

Clarifying the Murky Waters

—On Legal Liabilities Might Be Assumed by Civil and Commercial Arbitrators in China

Du Wen 

Civil, Commercial, and Economic Law School, China University of Political Science and Law (CUPL), Beijing, China
Email: wend@cupl.edu.cn

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Abstract

The New Arbitration Law has come into effect on this March 1. In addition to the existing institutional arbitrators, the law has established *ad hoc* arbitrators. Therefore, it is necessary to systematically answer the triple questions of whether these two types of civil and commercial arbitrators are required to bear the administrative, civil, and criminal responsibilities stipulated by Chinese laws. Upon investigation, the conclusions of this article are mainly as follows: First, in China, identified as members of other personnels who perform public duties in accordance with the law, civil and commercial arbitrators who have committed illegal acts in arbitral proceedings shall bear corresponding administrative sanctions (*Xing Zheng Chu Fen*), but not administrative penalties (*Xing Zheng Chu Fa*). Second, for civil and commercial arbitrators who violated professional code of conducts and moral requirements, relevant arbitration institutions or arbitral associations may impose appropriate professional disciplinary sanctions on them. Third, for civil and commercial arbitrators with illicit acts, they should assume corresponding breach of contract liability in the form of “compensating for actual losses” when their intention or gross negligence are lawfully vindicated. Meanwhile, the specific ways of *ad hoc* arbitrators and institutional arbitrators assuming their respective civil liability are different. Fourth, the crime of arbitrating by bending the law in China may be applied to both institutional arbitrators with illegal acts and law-breaking *ad hoc* arbitrators. In addition, civil and commercial arbitrators suspected of violating the law may also be held accountable for other crimes stipulated in *the Criminal Code of China*. Fifth, regardless of whether overseas arbitration institutions are registered in China’s free trade zones or free trade ports or not, as long as they conduct civil and commercial arbitration on the soil of the Chinese Mainland, the illicit acts of their arbitrators will still fall within the supervision scope of Chinese supervisory organs and judiciary. Sixth, in China, even though the crime of arbitrating by bending the law may be applied to both institution ar-

bitrators with illegal acts and the law-breaking *ad hoc* arbitrators, there are related technical ambiguities that urgently need to be addressed and clarified. Seventh, the crime of arbitrating by bending the law in China can also be applied to severely misbehaved arbitrators in the arbitration for labor disputes, the arbitration for human resource disputes, the arbitration for rural land contracting disputes, as well as the arbitration for sports disputes. Eighth, due to the limited members and mutual familiarity in the civil and commercial arbitration circle as well as the closely-linked domestic and international trade circle, once an arbitrator made a bad arbitration award by deliberately running against the laws or professional disciplines, their “word-of-mouth reputation” in these two said “circles” will be tarnished for sure. After that, this arbitrator’s chances of arbitrating any other dispute will be greatly reduced, and even falls into an awkward plight with no one showing interest in him or her. In the author’s opinion, this predicament should be the most effective punishment for arbitrators who knowingly violated laws and regulations.

Keywords

Civil and Commercial Arbitrators of China, Assumption of Legal Liabilities, Analyses of Questions

1. Introduction

On March 1, 2026, China’s *New Arbitration Law* came into effect. The new law not only stipulates a new system of *ad hoc* arbitration in paragraph 1 of its Article 82, but also partially modifies and improves the relevant existing system of institution arbitration. At the same time, some legal provisions in *the New Arbitration Law* also state the legal responsibilities that misbehaved arbitrators shall bear. For example, paragraph 3 of Article 19 provides that: “Arbitration institutions shall strengthen supervision over their members, staff, and their engaged arbitrators, and promptly investigate and handle their illegal and disciplinary behaviors related to arbitral activities in accordance with the law; if legal accountability needs to be pursued, the case shall be promptly transferred to relevant authorities for handling.” Likewise, its Article 50 further points out that: “If an arbitrator falls under the circumstances specified in item (4) under Article 46 of *this Law*, and the circumstances are serious, or falls under the circumstances specified by item (6) under paragraph 1 of Article 71 of *this Law*, he shall bear the related legal liability in accordance with the law, and the arbitration institution shall dismiss him or her.” The concrete situation indicated by the aforesaid item (4) under Article 46 is: “The arbitrator has privately met with a party or his agent, or accepted an invitation to entertainment or gift from a party or his agent.” The specific situation referred to in the mentioned item (6) under paragraph 1 of Article 71 is: “have solicited bribes, accepted bribes or done malpractices for personal gains or perverted the law in the arbitration of the case.”

The so-called “legal responsibilities refer to the corresponding legal sanctions that citizens, legal persons, or unincorporated organizations are going to bear for their committed illegal acts. Legal responsibilities are guaranteed by the coercive power of the State and are of great significance for maintaining the dignity of the law, educating lawbreakers, and persuading the general public to consciously abide by the law. Legal responsibilities can be divided into three types in nature: administrative responsibilities (including administrative sanctions and penalties), civil responsibilities, and criminal responsibilities.”¹

In the light of *the New Arbitration Law*, arbitrators who adjudge civil and commercial disputes within Chinese Mainland are now divided into two categories: one is arbitrators affiliated with arbitration institutions, and the other is newly established *ad hoc* arbitrators. These two types of arbitrators may also engage in illegitimate activities during the process of adjudicating civil and commercial disputes. Do these arbitrators who are suspected of violating the law also bear corresponding legal liabilities?

The author believes that this issue can be further divided into the following three sub-questions: First, in China, should law-violating civil and commercial arbitrators bear corresponding administrative responsibilities? Why? Second, in China, should law-violating civil and commercial arbitrators bear corresponding civil liabilities? Why? Third, in China, should law-violating civil and commercial arbitrators bear corresponding criminal accountability? And why? For the purpose of clarifying and answering these queries, the following four sub-sections will do the related analyses thoroughly and by turns.

Based on the comprehensive understanding of the four legal rules quoted above, arbitrators who adjudge civil and commercial disputes may indeed bear corresponding legal responsibilities in China due to their illicit conducts. Two details should be noted here: on the one hand, these legal liabilities should be strictly limited to the illegal acts that have been done within the scope of the related arbitration proceedings. If they actually involve the legal accountabilities of arbitrators for other illegal acts beyond the range of their professional activities, they shall not be the subjects of this treatise’s discussion. On the other hand, the things that trigger the arbitrator’s corresponding legal responsibilities is their illegal acts in practice, not their discipline-violating behaviors. It is generally believed that “behaviors that violate legal norms, with subjective fault, pose a danger or the harm to society, and are committed by individuals who have reached the legal age of bearing legal consequences and have the ability to take these responsibilities, are illegal.”² By contrast, disciplinary violations refer to the acts of the wrongdoer who breaches the internal regulations or rules established by a specific institution,

¹ *What are legal liabilities?* The official website of the National People’s Congress of China: http://www.npc.gov.cn/zgrdw/npc/flsyywd/flwd/2002-04/28/content_294405.htm.

² *What are illegal conducts? What are criminal acts? What are the differences between illegal conducts and crimes?* The official website of the National People’s Congress of China: http://www.npc.gov.cn/zgrdw/npc/flsyywd/flwd/2000-12/17/content_13476.htm.

a professional society, or a unit. The severity of this type of rule-breaching is usually and apparently lower than the severity of the law violation. Therefore, when there are committed illegal acts, the corresponding perpetrator shall bear the related legal responsibilities; whereas there is a violation of the working-place discipline, the offender shall be penalized by the suitable internal disciplinary sanction imposed by his employing unit.

2. Overview of Relevant Literature and Introduction to Research Methods

Based on a comprehensive review of relevant literature on *the Arbitration Law of China*, *the Civil Procedure Law of China*, *the Supervision Law of China*, *the Civil Code of China*, *the Criminal Procedure Law of China*, and *the Criminal Code of China*, the current research status of the academia in China regarding the theme of this article is as follows: firstly, although scholars have made some beneficial attempts in interdisciplinary research, overall, Chinese scholars are still predominantly limited to discussing relevant issues within their respective legal fields. This will result in the following three defects: (1) The research scope is too narrow. (2) Possible deviation in research conclusions caused by narrow research perspectives. (3) Causing perplexing differences in the interpretation and use of a large number of mutually-linked legal jargons that are related to multiple departmental laws, resulting in long-term confusion and uncertainty. Secondly, in terms of this topic, there are more superficial and cursory studies conducted by jurists of China, while there are relatively few in-depth systematic explorations. Thirdly, there is relatively more research in China's academic community on the civil and criminal liabilities to be assumed by civil and commercial arbitrators, while there is relatively less literature on the assumption of administrative liabilities by these arbitrators.

The main purpose of the author writing this article is threefold: first, to attempt to systematically answer whether civil and commercial arbitrators in China are required to bear three types of legal responsibilities. Second, try to clarify the relevant systems and technical details as much as possible. At the same time, try to supplement existing laws and regulations that are either not specified or insufficiently enacted through theoretical analyses. Third, systematically display the relevant conundrums that still need to be solved. As mentioned in the above paragraph, due to the fact that the legal liabilities of civil and commercial arbitrators is a multidisciplinary issue, the author has consulted a considerable amount of literature in related disciplines. To prevent repetition and redundancy in the writing, the author has only cited some references as footnotes in the following text. As for the cited and the consulted-only literature, readers can refer to the bibliography listed at the end of the text. In addition, in the process of writing this article, the author mainly used the following four research methods: literature analyses, analyses of legal provisions, the method of comparative law research, and case analyses.

