

## BOOK REVIEW NOTES

### ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS<sup>1</sup>

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**Recommended citation:** Nataliya Bocharova, *Arbitration in China: A Legal and Cultural Analysis*, 2(2) BRICS LJ (2015).

#### 1. Introduction

Undoubtedly we live in the age of arbitration. Arbitration is the preferred method of the international dispute resolution. But when we think over arbitration, its history, development, core and nature we usually refer to Western experience such as Roman *jus civile* or *lex mercatoria* in Europe, when the Roman principle *pacta sunt servanda* determines the possibility to deliver a dispute to arbitration. Among variety researches on international arbitration one can barely find complete and adequate analysis of the Asian experience in this field. China legal tradition lacks for a notion of private law. Dispute resolution in China was influenced by the Confucian idea of an avoidance of the conflicts. But over the past 30 years international arbitration become far the most popular mechanism for resolving international commercial disputes in the Asia-Pacific region.<sup>2</sup> How these mechanisms have been developing, what they are based on and what is the future of arbitration in China are examined by Dr. Kun Fan in her thorough study 'Arbitration in China: A Legal and Cultural Analysis.'

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<sup>1</sup> Reviewed book: Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (China and International Economic Law Series) (Hart Pub. 2013).

<sup>2</sup> Simon Greenberg et al., *International Commercial Arbitration: An Asia-Pacific Perspective 1* (Cambridge University Press 2011).

The author conducts research of current arbitration in China in the global context of the changing economic, social, cultural and legal structure of Chinese society.

The book explains contemporary arbitration law and practice in China from an interdisciplinary perspective and with a comparative approach. 'Book addresses an important theoretical question on the interaction between globalization of law and local culture and legal traditions' (p. 7). The author not only positively describes arbitration institutions and legislation but finds the ways of harmonization and coexistence of the historical and the contemporary; of the West and East.

## 2. Chapter Summaries

China is the world's second biggest and fastest growing economy and one of the main countries for foreign investments. China has the world's largest wealth funds and remains one of the most stable economies in the face of the European economy crisis, which plays significant role in the international commercial and financial markets. The growth of the foreign investments to China economy and international deals with Chinese element has caused interest to the China legal frame and its possible flexibility to adapt coherent and habitual Western legal mechanisms including mechanisms of dispute resolution. Professor Arthur Gemmel claims that there is historical 'arbitral chain' that linked the stages of the development of arbitration in the West.<sup>3</sup> But the question is if this 'chain' has its continuance in the East. To what extent it is possible to use Western arbitration in such non-confrontational culture as China society. The answer to these questions can be found in reviewed book. The author calls China 'a legislative laboratory since 1978 . . . when a vast array of laws and rules has been promulgated to establish institutions that did not exist before the start of economic reforms' (p. 47). That reminds the situation in Russia during the past 20 years, when legislation in some fields was only a translation of the foreign legislation which leads to the huge gap between positive law and practice.

The book starts to examine the contemporary law and practice of the arbitration system in China. In Ch. 1 the author views the Chinese legal framework and arbitration system. According to the Constitution of the PRC and Organic Law of People's Courts the people's courts has four levels and two instances. The most significant arbitral institution in China is the China International Economic and Trade Arbitration Commission [hereinafter CIETAC], which rules were adopted in 1956 by the China Council for the Promotion of the International Trade. The CIETAC is the most old arbitral institution in China but nowadays it faces increasing competition from other (more than 200) arbitral institutions. One of such competitors is the Beijing

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<sup>3</sup> Arthur J. Gemmel, *Western and Chinese Arbitration: The Arbitral Chain* 79 (University Press of America 2008).

Arbitration Commission (BAC) which was established in 1995. *Ad hoc* arbitration is not recognized in China.

There are two national laws that directly applicable to international arbitration: Arbitration Law 1995 and Civil Procedure Law 1991. Supreme People's Court has power to provide judicial interpretation of acts and a number of such interpretations concerning arbitration were issued in 1987, 1995, 1996, 1998, 1999, 2000, 2005, 2006. In 1986 China adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). Also China has entered into bilateral investment treaties with nearly all of its most important trading partners (excluding USA and Russia).

Before Arbitration Law 1995 the domestic and foreign arbitration in China were developing quite separately. The government promoted domestic arbitration and mediation, but the author mentions that arbitration system was lacking independence, autonomy and binding force of awards. It is interesting that the foreign-related arbitration has its roots in the Protocol for General Conditions of Delivery Goods signed between China and Soviet Union in 1950, which provides that any dispute should be settled by means of arbitration. China did not have arbitration institution and the Foreign Trade Arbitration Commission [hereinafter FTAC] (now the CIETAC) was established to conform to mentioned condition of the treaty. The FTAC was established by the Decision of the Government Administration Council and this decision served as the first regulation of the arbitration in China.

Further, in her book, Dr. Fan examines the laws of arbitration and court practice in China in comparison with international standards in terms of the arbitration agreement (Ch. 2), the arbitral institutions (Ch. 3) and the enforcement of arbitral awards (Ch. 4).

For Russian scholars and experts would be interesting to learn that the Arbitration Law 1995 *de jure* recognizes the transnational principle of the autonomy of the arbitration agreement, but in practice 'the core of the principle has not always been fully appreciated by the courts at all levels in different regions in China' (p. 67) and usually the binding effect of the arbitration clause on the transferee is denied. The similar situation we observe in Russia.

