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RESEARCH ARTICLE

Internationalization as a Leap of Faith: Arbitration Reforms in China and the Challenges of Implementation

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Abstract

Recent years have witnessed an increasing trend in Chinese arbitration reform that emulates international norms and practices. This article examines some of these key reform measures and major challenges to their implementation. It explores in both legal and practical terms why most of these reform techniques may remain largely ineffective, showing that engaging in international norms and standards in China can be highly challenging due to their potential illegality, the general lack of institutional capacity to sustain them, and the conflicts of local ideas about the purposes of arbitration. It is thus doubtful whether commitment to satisfying the formal requirements prescribed by the legal reforms would often prevail. When it does, it is questionable whether this form of commitment would become prevalent and how it could proceed in a sustainable and coherent manner from a practical perspective.

Keywords: Chinese arbitration reform; legal reform in China; internationalization; dispute resolution; legal transplants

1. Introduction

As China's role in the global economy has continued to grow, there has been a surge of interest in China's impact on the current "rules-based" international order.[1] In particular, debates over Chinese approaches to international economic law and the consequences of such approaches have burgeoned since the launch of the Belt and Road Initiative (BRI) in 2013.[2] However, most of the existing studies have been focused on the domains of trade and investment law[3] and little attention has been paid to China's increasingly proactive engagement in cross-border conflict resolution, especially to its creation and reformation of its domestic institutions to resolve international commercial disputes.[4] There remain underexplored questions about how and why such processes take place as well as the outcomes of implementation. This article aims to fill these gaps by using China's recent arbitration reform as a focused case-study to illustrate and explain its approaches to cross-border commercial dispute resolution and some of its key enforcement challenges.

[1] Zhao (2018); House of Commons of the United Kingdom (2019); United States Department of State (2020).
[2] Toohey, Picker, & Greenacre (2015); Shaffer & Gao (2020); Wang (2020).
[3] Potter (2014); Wu (2016); Guan (2017); Chaisse (2018); Mavroidis & Sapir (2021).
[4] State Council of the People's Republic of China (2018b); Supreme People's Court of the People's Republic of China (2018); Gu (2018); Bookman & Erie (2020).

Specifically, the article examines reform measures that aim to harmonize the Chinese arbitration system with international standards and the major obstacles that exist in both legal and practical terms to their implementation. My primary focus is on such measures that take the form of governmental initiatives and institutional arbitration rules. The former comprises policy decrees and instructions initiated by both central and local governments to bypass constraints imposed by China's current national arbitration legislation. The latter refers to rules promulgated by Chinese arbitration institutions to complement or improve upon certain procedural aspects of arbitration under the national Arbitration Law. Despite their limited scope of application, these two categories of measures have been the primary reform schemes adopted in China since the launch of the BRI in 2013.

My analysis concentrates on three lines of inquiry. The first relates to considerations that underline China's increasing push for the internationalization of its arbitration scheme and how this policy goal may determine the precise content of its reform measures. The second explores the compatibility of these efforts with China's national arbitration legislation, evaluating the extent to which these measures can effectively overcome constraints imposed by the national law. The third looks at the processes through which such measures are received by front-line bureaucrats and case managers at the very moment of service provision and implementation, with a specific focus on explaining the organizational and personal factors that may shape such processes of acceptance and reception.

Given the strong emphasis in Chinese arbitration reform on borrowing Western models and practices, these measures often take the form of legal transplantation—a highly dominant heuristic device widely used in the studies of law and society and comparative law.[5] In the context of legal reform in China, scholars have long observed that the Chinese approach to legal transplants has been eclectic and selective, involving "a dynamic of selective adaptation by which nonlocal institutional practices and organizational forms are mediated by local norms."[6] However, when writing about legal transplants, comparativists generally focus on the characteristic features of textual resources—often presented as legal texts, policy documents, and court decisions—and on the differences or, less frequently, the similarities of these texts.[7] The fact that laws and legal systems as social constructions tend to "describe the world in terms of generalizing rules and abstracting categories,"[8] as anthropologists suggest, is widely seen as one outstanding feature of law that distinguishes it from other normative sources and social institutions.[9] Such a text-focused approach may adequately reflect this rule-centred orientation of law. But this article also gives attention to the other end of legal transplantation: it is concerned not only with legal materials that the state promulgates as rules but also with how local actors engage with the black letter of legal requirements, especially in response to their role conceptions and the administrative resources allocated at the front line of service provision and enforcement.

In this article, I argue that the extent to which many of the current measures would be enforced is likely to be limited, for two main reasons. First, these reforms often suffer from a high degree of legal uncertainty arising from their potentially unlawful nature and provisional designs. While China's recent arbitration reform measures have shown an increasing trend toward international norms and practices, the present arbitration legislation has remained mostly unchanged since its promulgation in 1994. Consequently,

[5] Watson (1993); Erie & Ha (2021); Cohn (2010).
[6] Potter (2004), p. 478.
[7] Clarke (2020), p. 55.
[8] Pirie (2013), p. 139.
[9] Dresch & Scheele (2015), pp. 3–7.

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whereas the innovative orientation of these reform schemes is expected to allow their users to benefit from international standards and practices, their deviation from China's state legislation calls into question their legality. The legal certainty of these measures is further undermined by their expedient and provisional designs that often only permit their validity under limited temporal and geographic conditions, thereby raising doubts as to whether or not prospective clients will take the risk of using them.

Second, there has been resistance to taking these reforms seriously, especially among local arbitral officials and front-line case managers. This reluctance can be explained in both ideological and practical terms. Specifically, there often exists ideological conflict among front-line participants over the purpose and function of arbitration as a dispute resolution method in China. The central state's increasingly affirmative stance toward internationalization makes explicit its commitment to transforming Chinese arbitration into a conflict resolution scheme that specializes in cross-border commercial disputes so as to compete with its overseas counterparts. Yet participants are not always inclined to prioritize such an ambitious policy over other competing goals and values at the front lines of providing arbitration services. For instance, there remains a widespread view that arbitration is part of China's populist justice system, according to which arbitration is expected to maintain stability by helping to reduce court congestion rather than to become an exclusive, elitist forum for high-stakes commercial disputes. There also exists insufficient support to develop the institutional capacity of Chinese arbitration commissions with respect to their organizational structure and, in particular, human resources in order to attain the new standards of professional practices required by the state's broader policy goal of internationalization.

A broader claim of this article is that, for Chinese local actors, engagement with legal reforms, especially with those that heavily rely on foreign norms and practices, can be highly troublesome, due to their potential illegality and the general absence of local institutional capacity to support front-line workers. Such factors often place front-line participants in a difficult situation in which their commitment to Chinese legal reforms can be risky and unsustainable or self-defeating in the long run, causing them to incur uncomfortable legal consequences or to struggle in their professional roles on an everyday basis. For front-line Chinese workers, policy enforcement can hardly be a simple matter of rule-following compliance. It instead involves challenges of goal ambiguity, value conflicts, and limited administrative resources.[10] That is, there exist recurring tensions between formal requirements prescribed by the black letter of legal reforms and the extent to which actors are able or willing to fulfil them. The pervasiveness of these tensions suggests that engaging with legal reforms in China is in itself an "ethical" practice, constantly requiring participants to make judgements, choices, and decisions as to how such tensions should be resolved. It is thus questionable whether an appeal to follow the prescriptions of legal rules can with any frequency override the self-interest drifts of front-line workers toward avoiding uncertainties in both legal and vocational terms. Different actors, of course, would develop and adopt different approaches to coping with such conflicts. There are cases, for instance, in which rule-abiding actors showed a strong tendency to commit at great costs to the demanding policy ideal of internationalization required by legal reforms. It is doubtful, however, whether such a commitment to a singular value could be practised in a sustainable and coherent manner.

The article proceeds as follows. Section 2 draws on my fieldwork to explain the rationale that underlies the Chinese government's recent interest in reforming the arbitration system by aligning it closely with international standards and practices. Section 3 presents two such reform measures initiated and implemented by the governments in China: the recognition of ad hoc arbitration and the legalization of the operation of foreign

[10] Clarke (2012), p. 106; Zacka (2017), pp. 48–62.

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arbitration institutions within Chinese jurisdiction. Section 4 turns to measures adopted by some of the primary arbitration houses in China to improve their arbitration rules. After detailing the contents of these reforms, the next two sections examine implementation challenges. Section 5 explores legal uncertainties that arise from the potentially unlawful nature and the highly provisional orientations of these arbitration reform schemes. Section 6 provides an ethnographic account that illustrates and explains why front-line officials and case managers may not be inclined to take these schemes seriously. Section 7 examines how tensions between China's own domestic conditions and the transnational order of commercial arbitration may be explained in the framework of global legal pluralism and some of its limitations in the context of local bureaucracy. The conclusion briefly discusses how this article contributes to an understanding of China's engagement with cross-border dispute resolution and to the study of law and society more generally.

The ethnographic fieldwork upon which the article is grounded was conducted in China (2017–18) and spanned 14 months during which data were collected from participant observations, archival and documentary sources, and interviews. I was mainly based in a Chinese arbitration commission and a Chinese law firm that specializes in China-related cross-border commercial dispute resolution. In addition to attending arbitral hearings on a daily basis, I interacted with a wide range of participants, including arbitrators, in-house attorneys, arbitration counsel, case managers, and local arbitration officials. The data derived from this intensive fieldwork are focused on my interactions with these participants, including observations and conversations in both formal and informal settings. As my host organizations and most of my interviewees requested anonymity, the data have been anonymized to protect confidentiality; some details about the institutional settings and bibliographic profiles have also been altered accordingly.

