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Abuse of Process and Regulation in Commercial Arbitration – A Chinese Perspective

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This paper discusses the problem of extraordinary delay in the commercial arbitration process, increased arbitration fees, and denial of the benefits of arbitration to other parties due to the abuse of procedural rights by relevant parties in commercial arbitration process. This paper proposes measures to reduce abuse of process in commercial arbitration, such as statutory modification, judicial supervision, amendment of arbitration rules and the intervention of disciplinary bodies.

Key Words : Commercial Arbitration, Abuse of Process, Regulation

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Ⅰ. Introduction

Arbitration has become more popular among entities involved in commercial deals. Commercial enterprises have increasing become aware of the characteristics and advantages of arbitration. Likewise, judicial authorities have also gradually been more willing to acknowledge commercial arbitration and support its awards. In addition, arbitration has become more prominent and attractive to commercial actors as it becomes an increasingly dominant foundation of the legal system of the market economy. Unfortunately, with commercial arbitration's increasing prominence and acceptance has come more frequent manipulation and abuse. As a result, as arbitration becomes a more familiar procedure, the procedural rights of arbitration have become more frequently abused (hereinafter referred as "abuse of process"). Abuse of process in arbitration will not only delay and compromise the arbitration process, but also tends to increase arbitration costs and fees, and weakens the advantages arbitration offers over litigation. In serious cases, abuse of process can even become an obstacle to the assertion of rights by parties and threaten the development of commercial arbitration itself. The Chinese government's recent agenda aims at "improving the arbitration system and enhancing the credibility of arbitration".[1] Inherent to this requirement is how to improve the efficiency of the arbitration process to reflect the advantages of arbitration, namely "professionalism, efficiency and confidentiality", while strengthening parties' confidence in the arbitration system. This paper will discuss the abuse of process in current commercial arbitration and proposes some advice on regulation.

Ⅱ. The Definition of Abuse of Process in Arbitration

Abuse of process refers to when participants in an arbitration process exercise procedural rights outside of their reasonable scope and for their own particular aims. Abuse of process prevents the normal progress of case hearings by delaying the arbitration process, increasing arbitration fees, and infringing on the benefits that arbitration should offer to the other participants.

1) *Decision of the CPC Central Committee on the Major Issues of Comprehensively Promoting the Rule of Law* adopted on October 23, 2014 by the 4th Plenary Session of the 18th Central Committee of CPC.

Arbitration involves many participants, so abuse of process in arbitration may be committed by the parties, by the arbitral tribunal/arbitrator or arbitration institutions, or by the judicial authority either assisting or supervising the arbitration. This paper focuses on the abuse of process caused by parties.

The procedure of commercial arbitration defines the manner of arbitration and governs the relations between the arbitral tribunal, the parties to the arbitration agreement, and the relevant personnel and authorities of the arbitration commission. Each arbitration procedure begins with the submission of the arbitration application and normally ends with the arbitration award.[2)]

The parties to arbitration are generally referred to as claimants or respondents. Claimants believe their rights are infringed, so they initiate arbitration to make their claims for remedies. Generally, they will not delay or frustrate the course of the arbitration process on purpose. However, in some cases, claimants may engage in abuse of process. For example, a claimant might pursue arbitration in a way to pressure the respondent to conclude a settlement rather than out of a sincere aim to arbitrate the dispute. In such a case, the claimant might prolong each stage of arbitration as much as possible by delaying payment to the tribunal, submitting repeated applications for challenge, or through other improper means. A claimant may bring inordinate pressure to bear on the arbitrator(s) it believes may be unfavorable, or whom dissatisfies the claimant with relation to some procedural matter. In extreme cases, the claimant may use excuses to make a complaint about the arbitration body, or it may even force the arbitrator(s) to resign by threatening to make a complaint or even file a lawsuit against the members of arbitration tribunal. Such abuse of process may visit delay and disorder on the arbitration process.

The respondent is usually even more inclined than the claimant to abuse the rights vested by law, arbitration agreement, or the Arbitration Rules to delay the arbitration process on purpose and hamper the claimant or the arbitration tribunal. The respondent may aim to force the claimant to reach a settlement, to seize the opportunity to disperse property and evade eventual enforcement, or provoke flaws in the arbitration process which it might later argue should become the basis for revoking or refusing to execute the arbitration award.

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2) Zhao Xiuwen, *International Commercial Arbitration Law*, 3rd edition, China Renmin University Press, p127.

