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# STRIVING FOR INDEPENDENCE, COMPETENCE, AND FAIRNESS: A CASE STUDY OF THE BEIJING ARBITRATION COMMISSION

*Fuyong Chen\**

*The emergence in China of local arbitration commissions (“LACs”), and in particular their growing role as a forum of choice for dispute resolution, is a phenomenon that has received inadequate scholarly attention. Outside of China, research focusing on LACs is almost nonexistent, and articles dealing with LACs are characterized both by an absence of direct sources of knowledge as well as skepticism regarding the potential independence, competence and fairness of LACs. This article intends to present an analysis of LACs based on a case study of the Beijing Arbitration Commission (“BAC”), for which the author worked as a part-time case-handling secretary from April 2005 to April 2007. The case study describes how the BAC maneuvers within the legal and policy framework to obtain independence, raise standards, strengthen competence, and build effective mechanisms to maintain integrity. The findings of this case study suggest that the BAC’s employment system and its full financial independence are two fundamental factors bolstering the quality and efficiency of its arbitration. However, the achievement of these two factors requires a strong executive, which explains the challenges both for the BAC itself in its early years, and later for other LACs that wish to model themselves on the BAC.*

## INTRODUCTION

Since the Arbitration Law of the People’s Republic of China came into force in 1995, 183 new arbitration institutions have been founded, in addition to the China International Economic and Trade Arbitration Commission (“CIETAC”), established in 1954, and the China Maritime Arbitration Commission (“CMAC”), established in 1959.<sup>1</sup> These new arbitration institutions are called local arbitration commissions (“LACs”), generally named after the administrative area in which they are registered. However, their jurisdiction is not confined to their respective

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\* Fuyong Chen is a Ph.D. candidate at Tsinghua University School of Law and a Visiting Researcher (2007-2008) at the Center for the Study of Law and Society, UC-Berkeley. The author wishes to thank Malcolm Feeley, Jerome Cohen, Stanley Lubman, Gerald Clark, Robert Baum, Benjamin Liebman, David Anderson, Yaxin Wang and Yu Fan for their constructive comments on earlier versions of this article. The author also wants to acknowledge the support of the staff in the office of the Beijing Arbitration Commission during the field study and the financing by the China Scholarship Council during his stay at Berkeley. The project is part of a large study of Hybrid Dispute Resolution Mechanisms and the Construction of Harmonious Society funded by the Chinese Ministry of Education (Grant No. 05JZD0004).

<sup>1</sup> Department of Coordination on Government Legal Affairs, Legislative Affairs Office of the State Council, Issue No. 210, *Zheng fu fa zhi gong zuo jian bao* [Briefing Work of Government Legal Affairs] (2005) (on file with the author).

administrative areas; any Chinese arbitration institution can arbitrate domestic and international cases regardless of the location of the dispute or parties.<sup>2</sup> Although LACs are a relatively recent phenomenon in China, they are growing in importance and influence. As shown in the table below, LACs have developed at a very quick pace and their caseload has risen steeply in recent years, reaching 47,314 cases in 2005.

LACs' Caseload Growth: 1999-2005

Year	1999	2000	2001	2002	2003	2004	2005
Total caseload	6,703	8,928	11,380	17,261	28,098	36,418	47,314

Source: Department of Coordination on Government Legal Affairs, Legislative Affairs Office of the State Council, *Zhong cai gong zuo qing kuang* [Briefing Work of Arbitration] (Issue Nos. 13, 23 and 56); Administrative Department, Legislative Affairs Office of the State Council, *Zheng fu fa zhi gong zuo jian bao* [Briefing Work of Government Legal Affairs] (Issue Nos. 146, 171 and 210)

Recently, some of the top LACs, such as the Beijing Arbitration Commission ("BAC"), Wuhan Arbitration Commission ("WAC"), and Guangzhou Arbitration Commission ("GAC") have begun to take action to attract international commercial arbitrations.<sup>3</sup> More and more foreign companies negotiating with Chinese counterparts are being encouraged to incorporate arbitration clauses in their contracts to settle their disputes before LACs. Yet little research, if any, has focused on LACs. One recent publication on forum selection for international dispute resolution in China displayed complete ignorance of the existence of LACs by claiming that if a foreign party wants to avoid the Chinese courts by selecting arbitration, CIETAC is effectively the only choice for foreign-invested

<sup>2</sup> See *Guo wu yuan ban gong ting guan yu guan che shi shi* "Zhonghua Renmin Gongheguo zhong cai fa" xu yao ming que de Ji ge wen ti [Circular of the General Office of the State Council Regarding Some Problems Which Need to Be Clarified for the Implementation of the Arbitration Law of the People's Republic of China] (June 8, 1996).

<sup>3</sup> The BAC has been aiming to build itself into an international arbitration institution since 1999. See Wang Hongsong, 1999 *nian gong zuo zong jie* [The Work Summary in 1999] (Dec. 29, 1999) (unpublished memorandum, on file with the author). The WAC established an International Arbitration Court on December 18, 2005, with the main functions of accepting and hearing international commercial arbitration cases and cooperating and interacting with international commercial arbitration institutions. See "International Arbitration Court" (brochure, on file with the author). The GAC also took initial steps to establish an International Arbitration Court in 2005. See *Guangzhou zhong cai wei yuan hui 2005 gong zuo zong jie ji 2006 gong zuo yao dian* [The Work Summary in 2005 and Working Plan in 2006 of the Guangzhou Arbitration Commission] (Mar. 3, 2006) (unpublished memorandum, on file with the library of GAC).

entities.<sup>4</sup> Some experts are aware of the rising role of LACs, but are skeptical about their independence, competence, and fairness. Professor Donald C. Clarke argues that LACs are closely tied to government, especially in their reliance on local government for funding and personnel.<sup>5</sup> Nadia Darwazeh and Michael Moser have questioned whether all LACs are in fact competent and experienced enough to handle foreign-related arbitrations.<sup>6</sup> Professor Jerome A. Cohen has admitted that geographic convenience is usually the best argument to attract foreign companies to an LAC. But, unless elaborate measures are devised and implemented to prevent local government, the Communist Party, or business and personal influences from interfering with the decision-making of the arbitration panel, foreign businesses are unlikely to embrace this option.<sup>7</sup> Thus, whether LACs can be independent, competent, and fair forums is a significant and critical question worthy of careful study. Based on a case study of the BAC, this article will explore what kind of specific constraints LACs face during the process of striving for independence, competence, and fairness against the background of China's economic transition and social transformation resulting from the reforms and open policy adopted in 1978, and to what extent they can overcome these constraints through their own efforts.

The BAC was established on September 28, 1995 with its office in Beijing, which was one of seven pilot cities designated to reorganize arbitration commissions under the Arbitration Law.<sup>8</sup> As shown in the table below, the annual caseload of the BAC has continually increased at a rapid pace. The number of international arbitration cases also shows a rising trend. Meanwhile, the BAC has demonstrated a strong willingness to innovate and explore ways to introduce international practice into China's society. In 2005, Professor Cohen proffered ten recommendations drawn from his experience for consideration by CIETAC. At the time of his recommendations most of them had already been put into practice by the BAC.<sup>9</sup> The BAC also was the first of the LACs to host and publish a

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<sup>4</sup> For a specific discussion on the pros and cons of Chinese courts versus CIETAC, see William Heye, *Forum Selection for International Dispute Resolution in China: Chinese Courts vs. CIETAC*, 27 HASTINGS INT'L & COMP. L. REV. 535 (2004).

<sup>5</sup> Donald C. Clark, *Empirical Research into the Chinese Judicial System*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 171 (Erik Jensen & Thomas Heller eds., 2003).

<sup>6</sup> Nadia Darwazeh & Michael Moser, *Arbitration inside China*, in MANAGING BUSINESS DISPUTES IN TODAY'S CHINA: DUELING WITH DRAGONS 58 (Michael Moser ed., 2007).

<sup>7</sup> Jerome A. Cohen, *The Delicate Art of Arbitration*, FINANCIAL TIMES, Nov. 30, 2005, at 11.

<sup>8</sup> See *Guo wu yuan ban gong ting guan yu zuo hao chong xin zu jian zhong cai ji gou he chou jian zhong guo zhong cai xie hui chou bei gong zuo de tong zhi* [Circular of the General Office of the State Council on Making Good Arrangements for the Reorganization of Arbitration Institutions and the Establishment of the China Arbitration Association], (Nov. 13, 1994).

<sup>9</sup> The ten recommendations proffered by Professor Cohen include: (1) CIETAC should not use its own personnel as arbitrators; (2) A national of a third country should

professional journal, create an arbitrators' training program, and organize a monthly arbitrators' workshop. All of these features have made the BAC increasingly well-known and regarded as one of the most eminent arbitration commissions in China today.<sup>10</sup> An article in *Business China* even claimed, "The Beijing Arbitration Commission (BAC) is considered the only local arbitration commission which meets or surpasses global standards."<sup>11</sup> Dahan Song, Deputy Director of the Legislative Affairs Office of the State Council, also states that the BAC's development is the epitome of the arbitration industry's development in China.<sup>12</sup> With its leadership position among LACs, the BAC is a useful model for exploring various constraints an LAC faces in contemporary Chinese society, as well as the effectiveness of potential solutions. Although the case study method has limitations compared with other empirical research methods, it is undoubtedly an effective way to probe into the complex and subtle development processes of the LACs. The BAC's case may not completely represent other LACs, but it surely can be a window into the social conditions commonly faced by LACs. The experiences drawn from the example of the BAC may even have applications for the courts in China as they seek to become an independent, competent and fair forum.

#### The BAC's Caseload: 1995-2005

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Total caseload	7	149	168	233	326	449	666	891	1,029	1,796	1,979
International caseload	0	2	1	4	8	11	20	19	33	30	53

Source: BAC's Case Management System

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serve as presiding arbitrator; (3) The presiding arbitrator should be a respected legal expert familiar with the relevant business background; (4) CIETAC should limit the number of cases in which someone can serve as an arbitrator at any one time; (5) CIETAC should prevent its arbitrators from serving as advocates in other CIETAC cases; (6) Advocates as well as arbitrators must fully disclose conflicts of interest; (7) CIETAC should enhance the confidentiality of its proceedings; (8) More stringent standards should be applied to prevent arbitrators from engaging in ex parte contacts regarding their cases; (9) CIETAC staff should not draft awards for arbitrators; (10) CIETAC should require a dissenting arbitrator to write an opinion and make it available to the parties and their advocates. When Professor Cohen discussed recommendations 1, 4, 5, 9 and 10, he mentioned that these measures had been implemented by the BAC. *See* Jerome A. Cohen, *Time to Fix China's Arbitration*, FAR EASTERN ECONOMIC REVIEW, January/February 2005, at 31.

<sup>10</sup> Darwazeh & Moser, *supra* note 6, at 58.

<sup>11</sup> Economist Intelligence Unit, *No Dispute about It*, BUSINESS CHINA, April 24, 2006.

<sup>12</sup> DVD: *Zhu zao gong xin li* [The Establishment of Credibility] (BAC 2006) (on file with the author).

This article is composed of five parts. Part I introduces how the data were collected. The data presented came mainly from personal observations, interviews, and archived documents. Part II focuses on how the BAC strives to be an independent institution. This section discusses in detail how LACs rely on local governments for their funding and for personnel, and to what extent this reliance affects the independence of an LAC. It also describes the BAC's strategy for maneuvering within the legal and policy framework to obtain independent status. Part III explores the question of the competence of the BAC, analyzing the secretariat and the arbitrators separately. The analysis of the BAC's process of strengthening its competence reveals a theme of raising standards and eliminating incompetence. Part IV explores whether the BAC is fair, based on two main criteria: whether effective mechanisms are in place to prevent the occurrence of unfairness, and whether the stated sanctions are enforced strictly when misconduct occurs. Some discussion draws comparisons with corruption in the judiciary, in light of the concern over the spread of corruption from the judiciary to arbitration. Part V summarizes the main findings from the case study of the BAC and analyzes what kind of role BAC leadership plays in the process of seeking independence, competence, and fairness. It looks ahead to the main challenges faced by the BAC as it continues to develop and by other LACs that attempt to model themselves on the BAC.