The author explains that the requirements concerning the validity of arbitration agreement in China differs from transnational standards and the legislation creates doubts as to the enforceability of awards rendered in China under the auspices of foreign arbitration institutions (particularly *ad hoc* ones).

What arbitration tribunals are concerned the author points out that the Chinese approach deviates substantially from transnational standards. The core principle of 'competence-competence' is absent in legislation of China. The power to decide on jurisdiction does not lie within the arbitral tribunals but the state court and arbitration institutions. It means that in China arbitration institutions (which are administrative bodies) decide over jurisdiction matters. Also according to transnational standards, even when a jurisdictional challenge is filed before the court, the arbitral tribunals

are generally allowed to continue with the arbitral proceeding. On the contrary, the Chinese approach grants the people's court a prevailing power over the arbitration institution.

One more feature of the Chinese arbitration system, mentioned by the Dr. Fan, brings together the Chinese and Russian arbitration. That is the considerable complexity and obstacle in the field of the recognition and enforcement of arbitral awards.

Chapter 5 turns to the practices of arbitration institutions in China. In Ch. 6 the author discusses so called *arb-med* (the combination of mediation and arbitration) which seems to be one of the features of the Oriental world with its strong mediation culture. The author insists that in China combined mechanism of mediation and arbitration is used 'frequently and enjoys a high degree of success' (p. 153). The CIETAC Rules 1989 provided that the CIETAC and its tribunals may mediate cases accepted by the CIETAC. On the heels of the CIETAC Rules the Arbitration Rules also permits the combination of the mediation and arbitration. The author in detail analyses the pros and cons of such approach.

Based on the analysis in previous chapters, in Ch. 7 the author highlights the unique features and the legal obstacles to arbitration in contemporary China. The author emphasizes the following features of the arbitration in China: 1) deficiencies in the legislation; 2) inconsistencies in the implementation of the law; 3) administrative intervention; 4) conceptual differences between Western consensual arbitration and Chinese administrative character of arbitration. All named features can also characterize Russian arbitration, which arrive us to the conclusion that the roots of the arbitration in China are not in ancient Confucian ideas, but in recent plan-based economy and contemporarily state ideology.

In the Chs. 8 and 9 the author analyzes cultural influences on these 'Chinese characteristics' of arbitral practice, looking for explanations from traditional Chinese legal culture (Ch. 8) and legal reception and legal modernization in China (Ch. 9). The author describes three periods of Chinese legal history: 1) the period of traditional Chinese legal system; 2) the period of legal reception; and 3) the period of the construction of the socialist legal system. Dr. Fan describes two kinds of legal norms: 1) *li* advocated by Confucianism (moral rules, rituals) and 2) *fa* advocated by Legalism (positive law) and the relation between the two. The interaction between *li* and *fa* results a wide gap between the written laws and implementation. The Arbitration Law 1995 defines that in arbitration, disputes shall be resolved on the basis of facts, in compliance with law and in a fair and reasonable manner. The author shows that the principle of fairness is more important than the law in the decision-making process of the arbitration tribunals. Other cultural feature that influences arbitration in China is the protection of the government power and social interest is more important than the protection of individual rights and private interests.

Modern legal system in China is shaped by ideas from China's historical experience, on the one hand, and 'models based on the experience of Western countries' (p. 199),

on the other hand. In Ch. 9 the author argues if this modernization process continues or discontinues from China's traditions and how this modernization process reflects arbitration law and practice.

Finally, the author attempts to foresee how China will react to the movement of transnational arbitration and, in the other direction, what impact China may have on arbitration law and practice elsewhere (Ch. 10).

### 3. Conclusion

The author has chosen a comparative approach and examined the arbitration practice in transnational context. Also she analyzes arbitration law from historical and cultural point of view. The main value of the monography is the author has used mixed research method. A reader can learn how China's culture has influenced the development of contemporary China's legal framework and its arbitration law and practices. Also the book will help to learn how China arbitration differs from arbitration law and practice in the United States, Switzerland, France and other Western countries. The book clarifies the history of the arbitration in China and what has influenced its development. And finally one can find clear comparison between 'paper law' and real practice of arbitration institution and state courts concerning arbitration in China.

The author introduces the idea of so called 'glocalization of law,' when '[o]n the one hand, global scripts are localized when domestic actors translate and conceptualize the borrowed concepts in accordance with local norms – "localized globalism;" on the other hand, local ideas, practices and institutions may be globalized when they are projected to the global arena – "globalized localism."<sup>4</sup>

The reviewed book will be useful for arbitrators, practitioners in arbitration and international commercial arbitration; scholars specialized in comparative law, alternative dispute resolution. Anyone who is interested in contemporary China, the globalization of law, or developments in dispute resolution will find this book valuable.

### Information about the author

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<sup>4</sup> Kun Fan, *Glocalization of Arbitration: Transnational Standards Struggling with Local Norms through the Lens of Arbitration Transplantation in China*, 18 Harv. Negot. L. Rev. 175, 175, available at <[http://papers.ssrn.com/abstract\\_id=2177562](http://papers.ssrn.com/abstract_id=2177562)> (accessed Feb. 7, 2016).