Ⅲ. Forms of Abuse of Process by the Parties in Arbitration Process

1. Tactical Objections to Jurisdiction

The most important aspect at the beginning of the arbitration process is the determination of jurisdiction. In practice, after the claimant applies for arbitration, the respondent may object to the jurisdiction of the arbitration body based on one or more of the following reasons: (1) the non-expiration of a mutually agreed negotiation period; (2) a party lacks capacity as a legal entity (due to a transfer agreement, change of name, etc.); (3) the illegal form or content of arbitration agreement (such as signatory without power of attorney, arbitration agreement with key element missing; (4) the non-enforceability of an arbitration agreement; (5) the non-existence, waiver or change of an arbitration agreement; (6) the dispute remains outside of the agreed scope of the arbitration agreement; (7) the non-arbitrability of any dispute, etc.

According to Item 2, Article 20 of *Arbitration Law of the People's Republic of China* (hereinafter referred to as "Arbitration Law"), "if any party contests the validity of the arbitration agreement, the objection shall be made before the start of the first hearing of the arbitration tribunal." This provision "before the start of the first hearing" allows the respondent an enormous amount of time to take advantage of the objection. For example, after receipt of the request for arbitration and the first notice from the arbitration body, the respondent will refrain from immediately submitting its objection to the jurisdiction. Instead, a mischievous respondent will submit materials related to objection to jurisdiction one day, or even several minutes, before the start of the first hearing of the arbitration tribunal. This conforms to the letter of the rule, but leaves the claimant caught unprepared. Most Chinese arbitral tribunals will respond by postponing hearings since jurisdiction is a fundamental prerequisite of arbitration and Chinese tribunals do not have the sole power to rule on objections to jurisdiction.

Article 20 of the Arbitration Law has assigned the right to resolve jurisdictional objections to the "arbitration commission"[3] managing the arbitration process.

3) The term "arbitration commission" is interchangeable with the term "arbitration institution." In China, arbitration institutions have historically been called arbitration commissions. More recently, Chinese

Nonetheless, arbitration commissions have been given latitude in adopting their Arbitration Rules. For example, an arbitration commission may authorize the arbitral tribunal to determine jurisdiction in specific circumstances, but strictly on a case-by-case basis.[4] Respondents can at least postpone determination of this special authorization for a certain period of time by submitting the application. Many Arbitration Rules provide that "The Arbitration shall proceed notwithstanding an objection to the arbitration agreement and/or jurisdiction over the arbitration case".[5] Actually, in most cases, the arbitral tribunal will postpone the hearing, notify the claimant, give its opinions about the objection to jurisdiction and await the decision or authorization by arbitration commission. Even worse, after receiving a decision on the first objection, the respondent would make additional objections based on different grounds in order to delay and compromise the arbitration proceedings once again.

In addition, it is noteworthy that a party can request a local court ruling before arbitration commission/arbitral tribunal makes any decision. Should any party bring "an action about the validity determination of arbitration agreement" in a relevant court,[6]

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institutions and practitioners have begun to refer to arbitration commissions as arbitration institutions to conform with international nomenclature. Very recently, some institutions now refer to themselves as "arbitration centers," for example, the Beijing Arbitration Commission is also named the Beijing International Arbitration Center.

4) Such as: Item 1, Article 6 of *China International Economic and Trade Arbitration Commission Arbitration Rules* (2012 Edition) ("CIETAC Rules (2012)"); Item 1, Article 6 of *China International Economic and Trade Arbitration Commission Arbitration Rules* (2015 Edition) ("CIETAC Rules (2015)"); Item 4, Article 6 of *Beijing Arbitration Commission Arbitration Rules* (2015 Edition) ("BAC Rules (2015)")

5) Such as Item 5, Article 6 of CIETAC Rules (2012) and CIETAC Rules (2015); Item 3, Article 6 of *China Maritime Arbitration Commission Arbitration Rules* (2004 Edition).

6) The Article 12 of *Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the People's Republic of China* (Document Number: Fa Shi [2006] No.7):"

A case filed with a people's court by a party seeking to determine the validity of an arbitration agreement shall be subject to the jurisdiction of the intermediate people's court of the place where the agreed arbitration institution is located. If the arbitration institution is not explicitly provided for in the arbitration agreement, the case shall be subject to the jurisdiction of the intermediate people's court of the place where the arbitration agreement is concluded or where the respondent is domiciled.

Cases related to application for ascertainment of the validity of arbitration agreements involving foreign elements shall be under the jurisdiction of an intermediate people's court at the place where the agreed arbitration institution is located, or where the arbitration agreement is concluded, or where the applicant or respondent is domiciled.