## I. HOW WAS THE DATA COLLECTED?

As Professor Donald C. Clarke has pointed out, one of the primary obstacles to the study of China's judicial system is that information can be difficult to obtain.<sup>13</sup> The private nature of arbitration makes data even more difficult to access. Observers and visitors to the BAC, however, can observe the changes that have taken place there; but because of the limited access to first-hand data, it is nearly impossible to more intimately explore and discover the internal procedures and processes of the BAC. In order to access the internal operations of an arbitration institution and observe the subtleties of dispute resolution first hand, I chose to serve as a part-time, case-handling secretary with the BAC from April 2005 to April 2007.<sup>14</sup> I assisted various arbitral tribunals dealing with 127 cases in total, participated in part of the promotional activities, and discovered how to collect data in an arbitration organization setting. The data used for this case study were collected through the three sources described below.

### A. *Personal Observations*

I joined the office of the BAC on April 17, 2005. During the first six months I acted as an assistant to a senior case-handling secretary, observing and learning how he managed the cases. I was also required to attend the intensive training

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<sup>13</sup> Clark, *supra* note 5, at 180.

<sup>14</sup> The counterpart in the American Arbitration Association ("AAA") is called a case manager. But the case-handling secretary in the BAC is given broader duties than those of the case manager in the AAA, such as making a record of the hearing and serving documents.

program provided for new recruits.<sup>15</sup> After six months, I was deemed competent to become an independent case-handling secretary and was assigned cases directly. The basic duties of the case-handling secretary included, but were not limited to: accepting claims or counterclaims; delivering various notifications regarding the arbitration; drafting decisions concerning objections to the validity of an arbitration agreement or to jurisdiction over an arbitration case; facilitating the composition of arbitral tribunals; making a written record of the hearing; checking awards; and managing other procedural issues. In practice, all documents and information exchange outside the hearing between the arbitrators and the parties is conducted by the secretary. The secretary can play an important role in the process of resolving disputes, and sometimes the secretary may even know more information than the arbitrators. This direct experience with the nuts and bolts of the arbitration process gave me unique insights into every variable affecting the independence, competence and fairness of the arbitral tribunals.

### B. *Interviews*

While working at the BAC, I conducted many interviews with the arbitrators, staff, and the Secretary-General. These provided much background information, such as how the BAC was established, issues related to the BAC's obtaining full financial independence, as well as obtaining a better idea of the internal operations of BAC. The interviews were conducted under various working situations. Though most of those interviewed knew I worked at the BAC in order to conduct empirical research, usually they did not appear to feel constrained by any special purpose I might have had when I asked a specific question. They seemed to assume that I was simply talking about job-related matters, and appeared to answer candidly.

### C. *Archived Documents*

I collected published and unpublished statistical data, work reports, meeting memos, internal documents and magazines. The BAC, when it was established, equipped every staff member with a computer, built a network and implemented

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<sup>15</sup> The training program consisted of 14 lectures and seminars, including An Introduction to Internal Administrative Regulations of the Secretariat; The Culture and Value Orientation of the BAC; An Introduction to the Labor Union of the BAC office; An Introduction to Beijing Arbitration; Some Tips for a New Secretary; An Introduction to Regulations on Case Management; The Functions and Usage of the Case Management System; The Operation of the Case-filing Office; How to Judge The Validity of Arbitration Clauses and Make a Decision Concerning Jurisdiction; How to Deal With the Relationship Between Secretary and Arbitrator; Attention Points in the Process of Case Management (including three subtopics, which were the period from accepting the case to hearing, making a hearing record, and the period after the hearing and before the conclusion of the case); How to Scrutinize the Draft of the Award; The Role and Function of the Secretary During the Process of Mediation; and The Role and Function of the Secretary During the Process of Appraisal.



an arbitration system driven by management software. As the BAC developed, it upgraded the management software, achieving complete automation of case statistics, scheduling, fee calculation and data processing. It also updated the computer management of arbitration procedures from the acceptance of a case, to constitution of the tribunal, to oral hearings, through the resolution of the case. As such, extensive data can be obtained from the computer management system (also called the case managing system). Additionally, Hongsong Wang has held the position of Secretary-General of the BAC since its establishment. She knows every important event that has happened during the development of the BAC and keeps all the work reports, which made her a key resource for archival institutional information.

## II. MANEUVERING WITHIN THE LEGAL AND POLICY FRAMEWORK TO OBTAIN INDEPENDENCE

Article 8 of the Arbitration Law provides that arbitration should be carried out independently according to law and should be free from interference by administrative organs, public organizations or individuals. Article 14 further stipulates that arbitration commissions shall be independent from administrative organs and there shall be no subordinate relationships between arbitration commissions and administrative organs. In addition, there may be no subordinate relationships between arbitration commissions.

### A. *History of Arbitration Prior to Enactment of the Arbitration Law*

Why does the Arbitration Law specifically use these two articles to underscore the necessity of independence? Certainly a partial answer is that independence is a fundamental requirement for neutrality in dispute resolution. In addition, the specific historical background of Chinese arbitration prior to enactment of the Arbitration Law should be mentioned so that we can better understand the special significance of the foregoing articles. Prior to the enactment of the Arbitration Law, arbitration in China was a two-pronged regime, divided between domestic arbitration and international arbitration. The dividing line between them is that the latter involves “foreign elements.”<sup>16</sup> Domestic arbitration consisted of diverse types of arbitrations among which economic contract arbitration, technology contract arbitration and real estate dispute

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<sup>16</sup> As to the definition of foreign element, there are two interpretations in China: CIETAC and probably CMAC prefer a broad interpretation, accepting a foreign-invested Chinese company as a foreign element. The courts prefer a narrower interpretation, viewing a foreign-invested Chinese legal person as a domestic element. Since the judicial view prevails, it can be said that foreign-related arbitration in China refers to an arbitration involving at least one foreign legal or natural person; a legal relationship formed, performed or terminated outside China; or a property situated outside China. See MO JOHN SHIJIAN, *ARBITRATION LAW IN CHINA* 58-61 (2001).

arbitration were most prevalent. According to the then-effective Economic Contract Law, promulgated in 1981, and the Regulations on Economic Contract Arbitration, promulgated in 1983, economic contract arbitration was conducted by numerous economic contract arbitration commissions that were attached to the State Administration of Industry and Commerce and its subordinate agencies at various levels of government. These arbitration institutions exercised their jurisdiction over arbitrations and disputing parties pursuant to the administrative jurisdictions of different regions and levels. Technology contract arbitration and real estate dispute arbitration were attached to different governmental departments, but shared a structure similar to that of economic contract arbitration.

Prior to the establishment of the above-mentioned types of arbitration, dispute resolution had been “purely administrative,” an arrangement dating from the 1950s. The newer economic contract arbitration procedure in the 1980s was viewed as representing “significant progress.”<sup>17</sup> However, it was still characterized by a lack of independence, a lack of party autonomy, and arbitral awards without binding force.<sup>18</sup> The enactment of the 1995 Arbitration Law unified diverse types of arbitration and established the arbitration agreement as the sole and exclusive basis for the jurisdiction of an arbitral tribunal, and incorporated the principle of a final, binding award. These changes make the full independence of arbitral commissions vital. First, whether the arbitration commission is independent heavily influences whether the parties will choose arbitration. Prior to the Arbitration Law, arbitration institutions could accept cases based on mandatory jurisdiction, without regard for the parties’ intentions. Second, if an arbitration commission is not independent and issues an unfair award, it will be difficult for the aggrieved party to seek a remedy because an award can be set aside only in very limited circumstances. Prior to the Arbitration Law, arbitration awards did not have a binding effect on the parties. If a party were dissatisfied with an arbitration award, it could initiate civil proceedings in court.

#### B. *Establishment of the BAC*

Although provisions of the Arbitration Law state that the independence of arbitration institutions is absolute, scholars and practitioners have questioned the independence of the institutions in actuality. Professor Clarke believes that local arbitration commissions are closely tied to the government, especially relying on local government for their funding and for personnel.<sup>19</sup> Is this claim accurate? If so, how do LACs rely on local governments for their funding and personnel, and to what extent does this reliance affect their independence? To answer these questions, specific examination of the funding and personnel of the BAC is necessary.

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<sup>17</sup> John A. Spanogle, Jr. & Tibor M. Baranski, Jr., *Chinese Commercial Dispute Resolution Methods: The State Commercial and Industrial Administration Bureau*, 35 AM. J. COMP. L. 761, 798 (1987).

<sup>18</sup> TAO JINZHOU, *ARBITRATION LAW AND PRACTICE IN CHINA* 3-4 (2004).

<sup>19</sup> Clark, *supra* note 5, at 171.

A comprehensive understanding of funding and personnel of the BAC begins with an understanding of how it was established, a process which was closely linked to the historical background of the enactment of the Arbitration Law. According to Article 10 of the Arbitration Law, arbitration commissions were to be “established in municipalities directly under the central government and in cities that are the seats of the People’s Governments of provinces or autonomous regions.” They could also be established in other cities divided into districts, according to need. Arbitration commissions would not be established at each level of the administrative divisions. The People’s Government institutions of the cities referred to above would arrange for the relevant departments and chambers of commerce to organize arbitration commissions in a unified manner (Article 10). Arbitration institutions established prior to the implementation of the Arbitration Law in the municipalities directly under the central government, in the cities that are the seats of the People’s Government of provinces or autonomous regions and in other cities divided into districts were to be reorganized in accordance with the Arbitration Law. Those arbitration institutions that had not been reorganized would terminate at the end of one year from the date of the implementation of the Arbitration Law. Other arbitration institutions established prior to the implementation of the law that did not comply with its provisions would terminate on the date of its implementation (Article 79).

Prior to the enactment of the Arbitration Law, there were 3,500 economic arbitration commissions: 30 at the provincial level, 443 at the prefecture level, and 3,027 at the county level. There were also 5,000 detached arbitral tribunals at the township level. At the same time, there were more than 20,000 persons employed in work related to economic arbitration commissions and over 8,800 full-time arbitrators. In addition, there were 30 technology contract arbitration institutions with more than 1,000 arbitrators nationwide and 110 real estate dispute arbitration institutions with more than 2,000 full-time arbitrators.<sup>20</sup>

Given that so many people would be affected by the Arbitration Law, the reorganization of the arbitration commissions was considered an important task that would be impossible to achieve without the active participation of the government. Furthermore, the involvement of the government was critical because the enactment of the Arbitration Law was regarded as part of a much larger process of economic reform. Indeed, one of the law’s main purposes was to develop the “socialist market economy” and to facilitate foreign economic trade and exchanges.<sup>21</sup> Thus, about two months after the Arbitration Law was adopted

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<sup>20</sup> Shengming Wang & Xiuchun Xu, *Guan yu zhong cai fa de ruo gan wen ti* [*On Some Problems Concerning Arbitration Law*], in CHONG XIN ZU JIAN ZHONG CAI JI GOU SHOU CHE [MANUAL ON REORGANIZING ARBITRATION INSTITUTIONS], 18 (Guo wu yuan fa zhi ju yan jiu shi [Research Dept. of the Legislative Affairs Office of the State Council] ed., 1995) [hereinafter MANUAL].

<sup>21</sup> Yangran Gu, *Guan yu Zhonghua Renmin Gongheguo zhong cai fa (cao an) de shuo ming* [*Explanation Concerning the Arbitration Law of People’s Republic of China (draft)*], available at <http://www.law-lib.com/fzdt/newshtml/20/20050805195952.htm>.

at the Ninth Meeting of the Standing Committee of the Eighth National People's Congress on August 3, 1994, Hanbin Wang, the Vice Chairman of the National People's Congress, convened a meeting which included representatives from the State Economic and Trade Commission, the State Commission for Restructuring the Economy, the Ministry of Justice, the State Administration for Industry and Commerce, and the Council for the Promotion of International Trade, to discuss and reach an agreement concerning the reorganization of the arbitration commissions.<sup>22</sup>

Following the meeting, a *Circular of the General Office of the State Council on Making Good Arrangements for the Reorganization of Arbitration Institutions and the Establishment of the China Arbitration Associations* was issued on November 13, 1994. According to the provisions of this circular, reorganization of arbitration institutions was to be carried out in the cities of Beijing, Shanghai, Tianjin, Guangzhou, Xi'an, Hohhot and Shenzhen on a trial basis. These seven cities were asked to study the establishment of such arbitration institutions, including the appointment of the arbitrators and the composition, constitution, registration, property and funding of the arbitration commission, and thereupon to make proposals in these areas. The projects were spearheaded by an existing senior official in each municipal government who was to be in charge of that particular city's reorganization of its arbitral institution. The specific work was to be organized by the Bureau of Legislative Affairs, with the participation of the Justice Bureau, the Industry and Commerce Administration, the Council for the Promotion of International Trade, and the Association of Industry and Commerce.

In accordance with the above requirements, the work of establishing the BAC was organized by the Office of Legislative Affairs of the Beijing Municipal Government. In May 1995, Ms. Hongsong Wang, then a research fellow in the Legal Affairs Office of the Beijing Municipal Government, was assigned to take charge of the establishment of the BAC.

