The Role of State Control

Despite the contractual nature of arbitration, there must be a regulatory framework that controls the legal status and effectiveness of arbitration in a national and international legal environment[11]. In other words, arbitration is based on party autonomy, as well as national laws giving effect to that party autonomy. Professor Emmanuel Gaillard has categorised the legal sources of the legitimacy of the party autonomy into three representations of international arbitration:

(i) international arbitration is based on the national legal system at the seat of arbitration, pursuant to which parties can only submit to arbitration to the extent expressly allowed or accepted implicitly by the law of the seat of arbitration;
(ii) international arbitration is founded on plural national legal systems, which considers that the orders at the place of enforcement authorise the legitimacy of the arbitral awards retroactively; or
(iii) international arbitration is based on a transnational theory, according to which the legitimacy of arbitrators' judicial role is based not on a national legal system (be it at the seat or at the places of enforcement), but based on an a national legal system, an arbitral legal system.[12]

Leaving aside the theoretical debates as to the sources of party autonomy, it is observed that the traditional role of national legislation in international arbitration is evolving as a result of globalisation. The power to regulate arbitration has shifted from states to private actors.[13] According to Professor Kaufmann-Kohler,

> a transnational consensus on the core principles of arbitration law has emerged. That consensus encompasses broad party autonomy. The states have enacted new legislation – or the courts have interpreted existing statutes – making party autonomy a genuine source of arbitration law.[14]

One can conclude that there is a general trend among national courts to move to the position in favour of arbitration giving priority to party autonomy and

[11] On the judicial nature of arbitration, *see* Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, para 12; Hunter, et al, *Redfern and Hunter on International Arbitration*, para 5.01 et seq; Charles Jarrosson, *La Notion d'Arbitrage* (Paris, LGDJ, 1987), para 785; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, para 55-1 et seq. Clay, *L'arbitre*, para 60 et seq.

[12] Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (Leiden, Martinus Nihoff Publishers, 2008).

[13] Gabrielle Kaufmann-Kohler, 'Global Implications of the US Federal Arbitration Act: The Role of Legislation in International Arbitration' (2005) 20 *ICSID Review* 2, 339–56.

[14] ibid.

eschewing intervention.[15] Charts 4 and 5 below summarise the relationship between the various players in international arbitration, in which the main players are the private parties, with party autonomy being the core of arbitration:

Chart 4: Ad hoc Arbitration

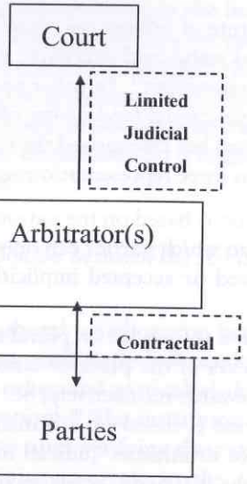
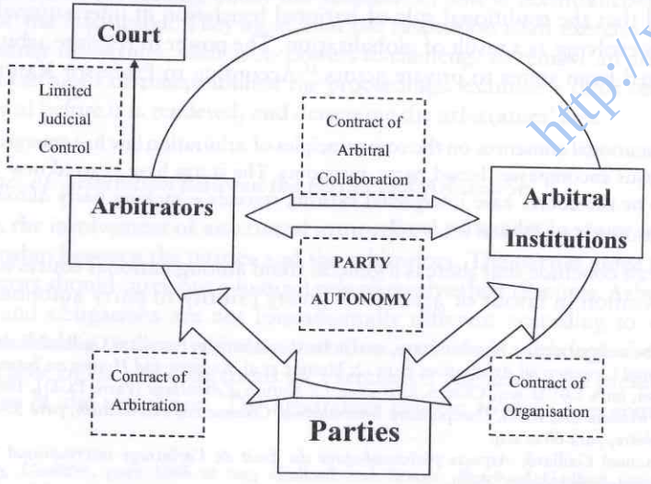


Chart 5: Institutional Arbitration



[15] See Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, para 15-5.