A case concerning the validity of an arbitration agreement, involving either maritime or maritime

according to the latter half of Item 1, Article 20 of the Arbitration Law, "the people's court shall render a ruling" in the case where "one party requests the arbitration commission to make a decision and the other party applies to the people's court for a ruling". In order to avoid any conflict between the judicial and the arbitration commission/arbitral tribunal, the arbitration commission/arbitral tribunal usually will suspend the arbitration and wait for the decision of the court. After the claimant initiates the arbitration proceeding, the respondent can always find many bases to resort to this mechanism. Grounds for challenge include minutiae as minor as clerical errors or fairly slight variations on the names of arbitration institutions such as "Beijing Municipal Arbitration Commission", "China International Economic and Trade Arbitration Center" or "China International Trade Arbitration Commission". In this way, it is not rare for an arbitration case to be delayed for more than six months in the name of ensuring legal rights.

2. Delaying the Constitution of the Arbitral Tribunal

Interim arbitration is not allowed in mainland China. Thus, as for arbitrator appointments, generally each party chooses a candidate and notifies the arbitration commission as the case secretary interacts with candidates. The president of the arbitral tribunal must be appointed by the arbitration commission's chairman when the parties are unable either to select the president of the arbitral tribunal through negotiation or to jointly consent to the arbitration commission's power of appointment.

These procedures are communicated directly to the arbitration commission, and the arbitration commission communicates with the arbitrator candidates. So, potential arbitrators also need time to consider whether to accept the appointment or not, and parties are obligated to pay relevant fees for their selected foreign arbitrators. At this point, any party can delay arbitration by one of several means. For example, the respondent may move to select another arbitrator after it 'discovers' that the

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trade disputes, shall be subject to the jurisdiction of a maritime court. The court shall be at the place where the agreed arbitration institution is located, the arbitration agreement was concluded, or the applicant or the respondent is domiciled; and, in the event of an absence of a maritime court in the aforesaid places, the case shall be subject to the jurisdiction of a maritime court in the vicinity."

foreign-based arbitrator's quoted fee is higher than the party would prefer to pay.[7] A party can select an elder arbitrator or an arbitrator in poor health secure in the knowledge that the arbitrator is unlikely to accept the appointment. A party can attempt to appoint an especially renowned arbitrator who has a full caseload or is busy with other matters because he or she is very likely to deny his or her appointment due to time constraints. Finally, as a more risky measure, a party can initially refuse, or simply fail, to appoint an arbitrator, and then turn around and submit a request to the arbitration commission to select an arbitrator even after the arbitration body has appointed one on behalf of the party, even though that party failed to timely nominate an arbitrator according to the Arbitration Rules. In these ways, a respondent which is fairly indifferent to selecting its choice of arbitrator can significantly delay the arbitral proceedings.

3. Challenging the Appointment of Arbitrators

Parties may challenge arbitrators on the basis of their alleged impartiality. Article 34, Item 3 of the Arbitration Law allows a challenge when an "arbitrator has other relationships with a party or his agent in the case which may affect the impartiality of arbitration". According to Article 13 of the Arbitration Law,[8] most arbitrators in China are lawyers, retired judges or professors in law, and they are likely to be teachers,

7) Since the arbitration commission handles communications with the potential arbitrators, more time is often necessary for the case secretary to liaise with an arbitrator residing abroad than with a domestic arbitrator. Furthermore, in many cases a party will have submitted its choice of arbitrator very near to the deadline. In addition, an arbitrator residing abroad will almost invariably demand more in both fees and expenses than a China-based arbitrator. An experienced arbitration practitioner knows well that a foreign-based arbitrator is more expensive, but simply in order to delay the proceedings, he may nonetheless drag the tribunal and commission through the farce of selecting a foreign-based arbitrator and then refusing to pay the higher fee

8) Article 13 of the *Arbitration Law of the People's Republic of China* stipulates that: "
Arbitrators of an arbitration commission shall be appointed from among the people who are fair and just. An arbitrator shall meet one of the following requirements:
A. they have been engaged in arbitration work for eight full years;
B. they have worked as a lawyer for eight full years;
C. they had worked as a judge for eight full years;
D. they are engaged in legal research or legal teaching with a senior academic title; or
E. they have legal knowledge and are engaged in professional work relating to economics and trade with a senior academic title or at the equivalent professional level.
An arbitration commission shall prepare the list of arbitrators according to different specialties."

students or schoolmates of one of the party's counsel, and it is very likely that at some point an arbitrator attended a certain event which party's counsel also attended. Parties may pounce on even the most tenuous and threadbare relation and challenge an arbitrator simply to delay arbitration.