To provide guidance on the reorganization of the arbitration commissions, the General Office of the State Council issued several related documents on August 1, 1995, including the Plan for the Reorganization of Arbitration Institutions ("PRAI"), Interim Procedures for Registration of Arbitration Commissions ("IPRAC"), Arbitration Fee Collection Measures of Arbitration Commissions ("AFCMAC"), Model Text of Arbitration Commission Charter ("MTACC"), and Model Text of Arbitration Commission Interim Rules ("MTACIR"). These documents were drafted and promulgated according to the Arbitration Law in an effort to make the Arbitration Law more specific and suitable for arbitration practice. Two aspects related to personnel matters should be mentioned.

First, the appointment of commission members and the establishment of working bodies are specified. The Arbitration Law provides that an arbitration commission shall be composed of one chairman, two to four vice chairmen and

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<sup>22</sup> Jingyu Yang, *Guan yu yi fa chong xin zu jian zhong cai ji gou de ji dian yi jian* [Some Opinions on Reorganizing Arbitration Institutions According to Law], in MANUAL, *supra* note 20, at 3.

seven to eleven members. The chairman, vice chairmen and members of an arbitration commission must be persons specialized in law, economics and trade and must be persons who have actual working experience. The number of specialists in law, economics and trade shall not be less than two-thirds of the members of an arbitration commission (Article 12). This provision does not state whether the chairman, vice chairman and commission members should be full-time or part-time, or how to appoint them. Thus, the PRAI specifies that one or two persons shall be full-time commission personnel and the others shall be part-time. As for the members of the inaugural term of an arbitration commission, they must be appointed by the People's Government of that city upon the recommendation by various departments such as governmental legal affairs, economics and trade, system reform, justice, the administration for industry and commerce, science and technology or urban construction, and organizations such as the trade promotion commission or the association of industry and commerce. The PRAI also stipulates that one secretary-general shall be appointed to each arbitration commission. The post of secretary-general may be held concurrently by a full-time member of the arbitration commission.

A working body that shall be responsible for handling the acceptance of arbitration cases, processing arbitration documents, file management and collection and management of arbitration fees shall be established under the arbitration commission. The secretary-general shall be responsible for the routine duties of the working body. The establishment of the working body and hiring of personnel shall be carried out in a streamlined and efficient manner. During the initial period of operation of the arbitration commission, it is not necessary for the working body to have excessive personnel. The number of staff members may be suitably increased with the growth of the arbitration workload. The personnel of the working body are required to possess good moral character and professional skills and will be appointed on the basis of competitive selection. The MTACC further specifies that the appointment of the personnel of the working body will be decided by its standing committee, which consists of the chairman, vice chairmen and secretary-general. It will manage important day-to-day operations when the commission is not sitting.

Second, the functions of commission meetings are specifically set out by the MTACIR as follows: (1) to review important issues before the arbitration commission, such as work policy and work plans, and to make corresponding decisions on these issues; (2) to review and adopt the annual work report and financial report submitted by the secretary-general; (3) to decide on the candidates for the post of secretary-general and members of the Expert Advisory Board; (4) to review and approve the plan for the establishment of the administrative body; (5) to decide on the appointment and dismissal of arbitrators; (6) to decide on any challenge to the chairman when the chairman acts as an arbitrator; (7) to revise the constitution of the arbitration commission; (8) to decide on the dissolution of the arbitration commission; and (9) to handle any other duties prescribed by the Arbitration Law, the Provisional Arbitration Rules and the Constitution.

### C. *Appointment of Commission Members*

The work of organizing the BAC was conducted within the framework provided by the Arbitration Law and related regulations. According to this framework, the personnel of the BAC were appointed by the Beijing Municipal Government (“BMG”). It is worth considering whether having such appointments made by the Municipal Government affected the independence of the BAC. Since the major qualifications for personnel have been clearly provided in Article 12 of the Arbitration Law and the candidates are to be recommended by specified departments and organizations, the appointment power of the BMG appears to be purely procedural, and in practice it never vetoes the recommendations. Thus, the recommendation of candidates by the various departments is a critical step. Because the jurisdiction of the arbitration commission over a dispute is based on the voluntary agreement of the parties, those who recommend the candidacy of commission members face a natural constraint. They must choose individuals who have an excellent reputation both in their area of expertise and for high ethical standards and who can help the arbitration commission win the confidence of disputing parties who come before it. If they did not, the arbitration commission would probably not survive because of a lack of ability to bring in business. Thus, those who were responsible for the recommendation of candidates to the BAC recommended experts and scholars in the legal and trade fields to serve as commission members, particularly as evidenced by the appointment of Professor Ping Jiang as the chairman, who at the time was one of China’s best-known legal reformers.

### D. *Mechanisms that Encourage Independence*

Meanwhile, the willingness of candidates to accept their nominations must be noted. The position of commission member is unpaid; it is deemed pro bono work. This reduces the possibility for any person to make inappropriate overtures toward a specific governmental department in order to solicit appointment or re-appointment and helps commission members to remain committed to the values of independence and fairness in policy-making. Another mechanism helpful in resisting external influence is vesting the power of decision-making in the commission meetings. According to the Constitution of the BAC, meetings of the Commission shall be chaired by the chairman or the vice chairman designated by the chairman. A meeting may not be held unless more than two-thirds of the members of the commission are present. Any resolution on the revision of the Constitution or dissolution of the BAC may only be adopted with the approval of more than two-thirds of the members of the commission. Any other important resolutions may only be adopted with the approval of more than two-thirds of the commission members present at the meeting. This decision-making mechanism makes it difficult to affect the independence of the members of the arbitration commission. It also gives every commission member an excuse to reject any improper request without offending the petitioner because he can explain that he

or she alone cannot affect the result of the decisions made by commission. This analysis supports the conclusion that the appointment of commission members by the government at the inception of an LAC would not necessarily harm its independence.

Also significant for the BAC is its funding source and the effects of that source on its independence. According to the PRAI, during the initial period of the establishment of the arbitration commission, the local People's Government of that city shall, referring to the relevant provisions on institutional organizations, arrange for the establishment of the staff, funds, and sites for the arbitration commission. The arbitration commission will gradually establish a system of independent revenue and expenditure. BAC Secretary-General Wang acknowledged that, in the initial period of the establishment of the BAC, most of its funds came from the government. Actually, it has not been uncommon in other parts of Asia for a newly-established arbitration institution to be funded by the government.<sup>23</sup> Three years after its establishment, the BAC achieved the goal of "financial independence," and in 2002, it attained the status of an "institution managed as an enterprise" and gained greater management freedom through tax payments.<sup>24</sup>

It is notable how the BAC achieved this goal of financial independence. The main reason is that its caseload increased dramatically in the first three years, and this provided a stable source of funding from arbitration fees paid by the parties. Why did the BAC attain the status of an institution managed as an enterprise and gain greater management freedom through tax payments? In accordance with

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<sup>23</sup> For example, the Singapore International Arbitration Center ("SIAC") states in its website, "Funded by the Singapore government at its inception, SIAC is now entirely financially self-sufficient." See Singapore International Arbitration Center, <http://www.siac.org.sg/aboutus.htm>; the Hong Kong International Arbitration Center ("HKIAC") also mentions in its website that it "has been generously funded by the business community and by the Hong Kong Government but it is totally independent of both and it is financially self sufficient." See Hong Kong International Arbitration Center, [http://www.hkiac.org/HKIAC/HKIAC\\_English/main.html](http://www.hkiac.org/HKIAC/HKIAC_English/main.html).

<sup>24</sup> Hongsong Wang, *Beijing zhong cai wei yuan hui shi zhou nian zong jie* [Decade Review of the Development of BAC], in SHANG SHI ZHONG CAI LI LUN YU SHI WU [THEORY AND PRACTICE OF COMMERCIAL ARBITRATION] 254 (Runshi Yang ed., 2006). The emergence of the "institution managed as an enterprise" occurred during the process of China's reform of institutions. Before adopting the reform and open policy in 1978 and even during the 1980s, China was deeply influenced by the Soviet Union and the public sector was extremely strong and the private sector was very weak. Most public institutions were established and funded by the government and applied a similar personnel and financial system as the government. In the 1990s, the government began to permit those institutions, which could obtain stable funding by providing service, to adopt the financial "management system of enterprise" which means the institutions do not have to follow the system of "income and expenses separate" management [*Shou zhi liang tiao xian guan li*] explained below and have the freedom to tie the wages of staff to the economic performance of the institution after paying business tax based on the revenues generated.

financial regulations, the office of the BAC is treated as a public institution (*Shi ye dan wei*). Public institutions in China can be divided into three categories according to their funding sources: public institutions that receive appropriations for their full cost (*Quan e bo kuan de shi ye dan wei*), those that receive appropriations for part of their cost (*Cha e bo kuan de shi ye dan wei*), and those that receive no appropriations at all (*Zi shou zi zhi de shi ye dan wei*). Although since 1999, the BAC has not had to depend on such appropriations, it still has been constrained by the system of “income and expenses separate” management (*Shou zhi liang tiao xian guan li*). This regulation requires that, when collecting arbitration fees, the BAC use receipts for collection of administrative institutional fees that are uniformly printed by the municipal department of finance, accurately record collected fees, and entrust a bank with collection on its behalf. Under this regime, all the administrative institutional fees must be credited to a bank account endorsed by the municipal department of finance and remain available for supervision and examination conducted by the departments of finance, prices, auditing, etc. As for expenditures, the BAC has had to submit a budget report every year to the municipal department of finance for its approval. The expenditures were then appropriated from the BAC’s endorsed bank account according to the approved budget report. This meant that although the BAC’s income from arbitration fees exceeded its expenditures, it did not have the power to use the surplus funds. As a result, the BAC continued to negotiate with the municipal department of finance, and in 2002 the BAC attained the status of an “institution managed as an enterprise” and thereby gained greater management freedom through tax payments. As a result of this administrative change, the BAC can now allocate those funds leftover after paying taxes so that it can meet its development needs, such as providing more competitive remuneration to attract high caliber arbitrators or staff.

The BAC has been self-funded since 2002 and therefore cannot be accused of bias due to government funding. The question remains, however, whether government funding of arbitration commissions in general harms the independence of the arbitration commissions, and deserves further research. The key question is whether the decision-making process for appropriations is transparent. If it is transparent, the arbitration institution will likely not be affected. If it is not transparent, inappropriate action might occur, threatening the independence of the arbitration institution. In China, a more important issue is whether the arbitration commissions will comply with the system of “income and expenses separate” management. If so, the operation of the arbitration institution will be heavily affected, since expenditures would have to be approved by the government and the LAC might not have the flexibility to meet needs such as development.

To maintain its independent status, the BAC also tries to use political discourse to encourage self-restraint on the part of the BMG. The Work Summary of the First Session of the BAC states that the development of the BAC has benefitted from the strong support of the BMG. When it appointed the BAC’s personnel during the process of its establishment, the Municipal Government



leadership adhered to the regulations of the Arbitration Law and designated experts and scholars in the legal and trade fields as the Chairman and Commission members of the BAC. This lent immediate expertise and credibility to the BAC and generated a favorable reaction throughout the country and around the world. Subsequently, the Municipal Government offered the necessary financial assistance and continued to provide the BAC with the freedom to operate independently, which guaranteed the independence of its arbitrations and established a strong foundation for the development of the BAC. In a variety of settings, the BAC emphasizes repeatedly that its separateness from the government has, from the very beginning, been affirmed by the relevant departments. The BMG definitively stated that “the government’s greatest form of support for arbitration is its absence of intervention.”<sup>25</sup> This hands-off approach has created a favorable environment for the self-directed development of the BAC. In fact, the BMG statement quoted above is often cited by the BAC, not only to indicate its independence, but also to make other relevant officials consciously respect the autonomy of the BAC rather than try to interfere with its operations. For a government official to attempt to influence decisions of the BAC, given the public affirmation above, would jeopardize the standing of both the BAC and the BMG.

It is important to emphasize that the meetings of the Commission do not involve deciding specific cases, which is within the power of each arbitral tribunal. This affords an additional guarantee of independence in arbitrations in that commission members and other staff in the BAC office are removed from the decision-making process. Suppose a commission member or a staff member in the BAC office would like to influence an arbitral tribunal; can he or she succeed? To answer this question, we should examine the relationship between the arbitral tribunal and the arbitration institution. According to the Arbitration Law, the award of an arbitral tribunal composed of three arbitrators must be made by a majority decision. A dissenting opinion of the minority may be put on record. If the arbitral tribunal fails to reach a majority decision, the award shall be made in accordance with the decision of the presiding arbitrator (Article 53). This would indicate that the arbitral tribunal alone has the authority to decide the merits of the case without interference from the Commission. This is so even though the Arbitration Law stipulates that the award shall be signed by the arbitrators and sealed by the arbitration commission, and in practice the secretariat of the arbitration commission will scrutinize proposed awards for technical mistakes before sealing.