3. Should Civil and Commercial Arbitrators with Illicit Acts Bear Relevant Administrative Responsibilities

The so-called “administrative responsibility refers to the legal consequences that shall be borne for the carrying-out of acts that violate the obligations provided by administrative laws. There are two forms of administrative responsibilities: one is called administrative sanctions (*Xing Zheng Chu Fen*), and the other is called administrative penalties (*Xing Zheng Chu Fa*).”³ Under the framework of laws and regulations of China, the meanings and contents of these two types of administrative liabilities are:

(1) “Within administrative organs, administrative sanctions refer to the disciplinary punishments imposed by the superiors against their being-led subordinates for violating discipline or for minor illicit acts that have not yet constituted a crime.”⁴ The specific types of administrative sanctions are: warning, demerit, major demerit, demotion, dismissal, and expulsion. Legally speaking, administrative sanctions apply to state functionaries who have committed illegal acts or dereliction of duties, and cannot and shall not be applied to ordinary citizens in society. As for the statutory scope of state functionaries, Article 93 of *the Criminal Code of China* (adopted at the 7th meeting of the Standing Committee of the 14th National People’s Congress on December 29, 2023) provides that: “(paragraph 1) For purposes of *this Code*, a ‘state functionary’ refers to a person who performs public service in a state organ. (paragraph 2) The following are regarded as state functionaries: persons performing public service in state-owned companies, enterprises and public institutions, and people’s organizations; persons assigned by state organs and state-owned companies, enterprises and public institutions to perform public service in non-state-owned companies, enterprises and public institutions, as well as social organizations; and other persons performing public service in accordance with the law.”

(2) Administrative penalties refer to the punishments imposed by the statutorily-designated administrative authority on external administrative opposite parties (citizens, legal persons, unincorporated organizations) for their acts of violating administrative laws. The basis for imposing administrative penalties is Article 9 of *the Administrative Penalty Law of China* (revised at the 25th Meeting of the Standing Committee of the 13th National People’s Congress on January 22, 2021). The specific types of administrative penalties include: warning; fines; confiscating illegally-gained income and property; provisionally seizing permits or licenses; downgrading the qualification level; revoking the permit or license; restricting the production and business activities; ordering to discontinue production or business operation; mandating to close down; restricting the engagement in relevant

³ What are administrative responsibilities? What are the two types of administrative responsibilities? What are the differences between the two? The official website of the National People’s Congress of China: http://www.npc.gov.cn/zgrdw/npc/flsyywd/flwd/2002-04/18/content_293285.htm.

⁴ What are administrative sanctions? What are its legal bases? The official website of the National People’s Congress of China: http://www.npc.gov.cn/zgrdw/npc/flsyywd/flwd/2002-04/28/content_294407.htm.

professions; administrative detention; other administrative penalties specified by laws and administrative regulations.

Paragraph 2 of Article 13 of *the New Arbitration Law* provides that: People's governments of the cities referred to in the preceding paragraph shall arrange for the relevant departments and chambers of commerce to organize arbitration institutions in a unified manner. Arbitration institutions are essentially the non-profit legal persons engaged in the services of public welfare. Paragraph 1 of Article 25 of *the Law* further states that the China Arbitration Association is a social organization with legal person status. Arbitration institutions are members of the China Arbitration Association. The bylaws of the China Arbitration Association are to be formulated by the National Congress of its Members. Based on these two legal provisions, we can draw the following five analytical conclusions:

First, China's arbitration institutions and arbitration associations are not state organs that exercise public power. Article 26 of *the New Arbitration Law* points out that: "(paragraph 1) The judicial administrative branch of the State Council shall guide and supervise arbitration work nationwide in line with the law, improve relevant work systems, and coordinate the development of the arbitration profession. (paragraph 2) The judicial administrative branches of the people's governments of provinces, autonomous regions, and municipalities directly under the Central Government shall guide and supervise arbitration work within their respective administrative regions in accordance with the law." However, on the basis of Article 24 of *the New Arbitration Law*, China's civil and commercial arbitration institutions are independent of all state organs and have no leading and being-led relationship with them. Based on this premise, it can be deduced that, for arbitrators of arbitration institutions and *ad hoc* arbitrators, when they carry out the arbitral job in their personal capacity, they are not state functionaries as stipulated in aforementioned Article 93 of *the Criminal Code of China*.

Second, based on Articles 21 and 22 of *the New Arbitration Law*, one of the statutory duties of China's arbitration institutions is to engage competent nature persons who meet the statutory qualifications as arbitrators. The basic legal relationship between the said two is an appointment relationship, not a labor contract relationship. For example, "arbitration institutions usually make higher requirements than the statutory standards for the appointment of arbitrators through their arbitral rules or other forms." (Jiang & Xiao, 2023: p. 93) Likewise, paragraph 3 of Article 5 of *the Management Measures for the Appointment of Arbitrators* of the Beijing Arbitration Commission points out that "if the Commission decides to appoint an arbitrator, it shall issue an appointment letter to the applicant and include he in the list of the selectable arbitrators."⁵ Furthermore, the vast majority of appointed arbitrators are not included in the formal staffing quota of relevant arbitration institutions, and do not need to comply with the institution's daily at-

⁵The official website of Beijing Arbitration Commission:

<https://www.bjac.org.cn/#/arbitration/1907618187044331522/1910507445149233153?categoryId=1910507445149233153>.

tendance demand and other labor management requirements. From this perspective, the appointed arbitrators are not hired staff members of the relevant arbitration commission who exercises the public functions.

Third, based on paragraph 2 of Article 25 and paragraph 1 of Article 81 of *the New Arbitration Law*, the arbitration association is a self-regulatory organization in the arbitral circle of China, and the institutional arbitrators and *ad hoc* arbitrators are the objects of the association's professional self-regulatory supervision. There is no labor or employment relationship between the two sides, nor does it constitute an administrative affiliation. The arbitration association conducts self-regulatory supervision against all arbitral personnel (including arbitrators) within the boundaries of China. This management authority comes from the clear authorization of the law, rather than a civil agreement between the two sides. Arbitrators are not staff members of the arbitration association, are not included in the association's formal staffing quota, do not enjoy the treatment of civil servants working for the association, and are not therefore recognized as state functionaries in that sense.

Fourth, after searching the official website of the Beijing Municipal Bureau of Justice, it was found that there are only 5 administrative management matters related to arbitral institutions on the website (i.e. establishment or cancellation of the registration of an arbitration commission, as well as establishment, alteration or cancellation registration of business branches of overseas arbitration institutions in the China (Beijing) Pilot Free Trade Zone).⁶ Meanwhile, there is only one administrative matter related to arbitral institutions on the official website of the Shanghai Municipal Bureau of Justice (i.e. the establishment or cancellation of the registration of an arbitration commission),⁷ whereas there are no administrative management matters related to arbitration institutions on the official website of the Guangzhou Municipal Bureau of Justice.⁸ Furthermore, as for "*the Provisions on the Application of Administrative Penalty Discretionary Standards in the Field of Judicial Administration in Beijing*"⁹ released by the Beijing Municipal Bureau of Justice, its application targets are rule-violating lawyers, law firms, foreign law firms' representative offices in China, notary offices, grassroots legal service workers, the court-engaged expert witnesses, etc., but not civil and commercial arbitrators.

The information listed in the preceding paragraph all indicate that even if there is an administrative liability involved the civil and commercial arbitration in China (e.g. administrative licensing or administrative penalties), it shall concern a particular arbitration institution itself as the opposing party of the related administrative legal relationship, and has nothing to do with the arbitrators appointed by that arbitration institution or *ad hoc* arbitrators who may not have an

⁶The official website of Beijing Municipal Bureau of Justice: <https://sfj.beijing.gov.cn/sfj/wsbs2/bszn53/index.html>.

⁷The official website of Shanghai Municipal Bureau of Justice: <https://zwdt.sh.gov.cn/govPortals/municipalDepartments/SHSFESH>.

⁸The official website of Guangzhou Municipal Bureau of Justice: <https://www.gdzwfw.gov.cn/portal/v2/branch-hall?orgCode=007483180>.

⁹The official website of Beijing Municipal Bureau of Justice: <https://sfj.beijing.gov.cn/sfj/zwgk/2024zwcw/436428161/>.

appointment relationship with any arbitration institution in Chinese Mainland.

Fifth, in pursuance of paragraph 2 of Article 22 of *the New Arbitration Law*, the incumbent supervisory officials, the incumbent prosecutors, and the incumbent judges are not eligible to be appointed as arbitrators. But this article also states that: “If other public servants also serve as arbitrators, they shall comply with relevant regulations.” So, this actually raises a relevant question: Can other civil servants also serve as qualified arbitrators? This author holds the opinion that the answer is an affirmative one. The basis for this inference is not only the aforesaid paragraph 2 of Article 22 of *the New Arbitration Law*, but also paragraph 2 of Article 23 of the same law, which clearly points out that: “If an arbitrator is deposed from public office [...] the arbitration institution shall dismiss him or her, too.”

Another technical query to be addressed here is: What are the restrictive conditions when other civil servants can be civil and commercial arbitrators on the side line? In terms of this issue, an article states: “For staff members of the Governing Party and government departments, *the Arbitration Law* does not prohibit them from serving as arbitrators. Considering that employees in public sectors, such as professionals of legal affairs, judicial affairs, as well as industry and commerce, possess strong expertise and authority, the State Council’s ‘*Plan for Reorganizing Arbitration Institutions*’ accordingly provides that: State civil servants and employees in public sectors that follow the state civil servant system, who meet the conditions specified in Article 13 of *the Arbitration Law* (Article 22 of *the New Arbitration Law*) and obtain approval from their respective employing units, may be appointed as arbitrators, but their arbitration work must not interfere with their primary duties.’ For this very reason, among arbitration institutions in China today, there is a phenomenon where government officials and civil servants serve as arbitrators, accounting for a significant proportion.”¹⁰ In addition, “*the Reply on Whether the Incumbent Civil Servants Can Serve as Arbitrators and Receive Remuneration*” (Lu Fu Fa Han [2016] No. 27) issued by the Legal Affairs Office of the Shandong Provincial People’s Government also holds a positive attitude towards the fact that other civil servants, except for current supervisory officials, current prosecutors, and current judges, can also serve as civil and commercial arbitrators.¹¹ However, in line with Article 44 of *the Law of China on Civil Servants* (revised at the 7th Meeting of the Standing Committee of the 13th National People’s Congress on December 29, 2018), civil servants who need to take part-time jobs outside the office due to his work needs shall obtain approval from relevant organs and shall not receive remuneration paid for his part-time job.