2. Chinese arbitration reforms and internationalization

A distinctive discourse that I found highly visible during my fieldwork among arbitration practitioners in China (2017–18) was the so-called "three-nine rule" (*sanjiu faze*). This rule refers to an anecdotal observation that one of the characteristic features of China's foreign-related commercial disputes is that 90% of such disputes are channelled to arbitration, 90% of these arbitral cases are administrated by arbitration institutions outside of China, and, perhaps most problematically, 90% of the Chinese parties in overseas arbitral fora lose their cases.[11] Most of my interlocutors, of course, recognized the overgeneralization of such a broad claim and its lack of statistical evidence. However, Chinese slogans matter in that they tend to operate as the propaganda tools by which to do the ideological work for the state's policies.[12] The "rule" may be understood as a rhetoric that suggests not only the important role of arbitration in managing China-related cross-border commercial disputes in China[13] but also, more immediately, the increasing concern among Chinese parties about their vulnerability in foreign arbitral fora.

The extent to which this local account of Chinese victimhood reflects the reality of what the Chinese have experienced in foreign arbitral venues is an important issue that requires further empirical research. Nevertheless, as I continued my fieldwork, this discourse became a recurrent theme discussed in many conferences and workshops organized by Chinese arbitration institutions. Many of the observed participants attributed the cause of such vulnerability—which an average lawyer might see as mere problems of legal

[11] Lin (2018), p. 49.
[12] Song & Gee (2020), pp. 209–10.
[13] Gu, *supra* note 4, p. 1317.

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compliance, breach of contract, and unfamiliarity with international practices—to cultural differences and ethnic discrimination. They called for the necessity to onshore "China's own international cases" (in local terms) in order to safeguard the rights and interests of Chinese parties that engage in overseas economic activities, especially those under the banner of the BRI.[14]

It is not always easy for Chinese arbitration institutions to convince prospective users to migrate their disputes to mainland China, however. First, there remain strong concerns about the impartiality and professionalism of Chinese arbitral institutions.[15] Professor Jerome A. Cohen, for example, draws on his experiences in China to illustrate a series of similar concerns, including corruption, government interference, protectionism, and lapses in confidentiality.[16] The nationalist approach to onshoring cross-border disputes is also likely to be counter-productive: for non-Chinese parties, it simply raises a red flag. Playing the victim card may only reinforce the negative perception of Chinese arbitral institutions.

Second, China's current arbitration legislation has long been criticized for its obsolescence due to its failure to catch up to international standards and practices.[17] To be fair, the 1994 Arbitration Law of the People's Republic of China (PRC) itself is a legal transplant that consults various sources of international legal requirements and models. These sources include the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, "the New York Convention"), the UNCITRAL Model Law on International Commercial Arbitration (hereinafter, "the Model Law"), and arbitration laws in some of the leading Euro-American jurisdictions.[18] Compared with China's previous Soviet administrative arbitration scheme, the 1994 Arbitration Law is no doubt a progressive move, especially as it sets up the principles of party autonomy and institutional independence (Articles 4, 8, and 14).[19] International "pro-arbitration" procedures, such as the presumptive validity of arbitration agreements and the obligation to enforce arbitral awards, are also recognized under the current arbitration legislation.

A closer examination of the 1994 Arbitration Law and its practices shows that the reform to create an internationalized Chinese arbitral scheme seems far from complete. As many studies have suggested,[20] the Chinese Arbitration Law has "not yet been synchronized with international standards."[21] For example, most Chinese arbitral institutions still remain closely tied to local bureaucratic sectors in both organizational and financial terms, even though the Arbitration Law explicitly provides otherwise (Article 14). Ad hoc arbitration is not recognized; nor are foreign arbitration institutions allowed to undertake cases in mainland China. Moreover, the Arbitration Law's approach to some of the major aspects of arbitral proceedings, such as competence–competence, the appointment of arbitrators, and interim measures, give courts and arbitral organs extensive power over arbitrators and are, for the most part, inconsistent with international norms and standards.

As the State Council of PRC itself indicates, the current arbitration system has long suffered from its lack of "international competitiveness" (*guoji jingzhengli*),[22] which makes mainland China a less popular arbitral venue than its competitors, including Hong Kong, Singapore, Paris, and London. To increase the appeal of China as an arbitral venue, the

[14] Mercurio & Sejko (2019), p. 252.
[15] Cohen (2005), pp. 32–7.
[16] Cohen (2014), p. 562.
[17] Chi (2009), p. 142.
[18] Tao (2012).
[19] Gu (2017a), pp. 809–12.
[20] Yu (2018), p. 271; Sun (2020).
[21] Ribeiro & Teh (2017), p. 460.
[22] State Council of the People's Republic of China (2018a).

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Chinese central authority has shown a strong interest in promoting the use of arbitration for China's cross-border commercial disputes. In 2018, the government started by explicitly endorsing arbitration as one major conflict resolution scheme for cross-border disputes arising from BRI-related projects, and by the end of the same year, it had integrated it into China's newly established "one-stop shop" for cross-border commercial dispute resolution.[23]

Given the changing expectations of the state with respect to the functions of arbitration, reforming the current Chinese arbitration scheme so that prospective users can benefit from international standards and practices has become a policy priority.[24] Measures to achieve such an ambitious goal have been manifold. One central category of measures is rulemaking in the form of governmental initiatives and institutional arbitration rules. This will be examined in detail in the next two sections.

3. Governmental initiatives

The 1994 Arbitration Law is now nearly 30 years old, which raises the question of how it should be set for further reform. As some scholars have observed, the law "has been proven to be outdated, creating obstacles to the Chinese arbitration system and its general development."[25] To attract more international users, some Chinese local governments have initiated a wide range of reform measures that aim to overcome or bypass some of the national legislation's constraints and shortcoming.[26] Two such major measures are the recognition of ad hoc arbitration and the legalization of the operation of foreign arbitral institutions in mainland China.

3.1 Ad hoc arbitration

Ad hoc arbitration refers to arbitral proceedings that "are not conducted under the auspices or supervision of an arbitral institution."[27] Parties simply agree to settle their dispute by arbitration without explicitly designating any arbitral organ to administrate their case. Despite its practical popularity, however, the current Chinese Arbitration Law does not recognize the legality of ad hoc arbitration held within China;[28] only awards rendered by ad hoc arbitration in foreign seats can be recognized and enforced.[29] More precisely, under the Arbitration Law (Articles 16 and 18), any arbitration agreement that fails to include a designated arbitration commission may be deemed null and void.[30]

This denial of ad hoc arbitration seated in China has been widely criticized as an example that shows the Chinese arbitration system's deviance from international standards, raising concerns about China's commitment to the spirit of the New York Convention.[31] As a contracting state to the Convention, Chinese courts are obligated to recognize and enforce foreign arbitral awards that include both institutional and ad hoc arbitration.[32] Under the current 1994 Arbitration Law, however, it is unclear whether

[23] Supreme People's Court of the People's Republic of China, *supra* note 4.

[24] Chen (2018a), pp. 7–9; Zhao (2001), pp. 31–9.

[25] Gu, *supra* note 19, pp. 834–5.

[26] Municipal Government of Shanghai of the People's Republic of China (2019); Sixth Executive Committee of the Municipal Government of Shenzhen, PRC (2019).

[27] Born (2015), p. 71.

[28] Gu (2017b), pp. 262–5.

[29] Zhang (2019).

[30] Zhang (2013), pp. 366–7.

[31] *Ibid.*, p. 368; Zhang & Zheng (2018).

[32] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517 (effective June 7, 1959), Art. 1(2).

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ad hoc arbitration seated in China is permissible. In practice, Chinese courts have largely adopted a negative view.[33]

The Chinese central authority has recently relaxed the legislative constraint on the use of ad hoc arbitration. On 30 December 2016, the Supreme People's Court (SPC) issued a landmark policy document, Opinions of the SPC on Providing Judicial Protection for the Establishment of Pilot Free Trade Zones (hereinafter, "the SPC's 2016 Opinions"), which sets out the conditions under which the validity of ad hoc arbitration agreements shall be recognized (Article 9). First, enterprises registered in China's pilot free trade zones (hereinafter, "FTZs") are eligible to make ad hoc arbitration agreements. Second, such agreements may be found to be valid insofar as the parties clearly specify the location of arbitration in mainland China, the arbitration rules, and the arbitrators to handle their disputes.[34]

To be sure, the conditions that the SPC lays down still remain rather ambiguous, casting doubt on the practicality of implementation and legality under the national Arbitration Law. Nevertheless, given the SPC's central status in China's formal state system, the opinion is highly instructive, reflecting the central state's policy shift in a more "pro-arbitration" direction.[35] The SPC's document itself is not a state law in the strict sense, nor do Chinese local governments necessarily have the obligation to obey the SPC's instructions. But in practice, a central policy decree such as the SPC's opinion can often function as a strong basis upon which local states may initiate more concrete reform measures.

One such local initiative was made by the Zhuhai municipal government in 2017, which endorsed the first ad hoc arbitration rule in China: the Ad Hoc Arbitration Rules of the Hengqin Area of Zhuhai in China (Guangdong) Pilot Free Trade Zone (hereinafter, "the Hengqin Rules"). The Hengqin Rules adopt a number of innovative schemes to further concretize the SPC's policy instructions. First, the rules can be used to govern ad hoc arbitration of disputes that take place between enterprises registered in any Chinese FTZ regardless of whether the parties themselves actually operate in the Hengqin FTZ or not (Article 3). Second, the rules recognize the authority of arbitrators to determine disputes over the validity and enforceability of arbitration agreements (Article 9). Third, the fees of arbitrators, in principle, shall be agreed upon by both arbitrators and parties (Article 17). These designs, among others,[36] complement the lack of regulations that govern ad hoc arbitration under the current national arbitration legislation.

3.2 *Foreign institutional arbitration in China*

Foreign arbitral organs refer to arbitration institutions registered outside of mainland China. Examples include the International Chamber of Commerce (ICC) in Paris, the London Court of International Arbitration (LCIA), and the Singapore International Arbitration Centre (SIAC). Arbitral awards rendered by foreign arbitral organs seated outside of China are precisely one major category of foreign arbitral awards that the contracting states to the New York Convention are obliged to recognize and enforce (Article I.1). As the Convention's contracting member, China is not exceptional in this regard.[37] However, when parties opt for foreign arbitral institutions to process their disputes in China, problems occur, especially with respect to the validity of such

[33] Gu, *supra* note 28, p. 263; Chen (2018b).