As Professor Cohen has pointed out with respect to CIETAC’s practice, scrutiny can sometimes go far beyond technical mistakes, by actually influencing decisions on the merits.<sup>26</sup> At this point, two questions deserve to be considered. First, to what extent is such scrutiny proper? It is clear that typographical errors

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<sup>25</sup> DVD, *supra* note 12.

<sup>26</sup> Jerome A. Cohen, *CIETAC’s Integrity*, FAR EASTERN ECONOMIC REVIEW (July 2005).

and calculation errors fall within the proper scope of scrutiny. Actually, in practice, the secretary also will pay attention to whether there are matters that had been decided but omitted in the award, and whether the evidence referenced in the award is in accordance with the record of the hearing. If the case is one of a group of cases, such as disputes over contracts for commodity housing sales,<sup>27</sup> the secretary will determine whether the same dispute has previously been decided in the same way. If not, he will notify the arbitrators of the potential conflict. However, the arbitrators must exercise their authority to decide how to deal with the potential conflict. Second, if the scrutiny goes beyond the proper scope, the arbitrators can prevent the award from becoming final by refusing to sign it. According to the BAC's arbitration rules, the arbitrator also can issue a dissenting opinion, which must be sent to the parties together with the award (Article 41). During my tenure at the BAC, I was aware of two instances where an arbitrator refused to sign the award and instead issued a dissent. So the secretary's scrutiny will not affect the independence of the arbitrator unless the arbitrator gives up his own independence. In practice, arbitrators usually care about their reputation very much and decide the case accordingly.

### III. RAISING STANDARDS AND ELIMINATING INCOMPETENCE

When a case is submitted to arbitration, a secretary will be assigned by the secretariat to manage the case and provide services to the disputing parties and the arbitral tribunal. As a result, the question of whether an arbitration commission is competent should be considered by inquiring separately into the competence of the secretaries and the arbitrators.

#### A. *Are the Arbitrators of the BAC Competent?*

Under the Arbitration Law, arbitration must be conducted by the arbitrators appointed from the list or panel of arbitrators maintained by an arbitration commission. Being listed in a panel of arbitrators is a precondition for a person to be appointed as an arbitrator in a case. In practice, the listing of arbitrators is a process by which an arbitration commission exercises its discretion pursuant to the uniform but general qualifications set out in Article 13 of Arbitration Law.<sup>28</sup> Thus, whether a commission's arbitrators are competent depends on whether an

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<sup>27</sup> In this category of disputes, usually there are many disputes with the same facts.

<sup>28</sup> Arbitration Law, Art. 13: "The arbitration commission shall appoint fair and honest persons as its arbitrators. Arbitrators must fulfill one of the following conditions: 1. they have been engaged in arbitration work for at least eight years; 2. they have worked as a lawyer for at least eight years; 3. they have been a judge for at least eight years; 4. they are engaged in legal research or legal teaching and in senior positions; or 5. they have knowledge of the law and are engaged in professional work relating to economics and trade, and are in senior positions or the equivalent professional level. The arbitration commission shall establish a list of arbitrators according to different professions."

arbitration institution can successfully select and maintain a competent panel of arbitrators. The BAC recognizes that, as China has implemented a system of institutionalized arbitration, establishing a sound system for selecting and training qualified arbitrators is a responsibility that an arbitration institution must assume. It is also one of the objective requirements necessary for an arbitration institution to maintain its competitiveness and uphold its reputation.<sup>29</sup> Therefore, to evaluate the competence of the BAC's arbitrator panel, it is necessary to examine separately academic qualifications, appointment standards, professional training, and case-specific performances.

### 1. Academic Qualifications

Many scholars agree that education is an important indicator of the quality of an arbitrator. As shown in the table below, the statistics on academic qualifications of successive terms of arbitrators at the BAC indicates that the percentage of arbitrators with Ph.D. and master's degrees has increased, while the percentage of arbitrators without bachelor's degrees has declined from 65.45% in the first session to 8.64% in the fourth session. Thus, the level of education of arbitrators in the BAC has risen dramatically.

Academic Qualifications of Arbitrators of BAC

Highest degree held	1 <sup>st</sup> term 1995-98	2 <sup>nd</sup> term 1998-01	3 <sup>rd</sup> term 2001-04	4 <sup>th</sup> term 2004-05
Ph.D.	8.73%	17.72%	27.02%	28.57%
Master's	14.18%	27.56%	32.28%	36.88%
Bachelor's	11.64%	19.69%	19.30%	25.91%
Other	65.45%	35.04%	21.40%	8.64%

Source: BAC's Case Management System (the 4th term data is through October 2005)

Certainly, the value of using education to measure competence should not be exaggerated. While discussing the competence of the judiciary in China, Professor Hualing Fu has pointed out that legal education may not be a valid test because legal reform and legal education are still relatively new to China. It also takes time for a legal system to evolve and mature. Given the intricate relationships the courts must maintain to survive politically and economically, the competence of

<sup>29</sup> Wang, *Decade Review*, *supra* note 24 at 259.

the presidents of the courts could be determined by their political skill and connections, not their legal learning.<sup>30</sup>

The insights of Professor Fu can be confirmed by the distribution of the academic qualification of arbitrators of the first term. Around 1995, even those who were deemed professionals or experts in their field rarely held a bachelor's degree or higher. At that time up to 65.45% of arbitrators on the panel had not received an undergraduate legal education. However, this does not mean that those appointed without higher education were necessarily competent. Interviews with Secretary-General Wang disclosed that two aspects of the arbitrator panels in the first term were not satisfying.<sup>31</sup> First, most of the arbitrator candidates were recommended by the working units to which they belonged. Therefore, some units recommended the candidates according to their seniority rather than according to their actual ability to deal with the case. They treated the position of arbitrator as an honor to be conferred rather than a professional position. Although there were nearly 1,000 candidates in the pool for the first 273 arbitrators, some arbitrators proved unsuitable after the test of dealing with real cases.<sup>32</sup> Second, to resolve the problem arising from the merger of newly established arbitration commissions with existing arbitration organs, the PRAI required that, as to the appointment of arbitrators or employment of personnel for the working body, those in existing arbitration organs who satisfied the requirements were to be considered first. As such, 44 arbitrators in the arbitrator panel of the first term were appointed from among the arbitrators of the former technology contract arbitration commission. But the number of technology contract disputes was very small, so most of the arbitrators in this field had little experience, if any. The subsequent progress made in choosing arbitrators is discussed below, after further consideration of the question of appointment standards.

## 2. *Appointment Standards*

The problems of arbitrator quality in the first term demonstrated the great need to build an arbitrator team with strong professional and ethical standards. Awareness of the importance of the arbitrators compelled the BAC to deliberate and explore constantly the issues of “what kind of person is suitable to be an arbitrator” and “how to select and train arbitrators.”<sup>33</sup> Let us explore how the BAC answers these two questions in practice.

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<sup>30</sup> Hualing Fu, *Putting China's Judiciary into Perspective: Is It Independent, Competent, and Fair?*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* 208 (Erik Jensen & Thomas Heller eds., 2003).

<sup>31</sup> Interview with Hongsong Wang, Secretary-General, BAC (Apr. 24, 2006).

<sup>32</sup> Hongsong Wang, *Quan guo zhong cai gong zuo hui yi shang de fa yan* [The Speech at the National Arbitration Work Meeting] (September 13, 1997) (transcript on file with the author).

<sup>33</sup> Wang, *Decade Review*, *supra* note 24 at 259.

What kind of person is suitable to be an arbitrator? The BAC's view was that, since the objective of arbitration is to resolve disputes fairly, reasonably and promptly, having high academic qualifications or job title and rank are merely an outward manifestation of professional qualification, neither of which necessarily represents nor truly reflects the actual standards and abilities of an arbitrator in handling cases.<sup>34</sup> This means that legal education only provides the possibility for a professional to be a qualified arbitrator but is not the only requirement needed by an arbitrator. What are the further requirements of an arbitrator? Wang told me she once tried to find a description of what an ideal arbitrator should be, but she failed. Although it is not difficult to find a description of what an ideal judge should be, it is rare to come across a similar description of an arbitrator. After ten years of exploring, Wang formulated her own ideal image of an arbitrator:

An arbitrator should be an expert, a special talent with all-round capabilities, who is not only proficient in his specialty but is also familiar with arbitration theories, arbitration rules, and arbitration procedures and practices. He must not only know the theories, and have the requisite knowledge but must also have wisdom, experience and ability. An arbitrator must have an aspiration for arbitration work. Not only must he have an in-depth understanding of the values and significance of arbitration and a strong sense of identity with arbitration, he must also have a strong interest and passion for arbitration work (and not merely be interested in the status and honor accorded to an arbitrator), and have long-term plans and thoughts for his career development in arbitration.<sup>35</sup>

Secretary-General Wang admitted that these attributes represent an ideal, but they are the fundamental ideas that are driving the BAC to spare no effort in the establishment of a modern arbitrator system.<sup>36</sup> To attract outstanding talent, the BAC crystallized the provisions of the Arbitration Law on the qualifications of arbitrators, and promoted greater transparency and standardization by formulating its own standards and measures for appointing arbitrators. "The Standards for the Selection and Appointment of Arbitrators" ("Selection and Appointment Standards") was deliberated and approved by the 1st Meeting of the 2nd Session of the BAC in September 1998. The criteria for the selection and appointment of arbitrators are based on the Arbitration Law and the needs of the BAC's own development, and are considered in totality with the quality of the work force in Beijing. Specific requirements (such as an arbitrator's educational background, professional experience and industrial evaluation) for professionals to act as arbitrators have been categorized under different headings, *i.e.*, "lawyers," "professionals from the economic and trade sector," "personnel engaged in legal education or legal research work," "personnel from administrative organs or industrial administrative departments," "personnel who were originally engaged in arbitration work," or "judicial officers who have left service or retired." In

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<sup>34</sup> *Id.* at 274.

<sup>35</sup> *Id.* at 259-60.

<sup>36</sup> *Id.* at 260.

accordance with this provision, up to 44.7% of the arbitrators on the panel of the first term were not re-appointed in 1998. Therefore, raising the qualification threshold by adopting the Selection and Appointment Standards helped not only with the appointment of qualified new arbitrators, but also by reducing the number of original arbitrators with unsatisfactory qualifications.

In December 1999, the 4th Meeting of the 2nd Session of the BAC approved the revisions to the “Standards for the Selection and Appointment of Arbitrators” and renamed it “Standards for the Selection, Appointment and Re-Appointment of Arbitrators,” stipulating that arbitrators must be “of noble character, fair and upright, conscientious and diligent, modest and prudent.” This revision augmented the moral content of the document and added the requirement that arbitrators “must be clear-minded and quick-witted, able to judge judiciously and with insight, able to communicate effectively in writing and orally, capable of hearing cases, mediation work and rendering awards and competent in handling cases.” Subsequently, the BAC revised the “Selection Standards” in April 2001 and September 2003 and renamed them “Administrative Measures for the Appointment of Arbitrators” (“Administrative Measures”). Procedural provisions for managing the selection and appointment of arbitrators were added, the parties’ expectations of arbitrators were adopted as the fundamental selection criterion, and the creation of a team of high-caliber arbitrators was set as the goal. The Administrative Measures also placed great emphasis on professional background, case-handling capabilities and experience of an arbitrator. For arbitrators in different categories, the Administrative Measures set forth specific requirements.<sup>37</sup> The formulation and revision of the selection and appointment criteria and measures reflect the BAC’s focus and effort to build a qualified, consistent, and reliable arbitrator panel.

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<sup>37</sup> For example, the revised 2003 Administrative Measures stipulate that the basic requirement for arbitrators in legal education or research work is they must not only be professors or research fellows but must also be “directly engaged in education or research work in civil and commercial law” and “possess the relevant experiences in handling cases”; for arbitrators working in the economic and trade sectors, the basic requirement is they must “hold a senior title in this field or a deputy senior title,” and they must also “have been engaged in economic and trade or professional technical work for eight years and have the relevant legal knowledge and a wealth of experience”; for arbitrators who are retired judges or who have left the judiciary, they must “hold a degree in law or higher academic degree” and must also have been “engaged in hearing civil and economic cases or research works for a long period of time,” “have a good reputation, high work performance standard, be competent in handling cases, a senior judge who was a presiding judge or deputy president of a law court or tribunal”; for arbitrators who are lawyers, they must not only “have a high professional standard and good reputation in the legal profession and no disciplinary or bad record,” they must also “be competent to act as a presiding arbitrator or sole arbitrator”; for arbitrators who are from Hong Kong, Macau and Taiwan and who are foreign nationals, other than meeting the aforesaid requirements, they must “have abundant practical experience in arbitration work.”