Based on the above-mentioned information, this paper argues that when these other civil servants who also serve as arbitrators to adjudge civil and commercial

¹⁰ *A Brief Analysis of the Qualifications and Code of Conduct of Arbitrators (Part 1)*, the official website of Yichang Arbitration Commission: <http://yczc.yichang.gov.cn/content-55583-889700-1.html>.

¹¹ The official website of Tai’an Arbitration Commission: https://zcw.taian.cn/art/2017/4/18/art_75454_5406257.html.

disputes in their private capacity, they clearly do not have the legal status of state functionaries as expressed in the above-quoted Article 93 of *the Criminal Code of China*.

From the analyses of the five dimensions above, it appears that we can arrive at the following seemingly plausible conclusion, that is, both institutional and *ad hoc* arbitrators in China shall not bear administrative responsibilities for their inappropriate or even illicit professional activities. But the actual situation is, on the one hand, Chinese civil and commercial arbitrators shall not be subject to administrative penalties due to flaws in their professional conducts for sure. On the other hand, the above text also pointed out that China's administrative responsibilities have two components: administrative penalties and administrative sanctions. So, the next linked question that must be answered here is: Shall administrative sanctions be imposed against Chinese civil and commercial arbitrators with unlawful deeds?

As far as this sub-topic is concerned, based on paragraph 3 under Article 2 of *the Law of China on Administrative Discipline for Public Officials* (enacted by the 19th meeting of the Standing Committee of the 13th National People's Congress on June 20, 2020), item (6) under Article 15 of *the Supervision Law of China* (revised at the 13th meeting of the Standing Committee of the 14th National People's Congress on December 25, 2024), and Article 4 of *the Regulations on the Jurisdiction of the National Supervision Commission (Trial)* (Guo Jian Fa [2018] No. 1)¹², civil and commercial arbitrators who have illegal acts can indeed be the subjects of the corresponding supervisory responsibilities. In line with Article 7 of *the Law of China on Administrative Discipline for Public Officials*¹³, the supervisory discipline referred to here shall essentially be one type of the administrative sanctions. Additionally, when subjected to administrative sanctions, the law-violating arbitrator are actually identified as components of "other personnels who perform public duties in accordance with the law" (*Qi Ta Yi Fa Lu Xing Gong Zhi De Ren Yuan*).

Although civil and commercial arbitrators may be subject to relevant administrative liabilities, two unresolved technical questions remain in this context:

Firstly, regarding the theme of this essay, the precise meaning and the logical relationship among multiple closely-linked legal terms mentioned by *the Supervision Law of China*, *the Law of China on Administrative Discipline for Public*

¹²Paragraph 3 under Article 2 of *the Law of China on Administrative Discipline for Public Officials*. For the purposes of *this Law*, "public official" means any person specified in Article 15 of *the Supervision Law of China*.

Item (6) under Article 15 of *the Supervision Law of China*: "Supervision authorities shall conduct oversight of the following officials and relevant personnel: [...] Other personnel who perform public duties in accordance with the law."

Article 4 of *The Regulations on the Jurisdiction of the National Supervision Commission (Trial)* (Guo Jian Fa [2018] No. 1) further provides that: "The objects of oversight by the supervisory committee are civil servants and relevant personnel who exercise public power as stipulated in Article 15 of *the Supervision Law of China*, mainly referring to: [...] (6) Other personnel who perform public duties in accordance with the law, including deputies to the National People's Congress, members of the Chinese People's Political Consultative Conference, representatives of the Communist Party Congress, people's assessors, people's supervisors, arbitrators, etc."

¹³Article 7 of *the Law of China on Administrative Discipline for Public Officials*: The types of administrative discipline are: (1) warnings; (2) demerits; (3) serious demerits; (4) demotion; (5) dismissal from office; and (6) expulsion.

Officials, the Criminal Code of China, etc. needs to be clarified. The relevant issues are specifically manifested in the following three categories: (1) As for the incumbent state functionary (*Guo Jia Gong Zuo Ren Yuan*), the staff of the state organs (*Guo Jia Ji Guan Gong Zuo Ren Yuan*), the civil servants (*Gong Wu Yuan*), the public officials (*Gong Zhi Ren Yuan*), the national civil servants (*Guo Jia Gong Wu Ren Yuan*), employees in public sectors that follow the state civil servant system (*Can Zhao Gong Wu Yuan Zhi Du De Ji Guan Gong Zuo Ren Yuan*), other personnels who perform public duties in accordance with the law, and the relevant persons (*Xiang Guan Ren Yuan*), their exact meanings and their relationships are ambiguous. In addition, the interrelationships between the above-mentioned persons and the other related legal jargons, such as “exercising public power (*Xing Shi Gong Quan Li*)”, “engaging in official duties (*Cong Shi Gong Wu*)”, “official duties (*Gong Wu*)”, “public employment (*Gong Zhi*)”, “the public power of the State (*Guo Jia Gong Quan Li*)”, and “the public power of the society (*She Hui Gong Quan Li*)” are also unclear. (Qu, 2005: p. 534, p. 536, and pp. 537-538; Ma, 2018: pp. 65-66; Xie & Shen, 2019: p. 84; Ma, 2019: p.152; Jiang, 2020: p. 28)¹⁴ (2) The logical relationship between the administrative discipline (*Zheng Wu Chu Fen*), the supervisory sanctions (*Jian Cha Zhi Cai*), and the administrative sanctions (*Xing Zheng Chu Fen*) also needs to be further elucidated. (3) There is a controversy in the academic circle of China over whether to adopt “the theory of holding public office (*Gong Zhi Di Wei Shuo*)” or “the theory of exercising public power (*Xing Shi Gong Quan Li Shuo*)” when determining the legal standing of relevant persons in question.

Secondly, the legal hierarchy of supervisory regulations represented by the above-quoted *the Regulations on the Jurisdiction of the National Supervision Commission (Trial)* is vague. Its specific manifestations are: (1) in terms of legal hierarchy, supervisory regulations are definitely lower than *the Constitution of China* and laws; (2) However, there is controversy over the relationship between supervisory regulations and administrative regulations. (3) There is also controversy over the relationship between supervisory regulations and judicial interpretations.¹⁵

In summary, this is an area where China’s practical and academic circles hold diverse viewpoints with significant differences. To put it more clearly, there is currently a lack of logically consistent and convincing consensus among the Chinese law practitioners and scholars regarding the precise meanings as well as the related mutual relationships of the multiple levels of legal jargons listed above. As the saying goes, “difference in profession makes one feel worlds apart”. Resolving these two major issues mentioned above is way beyond the scope of the author’s

¹⁴Scholars of criminal law studies are full of confusion and perplexity about the obscure logical relationships between these said legal terms.

At the same time, celebrated jurists of administrative law studies generally lack detailed analyses against the meaning and contents of “other personnels who perform public duties in accordance with the law”.

¹⁵Liu Yida: *The Positioning of Supervision Regulations in China’s Legal System*, the official website of Hunan University Law School: <https://law.hnu.edu.cn/info/1185/16166.htm>.

expertise. Therefore, the related expounding shall be ended here.

In addition to assuming the aforesaid corresponding administrative sanctions, the related arbitration institutions that appoints the related law-breaching arbitrators may also impose certain internal disciplinary sanctions upon them. For example, according to “*the Management Measures for the Appointment of Arbitrators*” of the Beijing Arbitration Commission, the Commission may refuse to renew or dismiss arbitrators who have committed corresponding disciplinary misconducts.¹⁶ At the same time, in the light of its “*Code of Conduct for Arbitrators*”, for arbitrators who violate relevant internal management rules and regulations, Beijing Arbitration Commission may also take measures such as notifying, warning, temporarily not allotting cases, temporarily removed from the list of selectable arbitrators, not renewing appointment contracts, and even dismissing them based on the relevant circumstances.¹⁷ Likewise, the news that Zhou Yuxing, a former arbitrator of the Changsha Arbitration Commission, was expelled from that Commission due to his illegal acts and disciplinary violations and is currently under supervision and investigation, released on January 3, 2025, also confirms that the arbitration institution does have the authority to implement internal disciplinary actions.¹⁸ In this regard, paragraph 3 of Article 19, paragraph 2 of Article 23, and Article 50 of *the New Arbitration Law* can be deemed as its legal bases.

In many cases, newly established *ad hoc* arbitrators are not the appointees of any arbitration institution. If there are professional disciplinary violations committed by *ad hoc* arbitrators, which entity or entities can exercise corresponding disciplinary supervision and subsequently impose suitable disciplinary sanctions against them? This paper argues that the China Arbitration Association and local arbitration associations can play such a role. The legal basis for this assessment is paragraph 2 of Article 25 of *the New Arbitration Law*, which points out that: “the China Arbitration Association is a self-regulatory organization of arbitration institutions, which supervises the behavior of arbitration institutions, their members, staff, and arbitrators in arbitral activities in accordance with its bylaws.” A jurist holds a positive attitude towards this system: “the role of arbitration associations and arbitral parties should be played in this regard. Supervision and guidance on *ad hoc* arbitration can be exercised at the level of arbitration associations, and an evaluation system and blacklist system for arbitrators can be established accordingly. However, this kind of nonjudicial supervision should only be social and discretionary, and should not have coercive force, to avoid the arbitration as-

¹⁶The official website of Beijing Arbitration Commission:

<https://www.bjac.org.cn/#/arbitration/1907618187044331522/1910507445149233153?categoryId=1910507445149233153>.