[34] In 2019, the SPC issued a similar opinion to support the introduction of ad hoc arbitration in Shanghai's Lin-Gang FTZ; see Supreme People's Court of the People's Republic of China (2019).

[35] Legal Daily (2019).

[36] Sun (2017b).

[37] Fan (2008), pp. 31–2.

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agreements and the enforceability of their resulting awards under the current Chinese arbitration legislation.

Strictly speaking, the 1994 Arbitration Law does not explicitly prohibit foreign arbitral institutions from undertaking cases in mainland China.[38] Yet Chinese legal scholars and arbitration officials have long debated whether such arbitral institutions can operate and manage arbitral cases in China. Some argue that the absence of legislative recognition does not necessarily preclude the validity of arbitration agreements that designate foreign arbitral institutions to process disputes within China, insofar as such agreements accord with the New York Convention.[39] Others hold that the Chinese government has not yet opened the arbitration market; therefore, under the 1994 Arbitration Law (Articles 10, 16, and 18), the only permissible institutions that can offer arbitration services in China are limited to Chinese arbitration commissions.[40]

In the past, Chinese courts adopted the latter position. But since 2009, the courts have allowed some exceptions through a series of landmark decisions and policy guidance.[41] The first exception was made by the Ningbo Intermediate People's Court in 2009, holding that the award in question shall be deemed as a "non-domestic award" and become enforceable because China is a contracting state to the New York Convention.[42] This view was later endorsed by the SPC in 2013. In *Anhui Longlide Packaging and Printing, Co. v. BP Agnati S.R.L.*, the SPC indicated that a foreign arbitral institution, such as the ICC Arbitration Court, can be regarded as a legitimate designated arbitration institution under the Chinese arbitration legislation.[43] More recently, in 2021, Chinese courts have made two momentous decisions to recognize the validity of arbitration agreements that designated foreign arbitral organs to administer cases in China.[44] One that followed the SPC's position in the 2013 Anhui decision was delivered by Shanghai No. 1 Intermediate People's Court on 29 June 2020.[45] The other was rendered by Guangzhou Intermediate People's Court on 6 August 2020, asserting further that the arbitral award rendered by the ICC in China can be regarded as a "Chinese foreign-related arbitral award" and thus be enforced under the Civil Procedure Law of the PRC (Article 273).[46]

Local initiatives that aim to promote the use of foreign institutional arbitration in China have been very rare. However, some local governments see the State Council's recent interest[47] in promoting the industry of cross-border legal services in FTZs as an opportunity to lift themselves out of the constraints of the national arbitration legislation governing the operation of foreign arbitral institutions seated in China. One such example is the Shanghai municipal government. In October 2019, the Shanghai Municipal Bureau of Justice promulgated the Measures for the Administration of Overseas Arbitral Institutions' Establishment of Business Departments in the Lin-Gang Special Area of China (Shanghai) Pilot Free Trade Zone. The measures not only ascertain the legality of foreign institutional

[38] Gu, *supra* note 28, p. 266.

[39] Zhao (2009), pp. 70–1.

[40] Tao & Wunschheim (2007), pp. 322–4; Li (2008), p. 134; Gu, *supra* note 19, p. 808.

[41] Zhang (2016), pp. 66–9.

[42] Gu, *supra* note 28, p. 269.

[43] 最高人民法院关于申请人安徽省龙利得包装印刷有限公司与被申请人BP Agnati S.R.L.申请确认仲裁协议效力案的请示的复函 [The SPC's Reply to the Request for Instructions on the Application for Confirming the Validity of the Arbitration Agreement in the Case of *Anhui Longlide Packaging and Printing, Co. v. BP Agnati S.R.L.*] (Sup. People's Ct. Mar. 25, 2013).

[44] Hanusch & Wong (2020).

[45] 上海市第一中级人民法院(2020)沪01特83号民事裁定书 [BNB v. BNA (2020) Shanghai 01 Civil Special 83] (Shanghai No.1 Intermediate People's Ct. June 29, 2020).

[46] 广州市中级人民法院(2015)穗中法民四初字第62号 [Brentwood Industries v. Guangdong Fa-anlong Mechanical Equipment Manufacture Co. Ltd. (2015) Guangzhou Sui Zhong Fa Min Si Chu Zi 62] (Guangzhou Intermediate People's Ct. Aug. 06, 2020).

[47] State Council of the People's Republic of China (2013, 2015).

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arbitration in China but also detail the precise conditions under which foreign arbitration institutions may operate within the Lin-Gang area of the Shanghai FTZ. Specifically, any lawful and internationally reputable foreign arbitral institutions that have operated for more than five years and have conducted substantial arbitration activities can register with the Shanghai Municipal Bureau of Justice insofar as the persons in charge have never intentionally committed crimes (Articles 6 and 7). Moreover, to ensure the smooth running of this initiative, the Management Committee of the Lin-Gang Special Area has issued another policy document: Several Policies for the Promotion and the Development of Legal Service Industry in Lin-Gang New Area of China (Shanghai) Pilot Free Trade Zone (2020), which details the processes through which foreign arbitral institutions may apply for subsidies to cover their operating expenses.

Shanghai to date has been the only local authority that has introduced concrete measures to support foreign institutional arbitration seated in China. In fact, Chinese top-tier cities have not shown much interest in promoting the use of foreign institutional arbitration.[48] The primary reasons for their resistance are twofold. First, promulgating such an innovative measure is likely to be seen as "unlawful"—a point that will be further articulated later in this article. While Chinese courts have indeed made a series of decisions that allow foreign arbitral institutions to administer non-domestic disputes in China, such progressive decisions are exceptional—far too expedient and fragmented. Neither is the scope of their application clear, especially with regard to the precise conditions under which foreign arbitral institutions may be accommodated in the Chinese legal system. Second, such a local initiative may overstep the central state's authority with regard to determining whether China should open its market for arbitration services under the General Agreement on Trade in Services (GATS).[49]

The other exceptional case is that of the Beijing municipal government. Beijing is often seen as more guarded in terms of its openness than other major coastal cities, such as Shanghai and Shenzhen. However, the central authority's increasing push for further "comprehensive opening-up" seems to have provided Beijing with an opportunity to transform itself into a financial hub open to trade and investment activities.[50] After 40 years of the Shenzhen Special Economic Zone, Beijing in 2020 set up its own FTZ and "demonstration zone" (*shifanqu*).[51] In these special zones, the municipal government allows foreign entities to offer various categories of services, including computing technologies, finance, tourism, biomedical research, and legal services.[52] One such type of legal service is commercial arbitration. Foreign arbitral institutions may now be able to undertake non-domestic arbitral cases in Beijing, provided that these institutions have registered with the municipal government's relevant judicial authorities and set up their offices in areas designated by the government.[53]

4. Institutional arbitration rules

Reform measures to internationalize Chinese arbitration are not limited to state-sponsored approaches. Long before the government's recent interest in promoting arbitration for cross-border dispute resolution, some city-named arbitral institutions had already initiated various measures to achieve the very same goal. Such a progressive and forward-looking orientation is uncommon in the broader community of Chinese

[48] Yang (2020).
[49] Li (2016), p. 185.
[50] Xinhua (2020a).
[51] Xinhua (2020b); State Council of the People's Republic of China (2020a).
[52] State Council of the People's Republic of China (2020b).
[53] Hu & von Wunschheim (2020).

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arbitral institutions. But the proliferation of city-named arbitration institutions in China over the past two decades has turned Chinese arbitration into a service market driven by intense inter-institutional competition.[54] Different institutions adopt different strategies to gain market share. One major approach discussed in detail here is the commitment of some leading arbitral institutions to international standards through the modification of their arbitration rules to emulate some of the existing best practices in international commercial arbitration.

As of 2021, China already had more than 270 arbitration institutions in operation across different provinces and municipalities.[55] Due to the highly diverse political and economic conditions of these localities, the extent to which Chinese arbitration institutions pursue the ideal of internationalization varies greatly. In fact, it is not unusual for many of these institutions to be inclined to restrict themselves to local cases, showing very little interest in competing for international cases. This inward-looking predisposition accords with the State Council's traditional position that sees the administration of domestic arbitral cases as the major duty of China's city-named arbitration commissions.[56] Some arbitral institutions, especially those in top-tier cities (such as Beijing, Shanghai, and Shenzhen), seem to have considered otherwise. Like most leading arbitration houses elsewhere in the world, they, too, are ambitious and are reluctant to be identified as merely "regional" arbitral institutions. They likewise want to expand their share of cross-border commercial disputes and eventually become arbitration institutions that are globally recognized and internationally competitive.[57]

It is, nevertheless, not always easy to convince the primary users of international arbitration, such as Chinese state-owned enterprises (SOEs) and foreign parties, to submit their cases to these city-named arbitral institutions. For one thing, dispute resolution for China-related international cases, especially those with an intended place of enforcement within the territory of China, has long been the exclusive domain of the Beijing-based China International Economic and Trade Arbitration Commission (CIETAC). For another, city-named arbitral institutions are not usually seen by regular users of international arbitration as ideal fora for cross-border dispute resolution. This negative perception results from various factors. The very "local" (*difang*) level of their ranks in China's formal state system is no doubt an immediate one. But more fundamentally, anecdotal evidence seems to suggest that inexperience in administrating international arbitration and local favouritism also discourage prospective users from approaching local arbitral institutions for services.[58] As a result, even for users who are dissatisfied with CIETAC, these local arbitral institutions are unlikely to be their second choice. They may instead opt for overseas venues, such as Singapore and Hong Kong, as the alternative to CIETAC.[59]

To attract more international cases, some of the observed front-line arbitration officials hold that a better strategy is not simply to mimic CIETAC but to provide services and regulatory designs that help ensure that prospective users will benefit from the best practices of international arbitration.[60] One way to achieve this goal is to enact or amend the arbitration rules so that they closely align with international norms. Sources they emulate, or from which they borrow, have been multiple and include the UNCITRAL Arbitration Rules and arbitration rules of leading arbitration institutions—such as the

[54] Gu, *supra* note 19, pp. 826–7.
[55] Ministry of Justice of the People's Republic of China (2021b).
[56] State Council of the People's Republic of China (1996).
[57] Chen (2020).
[58] Gu, *supra* note 19, p. 802.
[59] Erie (2021), p. 89; Beijing Arbitration Commission, China International Contractors Association, & Tianjin University (2021).
[60] Chen, *supra* note 24, p. 9.