Since the criteria for the selection and appointment of arbitrators were issued, the BAC has made their strict implementation a high priority. On the one hand, the BAC actively takes in outstanding talents, providing them with opportunities and spurring them to become accomplished arbitrators as soon as possible; on the other hand, the BAC removes those arbitrators who fail to meet the moral standards and professional requirements of the panel of arbitrators. Through this removal of unqualified arbitrators and the addition of new arbitrators, the good reputation and professionalism of arbitrators are maintained. By 2005, the BAC had undergone three terms of changes and a total of 286 arbitrators had not been reappointed.<sup>38</sup>

### 3. Professional Training

While the BAC is stringent in selecting and engaging high caliber talent, it has always attached great importance to the training and examination of current arbitrators. Actually, since its establishment the BAC has organized arbitration training and emphasized that arbitrators should attend training sessions to improve their skills and stay current with relevant information. For example, from October to the middle of November 1995, all arbitrators were divided into two groups to receive training on the “Arbitration Law of P. R. China,” the Rules of Arbitration, and Ethical Standards for Arbitrators.<sup>39</sup>

In February 2002, the training of arbitrators was given even greater importance. At the 2nd Meeting of the 3rd Session of the BAC, a decision was made to implement a new training system for arbitrators. Newly-appointed arbitrators or arbitrators from previous terms who had not undergone training were to attend training courses on Ethical Standards for Arbitrators, Administrative Measures for Appointment of Arbitrators, and the rules for handling cases and rendering arbitral awards organized by the arbitration commission (BAC, 2002). The 2003 version of Administrative Measures provides that an arbitrator shall undergo the relevant training courses and requisite examinations on the arbitration rules, ethical standards, and arbitration practices. Those who do not attend the training will not be appointed by the Chairman of the BAC to hear arbitration cases. If a previously appointed arbitrator fails to attend the BAC’s courses for arbitrators, lacks arbitration experience or has not handled arbitration cases for a long period of time, the BAC will not re-appoint him (Articles 8, 12). This requirement links an arbitrator’s attendance at training courses with his appointment as an arbitrator by the chairman of the arbitration commission and his re-appointment by the arbitration commission.

On August 25, 2004, the 1st Meeting of the 4th Session of the BAC deliberated and approved “The Decision on Intensifying the Training and

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<sup>38</sup> Wang, *Decade Review*, *supra* note 24, at 262.

<sup>39</sup> Hongsong Wang, *Beijing zhong cai wei yuan hui gong zuo zong jie* [Work Summary of the Beijing Arbitration Commission] (December 29, 1996) (unpublished memorandum, on file with the author).

Examination of Arbitrators” (“Decision”). Other than reiterating the principle that the Chairman of the BAC shall give priority to appointing arbitrators to hear cases who have passed the training and examination conducted by the institution, the Decision stipulates that it will give priority in appointments to arbitrators who meet the requirements of the Administrative Measures for the Appointment of Arbitrators and who have also attended the institution’s training and sat for its examinations. The training and examinations for arbitrators shall be organized and conducted by “training institutions” commissioned by the arbitration commission,<sup>40</sup> and an arbitrator’s training shall be included as part of his professional background and shall be listed in the BAC arbitrators computer enquiry system.<sup>41</sup>

#### 4. *Case-Specific Performance*

The BAC has gradually and successfully enhanced the competitive qualifications of its arbitrator panel. With such amplified qualifications, did the BAC’s arbitrators perform in specific cases? Were they competent to handle real cases? Two approaches are helpful to explore this question. The first is whether the awards made by arbitrators stood the test of judicial supervision. By the end of 2005, the BAC had accepted 7,699 cases and concluded 6,840 cases, with a conclusion rate of 89%. According to the information available to the BAC, among the concluded cases, 26 cases were judicially set aside or partially set aside, eight cases were ordered to be re-arbitrated and 18 cases were disallowed.<sup>42</sup> The percentage set aside or ordered to be re-arbitrated or disallowed was less than 1%, suggesting a generally high quality performance in the handling of cases. Furthermore, none of the cases set aside, ordered re-arbitrated, or disallowed was an international arbitration case.

Even in the small number of cases set aside, ordered to be re-arbitrated, or disallowed, the basis was not the incompetence of the arbitrators, but mainly because of the rigid judicial interpretation of the Arbitration Law. For example, the Chinese Arbitration Law provides that evidence shall be presented for examination during the hearing (Article 45). Most arbitrators held that: (1) the purpose of this provision is to guarantee the right of the parties to examine the

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<sup>40</sup> The BAC commissioned the Law School of Tsinghua University to organize and provide a four-day professional training course twice a year, consisting of Arbitration Law and its Value Orientation, The Ethics of Arbitrators, The Application of Evidence Rules in Arbitration Process, The Facilitation of Arbitration Process and the Disposal of Related Issues, The Drafting of Arbitral Award, Group Discussion, and Arbitration Moot Court, available at <http://www.tsinghua.edu.cn/docsn/fxy/webchn/px/xm/20070709-zc.htm>.

<sup>41</sup> The BAC maintains an arbitrators database for the use of disputing parties, containing every arbitrator’s background information, such as education, occupation and specialty.

<sup>42</sup> Hongsong Wang, *Zai 2006 nian chun jie cha hua hui shang de jiang hua* [The Speech at the Spring Festival Tea Party of 2006] (January 20, 2006) (transcript on file with the author).



evidence, and (2) the hearing is not mandatory, because the Arbitration Law also states that if the parties agree not to hold a hearing, the arbitral tribunal may render an award in accordance with the pleadings and other supporting documents (Article 39). As such, where evidence is produced by any party during or after the hearing, the arbitral tribunal may decide to admit the evidence without holding further hearings and require the parties to submit in writing any challenge to the authenticity, admissibility and relevance of such evidence within a specified period of time. But some judges have insisted that this practice violates the requirement of holding a hearing provided by the Arbitration Law and have set aside the related awards.<sup>43</sup>

Another way to evaluate whether BAC arbitrators are competent in specific cases is to interview the secretaries who work at the BAC office. The secretaries at the BAC have the opportunity to work with different arbitral tribunals and observe their performance in handling cases, so they are able to gauge the competence of arbitrators. According to my own experience and the interviews with other secretaries, the competence of arbitrators really is case-specific. In terms of deciding on substantive points of law, if the case to be handled falls into an arbitrator's specialty, the arbitrator usually will be very competent to deal with the case. If not, the arbitrator is presented with a great challenge. As far as presiding over hearings and dealing with other procedural items, those arbitrators who have received training usually do a better job than those who have not. Generally, the most difficult cases are those involved with construction contracts. Only a small percentage of arbitrators on the panel are competent to be a presiding arbitrator in a major case concerning construction contract disputes.

Some experts believe that whether all local arbitration commissions are in fact competent and experienced enough to handle foreign-related arbitrations remains an open question because in practice most local commissions deal predominantly with domestic disputes, which do not involve foreign parties.<sup>44</sup> Actually, many arbitrators on the BAC's panel are also on the panels of other international arbitration institutions such as CIETAC and the Hong Kong International Arbitration Centre ("HKIAC"). Thus, the pivotal question is whether the parties nominate suitable experts to the arbitral tribunal when an international case is accepted by the BAC. Additionally, the BAC's newly revised rules permit parties in international commercial arbitration to choose arbitrators outside the Panel of Arbitrators maintained by the BAC.<sup>45</sup> If the parties want to select arbitrators outside the Panel of Arbitrators, the parties must submit the resume and detailed

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<sup>43</sup> Li Wang, *Guo nei zhong cai si fa jian du shi zheng Yan jiu: yi Beijing zhong cai wei yuan hui wei li* [An Empirical Research on the Judicial Supervision of Domestic Arbitration: Based on the Case of the BAC], BEIJING ZHONGCAI (BEIJING ARBITRATION) June 2004, at 13, 19.

<sup>44</sup> Darwazeh & Moser, *supra* note 6, at 58.

<sup>45</sup> The newly revised BAC Rules were adopted at the First Meeting of the Fifth Session of the Beijing Arbitration Commission on September 20, 2007 and took effect April 1, 2008.

contacts of the candidate to the BAC. The candidate could act as an arbitrator if confirmed by the BAC and his/her term would expire at the close of the case, unless the BAC decides to list him/her on the Panel of Arbitrators (Article 55). These procedures should dispel any doubts about the competence of arbitrators in international arbitrations.

### B. *Are the Secretaries of the BAC Competent?*

According to the BAC Rules, the Secretariat of the BAC (the “Secretariat”) handles the day-to-day affairs. A member of its staff will be appointed as the secretary to an arbitral tribunal to assist with case management, including administration of procedural matters (Article 1). In examining whether the secretaries are competent, three related questions should be explored: What are the functions of the secretaries? To fulfill the required functions, what kinds of qualifications are needed? Do the secretaries in the BAC meet those requirements?

#### 1. *Secretarial Functions*

At the beginning of every case, the disputing parties contact the Secretariat before the arbitral tribunal is formed. When a case is initiated by the claimant and accepted by the case-filing office, it will be assigned to a case-handling secretary who is responsible for the management of that particular case. After receiving a case, the case-handling secretary sends the Respondent a Request for Submission of Defense, as well as a copy of the Application for Arbitration, its attachments, if any, a set of the BAC Rules, and its Panel of Arbitrators (Article 9). The defending party may raise a jurisdictional objection or an objection to the validity of the arbitration agreement after receiving the foregoing documents. In that case, the secretary has the authority, under Article 20 of the Arbitration Law, to make a finding regarding the objection on behalf of the arbitration commission. The defendant also may submit a counterclaim which then is reviewed and accepted by the secretary. The secretary also facilitates the composition of the arbitral tribunal, and following that, consults with the arbitrators to arrange for a hearing date. The secretary is also responsible for making the official record of the hearings and deliberations. If any party requests an expert opinion and the arbitral tribunal consents, the secretary arranges the procedure for obtaining it. After the arbitrators finish the draft of their arbitral award, the secretary reviews the award to be sure that there are no typographical errors or miscalculations. After the arbitral award has been served on the parties, the secretary collates all the files related to the case and submits them to the file archives.

From the description of the duties of the secretary, we can conclude that the secretary is the liaison between the arbitral tribunal and the parties and their representatives. Whether the secretary is skilled in communication and transmits the information accurately will have a direct influence on the trust and cooperation between the arbitral tribunal and the parties. The secretary also plays a key role in achieving a high quality and efficient arbitration. Though the arbitrator is the

master of the procedure, the arbitrator usually is part-time and heavily depends on the secretary regarding procedural matters.<sup>46</sup>

## 2. Secretarial Qualifications

It is thus clear how the secretary can play an important role in arbitration. To fulfill the tasks required of the secretary, what kinds of qualifications are needed? One author points out that the qualifications of a secretary can be roughly divided into two aspects: professional ethics and professional skills.<sup>47</sup> In terms of professional ethics, the secretary should be honest and self-disciplined, diligent and hardworking. In terms of professional skills, the secretary should possess expertise in a particular specialty, including particular knowledge of the arbitration law in that area, and multiple skills that include legal writing, computer competence, foreign languages, management and communication.

The BAC believes that the basic requirements of an ideal secretary comprise six characteristics: first, to hold strong ethical values, to be honest and self-disciplined, and to be scrupulous in separating public from private interests; second, to be discreet and keep confidential information carefully guarded; third, to be precise, meticulous, well-organized, and highly conscientious; fourth, to be cordial and courteous while providing good service and acting with initiative; fifth, to be of high professional competence and efficient; sixth, to be studious and curious, researching assiduously.<sup>48</sup> Again, this is an ideal skill set, but it serves as a guide for the BAC as it selects and trains its secretarial team.