Furthermore, the current law allows parties to take a wait-and-see approach to challenging an arbitrator's impartiality. According to Article 35 of Arbitration Law, "if a party challenges an arbitrator, he/she shall submit his challenge, with a statement of the reasons therefor, prior to the first hearing. If the matter giving rise to the challenge became known after the first hearing, the challenge may be made before the conclusion of the final hearing of the case." Therefore, some parties refrain from challenging an arbitrator immediately after becoming aware of the matter giving rise to the challenge, but will do so only after the situation moves against their interests. This adds uncertainty to the proceedings and wastes the time of all involved parties.

4. Abuse of Process during the Document Submission Phase

Parties may corrupt proceedings during the document submission stage in one of three major ways. A party might delay complete submission of its documents, it may fail to attend a hearing, or it may surprise the other party with new evidence very late in the proceedings.

It is a fact that all of the arbitration rules have set up the time frame for submitting a reply to the request or counterclaims and other issues, but they usually fail to specify penalties or sanctions for those delays. The arbitral tribunal has discretion over any application for an extension of time. However, the arbitral tribunal will always be very mindful to allow each party a fair and sufficient opportunity to present its case, as overall procedural fairness is an important consideration which may uphold the award under any subsequent judicial review. Therefore if the respondent delays but gives clear reasons for doing so, the arbitral tribunal generally will approve its application for extension of time, regardless of the sufficiency of the underlying bases. But it still happens that some parties will knowingly take advantage of this attitude and place the arbitral tribunal in a dilemma where it sacrifices a speedy arbitration for one party's improper benefit.

Purposeful absences from hearings will only increase the gravity of the arbitral tribunals' dilemma. In arbitration cases in which the author was a participant, if a party was absent from a hearing, it would proceed at the scheduled time and only the claimant would provide evidence, answer inquiries, and deliver comments. After the session, the secretariat of the arbitration commission would pass along the materials submitted by the claimant to the respondent and notify it that "any opinion or challenge about the case or any request to hold a second hearing should be submitted to the arbitration commission in quintuplicate/triplicate[9] within 7 days after the receipt of this letter." If the tribunal were to grant an absent respondent's request for a second hearing, it would render the first hearing between the arbitral tribunal and the claimant essentially meaningless.

Surprise evidence is a common affliction in arbitration cases. In an arbitration case with flexible rules of evidence, the arbitral tribunal often cannot preclude the submission of late evidence because of the various reasons which can compel even the late introduction of evidence. However, concealed evidence can frequently change the factual basis of the entire case. Surprise evidence therefore alters the disputed issues and thereby may destroy the central objectives of the hearing. Especially in complex arbitration cases, surprise evidence often results in re-hearings, which in turn causes gratuitous procedural delay and the waste of the time, expense, and effort for everyone involved.

5. Allegations of Document Fraud or Forgery

A party can substantially delay proceedings when it alleges a document submitted by the other party has been forged. This form of abuse may occur during the document submission stage, but a party will more often employ it after all documents have been submitted if the primary intent is to delay the proceedings.

When a party alleges that a document has been forged, or that the document is otherwise fraudulent, that necessitates a time-consuming expert review by an appraiser or a document specialist. In addition, the challenging party will require possession of the original document, which is a demand that will likely prompt an objection from

9) Five or three copies depending on whether there are three arbitrators or only one.

the producing party. Furthermore, the producing party will file for leave to introduce its own appraiser or document specialist to rebut the challenge and verify the authenticity of the document. The entire exercise will take months to resolve, and can delay proceedings for as long as a year if the tribunal takes a permissive attitude to the affair.

In an abusive document challenge scenario, an expert appraiser will likely submit an inconclusive report; neither confirming the authenticity nor affirming that the contents are fraudulent or forged. Given the great expense and delay of the appraisal, tribunals must exercise their own judgment as to the ultimate authenticity of the challenged documents. Should the arbitral tribunal decide that the documents are authentic, and not fraudulent, then as a minimum the tribunal must award fees and costs from the challenged party (or deduct them from the challenging party's award) to compensate it for the delay and expense incurred.

6. Other Means of Delay

In addition to the aforementioned situations, a party to arbitration may abuse the arbitral process by other means: (1) repeated applications to delay the hearing on the grounds that evidence collection needs more time or even assistance from the judicial court; (2) refusing to reach a settlement after inducing the claimant to withdraw the arbitration application for settlement discussions such that the claimant has to initiate arbitration again; (3) making excuses or changing agents to apply for holding the arbitration in abeyance; (4) changing the mailing address without notifying the arbitration commission, thus hindering the service of documents.