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ICC, SIAC, and Hong Kong International Arbitration Centre (HKIAC).[61] For example, the Beijing Arbitration Commission (BAC), the Shenzhen Court of International Arbitration (SCIA), and the Shanghai International Arbitration Center (SHIAC) have all promulgated arbitration rules that are for the most part in step with the leading international rules.

Specifically, the arbitration rules generally aim to complement China's arbitration legislation by further specifying certain aspects of arbitral proceedings that the state law fails to cover. But there are also cases in which these rules introduce innovative schemes that are directly transplanted from foreign sources and do not have similar counterparts in China's national Arbitration Law. The BAC Arbitration Rules (2019), for example, diverge from the 1994 Arbitration Law in many respects. The rules grant authority to arbitrators to determine disputes over the formation, validity, and enforceability of arbitration agreements (Article 6), whereas the Arbitration Law 1994 only gives such authority to courts and arbitration committees (Article 20). The rules also give arbitrators the power to grant provisional relief for international cases (Article 62), while both the Arbitration Law and the Civil Procedure Law of the PRC provide that such relief can only be delivered by national courts.[62] Other innovations, such as emergency arbitration (Article 63) and amiable composition (Article 69), are also not explicitly recognized by China's national Arbitration Law.[63]

5. Legal uncertainty

The previous two sections presented two major categories of Chinese regulatory reforms that build on some of the existing best practices in international arbitration: one by local governments and another by arbitral institutions. This recent trend echoes the observation that China is now seeking to onshore cross-border disputes by mobilizing and creating transnational law.[64] But these efforts have faced several challenges, one of which examined here is the legal uncertainty of these regulatory reforms, precisely with regard to the compatibility of these measures with the national legislation and hence their implementation. First, many of the aforementioned measures are potentially unlawful, given that their innovative and highly experimental orientation often deviates from state law. Second, the expedient and provisional designs of many of these reforms also call into doubt about their smooth running within China's wider dispute resolution system. A more comprehensive statutory approach to overcoming these challenges is therefore needed. The central state's recent proposed amendments of the Arbitration Law, released by the Ministry of Justice on 30 July 2021, is one such attempt. If the amendments are eventually approved by the National People's Congress (NPC), they would no doubt help enhance the legal certainty of the reform measures presented above, including allowing ad hoc arbitration (Article 91) and foreign arbitration institutions (Article 12) to administrate foreign-related cases in mainland China, recognizing the principle of competence–competence (Article 28), and granting arbitrators the power to render provisional measures (Article 43). Before these amendments are enacted, however, the legality of most of the current reform measures remains questionable.

[61] Erie (2020), pp. 248–9.

[62] Arbitration Law of PRC, promulgated by Standing Comm. National People's Congress, Aug. 31, 1994, effective September 1, 1995, Art. 68; Civil Procedure Law of PRC, promulgated by Standing Committee of National People's Congress, Apr. 9, 1991, effective April 9, 1991, Art. 272.

[63] Similar examples include the SHIAC Arbitration Rules (2015), the China (Shanghai) Pilot Free Trade Zone Arbitration Rules (2015), and the SCIA Arbitration Rules (2019).

[64] Erie, *supra* note 59, p. 96.

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5.1 Ad hoc arbitration under the SPC's 2016 Opinions

The recognition of ad hoc arbitration under the SPC's 2016 Opinions directly challenges the 1994 Arbitration Law, which only allows for institutional arbitration to operate in mainland China. To be sure, the Opinions are likely to be interpreted as the central government's increasingly hospitable stance toward the legalization of ad hoc arbitration given the SPC's very central status in China's formal state system. But it is unclear whether the SPC, as a judicial branch, can under Chinese law legitimately override national arbitration legislation by simply issuing such a decree. As required by the Legislation Law of the PRC, matters concerning "litigation and arbitration systems" must be exclusively governed by national laws (Article 9); in other words, it is the NPC that has the power to legalize the operation of ad hoc arbitration in China, not the SPC.[65]

In addition to the problem of legality, the ad hoc arbitration scheme under the SPC's 2016 Opinions is limited in its scope. First, the scheme only applies to disputes that occur among enterprises registered in Chinese FTZs. Second, it requires parties to specify the following matters in their arbitration agreements: (1) the location to host the dispute; (2) the arbitration rules to govern the proceeding; and (3) the person or persons to arbitrate the dispute. An ad hoc arbitration agreement can only be found to be valid if these conditions are met. As a result, enterprises registered outside of FTZs are not eligible for ad hoc arbitration; neither will agreements that fail to cover these three "requirements of specification" be recognized.

Despite these limitations, the SPC's ad hoc scheme is still a step forward. It provides enterprises in China's FTZs with a dispute resolution alternative to people's courts and China's domestic arbitral institutions. Nevertheless, this scheme is likely to be faced with problems of implementation because ad hoc arbitration has never been envisioned as a prototype in China's national arbitration laws. The processes to which prospective users can resort to resolve disputes over arbitration agreements and proceedings are not clear, especially with regard to the allocation of competence or authority between arbitrators and courts to determine such matters. For example, under the current Arbitration Law, the Chinese arbitration commission is one of the major designated authorities to determine controversies over competence–competence, selection, and replacement of arbitrators as well as provisional measures (Articles 20, 28, 31, and 32). This set of rules can hardly be applied to ad hoc arbitration, as there are simply no institutions to manage its proceedings. In consequence, unsolved questions remain about how such controversies may be tackled in ad hoc arbitration processes as well as in post-award enforcement stages.

5.2 Foreign institutional arbitration under the Shanghai FTZ scheme

The recognition of foreign institutional arbitration under the current Shanghai FTZ arbitration scheme also creates tension with China's national legislation. The Shanghai Lin-Gang FTZ Measures have so far not specified clearly how this scheme can be incorporated into China's national arbitration laws, such as the Arbitration Law and the Civil Procedure Law. They also do not contain any details about aspects of arbitral proceedings and, crucially, the precise processes through which parties can challenge or enforce awards rendered under this scheme. The operation of foreign institutional arbitration in the Shanghai FTZ thus prompts several important questions that need to be further clarified by the relevant authorities. For example, what exactly is the procedural law of the arbitration (or *lex arbitri*) that governs arbitration under the auspices of foreign arbitral institutions in the FTZ? To what extent would Chinese national arbitration legislation and judicial precedents still apply to foreign institutional arbitration in China? Perhaps more

[65] Sun, *supra* note 36.

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fundamentally, how "special" is the Shanghai FTZ as a distinctive sphere of regulatory regime in relation to the wider Chinese national legal system?

Chinese judicial authorities have thus far adopted a rather cautious stance toward these questions. In 2019, the SPC issued a decree to endorse the Shanghai Lin-Gang FTZ Measures, instructing that people's courts should handle "by law" (*yifa*) requests for provisional measures and enforcement of the awards rendered under the FTZ's arbitration scheme.[66] The SPC's instruction was immediately followed by an instruction from the Shanghai High People's Court that designated people's courts as the only authority to grant provisional relief for foreign institutional arbitration.[67] In effect, this instruction is simply a reiteration of China's current Arbitration Law, which only permits courts to deliver such relief. Therefore, despite the ambiguity of the very term "by law," the underlying message that Chinese judicial authorities attempt to convey is clear: the Shanghai FTZ's arbitration reform is not free from constraints imposed by national arbitration legislation and judicial precedents.

To be fair, the recognition of foreign institutional arbitration in Shanghai's Lin-Gang FTZ is a scheme that remains open to international norms and standards, as opposed to measures that emphasize local needs or the so-called "Chinese characteristics." And the judicial authorities' seemingly conservative position seems not so much a regression as a deliberate attempt in itself to help ensure the reform's smooth running within the broader system of Chinese legal bureaucracy.[68]

There remains a series of concerns about the operation of the Shanghai FTZ arbitration scheme, however. First, it is unclear whether and how foreign arbitral institutions registered in the FTZ should perform tasks that are assigned to Chinese arbitration commissions under the current Arbitration Law. Compared to arbitration laws in leading Western countries, China's Arbitration Law gives its arbitration commissions rather extensive power over the administration of arbitral proceedings. The Arbitration Law designates the commissions as the authority, for instance, to (1) form the panel list of qualified arbitrators (Article 13); (2) determine the validity of arbitration agreements (Article 20); and (3) submit applications for provisional relief on behalf of the parties (Articles 28 and 46). By contrast, arbitral institutions outside of China do not usually intervene in these matters; instead, such matters are often determined by arbitrators. As a result, the Shanghai FTZ arbitration scheme is likely to arouse legal controversies about the degree to which foreign arbitral institutions registered in the FTZ are bound by these requirements, and if these institutions adopt measures that differ from the Arbitration Law, what the consequences may be.

Second, the category of awards rendered by foreign arbitral institutions remains ambiguous. Chinese scholars and practitioners have long debated the processes through which awards rendered by foreign arbitral institutions in China should be challenged, recognized, and enforced.[69] One key issue is focused on whether such awards should be treated as "Chinese awards"—as opposed to the category of "foreign awards"—so that they could be directly challenged and enforced under China's national arbitration legislation without referring to the New York Convention.[70] It is unfortunate that the Shanghai FTZ arbitration scheme does not clarify this controversy; neither has any central judicial authority to date attempted to do so. Consequently, such a controversy may continue to occur during post-award stages.