During my interviews with her, Secretary-General Wang disclosed that when she was establishing the BAC, some people working in the Beijing Municipal Government tried to transfer to the BAC. Wang did not accept many of these individuals because they had been working in governmental departments for a long time and probably would bring an entrenched, “red-tape ethos” with them. Thus, she came up with the idea that the BAC would adopt a new system of employment rather than use standard civil-service practices. Under the new employment system, the employee would sign an employment contract of a fixed duration with the BAC, and the job would no longer be one with an “iron rice bowl,” as is the norm with civil servant ranks. This decision encouraged those who had planned to transfer to the BAC to reconsider applying to work there, because a transfer would cost them the stable guarantee they possessed as civil servants in other governmental departments.

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<sup>46</sup> For an introduction to the functions of the secretary during the process of case-handling, see Hongbo Jiang, *Jia qiang zhong cai mi shu zhi ze, gui fan zhong cai ban an cheng xu* [Strengthen the Functions of Secretary and Standardize the Procedure of Case-handling], available at [http://www.ccarb.org/news\\_detail.php?VID=1629](http://www.ccarb.org/news_detail.php?VID=1629).

<sup>47</sup> Lili Jiang, *Zhong cai mi shu zhou yi* [Preliminary Discussion on Arbitration Secretary], FAZHI RIBAO [LEGAL DAILY], Dec. 26, 2006.

<sup>48</sup> Hongsong Wang, *Mi shu de shu zhi* [The Qualifications of Secretary] (April 29, 2005) (unpublished memorandum, on file with the author).

After successfully resisting the transfer of staff from other governmental departments, Secretary-General Wang had the opportunity to recruit more suitable staff members to the BAC. There were five persons appointed as the first set of secretaries: one graduated from Peking University with a Bachelor's degree in Law and four graduated from China University of Politics and Law, two with Bachelor's degrees in law and two with Master's degrees in law.

In 1995, there was a great demand for law school graduates in China and it was easy for any graduate to find a good job. At that time, most of the law graduates preferred to become civil servants in government, especially in the central government. How was the BAC able to recruit well-qualified staff when it was impossible to know whether the BAC, as a new organization, would be a good employer? One of the five original secretaries still works at the BAC. She explained that she chose the BAC at that time mainly because she believed that working in a governmental department would only waste her youth and legal knowledge. Many believe that working in a governmental department consists of no more than reading newspapers and drinking tea while on duty. Another individual who is now working in the legal department of a regulatory institution after working at the BAC for eight years told me that he met Secretary-General Wang at a job fair and decided to join the BAC after talking with her. Actually, the Beijing Bureau of State Administration of Industry and Commerce had previously given him an offer. But he finally chose to work at the BAC because he identified with the outlook and values that Secretary-General Wang held.

### 3. *Professional Competence*

In practice, the secretary functions as the embodiment of the arbitration commission, as its key point of contact with the public.<sup>49</sup> Arbitrators, parties and their representatives are generally exposed to an arbitration commission's ethos, services, and integrity through interaction with its secretaries because they are so frequently in contact. After its initial staffing, the BAC maintained high criteria for recruiting new staff, and applying for the BAC also became increasingly competitive. In 2005, more than 1600 master's degree graduates from law schools applied for only four vacancies in the BAC. Since the secretaries were selected through a competitive process based solely on the merit demonstrated in their applications, their impressive accomplishments and professional approach have been widely praised by arbitrators, disputing parties and their representatives. In 2006, the average number of annual cases managed and concluded by a secretary was 124.78.<sup>50</sup>

As for professional skills, there is no doubt that the secretaries of the BAC are widely perceived to be highly competent. Some may question whether the secretaries are competent to manage international cases, since most of the cases

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<sup>49</sup> *Id.*

<sup>50</sup> Hongsong Wang, 2007 *nian chun jie cha hua hui fa yan* [The Speech at the Spring Festival Tea Party of 2007] (February 13, 2007) (transcript on file with the author).

accepted by the BAC now are domestic. One of the most obvious differences between international and domestic cases is that a high proficiency in foreign languages is necessary for managing international cases. Actually, this would not be a problem for BAC secretaries, since proficiency in English or other foreign languages has long been a requirement when recruiting new staff. Some secretaries are even proficient enough to provide simultaneous interpretation for conferences. Recently, more and more foreign experts have given speeches in English on arbitration theory and practice in the monthly Arbitrator's Workshop of the BAC, and some secretaries of the BAC have sufficient English skills to provide simultaneous translations. Some secretaries also have a command of Japanese or Korean. As for the management of arbitral procedure on an international case, BAC secretaries are similarly competent. Actually, many secretaries feel that it is more difficult to manage domestic cases than international cases, because according to the Arbitration Law, there is closer judicial supervision over domestic cases.

#### IV. BUILDING EFFECTIVE MECHANISMS TO MAINTAIN INTEGRITY

All arbitration institutions attest to their own fairness. But how can we test whether such a claim is true? At least two criteria should be taken into consideration: first, whether an arbitration institution tries to build effective mechanisms to prevent unfairness; second, whether the sanctions in place are strictly enforced when misconduct does occur. In China, both the expectations and concerns regarding arbitration have been closely related to the people's impressions of the judiciary. China's judiciary has long been criticized for its lack of independence, its lack of legal competence, and its corruption. Consequently, it was hoped that arbitration would provide an effective alternative forum. At the same time, some are concerned that corruption in the judiciary will spread to arbitration institutions. Thus, the fairness of arbitration in China should be discussed against the background of corruption in the judiciary.

##### A. *Corruption in the Judiciary*

The Supreme People's Court has long been plagued with corruption despite repeatedly prohibiting the adjudication of cases by means of personal relations (*guan xi an*), favors (*ren qing an*), and bribes (*jin qian an*). According to the research of Hualing Fu, the recent development of corruption in China's judiciary demonstrates specific characteristics. First, the nature of corruption in the courts has become more sophisticated, not simply resulting from cash bribes. Second, judges have become more selective in demanding or accepting gifts. Third, corruption has become more indirect, and a third party is almost always involved. Lawyers in particular have become instrumental in brokering deals and facilitating transactions between litigants and judges.<sup>51</sup>

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<sup>51</sup> Hualing Fu, *supra* note 30, at 211.

As for why corruption can occur so easily, Fu attributes it to the existence of numerous opportunities for litigants or their lawyers to influence judges. First, Chinese law requires trial judges to maintain contact with the parties or their lawyers throughout the litigation process. Second, the mediation process also gives the parties and their lawyers opportunities to influence judges. During a mediation judges must maintain frequent *ex parte* contacts with the parties in order to negotiate a possible settlement.<sup>52</sup> In a word, the fact that judges maintain close contact with the parties or their lawyers throughout the litigation process gives the parties or their lawyers the opportunity to influence judges. Fu also unveiled how corruption can possibly affect a case. First, the judge may allow a delay for the party who sent the bribe, or he or she may provide information about the court's thinking and the likely outcome of the case. Second, it is in the gray area of discretion that corrupt practices have their greatest impact. In economic cases and civil cases, corruption is also seen in the form of undue delays, repeated mediation to force a compromise, findings of fact that favor one party, and divided liability.<sup>53</sup>

Though there are some concerns about the integrity of arbitration, no empirical research has been conducted about whether corruption in the judiciary has also spread to arbitration. Actually, there is no empirical data showing to what extent corruption exists in the judiciary either. For that matter, nobody has collected systematic data to demonstrate whether such misconduct is an aberration or an everyday occurrence. Fu himself admitted that it does not make sense to condemn the entire judiciary and to reject the entire legal system because of some corrupt practices. Not all judges are corrupt, and certainly not all judges are corrupt at all times.<sup>54</sup>

#### B. *Fairness in Arbitration*

However, the undisputed fact that there is corruption in the judiciary is undoubtedly a warning to arbitration. It seems the BAC was quite aware of this point. At the time of its establishment, the BAC believed that whether its arbitration proceedings are seen as fair would decide the life or death of an arbitration institution.<sup>55</sup> To cultivate a fair and impartial image of arbitration, the BAC took four measures right at its inception. First, it stressed impartiality and fairness as the most important aspects of the training and examination of arbitrators, as stipulated in the Ethical Standards for Arbitrators of the BAC ("Ethical Standards").<sup>56</sup> The Ethical Standards mandate that if an arbitrator

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<sup>52</sup> *Id.* at 211-12.

<sup>53</sup> *Id.* at 212-13.

<sup>54</sup> *Id.* at 214.

<sup>55</sup> Wang, *Work Summary of the BAC*, *supra* note 39.

<sup>56</sup> The Ethical Standards for Arbitrators of the Beijing Arbitration Commission were first adopted on October, 1995 and revised successively in December 1996, September 1998, April 2001, July 2003 and August 2006.

conceals any fact that should have been disclosed, meets with a party ex parte, accepts entertainment, gifts or other benefits from the parties, violates principles of fairness in the handling of cases, or behaves in any other way that exhibits a definitive bias toward any party, the BAC has the power to dismiss or not re-engage him. Second, the BAC established the challenge and feedback systems for the parties. After the BAC receives pleadings from the parties and constitutes an arbitral tribunal, it will deliver notifications to the parties and require arbitrators to sign the arbitrators' declaration. The notification makes the parties aware of the fact that they are not permitted to meet with arbitrators in private, discuss the case ex parte, or provide entertainment, gifts or other benefits to the arbitrators. In the arbitrator's declaration, the arbitrators agree to accept their selection (or appointment) and affirm that no conditions stipulated in the Arbitration Rules bar them from hearing the case. Parties may challenge the selection or appointment of an arbitrator if any such conditions do in fact exist. After the resolution of a case, the BAC solicits feedback from the parties on the implementation of the Arbitration Rules either by letter or through an informal discussion. Third, the BAC has opened up its case-handling procedures and the Arbitration Rules to the public, and invited feedback and suggestions from lawyers and business managers on ways to enhance and improve the fairness of arbitration. Finally, a disciplinary board has been set up to investigate any violations by arbitrators.<sup>57</sup> The above measures are not only backed by the parties and their representatives, but also supported by the arbitrators. A report in 2001 stated that of more than 260 arbitrators who have handled cases, and been appointed on more than 1800 occasions, there has not been a single occasion on which the parties or representatives have alleged that the arbitrators have violated the Arbitration Rules and accepted entertainment, gifts or other benefits.<sup>58</sup>

The BAC panel of arbitrators consists of lawyers, scholars engaged in legal research and teaching, experts engaged in economic or trade work, civil servants engaged in legislation and legal affairs, and retired or resigned judges. Obviously, the relations between arbitrators who are practicing lawyers and an arbitration institution are most troubling when a member of the arbitrator panel acts as a party representative in an arbitration before the BAC. There is concern that, in this case, he may take advantage of his status on the panel and unduly influence his colleagues on the arbitral tribunal. Therefore, during the process of revising the Ethical Standards in 2001, some participants argued that the arbitration institution should prohibit members of the panel of arbitrators from representing parties in its arbitration cases. Others argued that whether an arbitral tribunal is fair in a

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<sup>57</sup> See Wang, *Work Summary of the BAC*, *supra* note 39; BAC, *Di yi jie Beijing zhong cai wei yuan hui gong zuo zong jie* [The Work Summary of the First Session of the Beijing Arbitration Commission] (Nov. 4, 1998) (unpublished memorandum, on file with the author).

<sup>58</sup> Hongsong Wang, *Ge ren shu zhi bao gao* [Report on Debriefing Mission] (Jan. 1, 2001) (unpublished memorandum, on file with the author).

specific case depends on the arbitrators rather than the representatives. Besides, no other arbitration institution in the world has adopted such a rule.<sup>59</sup>

The 2001 version of the Ethical Standards did not prohibit arbitrators from acting as party representatives in BAC arbitration cases, but rather standardized the conduct expected of a member of the arbitration panel while acting as such a representative. Article 21 of the Ethical Standards stated that BAC arbitrators must comply with the following requirements while acting as a party representative in a BAC arbitration case: (1) he shall not violate the time limits for hearings and the submission of legal documents; (2) in the presence of the parties and their representatives, he shall not discuss with arbitrators or secretaries matters involving other cases in which he is acting as an arbitrator; (3) he shall not discuss the case privately with the arbitrator or secretary concerned; (4) he shall not represent himself as having close relations with any arbitrator or secretary concerned; (5) if acting as a party representative in a case would probably result in a challenge to any arbitrator in that case, he shall make it clear to the party concerned and refuse to act as representative; (6) he shall not ask for any accommodations that are not suitable to his status as representative.

These provisions demonstrate that the BAC was aware of the existence of the potential problem and intended to control it. However, enforcement under this version of the Ethical Standards heavily depended on the self-discipline of arbitrators. It did not completely eliminate the concern of the parties when an arbitrator acts as representative for the other side in a BAC case. After three years, the 2004 version of the Ethical Standards set forth the BAC's resolution of this issue. It explicitly provides that an arbitrator shall not act as a party representative in any BAC arbitration cases (including an application to set aside or for non-enforcement of an arbitral award rendered by the BAC), nor make inquiries regarding a case nor provide lavish dinners and gifts or grant favors and benefits to member(s) of the arbitral tribunal or the secretary on behalf of another (Article 9).