There are numerous means for delay. Arbitration procedure is simply too flexible. Additionally, arbitrators are extremely sensitive to avoid infringing on a party's ultimate right to present its case. Unfortunately, these abusive activities not only interfere with individual arbitration proceedings, but such unprofessional and bad faith practices inevitably hinder and impede the development of a reputable and reliable arbitration service market. Abuses also undermine the CPC's objectives of "improving the prevention and resolution mechanism of social conflicts and disputes, and perfecting the diversified dispute settlement mechanism consisting of mediation, arbitration,

administrative adjudication, administrative review and litigation in an integrated and coordinated manner".[10] Therefore, we recommend several approaches and solutions in the following section.

Ⅳ. Recommendations to Reduce Party Abuse of Process in Arbitration

1. China's Arbitration Law

The core of China's statutory arbitration scheme, the Arbitration Law, is now more than twenty years old. China's domestic arbitration industry has developed rapidly within this period of time. Domestic arbitration bodies have truly entered the international arbitration arena in the interim. Whether certain provisions in our Arbitration Law can still adapt to the current industry trend or not has become a controversial subject. Nonetheless, any lag in the progress of law could become an umbrella for malicious delay and abuse of process. Therefore, updating the Arbitration Law is absolutely necessary, otherwise some parties will instigate procedural delays regardless of what steps and countermeasures other participants may adopt in response.

As a foundation for good practice, we suggest that the Arbitration Law should add a "good faith" requirement applicable to all parties participating in domestic and international commercial arbitration. Item 1, Article 13 of *Civil Procedure Law of the People's Republic of China* modified in 2012 has introduced the "principle of good faith" into the scope of Civil Procedure Law.[11] Namely, "the principle of good faith in the concept of substantive law combined with procedure law" proposed by Yasuhei Taniguchi.[12] In fact, the principle of "good faith" is even more compatible with the arbitration system than the litigation system. Arbitration is a dispute resolution

10) *See the Decision of the CPC Central Committee on the Major Issues of Comprehensively Promoting the Rule of Law*, adopted on October 23, 2014.

11) Article 13 of *Civil Procedure Law of the People's Republic of China* stipulates that "Civil litigation shall follow the principle of honesty and good faith."

12) Yasuhei Taniguchi, *Litigation and Justice of Proceedings*, translated by Wang Yaxin and Liu Rongjun, China University of Political Science and Law Press, 1st edition, November 2002, p168.

mechanism voluntarily selected by the parties through their agreements. Under the arbitration model, both parties and the arbitration body/arbitral tribunal ideally cooperate with each other and focus on the core disputed points through efficient investigation procedures to rapidly resolve commercial disputes. When the arbitration system works as intended, it should meet the ultimate objective of commercial entities, which is to minimize delay and maximize benefits. The arbitration system must respect the legitimate procedural rights of the parties, but in protecting those rights, arbitration procedures should avoid intensifying conflicts and confrontation, and must ultimately avoid becoming a means for one party to scheme and plot against the other party. In view of this, this article proposes the addition of a legal provision applying the principle of "good faith" in the "General" part of the Arbitration Law as a core principle existing alongside the complimentary and established arbitration principles of: "voluntary arbitration", "either arbitration or lawsuit", "independent arbitration" ,and "arbitration award as final and binding".

Furthermore, reform must be directed to the following areas: (1) setting reasonable criteria for challenging arbitrators and the circumstances for their withdrawal; (2) accepting the competence-competence doctrine,[13] and expanding the jurisdictional scope within Article 20 of the Arbitration Law to prevent premature outside judicial intervention; (3) setting firm deadlines for parties' submissions of applications and empowering the arbitral tribunal to impose appropriate penalties; and (4) defining and quantifying the criteria for judicial review of arbitration in such a way that it closes the gaps which allow for parties to abuse arbitration procedures.