[66] Supreme People's Court of the People's Republic of China, *supra* note 34.
[67] Shanghai High People's Court, PRC (2019).
[68] Yang, *supra* note 48.
[69] Gu, *supra* note 19, pp. 817–20; Zhang (2020).
[70] Zhao, *supra* note 39, p. 74.

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Third, the provisional design of the Shanghai FTZ arbitration reform may lead to further legal uncertainty regarding its implementation in the long run. Under the current reform scheme, the operation of foreign institutional arbitration seated in China is subject to a limitation period of three years. Specifically, as provided in the Shanghai Lin-Gang FTZ Measures (Article 25), the scheme will soon end on 31 December 2022. For potential users, how to deal with this temporal constraint in their arbitration agreements becomes an immediate challenge. It is also unclear whether foreign arbitral organs can undertake disputes or deliver awards after the expiry date.

These are all challenges that can affect how prospective users may choose China-seated foreign arbitral organizations over Chinese arbitration commissions and overseas arbitral venues such as Hong Kong and Singapore. Illegality and uncertainty are all risks that clients and their lawyers would very much like to avoid during the contract drafting phase. To mitigate such risks, prospective users may consider Chinese arbitration commissions or even arbitral services outside of China to be better fora than foreign institutional arbitration seated in the Shanghai FTZ.

5.3 Institutional arbitration rules and national arbitration legislation

As discussed previously, many arbitration commissions in China's top-tier cities borrow or transplant foreign arbitration rules to formulate their own institutional rules in order to compete for international cases. Nevertheless, it is questionable whether this strategy can achieve its objective since many of these rules are likely to be unlawful. While most of these rules simply aim to improve on national arbitration laws—often by further detailing aspects of arbitral proceedings that state laws neglect to cover—some are directly modelled on foreign or transnational legal sources, such as the arbitration rules of leading arbitration institutions and the UNCITRAL Arbitration Rules. As a result, these schemes tend to be inconsistent with China's current national legislation, provoking controversies over their legality and, more immediately, their enforceability during post-award processes. This section examines three such examples: (1) competence–competence; (2) the allocation of power to grant interim relief; and (3) the operation of investor–state arbitration.

First, most leading Chinese arbitration commissions adopt competence–competence measures that are in conflict with the Arbitration Law. "Competence–competence" refers to a widely accepted arbitral scheme or doctrine under which arbitrators are the primary authorities to consider and determine jurisdictional disputes.[71] For example, the UNCITRAL Arbitration Rules stipulate: "The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement" (Article 23). A number of Chinese institutional rules have adopted similar schemes, including the BAC Arbitration Rules (Article 6), the SHIAC Arbitration Rules (Article 6), and the SCIA Arbitration Rules (Article 10). However, the competence–competence doctrine has never been recognized by China's current Arbitration Law, according to which such power is only granted to courts and arbitration commissions (Article 20).[72] As a result, the competence–competence schemes under these institutional rules are likely to be unlawful as they seem to breach the national arbitration legislation.

Second, certain rules that grant power to arbitrators to order provisional relief overstep Chinese arbitration laws. Pro-arbitration regimes often grant tribunals broad power to deliver such relief in conjunction with national courts. For instance, the Model Law provides that "the arbitral tribunal may, at the request of a party, grant interim measures"

[71] Born, *supra* note 27, p. 271.
[72] Fan, *supra* note 37, pp. 27–9.

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unless the parties agree otherwise (Article 17), but this mode of arrangement does not exclude the concurrent authority of national courts to order such measures (Article 9). Similar legislative schemes have also been adopted in France, Germany, the UK, and the US.[73] Therefore, arbitration rules that follow this regulatory model do not clash with the national legislation in these jurisdictions. However, China adopts a different approach, reserving such power exclusively to national courts.[74] Tribunal-ordered provisional measures in China can be thus potentially unlawful.

Most leading arbitral institutions in China tend to formulate their arbitral rules to adhere to the Arbitration Law in this regard. For example, the CIETAC Arbitration Rules provide: "Where a party applies for conservatory measures pursuant to the laws of the People's Republic of China, CIETAC shall forward the party's application to the competent court designated by that party in accordance with the law" (Article 23). This approach is also followed by institutional rules, such as the BAC Rules (Article 17), the SHIAC Rules (Article 18), and the SCIA Rules (Article 25). These rules reflect the wider trend that arbitrators are unwilling to grant provisional relief unless the national legislation of the arbitral seat allows arbitrators to do so.[75]

Problems occur when these institutions make exceptions by granting arbitrators the power to order provisional relief. One example is the scheme of emergency arbitration. This scheme refers to a process by which parties are enabled to apply for an emergency tribunal to seek urgent relief prior to the formation of an arbitral tribunal.[76] This has been widely adopted by leading international arbitration houses, such as ICC, LCIA, SIAC, HKIAC, and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). It has also been instituted by China's primary arbitration commissions, including BAC, CIETAC, SHIAC, and SCIA.[77] For instance, the CIETAC Arbitration Rules permit parties to "apply to the Arbitration Court for emergency relief," insofar as the applicable law or the arbitration agreement permits (Article 23). However, the operation of such an innovative measure in China is potentially unlawful since the Chinese Civil Procedure Law only permits courts to issue urgent relief prior to the constitution of an arbitral tribunal (Article 101).[78]

Third, the operation of investor–state arbitration under Chinese arbitration rules is likely to face a number of legal impediments. Investor–state arbitration is a type of conflict resolution that specializes in disputes arising from cross-border direct investments. Some leading Chinese arbitration institutions have introduced this scheme in their institutional rules, including the SCIA Rules (2016), the CIETAC International Investment Arbitration Rules (2017), and the BAC Rules for International Investment Arbitration (2019). Despite some of its similarities to the conventional forum of international commercial arbitration, investor–state arbitration is distinctive in its own right, especially regarding its treaty-based jurisdiction and the unequal relationship between its users (namely, "the investor vs. the state" structure).[79] Consequently, the promulgation of the investment arbitration rules by Chinese arbitration commissions is not a comfortable fit with China's current arbitration legislation. For example, it is likely to give rise to jurisdictional controversies over the competence of Chinese arbitration commissions to undertake investor–state cases because the national law only allows for commercial disputes among

[73] French Code of Civil Procedure, Arts 1449, 1468; German Code of Civil Procedure, ss. 1033, 1041; English Arbitration Act 1996, ss. 38, 44.

[74] See Arbitration Law of PRC, Arts. 28, 46, 68; Civil Procedure Law of PRC, Art. 272.

[75] Born (2012), p. 203.

[76] Santacroce (2015), p. 283.

[77] BAC Rules, Art. 63; SHIAC Pilot FTZ Arbitration Rules, Art. 21; SCIA Rules, Art. 26.

[78] Huang (2019), pp. 151–2; Xu (2018).

[79] Born, *supra* note 75, pp. 416–8.

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subjects of equal status.[80] Investor–state awards rendered by Chinese arbitration commissions may also not be recognizable and enforceable under the New York Convention due to the commercial reservation made by China since its adoption in 1987.[81]

It is surely right for Chinese arbitral institutions to start competing for cross-border disputes by reforming their institutional rules, especially by synchronizing these rules with those of major institutions in leading jurisdictions. Such regulatory reforms provide prospective users with some of the best practices of international arbitration and, more importantly, convince them to migrate their cases to Chinese arbitral institutions. However, it is questionable whether the promotion of these innovations can help attract the kind of international cases that these institutions hope to undertake. As I have already shown, due to their inconsistency with China's current arbitration legislation, the use of these measures is likely to arouse controversy over their legality and enforceability during post-award stages.[82] As a result, prospective users may want to avoid rather than mobilize these innovations.

5.4 The 2021 proposed amendments

To reduce the uncertainty of the schemes aforementioned, further reform is needed. As most of the current measures are promulgated sparsely at judicial and subnational levels, an immediate solution to be considered would be a legislative reform by the NPC that can be nationwide applied to tackle the legality problems listed here.[83] One such effort is the proposed amendments (hereinafter, the "Draft") to the 1994 Arbitration Law released by the Ministry of Justice for public consultation on 30 July 2021. It introduces a series of radical changes that cover most of the reform schemes discussed above.[84] Consequently, the Draft may help ensure the certainty of these measures, if it becomes enacted by the NPC.

First, the Draft allows ad hoc arbitration and foreign arbitration institutions to operate in China for foreign-related (*shewai*) cases. As provided in the Draft (Article 91), parties are able to refer their case to an ad hoc arbitral tribunal so long as the case involves foreign-related commercial disputes. Article 12 also stipulates that foreign arbitration institutions that set up branch offices in mainland China to conduct foreign-related arbitration businesses shall register with the local sectors of judicial administration in accordance with regulations to be formulated by the State Council. This measure no doubt helps to clarify the long debate about whether foreign arbitration institutions are allowed to administrate arbitration in mainland China.[85]

Second, the Draft recognizes the principle of competence–competence. Under the 1994 Arbitration Law, parties can only submit their objections to arbitrators' jurisdiction to arbitration commissions or people's courts. Generally referred to as competence–competence, the authority of arbitrators to determine challenges to their own jurisdiction is not clearly recognized in China's present arbitration legislation.[86] In practice, it is

[80] Liu & Zhu (2019), p. 82; Chi (2021).

[81] New York Arbitration Convention, "Contracting States," http://www.newyorkconvention.org/countries (accessed 8 August 2022). In addition to the three major examples discussed above, other schemes such as the third-party funding and appellate arbitration all may encounter similar problems; see BAC Rules for International Investment Arbitration, Art. 39; CIETAC International Investment Arbitration Rules, Art. 27.

[82] Arbitration Law of PRC, Art. 75, which provides that Chinese arbitration commissions can only promulgate their rules in according with Arbitration Law and Civil Procedure Law of PRC.

[83] Sun (2017a); Ware, Gao, & Yang (2021).

[84] For a brief summary of the proposed amendments, see Chu, Tung, & Ye (2021).

[85] Wong et al. (2021).

[86] Fan, *supra* note 37, pp. 27–9 (suggesting that the 1994 Arbitration Law does not recognize the doctrine of competence–competence).