¹⁷The official website of Beijing Arbitration Commission:

<https://www.bjac.org.cn/#/arbitration/1907618187044331522/2081644788723281921?categoryId=2081644788723281921>.

¹⁸The official website of the Commission for Discipline Inspection of the Communist Party of Municipality of Changsha & the Commission of Supervision of the Municipality of Changsha: <https://www.ljcs.gov.cn/h/7/20250103/84808.html>. The official website of Nanning Arbitration Commission: <http://nnac.org.cn/xwzx/xwdt/t6263826.html>.

sociation and its evaluation system from deteriorating into tools for manipulating *ad hoc* arbitration.” (Shuimu, Zhang, & Wang, 2019: p.125) As a matter of fact, in China’s arbitral practice, local arbitration associations have already conducted beneficial explorations in this regard. “For example, in July 2024, the Hainan Arbitration Association released its *Guidelines for the Selection and Code of Conduct for Arbitrators in the Ad hoc Arbitral Proceedings of Hainan Free Trade Port*, which clarified the code of conduct for *ad hoc* arbitrators, and in the event that an *ad hoc* arbitrator violates the applicable *ad hoc* arbitration rules, regulations, as well as other mechanisms of *ad hoc* arbitration, the Hainan Arbitration Association may impose professional sanctions on them according to the actual situations of the case at hand.” (Zhang & Wang, 2026: pp. 52-53)

4. Should Civil and Commercial Arbitrators with Illicit Acts Bear Relevant Civil Responsibilities

After resolving the issue of whether institutional and *ad hoc* arbitrators should bear administrative responsibilities, it is necessary to further probe into the realm of whether these two types of arbitrators also need to bear corresponding civil liabilities for their law-violating professional acts. A scholar points out that “the current mainstream view in China is that arbitral power is a quasi-judicial power, which combines the theory of arbitral authority as a judicial power and the theory of arbitral power stemmed from the parties’ agreement, but put more emphasis on its judicial nature side. It is believed that arbitration power is a necessary supplement and a modified quasi-judicial procedure to the national judicial system.” (Chu & Shi, 2019: p. 109) This viewpoint is fully in line with the prevailing tenet of the nature of overseas civil and commercial arbitration: That is to say, “the obligations of arbitrators in international arbitration originate from their contractual relationship with the parties concerned and the judicial functions they undertake, therefore the obligations of arbitrators have the double traits of contractual and statutory.” (Lai, 2014, p. 86)

The author believes that the traditional institutional arbitration provided by *the New Arbitration Law* certainly possesses the above twin features. Moreover, China’s *ad hoc* arbitration system should also share these features. The reason is that, on the one hand, China’s *ad hoc* arbitration is first established on the basis of clear legal authorization. If there is no such an unequivocal lawful authorization, *ad hoc* arbitration conducted within China will inevitably be illicit. This reflects the inherent “arbitration judicial power” of China’s system of *ad hoc* arbitration. On the other hand, China’s *ad hoc* arbitration is also a manifestation of the “the theory of arbitral power stemmed from the parties’ agreement” mentioned above. Its specific demonstration is: “As the conduct of the *ad hoc* arbitration procedure depends on the good faith cooperation of the disputing parties, the mutual collaboration between the two sides is an important foundation for the *ad hoc* arbitral proceedings to avoid procedural stagnation or deadlock.” (Lai, 2014, p. 86)

Based on the above two paragraphs, civil and commercial arbitrators should bear corresponding civil liabilities to the parties concerned for their illegal professional conducts. For instance, “in a case reported in 2017, two arbitrators who violated the principle of collegiality, were ordered by the Supreme Court of Spain to pay hundreds of thousands of euros in compensation to the parties concerned.” (Chu & Shi, 2019: p. 108) A specific technical puzzle raised here is: What kind of civil liability is this? In term of this issue, a jurist has argued that “the parties to a commercial dispute also have a contractual relationship with the selected arbitration institution and arbitrator(s). Specifically, the parties to a commercial dispute have a contractual relationship with the arbitration institution and arbitrator(s) for the related arbitral services. The parties grant the arbitrator(s) the authority to hear and adjudicate commercial disputes between them. The arbitral institution and arbitrator(s) provide arbitration services to the parties, and the parties pay the agreed arbitration fees.”¹⁹ Based on the dual nature theory of civil and commercial arbitral power mentioned earlier, this should be considered as a special type of contractual breach liability. (Song, 2010: p. 83)²⁰

Here, it should also be noted that “the relationship between the *ad hoc* arbitrator and the parties is based on the arbitration agreement. Although there is no independent and tangible contract outside the arbitration agreement, its essence is still a contractual relationship. Therefore, that relationship can be regulated by the contents of *the Civil Code of China* on contract breach liability. If the *ad hoc* arbitrator violates his contractual obligations, he can be held liable for breach of contract.” (Yu & Yang, 2024: p. 34)

In the author’s opinion, in terms of the contract-violating liability that arbitrators with illegal acts shall bear, the author believes that it should has six constituent elements: (1) the arbitral service contract is rightfully established and effective. (2) The arbitrator has committed clear breaches of contract in related arbitral activities. (3) There is no statutory or agreed exemption for the arbitrator with misconducts. (4) The arbitrator’s breaches of contract resulted in actual harm to the parties concerned. (5) There is a direct causal link between the arbitrator’s breach of contract and the damage suffered by the parties concerned. (6) As for the maximum scope of contract-violating liability to be assumed by the law-breaking arbitrator, it should be limited to the actual losses suffered by the parties concerned,

¹⁹On the Positioning and Reform of China’s Commercial Arbitration System, the official website of University of International Business and Economics: <https://ielaw.uibe.edu.cn/fx/w/gjzcf/14048.htm>.

²⁰Based on Articles 135, paragraph 1 under 469, and 577 of *the Civil Code of China*, as well as Articles 4, 5, 6, 10, as well as 27 to 31 of *the New Arbitration Law of China*, the legal service contract between the arbitrators and the parties concerned is indeed a special type of contract. The author believes that the uniqueness of this type of contract is mainly demonstrated by the following three aspects: First, it is a legal service contract that complies with articles of *the Civil Code of China*; Second, undeniably, it also possesses a feature of public law procedural arrangement that complies with the relevant provisions of *the New Arbitration Law of China*. This is vividly reflected in the fact that the establishment and validity of this contract will have a public law effect that excludes the exercising of jurisdiction by the court against the same case. Third, “this type of contract is a specialized one because the designated arbitrator does not serve a particular side in dispute, but serves both sides together. However, the service provider does not need to obey the will of the designated persons, but independently and impartially resolves disputes between the two sides with his own specialized knowledge and experience.”

and the so-called punitive damages system shall not be applied in this scenario.²¹

As for the six constituent elements mentioned in the above paragraph, the most crucial one is the second constituent element—that is, “the arbitrator has committed clear breaches of contract in related arbitral activities”. The reason for this assessment is that from the perspective of civil law, the principle of imputation is the criterion for determining the transformation of the contract-breaching fact into the corresponding liability for breach of contract. In other words, a breach of contract is merely an objective fact, and the principle of imputation is to elevate this objective fact to the value appraising basis of the related legal responsibility. “The principle of imputation refers to the basis and standards for determining the civil liability to be assumed by the actor. According to the current civil codes and contract laws of the countries around the globe, the principles of imputation for breach of contract include the principle of fault liability, the principle of fault presumption, and the principle of no fault [...] the principle of fault presumption still belongs to the category of fault liabilities [...] The principle of imputation for breach of contract stipulated in China’s contract law is a system mainly based on the principle of no fault, supplemented by the principle of fault liability.” (Liu, 2021: pp. 523-524) This paper believes that, in order to effectively and thoroughly protect the normal professional practice of arbitrators, we should take the opposite approach in terms of their breach of contract liability—that is, we should only apply the principle of fault liability, thereby excluding the usage of the principles of no fault and fault presumption. This is mainly reflected in the limited exemption doctrine for civil liability to be shouldered by arbitrators, which is closely linked to the contractual breach liability of arbitrators.

“The limited exemption doctrine for civil liability to be shouldered by arbitrators is an eclectic type between extreme theories of civil liability exemption for arbitrators. It recognizes the contractual nature of arbitration and the very existence of the arbitrator jointly-choosing contract, and thus clarifies that arbitrators need to bear certain civil liabilities, at the same time also recognizes the judicial nature of arbitration and the quasi-judicial status of arbitrators, believing that arbitrators should enjoy a certain degree of civil liability exemption similar to that of judges.” (Hu, 2024: pp. 94-95) It is generally believed that the limited exemption doctrine for civil liability to be shouldered by arbitrators mainly includes the following five aspects:

First, civil and commercial arbitrators make corresponding rulings based on their professional determination and the available evidence in the normal performance of their duties, even if their verdict does not meet the expectations of one or both parties concerned, as long as there is no law-violation situation, they do not need to bear the liability for breach of such a legal service contract. For example, “the assumption of civil liability by an *ad hoc* arbitrator is based on the prem-

²¹As for the six constituent elements mentioned in this paragraph, they are not directly stipulated by valid laws and regulations of China, but are academically designed to fill the corresponding loopholes within the scope of Chinese laws—the author’s note.

ise of violating mandatory legal provisions, and thus general business negligence should be excluded from this type of civil compensation liability. This is similar to the ‘commercial judgment rule’ endorsed by English and American company law precedents. Therefore, an *ad hoc* arbitrator’s rational arbitration award should be respected by the law.” (Cao & Wang, 2018: p. 6)

Second, the principle of civil liability exemption for arbitrators is not absolute and should be limited to activities within the scope of the arbitrator’s legitimate performance of his judicial functions. (Shi, 2021: pp. 187-188) For instance, Article 57 (Exemption) of *the Rules Governing Ad hoc Arbitration* issued by the Shanghai Arbitration Association stipulates that, “**except for intentional misconducts**, to the maximum extent permitted by the applicable laws, the parties concerned waive any claims against the arbitrator(s), the appointing authority and its related persons, as well as any person designated by the arbitral tribunal on the grounds of acts or omissions related to this arbitration.”²²

Third, in terms of their illegal professional acts, “it is the international mainstream view that the degree of fault for the arbitrators to bear their civil compensation liabilities should be higher than that of general negligence.” (Shi, 2021: p. 177) The term of “‘their illegal professional acts’ mentioned above only refers to situations where an arbitrator violates either the legal or the contractual obligations out of his/her intention or the gross negligence.” (Jiang, 2018: p. 97)²³

Fourth, regarding the six constituent elements of the arbitrator’s liability for breach of contract listed above, the corresponding objective onus of persuasion is entirely borne by the party claiming his interests has been damaged by the related arbitrator(s). The objective onus of persuasion for these constituent elements is normally distributed, and none of them is legislatively reversely assigned to the opposing party (the alleged misbehaved arbitrator) to assume.