2. Judicial Interpretation of the Arbitration Law

In the shadow of the legislature's inattention to reform of the China Arbitration Law, the Supreme People's Court (hereinafter referred to as SPC) in the past 20 years has made obvious contributions in developing the Chinese arbitration legal system. Facing

13) The competence-competence doctrine is stipulated in the following provisions: Article 16 of the *Model Law on International Commercial Arbitration* (2006) of United Nations Commission on International Trade Law ("UNCITRAL"); Article 23 of the *Arbitration Rules of the UNCITRAL* (2010); Article 6 of the *International Chamber of Commerce Rules of Arbitration* (2012); Article 30 of the *Arbitration Act 1996 of United Kingdom*; Article 2 of the *Arbitration Law of Kingdom of Sweden*; Article 22 of the *Arbitration Law of Taiwan* (2002).

continuously emerging new cases and new trends, the SPC guides courts at all levels to correctly deal with the judicial support and supervision matters related to commercial arbitration through issuing judicial explanations and guiding cases.

In Article 13 of *the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the 'Arbitration Law of the People's Republic of China'*, the SPC stipulates that:

> The principle of estoppel regarding tacit declaration over the validity of an arbitration agreement shall be complied with and the court shall dismiss the application whenever the validity of an arbitration agreement has already been determined by an arbitration institution.

In Article 26, the SPC states, "the defense raised during the revocation proceedings shall not be raised repeatedly during the enforcement proceedings". Article 27, which regulates the abuse of procedural rights in judicial remedies, states that the "tacit declaration of the validity of an arbitration agreement shall not be overturned by later proceedings including the motion to set aside or the motion of refusal to enforce the arbitral award".

Despite the SPC's dutiful attention to the area of international arbitration, there is yet room for improvement. The SPC can further aid international arbitration in the following aspects: updating judicial explanations about arbitration in a more timely way; releasing guiding cases promptly and without extensive delay; and providing further guidance concerning the defective treatments of matters related to commercial arbitration by local courts which frequently result in confusion to the parties.

The SPC may consider restructuring the two-tiered reporting system governing foreign related arbitration cases. This structure was established in 1995 by the *Supreme People's Court's Circular on Dealing with Certain Issues Relating to Foreign Related Arbitration*. That was a signal that the Chinese court was very cautious in denying the validity of an arbitration agreement or refusing to enforce any arbitral award where foreign elements are involved. This system needs to be re-evaluated and updated. How to balance the relationship between efficiency and justice should be the primary concern in reforming the 20-year-old practice which once earned enormous praise.

3. Arbitral Tribunals and Arbitration Rules

Arbitration rules are deemed as "procedural law" that the parties and the arbitral tribunal must follow during arbitration. Developing a set of comprehensive arbitration rules not only can reasonably balance the rights and obligations of parties in arbitration, but also provides strong footstone to the arbitral tribunal for regulating parties. For example, the China International Economic and Trade Arbitration Commission ("CIETAC"), which deals with most international commercial arbitration cases in China, has been working to improve the provisions in Arbitration Rules to reduce possibilities of abuse of process in arbitration. CIETAC's latest Arbitration Rules (2015 Edition) adopts and implements comprehensive procedures designed to promote more rapid and fluid momentum. For example, the new rules restraint parties from issuing repeated challenges against the arbitrators:

> [U]pon receipt of the Declaration and/or the written disclosure of an arbitrator, a party wishing to challenge the arbitrator on the grounds of the disclosed facts or circumstances shall forward the challenge in writing within ten (10) days from the date of such receipt. If a party fails to file a challenge within the above time period, it may not subsequently challenge the arbitrator on the basis of the matters disclosed by the arbitrator.[14)]

The arbitrator nonetheless should continue to perform his/her function as arbitrator notwithstanding the pending challenge. Thus, "[an] arbitrator who has been challenged shall continue to serve on the arbitral tribunal until a final decision on the challenge has been made by the Chairman of the CIETAC."[15)]

In addition, CIETAC's latest set of Rules implements a number of meaningful reforms. First, it expands what constitutes "valid service of process". It also binds participants to the principle of "good faith". It further defines the power of the presiding arbitrator of the tribunal to solely determine the procedural arrangement.

14) Item 1, Article 32 of the *CIETAC Rules* (2015 Edition)
15) Item 7, Article 32 of the *CIETAC Rules* (2015 Edition)

Finally, it introduces emergency arbitrator procedures. CIETAC's reforms, especially Article 9's "principle of good faith", has filled in some of the gaps and reflects the latest development trends in the international commercial arbitration field. These provisions will function as models in the development of domestic commercial arbitration. We also understand that CIETAC will seek feedback from the parties and their counsels following each case, aimed at assessing the conduct of the arbitrators including whether the parties are satisfied with the tribunal's efficiency.