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possible that arbitration commissions can simply delegate the authority to arbitrators or make the formal decision on behalf of the tribunal, so as to adhere to the principle of competence–competence. These arrangements are by no means uncontroversial, however, and should be seen as merely expedient. Crucially, one must not confuse the existence of such prevailing practices with the normative question about their legality. The Draft is an apparent attempt to resolve the controversy: any objection to the existence or validity of the alleged arbitration agreement or to the jurisdiction of the arbitral case should be submitted to the tribunal in accordance with the applicable institutional rules (Article 28(1)); the courts do not consider and decide objections that fail to follow the aforementioned procedure (Article 28(3)).

Third, the Draft recognizes the authority of arbitrators to grant provisional measures of protection. Under China's current national arbitration legislation, the courts are the only authority to render such measures. This design is inconsistent with the pro-arbitration Model Law, according to which "the arbitral tribunal may, at the request of a party, grant interim measures" unless the parties have agreed otherwise (Article 17). Following the Model Law, the Draft authorizes arbitral tribunals to grant interim relief in addition to the courts (Articles 43 and 46(2)). Provided that tribunal-ordered provisional measures become permissible, the emergency arbitration scheme introduced by many of the Chinese leading arbitral institutions would be applicable to both domestic and foreign-related cases.[87] These institutions may also consider revising their current arbitration rules to harmonize with the proposed amendments and providing further details about the circumstances under which such measures may be granted.

It remains to be seen whether the Draft would be eventually enacted by the NPC as it is presently suggested by the Ministry of Justice. Doubtless though the proposed Draft is one such comprehensive legislative effort that is to systematically reforms China's arbitration scheme.[88] Should the proposed amendments become officially legislated, most of the legality problems listed in this article would be less unsettled. Before the Draft is finalized, nevertheless, the legality of most of the current internationalization reform schemes may remain subjected to challenges.

6. Local acceptance and resistance

I now turn to ideological and institutional obstacles to acceptance of regulatory innovations by local arbitral officials and case managers. Despite their wide publicity,[89] most of the innovative measures introduced by leading Chinese arbitral organs in their arbitration rules are infrequently used. For example, the BAC has so far undertaken fewer than ten emergency arbitration cases since 2017. Similarly, the schemes of investor–state arbitration under Chinese institutional rules have remained unused.[90] As shown previously, their incompatibility with China's current national arbitration legislation is one important factor for the reluctance of parties to approach these innovations. More fundamentally, there seems to be a widespread suspicion, often expressed by Chinese parties and corporate lawyers, that Chinese arbitral officials and front-line staff members may not be willing to enforce these reform schemes—even if disputants pursue them. Why, then, is there this resistance? What are the precise challenges to the effectiveness of these reforms at the very front lines of implementation?

This section presents and explains two key factors that seem to discourage these front-line agents from taking these reform measures seriously. The first results from incoherent

[87] For more detailed discussions, see also Section 5.3 of this article; Born, *supra* note 27, pp. 871–932.
[88] Lichtenstein & Meng (2021).
[89] Tang et al. (2015).
[90] Chi & Ren (2021).

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perceptions of the purposes of arbitration as a dispute resolution scheme in China. The second arises from a lack of systemic support to ensure the capacity of Chinese arbitration commissions to keep up the new standards of practices and professional requirements set by the broader policy ideal of internationalization, especially with respect to their human resources and organizational arrangements.

6.1 The heterogeneity of arbitration in China

The first challenge comes from the incoherent attitudes toward the institutional purposes and orientation of arbitration in China. Due to an emphasis on emulating norms and practices of Western arbitral regimes, the innovations promoted by Chinese arbitral organs in recent years have clearly reflected the policy process of internationalization that is taking place in the field of Chinese dispute resolution.[91] Despite the central government's affirmative position towards the policy goal,[92] arbitration in China is a highly heterogeneous dispute resolution scheme. Different local officials and case managers tend to understand it differently. As a result, these front-line actors are not necessarily inclined to always prioritize the policy of internationalization over other competing demands and norms by which they are bound or about which they care. The implementation of this policy often needs to be mediated or, in fact, circumscribed by the different preferences of these front-line agents with regard to the expected function of arbitration in China as well as the internal politics of the arbitration commissions in question.

One such example is Commission A.[93] The commission is one of the very few Chinese city-named arbitral organs that managed to secure financial and organizational independence from local states soon after China's 1994 arbitration reform. It is particularly renowned for its progressive and open attitude toward Western norms and practices of commercial arbitration. Many of my informants attribute Commission A's reputation for its commitment to internationalism to the incumbent deputy Secretary-General, whom I will call Mr Dan. In the wider Chinese arbitration circle, Mr Dan's strong and enduring interest in emulating leading arbitral regulatory models and institutions in Euro-American jurisdictions is highly known. For Dan, the central state's recent emphasis on reforming the Chinese arbitration system for cross-border dispute resolution echoes his vision. In several conferences hosted by Commission A, he stated that it was "a much-needed policy declaration."

Dan's high-profile enthusiasm for the ideal of internationalization is described by some of my informants as "too radical" since his vision of arbitration as a specialist scheme for cross-border commercial dispute resolution impairs the broader functions that arbitration is expected to perform in China. Although there has been an increasing trend toward specialism in Chinese arbitration in recent years,[94] there remains a widely shared view that considers arbitration to be a populist justice scheme that has as its main purpose the maintenance of social stability. For example, the head of Commission A, Mr Zhang, does not seem to be a fan of Dan's blueprint for internationalizing the commission. Zhang has never openly criticized Dan's position, at least not in front of me. But Zhang's responses to Dan's reform initiatives are often rather inactive or deliberately ambiguous. Zhang does not object to Dan's reforms for internationalization per se. What seems to concern him is that internationalization may come at the cost of

[91] Dong & Zhang (2019).

[92] State Council of the People's Republic of China (2018b).

[93] To protect the confidentiality of my informants, many of the ethnographic details have been greatly modified, omitted, and anonymized as required by my host institutions and some of interviewees.

[94] Gu, *supra* note 19, pp. 826–9.

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arbitration's broader function of maintaining stability due to the policy's discrimination against ordinary civil quarrels that only involve small claims.

The tension between Zhang and his deputy somewhat reflects the differences in their educational backgrounds and career paths. Dan is well regarded by many Chinese arbitration practitioners for his academic achievements and professionalism. Having received his Ph.D. in law from a prestigious Chinese university in the late 2000s, Dan was soon promoted by the then Secretary-General of Commission A to his current position. His monograph on arbitral institutions in China is praised by many of my interlocutors as a seminal work of Chinese arbitration studies. Dan is particularly famous for his liberal stance toward the function and development of arbitration in China. For example, Dan, along with Commission A's former Secretary-General, is one of the earliest arbitration officials to push for the "privatization" of Chinese arbitral institutions—an ideal that is inconsistent with China's arbitration legislation but that he sees as an intrinsic aspect of arbitration.

Zhang's curriculum vitae is not as impressive as Dan's, nor does Zhang have a nationwide reputation as does Dan. Zhang was scarcely known by the Chinese arbitration circle before taking up his current position as Commission A's administrative head. Although almost two decades older than Dan, Zhang has spent most of his career working as an official in the municipal government. Arbitration is not within his area of expertise. While Dan continues to be invited to teach and give talks on arbitration in various Chinese universities and arbitration houses, Zhang is often considered by my interlocutors to be a mere state technocrat who is not a proper class of "arbitration person" in China. This perception in part results from an impression that Dan's success is hard-earned and merit-based: he was recruited through Commission A's own employment competition and it was his hard work and contributions to the commission that helped him climb to the deputy rank. By contrast, Zhang is an outsider whose position as Commission A's head is sometimes described as unearned because it was his civil service qualification and grade in the formal state system over the past 20 years or so that allowed him to win the title rather than his dedication to the commission. There is, in fact, a long tradition established by the municipal government that Commission A's Secretary-General can only be a civil servant from the government's legal affairs office, namely Commission A's *de facto* direct supervisory authority.

As the local government's designee to fulfil the position, Zhang is expected to act as an intermediary to ensure effective communication between Commission A and its supervisory authorities inside the municipal government. While he certainly has the skills and connections to help Commission A seek policy support from the government, Zhang's bureaucratic identity and background also make him vulnerable to the suspicion that he may be more inclined to see himself as the municipality's representative rather than as an independent professional. Consequently, there have been doubts about the extent to which he would prioritize the interests of Commission A over that of the local government should a conflict of interest arise between these two entities.

Zhang's seemingly conservative position toward the policy of internationalization now becomes comprehensible. It must not simply be reduced to a strategic move that aims to compete for authority against Dan; instead, his reluctance is likely an attempt to realize the municipality's continuing interest in operating arbitration for grassroots disputes in order to reduce the congested dockets of local courts. In effect, the tension between Zhang's conservatism and Dan's progressive ambition may be symptomatic of a deeper conflict between the different interests and competing goals of the local state and its subsidiary: the former persists with the social function of arbitration for public services, whereas the latter is eager to transform itself to become a market-driven scheme specializing in selective high-stakes and international disputes.

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Similar conflicts between the divergent understandings of arbitration's function and vision can also be seen in the wider community of Chinese arbitration, although they do not necessarily take the form of inter-institutional antagonism that I have just presented in the case of Commission A. The other example to be considered here is Commission B, in which the resistance to international norms and practices comes from front-line case managers rather than the governmental authority.

Commission B is often seen as China's flagship arbitration institution due to its institutional ranking as a legal organ directly sponsored by the central government. As part of the corridors of power, Commission B also enjoys a long monopoly on China-related international cases among high-profile parties, such as SOEs and foreign investors. In recent years, however, there have been increasing concerns about its professional competence and commitment to international standards and practices. For example, Commission B does not prohibit its own employees from being selected as arbitrators; it has not implemented any effective measures to prevent arbitrators from engaging in *ex parte* contacts; and it also seems to have frequently failed to maintain the confidentiality of its proceedings. But more generally, Commission B is frequently described by Chinese advocates as a bureaucratic organ that by its nature is "arrogant, formalist, and closed to outsiders."