This is perhaps the most stringent set of ethical requirements for arbitrators anywhere. Obviously, the 2004 revisions will reduce the income of those arbitrators who are lawyers because it blocks their opportunity to represent parties before the BAC. Since these lawyers provide opinions for their clients nearly every day and can influence their clients during the process of forum selection, that raises the question of how the BAC could adopt this provision without fear of offending those arbitrators who are lawyers. Two main reasons account for the BAC's action: First, the BAC tried to reduce or avoid possible complaints by first imposing a prohibition on commission members and staff from acting as arbitrators before adopting the prohibition against arbitrators representing parties before the BAC. On January 24, 2003, the BAC revised its constitution to provide

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<sup>59</sup> Hongsong Wang, *Guan yu "Beijing zhong cai wei yuan hui zhong cai yuan shou ze" he "Beijing zhong cai wei yuan hui zhong cai yuan xuan (xu) pin biao zhun" de xiu ding shuo ming* [The Revision Explanations on the Ethical Standard of Arbitrators of BAC and the Appointment Standard of Arbitrators of BAC] (April 25, 2001) (unpublished memorandum, on file with the author).



that the Chairman and the office staff of the BAC could not be appointed concurrently as arbitrators. The Vice-Chairmen and members of the Commission may not accept an appointment to act as arbitrators by a party, nor may the Chairman of the BAC appoint them as arbitrators except when they have been jointly appointed by both parties. Second, Secretary-General Wang has stated that it is the BAC's position that the interest of the client should be placed above the interest of the lawyer.<sup>60</sup> Actually, considering that a lawyer usually has to maintain many complicated relations with all kinds of departments and people and faces many challenges to remain an impartial arbitrator, the BAC intentionally reduced the percentage of lawyers who act as arbitrators when it re-engaged the arbitrators for the third and fourth term of the panel.<sup>61</sup> Disaffected lawyers who were not re-engaged as arbitrators began to suggest that their clients not choose the BAC as a dispute resolution forum. The BAC was willing to risk this outcome.

The BAC has successfully fought corruption not only through the adoption of positive measures but also because it benefits from the existence of the institutional role of the secretary and from the procedures of institutional arbitration. One way that the parties or their lawyers can unduly influence the judiciary is that there are many opportunities for judges to maintain contact with the parties or their lawyers. When examining the practice of the BAC, we find that there are generally no opportunities for arbitrators to contact the parties or their lawyers directly, because of the existence and function of the secretary. According to Article 8 of the Ethical Standards, in the course of an arbitration the arbitrator may not meet or accept any evidence submitted by a party or its representative *ex parte* and may not discuss the case directly or indirectly with any party or its representative in the absence of the other party (including but not limited to conversations, telephone calls, letters, facsimiles, telexes, or e-mails). In practice, all documents should be submitted to the secretary and then delivered to the arbitrator by the secretary. Even in the course of mediation, the arbitral tribunal shall consider carefully the decision to assign an arbitrator to meet one of the parties or its representative in the absence of the other party. In cases where the arbitral tribunal has decided to assign an arbitrator to meet with one of the parties or its representatives in the absence of the other party, a secretary must be present and the other party must be notified (Article 8). Therefore, there is no legitimate channel for parties and their lawyers to contact the arbitrators directly. This should reduce the risk of the arbitrators being unduly affected by the parties.

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<sup>60</sup> Interview with Hongsong Wang, Secretary-General, BAC (Apr. 24, 2006).

<sup>61</sup> The percentage of lawyers who act as arbitrators among the panel fell from 23.1% during the second term to 19% during the third term and to 16.3% in the first year of the fourth term. See BAC, *Di san jie Beijing zhong cai wei yuan hui gong zuo zong jie* [The Work Summary of the Third Session of the Beijing Arbitration Commission] (April 25, 2001) (unpublished memorandum, on file with the author); Hongsong Wang, *Zai 2005 nian chun jie cha hua hui shang de jiang hua* [The Speech at the Spring Festival Tea Party of 2005] (Feb. 4, 2005) (unpublished transcript on file with the author).

Observers may be skeptical because, although there is no legal channel for the arbitrators to use to contact parties or their lawyers, *ex parte* contact is still possible. Even so, the relevant analysis should focus on whether *ex parte* contacts or even bribery could affect an arbitration case without being detected. The above-mentioned pitfalls of the judicial process that result from bribery will be discussed separately below.

### C. *The Risk of Bribery*

First, is it possible to obtain a delay for the party who delivered the bribe? According to Article 29 of the BAC Rules, the arbitral tribunal has the power to require the parties to produce their evidence within a specified period of time and the parties must comply accordingly. The arbitral tribunal has the power to reject any evidence not produced within the specified time period. In practice, if the tribunal does not require parties to produce their evidence within a specified period of time, both sides would be given equal opportunity to submit supplemental documents. If the tribunal sets a specific time limit, both sides must comply. If the arbitral tribunal accepts the documents submitted by one party after the time limit has expired, the other party can challenge the admissibility of that evidence. If the arbitral tribunal does consider such evidence in drafting its award, this will constitute a statutory ground for the award to be set aside by the court.

Second, is it possible for the arbitral tribunal to favor one party by undue delays? Efficiency is deemed one of the advantages of arbitration over litigation. Any undue delay (whether it results from bribery or not) could be regarded as a form of injustice. The BAC attaches great importance to efficiency. It makes the remuneration of both arbitrator and secretary related to efficiency – the sooner the arbitrator closes a case, the more subsidies he will receive. The same applies to the secretary. Therefore both the arbitrator and the secretary usually have an incentive to expedite the arbitration procedure.

From an institutional perspective, the BAC has formulated the provisions needed to strengthen control over the time management of the arbitration process, thus avoiding inefficiency and delay in handling cases. The 2d Meeting of the 3d Session of the BAC held in February 2002 deliberated and approved the “Selected Provisions pertaining to the BAC Strengthening Control Over Arbitration Hearing Duration” (“Selected Provisions”). These provisions define the concepts of “delay” and “exceeding trial duration” by arbitration tribunals and the shared liability caused by the delay, and expand the obligation of arbitrators to maintain timely contacts with the secretaries or other members of the arbitration tribunals. Article 6 of this provision stipulates that when the hearing of a case is delayed for 20 days, the arbitration commission shall issue a “Case Expedition Notice” to the arbitrator(s) causing the delay. If the delay is caused jointly by all members of the arbitration tribunal, resulting in the hearing exceeding the specified duration by one month, the arbitration commission shall issue a “Case Expedition Notice” to the arbitration tribunal. Article 5 of the “Selected Provisions” stipulates that if an

arbitrator fails to comply with the “Ethical Standards” and the “Selected Provisions,” “resulting in the secretary or other members of the arbitration tribunal not being able to contact him and the case being unable to be heard within the prescribed duration, the said arbitrator shall be deemed as having absented himself without cause and the other arbitrators may make a decision on procedural issues in his absence, except commencement of the trial.” At the same time, the “Selected Provisions” further spell out the measures the BAC shall adopt regarding the delay, including “recording the number of cases exceeding the prescribed trial duration due to delay in the computerized enquiry system for the parties’ reference,” “the delay satisfying the circumstances of an arbitrator not being re-appointed or dismissed as provided in the ‘Arbitrators’ Ethical Standards’ and ‘Administrative Measures on Appointment of Arbitrators’ and dealing with it according to these provisions” (Article 7).

In September 2003, the 5th Meeting of the 3rd Session of BAC deliberated and approved the revised “Selected Provisions” and renamed them “Selected Provisions of the Beijing Arbitration Commission on Raising Arbitration Efficiency,” incorporating the provisions allowing the hearing of cases within the prescribed time limit in the original “Ethical Standards” into the “Selected Provisions,” clearly stipulating the time limits on hearing cases and rendering of arbitral awards and requiring each stage of the process to proceed as scheduled so as to ensure the efficient and smooth progress of the entire proceedings. In order to implement the “Selected Provisions,” the BAC has, in its arbitrator management software system, set up “Arbitrator Time Statistics” and “Statistics on Delay by Arbitrators” as well as an instant messaging system to remind arbitrators to render the arbitral award promptly. Essentially, any undue delays, whether resulting from the arbitral tribunal’s favoring one party or not, will be controlled and redressed under the BAC’s mechanism.

Third, is it possible to favor one party by conducting repeated mediation to force a compromise? Both the Arbitration Law and the BAC Rules stipulate that mediation should only be initiated with the consent of both parties. In practice, if one party does not consent to mediation, the process of mediation cannot even begin. In the case of a three-arbitrator tribunal, there is at least one arbitrator appointed by each party. If the presiding arbitrator tries to unduly force a compromise by repeated mediation, he will probably be opposed by one of the party-appointed arbitrators. Meanwhile, a secretary must be present during the mediation who should be aware if improper repeated mediation occurs. In this situation, the secretary will record the conduct of the arbitrators. If similar misconduct happens repeatedly, the opportunity for the arbitrator to be reappointed will be reduced and he may even not be re-engaged.

Fourth, is it possible for an arbitrator to manipulate the findings of fact to favor one party or unfairly divide liability? The findings of fact and apportionment of liability are critical, and the decision on the merits is the task of the arbitral tribunal. According to current the BAC Arbitration Rules, unless otherwise agreed by the parties, the summary procedure conducted by a sole arbitrator will only apply when the amount in dispute does not exceed RMB

1,000,000. That means any case with the amount in dispute exceeding RMB 1,000,000 necessarily will employ the Ordinary Procedure (non-summary procedure) and have a three-arbitrator panel. Each party will appoint his arbitrator and then jointly nominate or jointly entrust the Chairman to appoint a third arbitrator who shall be the presiding arbitrator. It is highly unlikely that an arbitrator would agree to a decision that is unfair to the party who appointed him, and even a party-appointed arbitrator is required by the Ethical Standards to treat both parties impartially and equally. The presiding arbitrator would thus play a critical role, since any decision of a tribunal composed of three arbitrators must be made by a majority of the arbitrators.

If the arbitral tribunal fails to reach a majority decision, the decision of the presiding arbitrator will prevail (Article 39). In practice, it is rare that parties can reach an agreement to jointly appoint the presiding arbitrator. If they cannot, the presiding arbitrator will be appointed by the Chairman of the BAC (Article 18). The Chairman authorizes the Secretary-General to perform this obligation according to Article 1 of the Arbitration Rules. In this situation, as Yoshio Iteya pointed out based on his experience in CIETAC, the Secretariat wields substantial influence.<sup>62</sup> Iteya further raised concern that the Secretariat could influence or control the arbitration through its appointment of the presiding arbitrator, or that one of the parties to the arbitration could influence the Secretariat's decision on that appointment because there are no specific rules on the Secretariat's responsibility and scope of power, and in particular no written rules regulating the Secretariat's appointment of the presiding arbitrator.<sup>63</sup>

Actually, the Secretariat's responsibility and scope of power are provided specifically by the Arbitration Rules (Article 1) and Constitution (Article 15) of the BAC. A wise decision appointing the presiding arbitrator should be made after comprehensively considering the nature of the dispute and the expertise required of the arbitrators, even the party-appointed arbitrators. It is impossible to set out written rules to regulate the conduct of appointment, which is why no arbitration institution in the world has this kind of rule. Since the appointment of the presiding arbitrator is always an act of discretion, it is impossible to over-emphasize the importance of the impartiality of the arbitration institution in making this decision. In practice, to reduce its institutional influence over this key appointment, the BAC tries to facilitate an agreement of the parties to jointly nominate the presiding arbitrator. The 2004 Arbitration Rules stipulate that the parties may each nominate one to three arbitrators as candidates for the presiding arbitrator or jointly apply to the BAC to provide a list of five to seven candidates for the presiding arbitrator from which the parties shall select one to three as candidates within the given time limit. Where there is only one common candidate

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<sup>62</sup> Yoshio Iteya, *Case Study of Arbitration in China*, in *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 119-22 (Albert Jan van den Berg ed., 2005).

<sup>63</sup> *Id.*

on either the nomination list or the selection list of both parties, such candidate shall be the presiding arbitrator jointly nominated by both parties. If there are two or more such candidates, the Chairman shall, taking into consideration the specific circumstances of the case, confirm one of them as the presiding arbitrator, who shall be regarded as being jointly nominated by the parties. If there are no such candidates, the Chairman shall appoint the presiding arbitrator from outside of the parties' nomination or selection lists (Article 18).