Fifth, in terms of the subjective fault assessment against the professional acts of civil and commercial arbitrators, this is a loophole in Chinese laws and regulations that is yet to be patched. Frankly speaking, the following five paragraphs are merely theoretical inferences and explanations expressed by Chinese men of learning. For example, a scholar holds the opinion that, “for the identification of ‘the intention or the gross negligence’, Chinese courts focus on whether the actor has fulfilled the reasonable and prudent duty of care. This is different from the theoretical viewpoint of the traditional fault-spotting procedure where the different degrees of duty of care are distinguished by resorting to some objective criteria like ‘ordinary person’s attention’, ‘attention to handling one’s own affairs’, and ‘good administrator’s attention’.” (Shi, 2021: p. 183) In other words, for the dual purposes of both fully protecting the legitimate rights and interests of arbitrators as well as implementing the above-expounded limited exemption doctrine

²²The official website of Shanghai Arbitration Association: <https://www.sharbitration.org.cn/zh/adHocArbitral/1>.

²³“In line with the civil laws, the general approach of imputation for civil liability is the doctrine of fault, and the method of assuming that responsibility is to pay the corresponding compensation. Therefore, if an arbitrator violates the arbitral obligations agreed upon by the parties in their arbitration agreement due to the intention or the gross negligence, thereby causing damage to the parties, the arbitrator should bear the related civil compensation liability.”

for civil liability to be shouldered by arbitrators, judges as the *ex post* judicial supervisors should adopt a “subjective determining standard for individual cases”, instead of a “universally applicable objective determining standard”, when trying to figure out whether there is subjective fault concerning the professional activities of the related arbitrator(s). In his brilliant works, a Chinese jurist has especially elaborated the details of that “subjective determining standard for individual cases” as follows:

(1) “The other obligations of arbitrators in arbitral proceedings are often evaluated based on subjective standards. Although judicial practice and the theory have different ideas of the degree of performance required for these obligations, the standards being proposed are not strict objective ones. Both arbitrators and judges still need to make determinations based on the overall information of the case at hand. Whether arbitrators indeed fulfill these duties in a case involves the estimations of reasonableness, and as natural persons, the information that arbitrators can obtain in a specific time and space is limited. The legal assessment of the arbitrator’s acts during the procedure can only be conducted *ex post* and depends on the personal evaluations of another type of subjects (i.e. judges). Therefore, while acknowledging the limitations of knowledge, it is not in line with the realistic rules to evaluate the performance of arbitrators based on objective standards completely. Consequently, it is necessary to introduce an evaluation of the subjective state of the arbitrator’s behaviors.” (Shi, 2021: p. 177)

(2) “Based on the process of arbitral activities, the determination of whether the aforementioned reasons for non-enforcement exist is first made by the arbitrator or the parties in the arbitral procedure, while the assessment of the court only exists in the stage of enforcing the related award. However, based on differences in information acquisition, legal conflicts, or different individual understanding, there will inevitably be subjective discrepancies in the determinations of different parties. Therefore, the determination of whether the arbitrator breached his obligation in the arbitral process can only be made subjectively, and cannot be based solely on the existence of defects in the arbitral proceedings or the denial of the enforceability of the related award as the bases for confirming the arbitrator’s breach of obligations. That is to say, ‘the principle of non-fault’, which turns a blind eye towards subjective factors, shall not be applied to the arbitrator’s arbitral behavior process.” (Shi, 2021: pp. 176-177)

(3) Based on Article 22 and Paragraph 1 of Article 82 of *the New Arbitration Law*, “the person appointed as an arbitrator should have professional knowledge, occupational experience, and his moral standards higher than those of ordinary people. Their actions in arbitral activities are generally not something that ordinary people without the aforesaid features can accomplish. As an arbitrator, the person should be considered to have a reasonable understanding of the fundamental norms of arbitration activities and the arbitral procedural requirements agreed upon by the parties concerned, and act accordingly. Consequently, the assessment of the arbitrator’s gross negligence should be based on the lowest level

of care in the same profession.” (Shi, 2021: p. 185)

(4) “The general meaning of ‘intention’ in Chinese laws includes both knowledge of the outcome of an act and the subjective mental attitude of intending or permitting the consequence to happen. Although the above is a concept in the sense of criminal laws, the division of subjective states in criminal legal theory also has reference value for defining subjective fault types in civil laws. For criminal laws, the concept of the aforesaid ‘intention’ can be divided as the direct or the indirect intention based on the difference between ‘hoping for the result to occur’ and ‘permitting the consequence to happen’. However, the significance of the above bifurcating classification from the perspective of the actor’s civil liabilities is relatively small, and both ‘hope’ and ‘permit’ are sufficient to constitute ‘intention’ so as to bear the related civil liability.” (Shi, 2021: p. 184)

Based on the above four paragraphs, the author suggests that the intentional and grossly negligent fault of the civil and commercial arbitrator can be figured out by comprehensively investigating at least the following eight aspects: whether the arbitrator engages in fraudulent behaviors or not; whether the arbitrator accepts bribes or not; whether the arbitrator violates confidentiality obligations and thus causes losses to the parties concerned; whether the arbitrator has covered up factors that may compromise his impartiality and independence before accepting the selection by the parties; whether the arbitrator who unjustly favor one party during the arbitral process, thus resulting in unequal treatment between the two sides; whether the arbitrator who improperly delay the proceedings; whether the related arbitration award is judicially revoked due to violation of procedural justice; whether the related arbitration award’s enforceability is procedurally denied by the judiciary of China, etc.

In terms of the assumption of the contract-violating liabilities by the law-breaking arbitrators, the following mechanisms can be considered and used: (1) to handle it through a private settlement reached by the two sides in controversy. For example, “the specific amount of compensation can be stipulated in the code of conduct drafted by the arbitration institution where the arbitrator is appointed, or determined through consultation between the parties concerned and the arbitrator;” (Jiang, 2018: p. 97) (2) it may be mediated by an intermediary trusted by the two sides; (3) Various out-of-court mediation mechanisms can be utilized to resolve the dispute; (4) On the premise of mutual consent in writing, the dispute can be resolved through civil and commercial arbitration; (5) When all the above mechanisms fail to settle the relevant disputes, it is also possible to consider filing a civil lawsuit with a competent people’s court for its resolution. (Hu, 2024: p. 95)²⁴

Another relevant technical issue that needs to be addressed here is whether the way and circumstances in which institutional arbitrators and *ad hoc* arbitrators assume civil liability are exactly the same? Based on the literature collected by the

²⁴“In practice, there have been civil litigation in China where arbitration parties have sued the related arbitrators.”

author, there are currently no rule in China's laws and regulations to address this particular issue. To patch this loophole, the corresponding stopgap resolutions should be figured out in terms of academic principles. In this regard, the author believes that both types of arbitrators may bear relevant civil liabilities. However, for the two, their respective specific way and mechanism of assuming that responsibility are different:

As for *ad hoc* arbitrators, when their acts meet the relevant conditions for assuming contract-breaching liabilities, they themselves shall independently assume the relevant civil liability; As for institutional arbitrators, when their illegal activities meet the conditions for assuming contract-breaching liabilities, if the arbitration institution that appointed them is not at fault (i.e. neither with intention nor with gross negligence), the arbitrators who violated the contract due to his intention or his gross negligence shall independently bear civil compensation responsibility. However, if an institutional arbitrator and the staff of the related arbitral institution who appointed him maliciously conspire to breach the contract, that arbitrator and the arbitration institution shall bear the relevant joint and several contract-breaching liability together. Furthermore, if there is a certain degree of minor negligence in the supervision and management of an arbitrated case by the related arbitral institution (i.e. certain minor mishandling of preliminary examination and the subsequent acceptance of the filed case, appointment or approval of arbitrators, etc.), but the arbitrator designated to hear the case neither has the intention or the gross negligence in this regard, then both the arbitral institution and the arbitrator should enjoy exemption from liability in the sense of civil laws. The reason is that in civil and commercial arbitral activities, arbitrators are the main players, while the arbitration institution that appointed them is only playing a secondary coordinating role. (Song, 2010: p. 43)²⁵

Lastly, in terms of the contract-breaching liabilities to be assumed by the civil and commercial arbitrators, once they are identified as the defendants in civil litigation, the corresponding disputed subject matter (*An You*) should be identified based on the latest version of *SPC Provisions on Summary Descriptions of the Subject Matters in Civil Cases* (Fa [2025] No. 226). Specifically, the disputed subject matter (*An You*) for such civil cases should be the fourth level *An You* (142. (5) Legal service contract disputes), rather than another fourth level *An You* (124. (4) Disputes over litigation, arbitration, or civil mediation agency contracts).²⁶ The reason for this assessment is simple: in terms of "disputes over litigation, ar-

²⁵An arbitrator is a person who presides over the arbitration proceedings in an arbitrated case and render arbitration awards on the disputed facts and rights and obligations, thus playing a decisive role in that process and outcome of the arbitration case. In contrast, the main duties of the management carried out by China's arbitration commission are: (1) to handle procedural affairs such as case acceptance, service of arbitration documents, and case-file management; (2) collect and manage arbitral fees; (3) handle other affairs assigned by the arbitration commission. In addition, in the case of *ad hoc* arbitration, the arbitrator presides over the arbitration in their personal capacity, and it is impossible to involve the responsibility to be assumed by the arbitral institution on this occasion; but in the case of institutional arbitration, arbitrators often perform their duties in the name of an arbitration institution, and hence it may be necessary to examine whether the arbitral institution should be accountable for the damages caused to the parties concerned due to improperly handled arbitral affairs.