Notably, the *Arbitration Rules of the London Court of International Arbitration* ("LCIA Arbitration Rules"), effective as of October 1, 2014, clarifies the ethical standard applicable to arbitration counsel. Article 18.5 stipulates that:

> [e]ach party shall ensure that all its legal representatives appearing by name before the Arbitral Tribunal have agreed to comply with the general guidelines contained in the Annex to the LCIA Rules, as a condition of such representation. In permitting any legal representative so to appear, a party shall thereby represent that the legal representative has agreed to such compliance.

Article 18.6 further bestowing the power of ordering sanctions on the Arbitral Tribunal:

> In the event of a complaint by one party against another party's legal representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that legal representative a reasonable opportunity to answer the complaint, whether or not the legal representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the legal representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfill within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.4(i)[16] and (ii)[17].

The *General Guidelines for the Parties' Legal Representatives as the Annex to the LCIA Rules* provides that:

> A legal representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardize the finality of any award, including repeated challenges to an arbitrator's appointment or to the jurisdiction or authority of the Arbitral Tribunal known to be unfounded by that legal representative.

Based on the *Annex*, counsel are prohibited from deliberately making false statements, fabricating or knowingly participating in the fabrication of evidence, withholding or assisting to withhold all or part of documents required by any arbitral tribunal, or initiating *ex parte* contact with any member of the arbitral tribunal about the matter in dispute, particularly without disclosing the *ex* parte communication.

In the meantime, arbitral tribunals need to take control of the process. Arbitral tribunal must apply the arbitration rules sensibly, and the tribunal itself should observe and practice international best practices as long as they are consistent with Chinese laws. For example, arbitral tribunals could order the parties to submit their schedules ahead of it convening a procedural arrangement meeting, as this will allow easier determination of points in dispute in advance.[18] As observed by a Chinese practitioner:

> Our legal system of commercial arbitration cannot be radically changed. So, we might learn and introduce the approaches of international arbitral tribunals on issuing procedural orders and actively guiding and managing the arbitration process. It will be of great assistance to increase the transparency of procedures in our arbitration

16) "[A] duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s)[.]"

17) "[A] duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute."

18) Lawrence W. Newman, *Achieving Fairness and Efficiency in Complex Commercial Arbitration*, AAA Yearbook on Arbitration and the Law, 24th edition, Juris Net, LLC, 2012, p581.

> institutions, gradually reassert the core role of the arbitral tribunal in our arbitration practices, give full play to its management functions of arbitration process and narrow the gap between China and mainstream international arbitration practices.[19)]

Furthermore, the absence of evidence rules in arbitration practice is also a hurdle to efficient dispute resolution. Prof. Lu Song recommends the IBA Rules (*International Bar Association Rules on the Taking of Evidence in International Arbitration*) as a successful example of compromise between the continental law system and the common law system.[20)] The IBA Rules can be applied if either the parties agree or the arbitral tribunal determines to adopt them, and they offer some useful reference for countries to improve the evidence rules pertaining to international commercial arbitration.

Arbitral tribunals assess the costs of delay against the abusive party. Arbitral tribunals are commonly vested with the discretion as to the distribution and apportionment of case fees. Any party that delays and compromises the arbitration process will objectively increase the time and cost incurred by the arbitration body, the arbitrators and the other party. Therefore, the arbitral tribunal has an affirmative duty to impose appropriate penalties , financially or otherwise. For example, the BAC rules stipulate that:

> A party who, after becoming aware of the composition of the Arbitral Tribunal, appoints authorized representatives whose appointment may give rise to grounds for the challenge of any arbitrator, shall be deemed to have waived its right to challenge the arbitrator on those grounds; the right of the other party to challenge the arbitrator shall not, however, be affected. Additional costs resulting from any delay caused to the arbitral proceedings in these circumstances shall be borne by the party responsible for giving rise to the grounds for challenge.[21)]

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19) Ma Zhihua, *Research on the Procedural Orders in the International Commercial Arbitration and the Necessity of Introducing it into the Arbitration System in China*, Beijing Arbitration, vol. 2, 2014, p72.

20) Lu Song, *Evidence in International Commercial Arbitration*, Beijing Arbitration, vol.2, 2014, p92.

21) Item (7), Article 22 of the *Beijing Arbitration Commission Arbitration Rules* (2015 Edition).