As an additional means of promoting integrity in arbitral decisions, the BAC permits the dissenting arbitrator to choose not to sign the award and instead to issue a dissenting opinion, which shall be sent to the parties together with the award (Article 41). This mechanism, to some extent, will check the majority opinion and reduce the possibility of unreasonable decisions on the merits.

Fifth, is it possible for the arbitrator inappropriately to provide information about the tribunal's thinking and the likely outcome of the case? If the arbitrator does so, usually the party will take some responsive measure in the process. For example, if the claimant knows its claims will not be supported by the arbitrator, it is very likely that the claimant will withdraw the application. In this case, the secretary will become aware of what may have happened behind the scenes and will make a record about the arbitrator in the case management system. The arbitrator probably will not be appointed to deal with a specific case again by the BAC. If a similar situation occurs repeatedly, the arbitrator probably will not be re-appointed to the panel next time.

The existence of the secretary not only prevents possible direct contact between the arbitrator and the parties, but makes nearly any form of misconduct hard to conceal. This reality raises the question of how to prevent the secretary himself from being involved in corruption. First, in recruiting the secretary, professional ethics is one of the important factors for consideration. Second, the BAC has adopted a case management system where the status of every case can be tracked easily. If a secretary were to intentionally allow a case to be delayed, he would likely be found out by his supervisors. Third, there is also a feedback system to evaluate the secretary. When every case is closed, a questionnaire is sent to the parties and arbitrators concerned to ask for their evaluations of the performance of the secretary. Fourth, the employment contracts of the BAC with its secretaries are for one year only. If a secretary is found to be involved in corruption, he will be fired immediately under the contract. In addition, even if a secretary does not violate the provision concerning integrity but nevertheless performs poorly in managing his caseload, he probably will not be re-engaged the following year. Furthermore, the BAC has a policy that a secretary will not be re-engaged if he has been working at the BAC for eight years unless he has been promoted to a manager/supervisor position and no longer serves as a secretary. The BAC undertook this policy out of a concern that those who have worked as a secretary for more than eight years would tire of the job and lack the necessary passion to make sure the job is done well. Because of the provision that the staff of the BAC may not be appointed concurrently as an arbitrator, if a secretary were not promoted to a managerial position, he might well become bored with the job

of secretary. So the BAC will not re-engage a secretary with a lengthy tenure. But if the secretary meets the qualifications of an arbitrator, he might be appointed as an arbitrator after he leaves the BAC. This arrangement provides an incentive for the secretary to adhere to professional ethics and to hone his professional skills to enhance the possibility of being appointed as an arbitrator after working as a secretary for eight years.

#### *D. Recent Measures to Combat Corruption*

The foregoing analysis indicates that the BAC has worked to build effective mechanisms to combat corruption. On August 14, 2006, the BAC strengthened these mechanisms by revising its Constitution, the Rules for Arbitrators, and the Administrative Measures for the Employment of Arbitrators (the “Administrative Measures”) and establishing procedures for the “suspension from being listed on the panel of arbitrators.”

The Administrative Measures specifically provide that, if during an arbitrator’s term of office, the BAC has reason to suspect that an arbitrator has breached provisions of the Ethical Standards or the Administrative Measures pertaining to impartiality and independence such that would warrant his/her dismissal, then the Disciplinary Board must conduct an investigation. The Board will have the right to request that the arbitrator explain facts that need clarification and furnish proof thereof. During the period of investigation by the Disciplinary Board, that arbitrator must be temporarily suspended from the Panel of Arbitrators (“Panel”). The Chairman of the BAC must also refrain from appointing him/her as an arbitrator in any matter, and any case currently being handled and heard by such arbitrator must be dealt with in accordance with the provisions in Article 18(4) of the Constitution of the Beijing Arbitration Commission. As stipulated in Article 18(4), when an arbitrator is dismissed during his term of office, or not listed in the Panel of Arbitrators as a result of the circumstances set forth in Article 9 of the Administrative Measures, the BAC shall notify him/her in writing. Within 7 days from the receipt of the notice, the arbitrator concerned must decide if he is withdrawing from the case/s he is arbitrating and must then notify his or her decision in writing to the relevant secretary handling the case. In the event the arbitrator fails to respond or decides not to withdraw voluntarily, the BAC shall inform the parties of the cases that are still pending of the BAC’s decision. The dismissed arbitrator or the arbitrator excluded from the Panel shall not participate in the hearing of cases from the date the newly revised Panel is officially published. However, where both parties have agreed for the arbitrator to continue hearing the case, he may perform his duties until the hearing of the case is concluded. According to Article 9 of the Rules for Arbitrators, which also concerns the role of secretaries, such arbitrator also shall not make inquiries regarding a case on behalf of someone else, nor shall he/she lavish dinners and gifts on or grant favors and benefits to member(s) of the arbitral tribunal or the secretary on behalf of another.

### E. *The Extent of Corruption*

The BAC strictly enforces the stated sanctions when misconduct occurs. In 2006, one arbitrator was dismissed and two arbitrators were suspended from the panel of arbitrators.<sup>64</sup> The dismissed arbitrator was found to have engaged in ex parte contact. The two arbitrators excluded from the panel were suspected of misconduct that involved breaching provisions in the Ethical Standards. Though the BAC seems not entirely pure, that only a few arbitrators have been sanctioned might indicate that the extent of corruption could be far less than imagined. Can it be true? I am inclined to believe that it is true because, based on my own experience as a case-handling secretary, I found it is not difficult for a secretary with legal training to discern whether the arbitrator has an intentional bias in a specific case. Arbitrators should also know it is difficult to make blatantly unfair awards without being found out. My private interviews with some arbitrators show they are very proud of the integrity of their conduct during the arbitration.

If most of awards are, in fact, fair, where does the suspicion of general corruption come from? This is a complicated question and needs to be discussed in a separate article. Based on my experience, I will offer two conjectures about this. The first is that corruption sometimes is used by lawyers as an excuse to shirk responsibility or to ask for additional fees from their clients. Since hearings in China have become more and more adversarial, how lawyers perform in presenting their case during a hearing can have an important influence on the award. When lawyers lose a case because of their own poor performance, they may not want to admit their own fault, but try instead to blame their failings on corruption in the system. Furthermore, some lawyers may take advantage of the parties' ignorance of arbitration procedures and attribute the smooth progress of the procedure and the successful outcome of the case to their personal relationship with the arbitrators in order to ask for more attorney fees. The other conjecture is that when a decision goes against a party, the losing party may jump to the conclusion that corruption was involved. Behavioral studies of legal decision-making show that judicial decision-makers such as juries, judges and arbitrators are more or less subject to the effect of cognitive illusions.<sup>65</sup> This would suggest that there is no single objective correct decision in a case. But in China, these normal variations among judicial decisions are often suspected of corruption because of the low level of trust throughout the society.

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<sup>64</sup> BAC, *Beijing zhong cai wei yuan hui di si jie gong zuo bao gao* [The Work Report of the Fourth Session of the Beijing Arbitration Commission] (Sept. 20, 2007) (unpublished memorandum, on file with the author).

<sup>65</sup> For an in-depth discussion of cognitive illusions (or cognitive biases), see Christopher R. Drahozal, *Behavioral Analysis of Arbitral Decision Making*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 319-37 (Christopher R. Drahozal & Richard W. Naimark eds., 2005).

## V. CONCLUSIONS

The development of the BAC points out specific constraints that an LAC might face against a background of China's social transformation and the extent to which these constraints can be overcome through an LAC's own efforts. The enactment of the Arbitration Law is part of China's top-down legal reform, rather than a reform driven by bottom-up demand. The framework set up for the reorganization of arbitration institutions was constrained by then-existing social conditions and could not block all the potential threats to the independence of arbitration institutions, especially in financing and personnel. However, the framework also leaves room for arbitration institutions to consciously strive for independence. The BAC successfully expands and maintains its independent space by fully employing the flexibility created by the legal and policy framework.

China revived its legal education system and began legal reform in 1978. There is no doubt that in building a professional arbitrator cadre in China one can expect to encounter more challenges than exist in any developed country with a mature legal system and ample legal talents. The BAC works to strengthen its competence by continuously raising its standards and eliminating incompetence. Aside from building a professional arbitrator team, the BAC also spares no effort in selecting and training its secretaries to ensure their competence to manage cases.

Although no empirical data show to what extent corruption exists in the Chinese judiciary, judicial corruption amplifies concerns about arbitration. At its inception the BAC actively took measures to prevent the occurrence of partiality and has gradually built effective incentive and constraint mechanisms. Meanwhile, the BAC has shown its resolve by strictly enforcing sanctions when misconduct does occur.

The frequent revisions of the BAC Arbitration Rules, its Constitution, Arbitrators' Ethical Standards, and Administrative Measures on Appointment of Arbitrators are indicative of its effort to build effective mechanisms to strengthen its competence and fairness. The BAC's practices demonstrate the possibility of success in building a modern commercial arbitration system in China. In the near future, however, the other LACs which would like to follow the BAC's example, will still face great challenges in taking active measures like those of the BAC. The main reason is that the factors allowing the BAC to take effective measures through a series of rules and regulations are still hard to duplicate completely elsewhere in contemporary China. One is that the employment system of the BAC avoids the typical bureaucratic style. The other is its full financial independence, through which the BAC can provide comparatively greater remuneration to attract and maintain high-caliber arbitrators and secretaries even while imposing high standards on them. Comparing these two factors, full financial independence is the more fundamental. It not only provides incentive for the BAC to try its best to meet the demand from the dispute resolution market and increase its share, but becomes a natural constraint to prevent any misconduct that might be harmful to



its reputation. For those LACs that are dependant on financial support from the government and that are constrained by the system of “income and expenses separate” management, it is difficult to take substantial measures to impose high requirements on its arbitrators and secretaries. What is worse, they may even not have enough incentive to consider such reforms, since usually the performance of the whole institution will have little influence on the income of the staff individually.

Why can the BAC successfully achieve these two prerequisites for further reform while other LACs cannot? Leadership plays an important role. The employment system was set in place by Secretary-General Wang as a safeguard to prevent incompetent employees in other governmental departments from transferring to the BAC in 1995. It is a common practice to employ staff by contract in arbitration institutions in other countries. But in China, it was really innovative, since at that time the concept of the “iron rice bowl” was still very popular. Until 2000, one of the main tasks to promote personnel system reform of public institutions in China was to break the tenure system (“iron rice bowl”) and introduce the employment system.<sup>66</sup>

As for full financial independence, to avoid the application of “income and expenses separate” management by paying tax means an arbitration institution will not have any financial support from the government and thus will be nearly totally dependent on its own income from its fees generated from managing cases. Most LACs, even those that currently have good performance records, are not confident that they will be able to maintain a stable caseload in the future and are reluctant to take the possible risk of losing financial support from government. The BAC has pioneered a road that most LACs dare not take because of Secretary-General Wang’s boldness to withstand various pressures, and her ability to win support for every innovation. As she puts it in her own words, “When turning ideas and decisions into reality, boldness is even more important than intelligence.”<sup>67</sup>

Although the BAC’s development demonstrates the institutionalization of positive ideas into effective practice, the role played by a strong executive is the key for its success. The main challenge for other LACs that want to follow the BAC is to find the “Hongsong Wang” in their institutions, while the potential limitation for the BAC is whether it will be able to maintain the momentum to strive for independence, competence, and fairness after the retirement of Secretary-General Wang. This raises two important questions deserving of future study. One is how to find strong arbitration leaders like Hongsong Wang. The other is how to build a governing structure that does not depend on any single

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<sup>66</sup> Organization Department of the Communist Party of China Central Committee & Ministry of Personnel, *Guan yu jia kai tui jin shi ye dan wei ren shi zhi du gai ge de yi jian* [Opinion on Expediting Personnel System Reform of Institutions] (August 13, 2000).

<sup>67</sup> Hongsong Wang, *2003 nian gong zuo zong jie yu 2004 nian gong zuo she xiang* [The Work Summary of 2003 and the Work Plan of 2004] (Feb. 12, 2004) (unpublished memorandum, on file with the author).

individual once an arbitration institution has been put on track. Recently, the BAC has made great efforts to build a governing structure not dependant on individually strong executives by improving the supervision of the commission over the working body, attracting arbitrators to participate in the management of the institution through the organization of a development committee, and making the revenue report available to arbitrators.<sup>68</sup> These actions may allow the BAC to develop further toward its goals, even after its current leadership is no longer driving the reforms.

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<sup>68</sup> BAC, *supra* note 64.