The incumbent Secretary-General, Mr Shen, then comes to rescue Commission B's increasingly deteriorating reputation by initiating new processes of reform. Shen is no stranger to Commission B's internal politics and highly bureaucratic predisposition, having served as a high-ranking official in charge of China's international economic legal affairs for most of his career. He is aware that foreign parties frequently use these factors as excuses to push for arbitral fora outside of China. He often openly urges that the internationalization of the commission's rules and services is the right path to follow to enhance Commission B's trustworthiness among foreign parties—specifically by adapting to international arbitral rules, developing front-line employees with the ability to engage in international arbitration, and increasing the commission's international visibility.

But many of Shen's efforts have been compromised by the uncooperative responses from the employees of Commission B. This resistance comes from two major considerations. First, the extent to which Shen would commit to the policy ideal of internationalization is by no means clear to these front-line actors. As some of my interlocutors suspect, it is likely that Shen's interest in internationalization is superficial, limited only to the aspect of public relations that aims to change the perception of Commission B simply by organizing overseas roadshows and international conferences. New rules and training workshops introduced by Shen may be just propaganda techniques expected to perform only symbolic functions rather than to be taken seriously.

Second, even if his intention is genuine, not all of these front-line practitioners agree with Shen's push for international standards and practices. The very term "internationalization" (*guojihua*) is, after all, an essentially contested idea, and local actors do not always agree on the best way to realize it. For example, although hardly any of these front-line actors would object to Shen's attempt to boost Commission B's international visibility, they are not necessarily keen on his endeavours to closely align the commission's arbitral rules and proceedings with foreign norms and practices. As some of my informants sharply pointed out, "internationalization" should not be narrowly understood as a one-way process in which China can only be the passive end that receives legal standards and practices from Euro-American countries. They instead suggested that arbitral rules and practices already adapted to China's own sociopolitical conditions should be reserved or, more ambitiously, simply seen as part of international norms and practices.

It should be noted that the extent to which the aforementioned tensions are experienced and expressed by Chinese arbitral participants varies. It is also not my intention to employ the cases of Commissions A and B to make general claims about the diverse political conditions of arbitral institutions in different localities in China. But such

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noticeable conflicts over the purposes and orientation of practising arbitration can hardly be ignored. These tensions suggest that a wider transitional process or cultural change is taking place in the sphere of Chinese arbitration. And the policy goal of internationalization now comes into play to compete or negotiate with other conventional positions that attempt to challenge such an endeavour. As a policy ideal, internationalization is one part of the plurality of goals and values to which Chinese arbitral practitioners stay attuned, and different actors may approach it differently in response to their own perceptions of how arbitration in China should operate and develop.

6.2 The lack of institutional support

Another challenge to implementation of the policy ideal of internationalization directly results from the lack of support that helps develop the institutional capacity of Chinese arbitral organs to engage in international arbitration. Institutional capacity refers to operational aspects of institutional performance, including organizational designs, financial and human resources, and professionalism. As several studies have observed, the capacity of legal institutions plays a vital role in shaping Chinese legal policies and practices, and it has long been seen as a major obstacle to the implementation of reform measures in China that are modelled on globalized regulatory norms and practices.[95] Similar phenomena can also be seen in the field of Chinese arbitration.

There are two key factors that may discourage front-line arbitral workers from engaging with regulatory innovations initiated by their own commissions. One involves designs and organizational structures that fail to provide front-line staff with sufficient administrative resources to manage high-stakes international cases. The other concerns the underdevelopment of professional competence necessary to fulfil new standards and requirements set by the arbitration reforms.

First, the organization of many Chinese arbitral organs is often ill adapted to handling international arbitration proceedings. While regulatory reforms that aim to internationalize arbitration in China have proliferated in recent years, most Chinese arbitral organs remain slow to improve their organizational structures to respond to such trends—a problem that the Chinese central state has also addressed.[96] For example, although most Chinese arbitration rules have maintained a clear distinction between domestic and international arbitration procedures, their operations in practice have shown very little difference. Front-line staff seem inclined to conflate international proceedings with domestic ones, even though a formal distinction is maintained.

One immediate cause of this tendency is the absence of a clear division of labour. As a latecomer in the international economy, China's interest in promoting its own arbitration system for cross-border dispute resolution is a relatively new move. Chinese arbitration commissions rarely dedicate themselves exclusively to international commercial cases. Unlike their major competitors in global financial centres such as Hong Kong, Singapore, and London, which have long focused on developing expertise and experience in cross-border commercial conflict resolution,[97] the strength of Chinese arbitration commissions lies in their high efficiency in resolving domestic cases. Their organizational designs and arrangements tend to reflect this orientation, failing to develop a clear division of labour or a separation of tasks so that front-line staff can have the administrative resources, such as time and attention, to manage and process cross-border disputes in ways that meet international standards. As a result, Chinese case managers continue to

[95] Potter, *supra* note 6, pp. 471–2, 478–9.
[96] State Council of the People's Republic of China, *supra* note 22.
[97] Erie, *supra* note 61, pp. 253–67; Bookman & Erie, *supra* note 4, p. 6.

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be overwhelmed by domestic case-loads, and they are unlikely to handle international cases as expected by the regular users of international arbitration.[98]

Second, the implementation of arbitration reform schemes may encounter the problem of a lack of professionalism.[99] Due to China's relatively recent participation in the international economic legal order, concerns exist about the extent to which Chinese legal professionals possess the skills and expertise to meet the particular requirements of legal reforms.[100] In the specific domain of arbitration, the concern becomes whether Chinese participants are capable of engaging with reforms to arbitration rules that are modelled on international norms and practices. After more than four decades of reform and opening-up, Chinese experts in cross-border economic affairs are no longer in short supply.[101] But the distribution of these human resources is uneven. Geographic locations matter.[102] Arbitration commissions outside of China's first-tier cities generally suffer from a shortage of specialists in international commercial dispute resolution because of their relative underdevelopment of legal service industries. Arbitration commissions in first-tier cities may also face difficulty in recruiting the best legal talent, given that they offer lower wages than that of law firms. Therefore, it is unclear whether Chinese front-line workers have the subject-matter expertise and English-language proficiency to administrate international arbitration in the way that prospective users experience and expect from the other leading arbitration houses outside of China.

The process by which Chinese arbitration commissions engage in international arbitration practices represents a learning curve. The slow response of their personnel structures and their competency to meet international standards may be only temporal and, therefore, must not be reduced too quickly to fixed ideas or assumptions about the legal culture in China.[103] There will be change over time. It is probable that Chinese arbitration commissions will soon take seriously the need for capacity-building to compete with foreign competitors. Their pathways to reform may also lean toward international standards rather than "Sinicization," especially since the nationalist approach will not help overcome the image deficit of China's arbitration system. Of course, not all Chinese arbitration commissions have a demand for cross-border commercial dispute resolution since the socioeconomic conditions of their localities differ greatly. This means that the degree to which Chinese arbitration commissions would engage in international standards is likely to vary. As a result, there may be polarized development among them. Whereas arbitration houses in Beijing, Shanghai, and Shenzhen continue to be pushed for internationalization, the rest may remain as regional institutions and specialize only in domestic cases.

7. Global legal pluralism and local bureaucracy

In the broader social scientific studies of law, particularly in legal anthropology, there is no shortage of examples showing that the coexistence of state law and other forms of normative orders has been prevalent in various cultures and historical contexts.[104]

[98] The problem of limited resources is of course not exclusive to Chinese legal institutions; see also Zacka, *supra* note 10, pp. 52–3; Lipsky (2010), pp. 27–39.

[99] State Council of the People's Republic of China, *supra* note 92, Art. 8.

[100] Liebman (2014), p. 100; Cohen, *supra* note 16, p. 566; Erie, *supra* note 61, p. 282.

[101] Lo & Shape (2005), pp. 433–55; Liu (2006), p. 752.

[102] Potter, *supra* note 6, p. 472; Erie, *supra* note 61, p. 252.

[103] Fan (2013).

[104] Pirie, *supra* note 8, pp. 38–42; see generally von Benda-Beckmann & Keebet (2006); Merry (1988); Griffiths (1986).

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Despite the contemporary domination of the modern idea that sees legal ordering as an exclusive domain of the state,[105] anthropologists have long made it clear that state laws do not necessarily exhaust the making and maintenance of social order. In colonial and post-colonial societies, for instance, state forms of legal order—mostly borrowed from European regimes—tended to operate with less formalistic indigenous and customary laws.[106] Similar phenomena can also be identified in developed industrial societies. One such example is Moore's seminal research into the garment traders in New York in the 1970s. She demonstrated how their network produced informal obligations and extra-legal norms that would often frustrate requirements prescribed by the union's formal rules. This observation eventually led to her proposition of the "semi-autonomous social field" as a distinct subject of study to think critically about the central role of state law in ordering society, especially its efficacy in achieving social changes.[107]

Having since then become widely accepted as a useful heuristic device to consider the plurality of normative ordering in different societies, ideas about legal pluralism—and the ethnographic research that supports them—have now been greatly enriched by the increasing interests in transnational processes of law.[108] Rephrased by some of the leading anthropologists and legal scholars as "global legal pluralism," this shift of focus from local rules and social norms to the dialectic relations between domestic orders and transnational legal processes no doubt reflects the rapid proliferation of transnational legal instruments used for interstate politico-economic organization and governance over the past four decades.[109] Ethnographic examples of such transnational sources have been abundant, including human rights,[110] financial regulations,[111] and cross-border commercial dispute resolution.[112] As the legal anthropologist Sally Engle Merry had long suggested in the early 1990s, this appeal of transnational law then prompted new questions about legal pluralism, by drawing renewed attention not so much to its existence as to the interactions between local and transnational legal orders and how different groups of actors would mobilize them to dominate or resist one another.[113] Ethnographers may find that the answers to these questions cannot be easily isolated from the cultural and historical contingencies of the social setting in question.[114]

The tensions between local and transnational arbitral norms and standards in China, as discussed in the previous two sections, thus provide an immediate example to consider comparatively many of the inquiries set up by the global legal pluralists.[115] For the purpose of this article, the important task here has been to show and explain, in both normative and operational terms, the complexity and specificity of how such tensions are manifested and engaged with in local social settings, so as to better reveal what is—or is not—distinctive about transnational legal processes in China.