We humbly recommend that arbitral tribunals adopt a three-strikes approach to tactical delay under the general theory that 'once is a mistake, twice may be a grievous error, but three times is enemy action.' It will be impossible for tribunals to confidently assess whether the majority of apparent abuses of process are clearly abusive or simply instances of genuine incompetence or failure. Nonetheless, a party that engages in three or more instances of abusive conduct will almost certainly have done so as a deliberate, pre-meditated attack on its rival. Under ideal conditions, a tribunal would levy fees against a party each and every time it abused the arbitral process. To push circumstances closer to such ideal conditions, more arbitral commission rules should explicitly warn parties that delay will not be tolerated. Explicit policies set a clear standard and thus increase the likelihood that arbitral tribunals will allocate fees in a way to penalize abuses of process. Arbitral Commissions should add corresponding provisions in the "distribution of fees" section of their Arbitration Rules. Here is specific language offered for such a suggested provision:

> To ensure and protect the efficiency and integrity of the proceedings, the arbitral tribunal shall have the right to determine in its discretion, as a factor in the arbitration award, that any party that delays and compromises arbitration process may be subject to sanctions exacted over and above the actual costs incurred by the parties, the tribunal, or the commission. The arbitral tribunal should explicitly state the effect of the specific misconduct of the party or its counsel on the distribution of costs. The arbitral tribunal shall consider the degree of bad faith exhibited, the nature and degree of the misconduct, the effects of the misconduct on the process, the effects on other parties and the extent to which the misconduct disregarded any specific or advance warning(s).

4. Bar Associations

Abuses will still occur even under the most comprehensive set of rules. Too many abuses of process actually originate with lawyers themselves. Meanwhile, the arbitration industry is an integral part of the legal service environment. Any damage to

the field of arbitration will certainly prejudice the entire bar. Therefore, bar associations should establish an appropriate system of penalties and sanctions as an effective measure of self-regulation.

In order to protect the justice and integrity of arbitration and guide the standardization of related procedures, the IBA developed a series of rules and guidelines as the model for best practices in international arbitration.[22] These rules have since been widely adopted by the profession. In particular, *The IBA Guidelines on Party Representation in International Arbitration* ("GPRIA") developed by the Task Force on Counsel Conduct in International Arbitration of the International Bar Association in 2013 provides guidance for the behavior of agents. The seven aspects addressed include "disclosure by agents and conflicts of interest", "communications with arbitrators", "submissions to the arbitral tribunal", "information exchange and disclosure", "witnesses and experts", and "remedies for misconduct". The GRPIA is aimed to promote integrity and honesty among party representatives who are tasked with refraining from activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.[23] The GRPIA is not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. The parties may thus adopt the Guidelines or a portion thereof by agreement. Arbitral tribunals may also apply the Guidelines in their discretion after consultation with the parties.[24] By contrast, China's legal regulatory guides, such as the *Code of Conduct for Lawyers* and *Rules on Disciplinary Actions against Violation by Members of Bar Associations*, are more applicable to industry self-discipline in China. These litigation and transactional texts fail to fully reflect the particularity of arbitration representation and practice.

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22) Such as *Guidelines on Conflicts of Interest in International Arbitration* (2014), *Rules on the Taking of Evidence in International Arbitration* (2010), *Guidelines for Drafting International Arbitration Clauses* (2010) and *Guidelines on Party Representation in International Arbitration* (2013).

23) Please refer to the Preamble of the GPRIA that "the 'Guidelines' are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings."

24) Please refer to Guidelines 1 to 3 of the GPRIA with relevant comments.

V. Conclusion

Normally, arbitral tribunals will defer to the parties to preserve their rights and allow the parties the fullest opportunity to present their case. Unfortunately, left largely to their own devices, some parties will abuse the arbitration process. Arbitral tribunals must establish and communicate their expectations early, and subsequently hold the parties to the rules. Furthermore, arbitral tribunals simply must overcome their default reluctance to censure a party if that party demonstrates a pattern of delay. Nonetheless, the legislature, the courts, arbitral institutions, and bar associations can all assist arbitral institutions in their unenviable task by restricting avenues of delay and supporting arbitrators when they must exercise their discretion to levy sanctions or deny a party leave to engage in conduct that would complicate or delay proceedings.

Each procedural mechanism shares with each other common concepts concerning the abuse of procedural rights, which themselves are "not only harmful behavior[s] irritating the other party, but also (and sometimes even just) an obstacle to efficient justice".[25] Abuse of process threatens commercial arbitration's systematic advantages of efficiency, commercial expertise, and low cost. Therefore, ameliorative efforts must coordinate and combine long-awaited legal reforms with renewed judicial attention and interpretation, and do so alongside continued progressive amendments of arbitration rules. Hopefully, professional disciplinary bodies in China can also begin to turn their attention to the problem of abuse of process in arbitration.

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