²⁶The Supreme People's Court promulgates the revised "SPC Provisions on Summary Descriptions of the Subject Matters in Civil Cases", the official website of the Supreme People's Court of China: <https://www.court.gov.cn/zixun/xiangqing/484231.html>.

bitration, or civil mediation agency contracts”, they refer to the signing of a specialized agency contract between the commissioning party and the legal service providers (lawyers, grassroots legal service workers, etc.), which stipulates that the trustees have the duty to handle the legal affairs either in the related litigation, or in the related arbitration, or in the related extra-judicial conciliations. However, controversies occurred between the two sides over substantive legal rights and obligations due to the conclusion, performance, modification, and termination of the said agency contract. By comparison, in civil and commercial arbitration, both institutional arbitrators and *ad hoc* arbitrators are impartial decision-makers, and their legal status and procedural functions differ significantly from those of delegated agents who are manifestly one-sided in favor of their commissioning parties.

5. Should Civil and Commercial Arbitrators with Illicit Acts Bear Relevant Crime Responsibilities

After working out the two queries of whether law-violating civil and commercial arbitrators should bear administrative and civil liabilities, the next question to be addressed is whether arbitrators with serious illegal conduct shall also assume corresponding criminal liabilities?

In this regard, a published treatise remarks that “Article 399 of *the 6th Amendment to the Criminal Code of China*, which stipulates the crime of law-bending in arbitration, has always been the sword of Damocles hanging over the heads of arbitrators. Although this provision has been hotly-contested since the beginning of the expert argumentation for the draft, it cannot be denied that arbitration, like litigation, can cause substantial damage to the rights and obligations of the parties through perverting the law in arbitral and judicial determinations. As for today’s increasingly covert and frequent false arbitrations, holding the law-bending arbitrators criminally accountable is the ultimate supervisory and restrictive measure.” (Yu & Yang: 2024, p. 34)

Scholars specialized in the penal code studies believe that “the crime of law-bending in arbitration refers to the acts of a person who, in pursuance of the law, undertakes arbitral responsibilities to render a law-perverting award by intentionally against the facts and violating the law during arbitration activities, and the consequential circumstances are also serious.” (Zhang, 2024: p. 715)

According to the theory of the criminal laws, there are four elements that constitute the crime of law-bending in arbitration: [the subject] the persons who undertake arbitral responsibilities in accordance with the law. [the harmed objective] The fairness and the equity of arbitration activities. [the subjective fault] intention, it refers to knowingly against facts and violating laws when rendering an arbitration award, but is fully aware of the facts of the case or the applicable laws at the same time. [unlawful act] it refers to purposefully against facts and violating laws in arbitral activities and making illegal verdict, with serious consequential circumstances. Here, the so-called “rendering a law-bending award that against facts and violates the law” refers to making an arbitral verdict that confuses or distorts facts,

confounds right and wrong, or twists the law without clarifying or finding out the facts of the arbitral case based on existing evidence, or without correctly applying the law based on the verified facts of the case. It usually is manifested as deliberately favoring one party or harming the interests of one party by design; For those evidence that are correct, conclusive, and sufficient, they will be deemed as insufficient evidence willfully; where the evidence is insufficient, it will be deemed as sufficient instead; not fairly determining the liabilities of the parties based on the vindicated facts, etc. (Ruan, 2016: pp. 533-534).

In line with the law, the acts of perverting the law in arbitration can only constitute a crime if it reaches the level of “serious consequential circumstances”, in addition to meeting the four constituent elements listed in the preceding paragraph. However, it is regrettable that China’s laws and regulations have not specifically set the case-registration threshold for the crime of law-bending in arbitration. Nowadays, case handling authorities often refer to the cognitive ways of determination for the crime concerning civil and administrative law-bending judgments provided by *the Regulations of the Supreme People’s Procuratorate on the Standards for the Case Registration of the Infringement Crimes Caused by the Dereliction of Duty* (Gao Jian Fa Shi Zi [2006] No. 2) for handling that technical issue.

For the purpose of patching this regulatory loophole, a jurist advocates the following academic design in his article: “In my opinion, the standards for putting a case concerning the crime of arbitrating by bending the law on file can be formulated as follows: 1. arbitrating by perverting the law, causing the parties or their close relatives to commit suicide or self-inflicted harm, thus resulting in serious injury, death, or mental disorder; 2. arbitrating by perverting the law, causing direct economic losses of more than 150,000 yuan to the related personal property, or direct economic losses of less than 150,000 yuan but indirect economic losses of more than 500,000 yuan; 3. arbitrating by bending the law, causing direct economic losses of more than 300,000 yuan to the related legal person or the unincorporated organization, or direct economic losses of less than 300,000 yuan but indirect economic losses of more than 1.5 million yuan; 4. arbitrating by twisting the law, resulting in the suspension of business, production for more than one year, or bankruptcy of the related company, enterprise, and other units; 5. falsifying or tampering with relevant materials and evidence, creating false cases, and hence bending the law in the related arbitration; 6. these arbitral personnel who collude with the parties to fabricate false evidence, destroy evidence, intentionally lose evidence, or tamper with arbitral records, thereby bending the law in the related arbitration; 7. engaging in favoritism or personal gain by knowingly accepting evidence that is forged or tampered with, or by purposefully refusing to accept evidence that should lawfully be admitted, or by knowingly violating legal procedures, or by willfully applying the law incorrectly, and thus perverting the law in arbitration; 8. there are circumstances of arbitral personnel soliciting or accepting properties; 9. the wrongful award has caused adverse social impact; 10. other seri-

ous consequential circumstances.”²⁷

The Central Commission for Discipline Inspection of the Communist Party of China (the CCDI) and the National Commission of Supervision of the People’s Republic of China (the NCS) hold the opinion that “arbitrators are civil servants when performing their arbitral duties. From a theoretical perspective, arbitration is both contractual and judicial. Although the arbitral power of arbitrators comes from the arbitration agreement concluded by the parties concerned, the exercise of arbitral power is protected by national laws and guaranteed by national coercive power. At the same time, although arbitrators are different from judicial personnel in their legal status, arbitration activities are conducted in accordance with legal provisions and are quasi-judicial acts in nature that can determine the rights and obligations of the parties, thereby possessing the attributes of public power. From a legal perspective, the effective arbitral award made by an arbitrator has similar legal effects as the final judgment declared by a people’s court. In the light of the relevant articles of *the Arbitration Law* and *the Civil Procedure Law*, if one party fails to perform the effective arbitration award, the other party may apply to the competent people’s court for its enforcement. Meanwhile, Article 399-1 of *the Criminal Code of China* specifically sets the crime of arbitrating by bending the law, which is a crime by taking advantage of duty under the exclusive jurisdiction of the supervisory organs.”²⁸

Based on the official viewpoint expressed above, a key issue to be addressed here is whether the crime of arbitrating by bending the law stipulated in Article 339-1 of *the Criminal Code of China* applies to the institutional arbitrators and *ad hoc* arbitrators handling civil and commercial disputes in China? In this regard, the author does not agree with the view that the arbitrators who violated the law should be exempted from related penal liability after being deemed as the proper subjects to bear the criminal responsibility in the first place. (Zhang & Zhang, 2010: p. 156)²⁹ In terms of this issue, the author’s basic judgment is twofold: On the one hand, in China, the crime of arbitrating by bending the law may be applied to both institution arbitrators with illegal acts and the law-breaking *ad hoc* arbitrators. On the other hand, in China, there are some related technical issues that urgently need to be addressed and clarified. Specifically, they are:

First, this treatise fully supports the inclusion of the crime of law-bending in arbitration as one of the crimes of dereliction of duty stipulated by *the Criminal Code of China*. However, in order to fully streamline the connections between the upfront oversight investigation conducted by the supervisory organs and the fol-

²⁷Zheng Zhuojia: *The Case Registration Criteria for the Crime of Law-bending in Arbitration should be Clearly Defined*, the official website of Supreme People’s Procuratorate of China: https://www.spp.gov.cn/llyj/200706/t20070621_50574.shtml.

²⁸The official website of the Central Commission for Discipline Inspection of the Communist Party of China & the National Commission of Supervision of the People’s Republic of China: https://www.ccdi.gov.cn/yaowenn/202202/t20220223_173572_m.html.

²⁹“After the passage of *the 6th Amendment to the Criminal Code of China* in 2006, most scholars no longer insisted on holding the viewpoint that China’s laws did not intend to impose criminal liabilities upon arbitrators. However, there were still fierce outcries against Article 399 of *the New Criminal Code*, which stipulates ‘the crime of law-bending in arbitration’, and also advocating for the exemption of that criminal liability for the related arbitrators.”

low-up supplementary investigation conducted by the people's procuratorates (Liao, Zhang, & Liu, 2022: pp. 65-66)³⁰, efforts must be made to solve the following two related technical problems: (1) The conundrum emphasized in sub-section III of this article related to "a lack of logically consistent and convincing consensus among the Chinese law practitioners and scholars regarding the precise meanings as well as the related mutual relationships of the multiple levels of a train of legal jargons". (2) On the basis of better solving the first problem mentioned above, efforts shall be made to try to coordinate and unify the provisions of administrative laws such as *the Supervision Law of China* with the corresponding provisions of *the Criminal Code of China*.