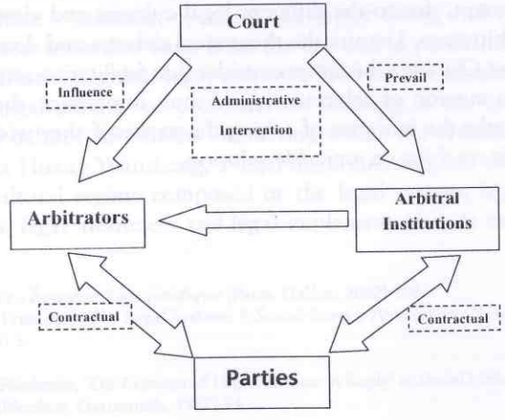
7.4.2 The Chinese Notion of Arbitration – Top-down

In China, however, the nature of arbitration remains more administrative than contractual. The concept of party autonomy is traditionally foreign to Chinese minds. On the basis of international experience, the private nature of arbitration and its core principle of party autonomy have been much addressed by academics and other arbitration experts in China. However, legislation and arbitration practice still lags behind. Although the Arbitration Law sets forth party autonomy as one of the basic principles for the development of arbitration in China, in reality this principle is neither fully implemented in substantive provisions of the law, nor fully respected in arbitral practice. A number of restrictions on the parties' choices in law and practice derive from the procedural rules of the courts. The restrictions on party autonomy permeate the whole process of arbitration:

(i) the principle of severability of the arbitration agreement is applied with limited scope;
(ii) the parties' choice of ad hoc arbitration or of a foreign arbitration institution is denied if the arbitration is to be conducted in China;
(iii) the power to rule on jurisdictional issues is not conferred on the private judges of the parties' choice, but shared by the court and arbitration institutions; and
(iv) the parties' choice of arbitrators is limited to a closed panel list drafted by arbitration institutions including only individuals with strict statutory qualifications.

Chart 6 below demonstrates the relationship between various players of arbitration, in which *top-down* administrative governance is the main feature, instead of party autonomy.

Chart 6: The Chinese Arbitration Structure



8.2 THE EMPHASIS ON RELATIONAL NETWORK

Another important difference between traditional Chinese legal culture and that of the West is the role of the individual in the society.

The idea of natural law can be traced back to the ancient Greek and Roman period. Socrates and his philosophic followers Plato and Aristotle argued for the existence of natural justice or natural rights, which existed beyond the laws implemented by the states or governments and should apply to all human beings.[45] In the seventeenth and eighteenth century, the concept of individual 'natural rights' emerged. The most representative advocates for natural rights are Thomas Hobbes, John Locke and Jean-Jacques Rousseau. They believed that each individual lives in a 'state of nature', and enjoys natural rights that are indispensable for living well.[46] The idea of natural right has since become one of the basic principles in Western legislation. For instance, the Code of Frederick the Great of Prussia, the 1804 French Civil Code, the 1896 German Civil Code, and the 1907 Swiss Civil Code all contained the idea of protecting individual rights and individual freedom, equality and security.[47] Since the nineteenth century, although the idea of natural law was challenged by the legal positivists, the importance of individual freedom and rights was never denied. The idea of individual protection can be found in almost all modern Western legislations. In short, the protection of individual rights has been the core of Western legal culture and also an indispensable part of the political democracy.

Western concepts of 'individual rights', 'natural rights', and 'freedom' did not exist in traditional Chinese society. Confucius defines the social structure of society as a network of relations of persons enacting certain 'social roles'. Social roles do not merely place individuals in certain social locations but also bear within themselves normative prescriptions of how people ought to act within

[45] On natural law, see Heinrich Albert Rommen and Thomas R Hanley, *The Natural Law, a Study in Legal and Social History and Philosophy* (St Louis, B Herder Book Co, 1947); Tony Burns, *Aristotle and Natural Law* (London; New York, Continuum, 2011); Patrick Farrell, Sources of St Thomas' Concept of Natural Law (1957) (Part of thesis, Pontificio Istituto 'Angelicum', Rome); John Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980); Otto Friedrich von Gierke and Ernst Troeltsch, *Natural Law and the Theory of Society, 1500 to 1800* (Cambridge, England, Cambridge University Press, 1958); Jacques Maritain and Doris C Anson, *The Rights of Man and Natural Law* (New York, Gordian Press, 1971); Mark C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge, England,Cambridge University Press, 2006); EJ Simcox, *Natural Law. An Essay in Ethics* (Boston, Osgood & Company, 1877); Yves René Marie Simon and Vukan Kuic, *The Tradition of Natural Law; A Philosopher's Reflections* (New York, Fordham University Press, 1965); Lloyd L Weinreb, *Natural Law and Justice* (Cambridge, Mass, Harvard University Press, 1987); John Daniel Wild, *Plato's Modern Enemies and the Theory of Natural Law* (Chicago, University of Chicago Press, 1953); Robert N Wilkin and Arthur Leon Harding, *Origins of the Natural Law Tradition* (Port Washington, NY, Kennikat Press, 1971).