Section 5 presented a series of conflicts between requirements prescribed by China's current arbitration legislations and internationalization measures promoted by some Chinese subnational governments and arbitral institutions. This form of tension is certainly not limited to China. According to Erie's research into the recent emergence

[105] Tamanaha (2008), p. 397.

[106] Merry, *supra* note 102, p. 872 (describing this model as "classic legal pluralism").

[107] Moore (1973).

[108] von Benda-Beckmann, von Benda-Beckmann, & Griffiths (2009), p. 1; see also von Benda-Beckmann & Keebet (2007). For an earlier review of this development in legal anthropology, see Merry (1992).

[109] Berman (2012); Merry (2014), p. 108.

[110] Wilson (2007); Merry (2003a; 1997); Goodale (2002).

[111] Riles (2011).

[112] Erie, *supra* note 61.

[113] Merry, *supra* note 106, p. 358.

[114] Merry (2003b).

[115] For a detailed discussion about the practice of comparison in anthropology, see Candea (2018).

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of new legal hubs across several Asian and Middle Eastern jurisdictions, innovations initiated by many such hubs often clash with the formal legislation of host states.[116] Also, in the more specific context of international arbitration, collisions between the autonomous order of arbitration and governmental authorities have been highly visible throughout its history.[117] The local push for internationalization in China may also illustrate a recurrent phenomenon that private arbitral institutions in many parts of the world have long played a proactive role in reforming national arbitral legislation and international treaties even though their initiatives are not always appreciated by the state—the ICC's influence on the New York Convention being one example, as Grisel has reported in detail.[118] And this phenomenon is in itself symptomatic of a wider transnational process through which international arbitration is forming its own order that would supersede state interference.[119]

It is therefore not unreasonable to see the 2021 Draft proposed by the central state as a forced move compelled by this vibrant process to recognize such autonomous order. In other words, the legislative proposal seems to follow an increasing trend where the pull for regulatory harmonization that the transnational process of arbitration has exerted tends to undermine the state's authority over the formation of arbitral order, thereby—according to Sweet and Grisel[120]—turning the state into the subordinate of the process rather than its superordinate. Consequently, this attempt to legalize many of the local initiatives appears to reaffirm the general observation that the triumph of "private interests" over "public authority" may have now become a common characterization of the contemporary arbitral order,[121] even in a political regime that is conventionally perceived as authoritarian, or illiberal, such as China.

From an anthropological perspective, however, questions remain as to the extent to which China's sociopolitical needs, conditions, and values can be so vulnerable, or malleable, to the transnational arbitral order. As discussed in Section 6, in addition to the legal uncertainty caused by the inconsistency between national legislation and local reform initiatives, there are other non-legal factors that shape significantly the processes and outcomes of how these reforms are engaged with, including views about the purposes of arbitration, perceptions of the legitimacy of foreign arbitral norms and practices, and the competing goals of policy requirements that arbitral officials are taught to attain. The limitation in administrative resources also casts doubt on the capacity of Chinese arbitral organs to meet the heavy demands placed on them by international arbitration practices. These are all irreducible factors that front-line officials and case managers cannot easily ignore when deliberating over compliance or other forms of engagement with the requirements of the reform measures. That is to say, the implementation of laws—be they indigenous or foreign—can be intrinsically reflective, requiring local actors to make difficult choices and judgements.

[116] Erie, *supra* note 61, p. 293 (examples include the Dubai International Financial Centre Courts' conversion of judgments into arbitral awards and the hybrid scheme of "Arb-Med-Arb" proposed by the Singapore International Mediation Centre and SIAC).

[117] Lew (2006), pp. 180–2; Born, *supra* note 27, pp. 11–28 (providing a historical overview of the development of international commercial arbitration showing that the non-national autonomy of arbitration was frequently undermined by the rise of modern states, especially by their judicial and legislative authorities).

[118] Grisel (2017), pp. 79–80, 86.

[119] Lew, *supra* note 115, p. 181.

[120] Sweet and Grisel (2017), pp. 35–78.

[121] Here I borrow Grisel's terms; see Grisel, *supra* note 116, p. 75 (showing that private interests, as represented largely by private arbitral institutions such as the ICC and the transnational network of experts revolved around them, "acted in a strategic, coordinated manner during the genesis of the New York Convention and achieved what had been rejected as provocative by national governments shortly before").

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This does not mean that patterns cannot be discerned from such complex processes of reflection. As indicated previously, many of the current reform measures have rarely been used. The reluctance to take seriously these reforms and the more general policy ideal of internationalization suggests that a clear gap exists between transplanted rules and practical outcomes. While international arbitral norms and standards have become increasingly incorporated into Chinese legislation and regulations, their local receptions have been rather cautious. It seems that the autonomous dynamic of transnational arbitral order in China may not be as penetrative as it has been elsewhere in the world.[122] As a result, for those who take for granted the transnational efficacy of arbitral order, it is not wrong to characterize this form of reflection as reductive, or pathological even, due to its disregard for the letter of reforms and the transnational arbitral order that undergirds them. Given the long history of authoritarian control over Chinese society, it is tempting to see this mode of deliberation as yet another example of China's often superficial commitment to international legal requirements.[123]

Nevertheless, if the goal here is to counter the still-prevalent "Orientalist" approach in the studies of Chinese law, one must not dismiss too hastily the complex dilemmas that front-line bureaucrats and practitioners in China face when engaging with legal reforms, especially with those that rely heavily on foreign normative sources. It is important not to confuse a direct denial of foreign rules and practices with the quite different process of how local actors experience and manage various demands to reach decisions. At street-level implementation, Chinese local actors are not simply required to deal with the normative tension between domestic and transnational legal orders; they are instead caught by the multiple competing demands between legal integrity, administrative efficiency, policy enforcement, and the pursuit of an international outlook. It can only be imagined how difficult it would be for those involved in such processes to reconcile these demands on a daily basis. The current negative reception of international standards on arbitration in China, therefore, may be better understood as the outcome of such reflective difficulty rather than a passive effect of the Chinese authoritarian legal culture.

8. Conclusion

The extent to which China would commit to international legal norms and institutions as it did during the early opening-up period has no doubt become one of the much-debated issues in recent years. Contrary to earlier optimism, China's ever deeper integration into the world economy and the global legal system over the past four decades seems to have resulted in neither liberalization at home nor moderation abroad. A retreat from further reform, or a "turn against law,"[124] appears to be characteristic of the recent development of Chinese law, raising concerns about whether China may now be developing its own "Sino-centric" economic legal order to replace or repurpose the existing international system dominated by Western countries.[125]

This article offers a counter-narrative to such contestation by showing that China may maintain—at least in the case of commercial arbitration—a strong interest in international standards. Yet the processes through which prospective users and front-line workers approach reform measures that rely heavily on foreign norms and practices often display a rather reductive tendency. Central to the article is a broader claim that, for local

[122] Dezalay & Garth (1996), pp. 63–99.

[123] Ruskola (2013), pp. 1–29 (discussing how the contemporary understanding of Chinese law has long been shaped by the dominant paradigm of "legal Orientalism," which tends to portray Chinese society as irrational and lawless that stands in striking contrast with the rational legalistic West).

[124] Minzner (2011), p. 936.

[125] Shaffer & Gao, *supra* note 2, p. 607.

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actors, engaging with international norms and practices in China can be a potentially dangerous move because of the potential illegality of reforms and a relatively underdeveloped organizational and personal capacity to sustain them. Participants frequently find themselves in a difficult situation in which their commitment to legal reforms becomes risky, unsustainable, or self-defeating in the long run, resulting in either uncomfortable legal consequences or great difficulty in carrying out their professional roles on a day-to-day basis. Therefore, it is doubtful whether an appeal to honour the black letter of legal reforms would prevail over the self-interest and the vocational integrity of front-line participants. When it does, such a move can only be understood as a leap of faith by the participant in question to pursue the policy ideal of internationalization at all costs. But from a practical perspective, it is questionable whether this form of commitment would become prevalent and how it could proceed in a sustainable and coherent manner.

The 1994 Arbitration Law of the PRC is now nearly three decades old, posing the questions of whether or not it is in need of urgent reform and how such reform should be designed and implemented. While the central state seems to have embraced the policy goal of internationalization in recent years, reform measures that aim to achieve this goal have so far been mostly initiated by governmental sectors and arbitration commissions on a highly experimental and piecemeal basis. In this article, I have demonstrated that this approach is often confronted with immediate challenges of legality and practicality at the very point of service provision and enforcement. As the Chinese Arbitration Law is placed on the agenda for future reform (the 2021 proposed amendments to the 1994 Arbitration Law being one such major effort),[126] it is necessary that policy-makers take into account such impediments and reconsider their legislative approaches to international norms and practices from a more holistic perspective that allows future reform schemes to be better integrated into China's own wider national legal system and the conditions of its domestic institutions.

There is general agreement that China is playing an increasing role in shaping the international economic legal order with a clear aim to safeguard its rights and interests with respect to economic globalization. And the processes by which China engages with this order involve various domains of normative sources and multiple levels of practices, as well as different actors with a wide range of diverging incentives. Nevertheless, there remains insufficient understanding of how such processes take shape in empirical terms, especially with respect to the complexity of the legal and sociopolitical contexts with which they are deeply intertwined. Yet the international community urgently requires this knowledge. This article provides one such ethnography-based account by using Chinese commercial arbitration as a case-study to demonstrate how China is reforming its own domestic institutions for cross-border dispute resolution, thereby illustrating what may more generally be distinctive about the Chinese approach to international legal norms and practices and some of its consequences.

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