It should also be pointed out that, in a secondary sense, there seems to be a lack of logical consistency when treating "the crime of arbitrating by bending the law" as a concrete type of "the crimes of dereliction of duty". The specific meaning of this assessment is: "the crime of arbitrating by bending the law" is included as Article 399-1 in Chapter 9 of *the Criminal Code of China* (the crimes of dereliction of duty), and the harmed object of 'the crimes of dereliction of duty' is deemed as the duty-performing activities of state organs. The harmed object referred to in penal laws refers to the social relationships protected by China's criminal laws but infringed upon by the related criminal acts. If 'the crime of arbitrating by bending the law' is classified as 'a crime of dereliction of duty', it means that the related criminal behaviors of this crime encroach on the duty-performing activities of state organs. This obviously conflicts with the basic characteristics of arbitration expressed by *the Arbitration Law of China*, and does not conform with the legal status of the staff and arbitrators of arbitration institutions." (Shi, 2021: p. 190)

The author believes that the views of the scholar quoted above can be confirmed by the following legislative interpretation: *Interpretations of the Standing Committee of the National People's Congress on the Application of the Subjects of the Crimes of Dereliction of Duty in Chapter 9 of the Criminal Code of the People's Republic of China* (adopted at the 31st meeting of the Standing Committee of the 9th National People's Congress on December 28, 2002), which clearly states that: "The Standing Committee of the National People's Congress discussed the application of the subjects of the crimes of dereliction of duty in Chapter 9 of *the Criminal Code of China* based on the situations encountered in judicial practice, and interpreted it as follows: personnel who engage in official duties in organizations that exercise state administrative management powers in accordance with laws and regulations, or personnel who engage in official duties in organizations au-

³⁰By comprehensively observing item (4) under paragraph 1 of Article 52 and paragraph 3 of Article 54 of *the Supervision Law of China*, as well as Article 170, paragraph 1 of Article 172, and paragraph 1 of Article 291 of *the Criminal Procedure Law of China* (revised at the 6th meeting of the Standing Committee of the 13th National People's Congress on October 26, 2018), it can be seen that the power to investigate the crimes of dereliction of duty is actually shared between China's supervisory organs and procuratorates. In addition, in this state of shared power, the supervisory organs play the leading role by exercising their investigative power. By contrast, the procuratorial organs only play a supplementary and secondary role here. In terms of this topic, scholars specialized in researching administrative laws also hold similar views.

thorized by state organs to exercise powers on behalf of state organs, or personnel who engage in official duties in state organs even though they are not included in the staffing quota for state functionaries, shall be held criminally responsible in accordance with the rules of *the Criminal Code of China* on the crimes of dereliction of duty when exercising powers on behalf of state organs.”³¹ After careful analysis and comparison, it is obvious for us to conclude that both institutional arbitrators and *ad hoc* arbitrators in China cannot be included in the anyone of the three categories of subjects listed in this legislative interpretation.

Second, in line with Articles 71 and 76 of *the New Arbitration Law* and Article 248 of *the Civil Procedure Law*, the grounds for invoking judicial review against effective domestic civil and commercial arbitral awards are mostly due to procedural violations of the related arbitral activities, with only three review grounds involving substantive defects concerning the related awards, as jointly stipulated by items (4) to (6) under Article 71 of *the New Arbitration Law* and items (4) to (6) under Article 248 of *the Civil Procedure Law*.³² By comparison, based on Articles 83 and 84 of *the New Arbitration Law*, as well as Article 291 of *the Civil Procedure Law*, Chinese courts currently only conduct judicial review on pure procedural flaws in effective foreign-related civil and commercial arbitral awards.

According to the scope of judicial review against civil and commercial arbitration mentioned in the preceding paragraph, although arbitrators (including *ad hoc* arbitrators) for adjudging foreign-related disputes in China are also the applicable subjects of the crime of law-bending in arbitration, it will be more difficult for judicial authorities to prosecute them for the related criminal accountabilities. Six reasons supporting this judgment are:

1. The persistent criticism and opposition uttered by Chinese arbitration community. For example, a jurist alleges that “introducing this criminal charge into the liability system against civil and commercial arbitrators (and the personnel of arbitral institutions) would constitute excessive intervention by public law in civil and commercial arbitral activities, and would also go beyond the scope of judicial supervision of arbitration awards under the existing civil and commercial arbitration system.” (Shi, 2021: p. 193) For another example, some scholars also find fault with the court’s improper application of that criminal charge in individual cases. In this regard, the article “*The Chief Arbitrator’s Failure to Clearly Express His Opinion in the Deliberation Record and Thereby Rendering an Arbitration Award Solely Based on His Opinion, Constitutes the Crime of Law-bending in Arbitration*” is typical.³³

³¹The official website of the Central People’s Government of the People’s Republic of China: https://www.gov.cn/gongbao/content/2003/content_62410.htm.

³²These three statutory reasons for initiating the civil judicial review are: (1) Where the evidence being used as the base for a judgment or a procedural ruling is a forgery one; (2) where, for the arbitration organization, the opposite party intentionally hid the evidence whose existence or not has a great influence for the justness of the verdict; and (3) where the arbitrators involved in any of conducts of soliciting and accepting bribes, practicing favoritism for himself or relatives, twisting the law in rendering arbitration award.

³³The official website of Luzhou Arbitration Commission: <https://www.lzzcwyh.com/content/1163.html>.

2. As pointed out earlier, China's laws and regulations have not yet established a clear threshold for the criminalization against the illicit acts of law-bending arbitration. This is not conducive to the unified interpretation and application of the related laws and regulations, and to some extent also increases the difficulty of handling cases of the crime of law-bending arbitration.

3. "According to Article 20 of *the 6th Amendment to the Criminal Code of China*, in order to constitute such a crime, the acts of bending the law in arbitration must have serious circumstances." (Ruan, 2016: p. 533) In contrast, ordinary irregularities and flaws in the arbitral procedure as well as minor deviations in its law application shall not be directly subjected to criminal prosecution, which greatly reduces the application scope of this crime.

4. As for the foreign-related arbitration awards rendered within the boundaries of China, "in the case where the judicial review of civil courts no longer directly intervenes in the finding of the related facts and the law application by arbitrators in civil and commercial controversies, it may be difficult to conclude through criminal investigation that the relevant award 'against the facts and violating the law' in the trials concerning 'the crime of law-bending in arbitration'." (Shi, 2021: p. 192)

5. Compared with the annual number of domestic civil and commercial cases accepted by various arbitration institutions across China, the number of foreign-related civil and commercial cases and maritime cases accepted by them is significantly in the minority. For instance, "*the 2024 Work Report of CIETAC*" demonstrates that the total number of new cases accepted by CIETAC in that year was 6,013. Among them, the total number of foreign-related cases is merely 758.³⁴ When the foreign-related cases only take a small proportion of the total undecided cases accepted by the arbitral institutions on the annual bases, it is easy to appreciate the rarity of arbitrators involved in the foreign-related arbitral activities who are suspected of committing the crime of law-bending in arbitration.

6. Due to the fact that the *ad hoc* arbitration in China is a newly established system, coupled with its multiple features, such as its strictly limited applicable scopes, the extremely small number of its cases, the high flexibility of its proceedings, and its better confidentiality, it will be way much more difficult to investigate the criminal accountability concerning *ad hoc* arbitrators suspected of violating the law.

The long-term combined effect of the above six factors is that in China, it is relatively rare for the judiciary to criminally convict civil and commercial arbitrators for their law-breaching acts. For example, up to now, there are relatively few cases where the crime of law-bending in arbitration has been successfully and fully convicted in China. In this regard, this author has only found the following four cases: (1) Liu Mou Ming, an arbitrator of Y City Arbitration Commission, was found guilty of conspiring with others to tamper with the term of arbitration

³⁴The official website of CIETAC Tianjin Sub-Commission: <http://www.cietac-tj.org/articles/32214>.

agreement.³⁵ (2) Zhang, an arbitrator of Shenyang Arbitration Commission, was found guilty of colluding with Liu, a lawyer representing one party in the related arbitration. (Tang, 2019: p. 6) (3) Xue Bingfeng and Shu Zhongliang were found guilty in a case concerning law-bending in arbitration and bribe acceptance.³⁶ (4) After being prosecuted by the people's procuratorate of Shigu District, Hengyang City, Hunan Province, Liu Guohou, an arbitrator of the Hengyang Arbitration Commission, and Zhang Ping, a secretary of the secretariat of the same arbitration institution, were found guilty of the crime of law-bending in arbitration by the primary people's court of Shigu District. (Zhao et al., 2011: p. 8)

Third, regarding the specific application of the crime of law-bending arbitration, we also need to pay attention to the following seven relevant sub-details:

1. In pursuance of paragraph 3 of Article 22 of *the New Arbitration Law*, when the institutional arbitrators who are selected to adjudicate purely domestic civil and commercial disputes are foreign citizens or stateless persons, and if there are serious violations in their arbitral activities, they may also become the proper subjects for the application of the crime of law-bending in arbitration.

2. Based on the provisions of *the New Arbitration Law*, *the Supervision Law of China*, *the Criminal Code of China*, and *the Regulations on the Jurisdiction of the National Supervision Commission (Trial)*, in addition to civil and commercial arbitrators, the applicable subjects of China's crime of law-bending in arbitration also include: arbitrators who adjudges labor disputes; arbitrators for handling disputes of human resources concerning Chinese public institutions; arbitrators for handling disputes over rural land contracting management; arbitrators for handling sports disputes. (Li, 2011: p. 6)

3. How to properly handle the mutually-competing application relationship between the crime of law-bending arbitration and other related penal charges (e.g. the bribery crime under Article 385, the bribery crime committed by non-state personnel under Article 163, the commercial bribery crime under Article 164, and the crime of forging seals of companies, enterprises, public institutions or people's organizations under paragraph 2 of Article 280 of *the Criminal Code of China*), while investigating the criminal responsibilities of law-violating civil and commercial arbitrators? In other words, what is the legal mechanism for handling the co-existing yet competing criminal charges against the same suspect in that particular situation? And how to use that mechanism in the judicial practice? These all need further clarifications.