[46] See Thomas Hobbes, *Leviathan, or the Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civil* (1651); John Locke, *Two Treatises of Government* (1689); Jean-Jacques Rousseau, *Du contrat social aux Principes du droit politique* (1762).

[47] See Edger Bodenheimer, *Jurisprudence – The Philosophy and Method of the Law* (Cambridge, Mass, Harvard University Press, 1974) 58–59.

these roles. Confucianism categorises society into five relationships ('Five Ethical Codes'), which are presumed to embrace all fundamental relationships – relations between the ruler and the ministers, father and child, husband and wife, elder and younger siblings, friend and friend.[48] The most important relations are the ones between the ruler and the ministers, father and child, and husband and wife – referred to by the Han Confucianists as the 'Three Bonds'.[49] In Confucian ideology, these ethical rules should be achieved by rules of *li*, which guide people's behaviour.[50] The essential rituals include benevolence (*ren*), loyalty (*yi*), ritualism (*li*), wisdom (*zhi*), and sincerity (*xin*).

To understand traditional legal culture in China, it is important to bear in mind that the basic unit in imperial Chinese society was not the individual, but the social group. [51] The most basic of these groups was the family, where rules of customary behaviour emphasised the authority of the elder generations over the younger ones. Families themselves were organised into clans, which instructed members on Confucian morality and settled disputes among members. Yet another collective grouping was the guild, which was an organisation of merchants or artisans in the same trade or craft. The guilds controlled prices, competition, training and admission to practise the trade or craft. These social groups dominated the individual. Implicit in the Confucian concept is the notion of hierarchy between individuals and certain obligations inherent in these hierarchical structures.[52] In such society, most civil relations were regulated by the customs of *li*, or the rules within each social group. Under the Confucian principle of *li*, individual rights can be sacrificed for the interests of the whole group, in order to achieve social harmony.

Moreover, law in imperial China was essentially used by the rulers to control, not to protect, the individual. While Western civilisation was born as a result of social compromise between pluralistic groups, law was used to preserve the rights of the various segments of society and to balance the power of the ruler; Chinese civilisation was created in the form of a single clan to exercise its legitimatised control – a system of strict upper class control to preserve stability within the system. As a consequence, individual rights were not a prominent feature of the political landscape of traditional China. Rather, the rulers were more interested in securing their ultimate power so as to maintain stability in society.

[48] 《中庸》: '君臣也, 父子也, 夫妇也, 昆弟也, 朋友之交也, 五者天下之达道也。' (Doctrine of Middle Way: 'Ruler and ministers, father and son, husband and wife, brothers, and friends – these are the five great ways').

[49] See 《白虎通德伦》(Records of White Tiger Temple Seminar) 79 AD.

[50] 《孝经．广要道章》: "安上治民莫善于礼。 (*Classic of Filial Piety*, ch 12: 'In serving the supreme and governing the populace nothing is more appropriate than rituals').

[51] See Jerome Cohen, 'Chinese Mediation on the Eve of Modernization' (1966) 54 *California Law Review* 3, 1924; Lubman, 'Mao and Mediation: Politics and Dispute Resolution in Communist China' 1216–222; Hui-chen Wang Liu, *The Traditional Chinese Clan Rules* (Locust Valley, NY, Augustin, 1959); DJ MacGowan, 'Chinese Guilds or Chambers of Commerce and Trade Unions' (1888–1889) XXI *Journal of the North China Branch of the Royal Asiatic Society*.

[52] Cohen, 'Chinese Mediation on the Eve of Modernization'; Lubman, 'Mao and Mediation: Politics and Dispute Resolution in Communist China', 1216–22.

8.3 THE EMPHASIS ON HARMONY AND CONFLICT AVOIDANCE

Randle Edwards has characterised five themes of legal values underlying both ancient and contemporary Chinese law and legal institutions, one of which is the non-adversarial method of dispute resolution.[53] The reasons for this aversion towards litigation in traditional Chinese society can be explained by the philosophical influence of the pursuit of harmony (section 8.4.1), and by the traditional legal practice of suppressing litigation (section 8.4.2).

8.3.1 Philosophical Influence

The development of mediation has deeply embedded philosophical basis in traditional Chinese culture. Confucianists are the strongest advocates for avoiding litigation in order to maintain social harmony. Confucius believed that the optimal resolution of most disputes was to be achieved not by the exercise of legal power but by moral persuasion:

> Lead them by political maneuvers, restrain them with punishments: the people will become cunning and shameless. Lead them by virtue, restrain them with ritual: they will develop a sense of shame and a sense of participation.[54]

Confucius maintained that to rely solely or even predominantly on law to achieve social order was not ideal. Laws backed by punishments may induce compliance in the external behaviour of individuals, but they are powerless to transform the inner character of members of society. Confucius's goal was not simply a stable political order in which everyone coexists in relative harmony and isolation from each other, with each afraid to interfere with the other for fear of legal punishment. Rather, Confucius set his sights considerably higher. He sought to achieve a harmonious social order in which each person was able to realise his or her full potential as a human being through mutually beneficial relations with others. At the heart of Confucian teaching are the concepts of harmony (*he wei gui*), moderation in all things – the doctrine of middle way (*zhongyong*), concession or yielding (*rang*), and avoidance of litigation (*xisu*). This provides the philosophical basis for the development of mediation (*tiaojie*) in China.

From the perspectives of Confucianism, the preservation of harmony between humanity and nature, and the spheres of man and nature were thought of as forming a single continuum (*tian ren gan tong*).[55] Therefore, social disharmony would lead to a violation of the whole cosmic order.[56] In the Confucian view, law is applied only to those who have fallen beyond the bounds of civilised behaviour. Civilised people are expected to observe proper rituals. Only social outcasts must have their actions controlled by the law. According to Confucianists, 'the legal process was not one of the highest achievements of Chinese civilisation but was, rather, a regrettable necessity'.[57] Involvement in a lawsuit symbolises disruption to social harmony and thus should be avoided at all costs. When a dispute occurred, Confucianism believes that the key to the successful resolution of the dispute is not to find whose rights have been infringed or to award damages to the innocent party. Rather, it is to educate the disputants about the moral precepts. Such moral precepts include the doctrine of middle way and concession. The doctrine of middle way advocates that the right course of action was always some middle point between two extremes, excess (too much) and deficiency (too little). The goal of mediation is the settlement of disputes through compromise, and finding the 'middle way' is an intrinsic part of mediation. Litigation is more about entrenched positions often offering extremes, which runs counter to basic Chinese instincts.[58]

Another important moral value that Confucius sought to teach was concession and self-criticism. Professor Goh Bee Chen made the following statements:

> In traditional view, when the Confucian gentleman was unreasonably treated by another, he ought to regard it as a result of some personal failings on his part and to seek the source and solution of the problem. He would then be seen to be engaged in self-criticism, a first step towards the cultivation of moral virtue. Thus, by this process of self-improvement, a positive response might come about from the other party and the problem which could lead to a dispute would thereby be terminated even before it started. The emphasis here is dispute dissipation, which bears a preventative quality, rather than dispute resolution, which may be regarded as a more remedial.[59]

In a society of a moral civil order, the domain of *li* is greater than the domain of *fa*. Conflicts can easily be resolved: to insist on one's rights will run counter to the spirit of *li*; thus both sides will be ready to make concessions.[60] A lawsuit implies some falling from virtue on one's own part through obstinacy or lack of moderation, or the failure to elicit an appropriate concession from another as a matter of respect for one's own 'face'. Thus, mediation took precedence over direct confrontation. The virtue of concession (*rang*) was strongly encouraged to ward off disharmony. In connection with *rang*, it was better to meet an opponent half-way than to stand on principle.

[53] Randle Edwards, Louis Henkin and Andrew Nathan (ed), *Human Rights in Contemporary China* (New York, Columbia University Press, 1986) 43–47.
[54] 《论语 • 为政第二》, translated by Simon Leys. Simon Leys, *The Analects of Confucius*, (New York, WW Norton and Company, 1997.
[55] Bodde and Morris, *Law in Imperial China*, 43; Huang, Legal Transplant and Recent Chinese Law, 7–9.
[56] Bodde and Morris, *Law in Imperial China*, 43–44; Phillip Chen, *Law and Justice: The Legal System in China 2400 BC to 1960 AD* (New Jersey, Dunellen Publishing Company, 1973) 14–15; Sybille van der Sprenkel, *Legal Institutions in Manchu China: A Sociological Analysis* (London, The Athlone Press, 1962) 29.
[57] Cohen, 'Chinese Mediation on the Eve of Modernization', 1206.
[58] Niall Lawless, 'Cultural Perspectives on China Resolving Disputes Through Mediation' (2008) 5 *Transnational Dispute Management* 4.
[59] Chen, *Law Without Lawyers, Justice Without Courts: On Traditional Chinese Mediation*, 68.
[60] Schwartz, 'On Attitudes Toward Law in China', 163–64.