4. From the nature and contents of their job, arbitrators who adjudicate civil and commercial disputes cannot be deemed as the proper subjects for the crime of embezzlement (*Tan Wu Zu*) as provided by paragraphs 1 and 2 of Article 382 of *the Criminal Code of China*. This author believes that only when civil and com-

³⁵The official website of the Commission for Discipline Inspection of the Communist Party of Hubei Province & the Commission of Supervision of Hubei Province: <https://www.hbjwjc.gov.cn/xwtt/139798.htm>.

³⁶Zhang Zhen'an: *On the Criminal Liabilities to be Assumed by Arbitrators*, the official website of Shanghai Bar Association: <https://www.lawyers.org.cn/info/b8867aa0b6aa48efa1a99f269d5d3004/>.

mercial arbitrators collude maliciously with state-owned enterprises and other public property management entities involved in the relevant arbitral proceedings and subsequently render unjust awards, can they have the chance to become accomplices to the crime of embezzlement. Therefore, the lawmakers of China are advised to delete the obsolete phrase of “embezzlement (*Tan Wu*)” from the text of item (6) under paragraph 2 of Article 248 of *the Civil Procedure Law*. (Xiao, 2025: p. 91)³⁷

5. In the light of paragraph 2 of Article 86 of *the New Arbitration Law* and the recent released guiding case by the Supreme People’s Court, arbitral awards rendered by overseas arbitration institutions (including foreign arbitration institutions) in the territory of the People’s Republic of China should be regarded as foreign-related arbitration awards of China and not foreign arbitration awards. Three inferences can be drawn from this combination: (1) When foreign arbitration institutions registered in China’s free trade zones or free trade ports conduct institutional or *ad hoc* arbitration on the soil of Chinese Mainland, the relevant law-breaking arbitrators may become the proper subjects for the corresponding contract-breaching liabilities or even the criminal liabilities. (2) Even if overseas arbitration institutions are not registered in China’s free trade zones or free trade ports, as long as they conduct institutional or *ad hoc* arbitration on the soil of Chinese Mainland, the illegal acts committed by their arbitrators will still fall within the monitoring scope of Chinese supervisory and judicial authorities. (3) If the relevant law-breaking arbitrator conducts institutional arbitration or *ad hoc* arbitration outside of Chinese Mainland, they certainly shall not be deemed as the proper subjects of corresponding civil or criminal liabilities under Chinese laws. It should be noted here that the geographical scope of “outside Chinese Mainland” includes foreign countries, foreign regions, Hong Kong SAR, Macao SAR and Chinese Taiwan region.

6. According to Chinese laws, there are two methods for courts to conduct judicial review against an effective civil and commercial arbitral award: One is to procedurally revoke that arbitration award, and the other is to procedurally deny the enforceability of that arbitration award. In terms of these two types of effective rulings, their impact and binding effect on the follow-up arbitrators’ contract-breaching liability or their criminal prosecution are relatively weak. The primary reasons for this assessment are as follows: First, the grounds for revocation and non-enforcement mainly involve procedural flaws in arbitration, with only a few touching upon partial substantive issues (primarily fabricated or concealed evidence). Second, these statutory grounds for two types of civil judicial review do

³⁷The author believes that the term “embezzlement (*Tan Wu*)” in this legal article is a historical relic of the “civil and commercial arbitration imbued with strong administrative features” in the former era of the planned economy of China. At present, with the thorough implementation of socialist market economy in China, there is no need to retain these two outdated Chinese characters.

The following literature can support the viewpoint expressed by the above paragraph: “Before the implementation of *the old Arbitration Law*, China’s arbitral institutions were basically modeled after the administrative arbitration model of the Soviet Union, that is, arbitral institutions were established within administrative organs and were led by administrative organs. Arbitrators were staff members of the related administrative organs, and arbitral activities were conducted by administrative organs through the exercise of their administrative power to adjudicate disputes.”

not at all involve the interpretation or application of substantive laws in the related arbitrated cases. Third, these two effective rulings do not possess *res judicata*. Under this premise, the facts adjudicated in these two rulings cannot directly and completely correspond to the essential constituent elements required for proving contract-breaching liability or criminal accountability. In other words, these two rulings only partially overlap with the evidentiary objects related to the relevant civil dispute or criminal prosecution.

7. As expounded earlier, a special legal service contract relationship has been formed between the arbitrator and the parties of the case being arbitrated. Civil law scholar holds the opinion that “according to the principle of fault liability, the constituent elements of the liability for compensation include the facts of damage, acts of contract-breaching, the causal link between contract-breaching acts and the facts of damage, and the subjective fault.” (Wang et al., 2013: p. 202) In comparison, as for the crime of law-bending in arbitration which could be borne by the related arbitrator, its constituent elements are as follows: 1. The object of the crime is the normal operation of the arbitral institution and the fairness of arbitral proceedings. The objective aspect of the crime is manifested as follows: (1) unlawful acts must have occurred during the arbitration process; (2) Arbitrating activities are conducted in violation of existing facts and legal provisions; (3) The caused consequences are serious. 3. The criminal subjects are limited to personnel who are legally responsible for arbitral affairs. (4) The subjective aspect of crime is intent. (Wang & Huang, 2021: p. 616)

By comparing the constituent elements of the two legal liabilities listed in the preceding paragraph, the following inference can be drawn, that is, related civil judgment or arbitration award for contract-violation accusation shall have a greater impact and binding effect on the prosecution of relevant criminal liability. Its specific manifestations are: (1) The subject scope of the two is highly overlapping, both requiring the perpetrators to be arbitrators or other personnel engaged in arbitral activities. (2) As for the objective aspect, it is manifested as arbitrators or other personnel engaged in arbitral activities failing to perform their arbitration duties in accordance with the law and regulations. (3) All relevant illegal activities were carried out during the arbitration process. (4) There is a progressive relationship between the two sets of constituent elements. The meaning is that the illegal acts that shall be investigated for the crime of law-bending in arbitration will certainly also meet all the constituent elements of the arbitrator’s contract-breaching liability simultaneously. However, a violation that meets the requirements of contract-breaching liability does not necessarily satisfy all the constituent elements of the crime of law-bending in arbitration. (5) There is a certain degree of connection between the two legal responsibilities. For instance, even if a wrongful arbitration award is subsequently revoked or unenforced by a court procedurally, it does not affect the guilty conviction against the misbehaved arbitrators thereafter. At the same time, the relevant arbitrators still need to bear corresponding breach of contract responsibilities. In other words, the two types of legal responsibilities can be

pursued simultaneously or sequentially, and there is no relationship of mutual substitution or offsetting.

It should be noted that there are also dissimilarities between these two sets of constituent elements: (1) Different legal nature: one set is for the assumption of civil compensation liability, while the other set is for shouldering criminal accountability; (2) Requirements for consequences caused by illicit acts are different. For assuming criminal responsibility, the severity of the consequences must be met. For assuming civil liability, there is no such requirement. (3) Requirements for subjective fault are different. In terms of assuming civil liability, both intention and gross negligence are acceptable. As for the assumption of criminal responsibility, it can only be intentional. (4) The consequences after proving the two charges are different. After the breach of contract is substantiated, the relevant arbitrators and arbitral institutions shall bear the corresponding civil liability for compensation. By contrast, after the constituent elements of criminal accusation are verified, the relevant arbitrators and other related wrongdoers shall be sentenced to criminal detention or fixed-term imprisonment for a specific period of time.

The above text mentioned the sub-topic of “the relative weak or greater impact and binding effect” of civil adjudication documents or arbitration awards on corresponding criminal prosecution. One doubt that must be clarified here is: In the sense of law, what exactly is the meaning of the so-called “impact and binding effect”? In this regard, the author believes that: First, the conclusive part of civil adjudication documents does not have a binding effect of *res judicata* on subsequent criminal prosecution. The reason for this assessment is that due to the significant distinctions in the value pursuit, goals, and functions of civil and criminal trials, these two trial procedures shall be conducted mutual-independently. Therefore, “the mutual recognition of the adjudged gist (*Tenor des Urteils*) of the judgment and the determination of facts should have different conclusions in different lawsuits due to the different standards of evidence evaluation in these two types of litigation.” (Zhao, 2022: p. 66) Second, after a comprehensive search of *the Criminal Procedure Law of China*, *SPC Judicial Interpretations on the Criminal Procedure Law* (Fa Shi [2021] No. 1), and *SPP Rules of Criminal Procedure for the People’s Procuratorates* (adopted at the 28th meeting of the 13th Procuratorial Committee of the Supreme People’s Procuratorate on December 2, 2019), there is no provision regarding the “exemption from proof” treatment for facts determined in civil judgments or arbitration awards in subsequent criminal prosecution. In light of this, the following deduction can be made: civil adjudication documents and arbitral awards can only be used as documentary evidence in the related criminal trials. That is to say, with respect to these two types of documentary evidence, only after thorough debate and cross-examination in criminal proceedings can the judge or the collegial bench accurately assess their probative value (Article 55 of *the Criminal Procedure Law of China*).

The handling of the issues mentioned in the above paragraph should not be subject to Article 93 of *SPC Judicial Interpretations on the Civil Procedure Law*

and Article 10 of *SPC Regulations on Civil Trial Evidence* (Fa Shi [2019] No. 19). The reason is that the situation involved here is a type of “civil first, criminal later”, and Article 93 and Article 10 can only be used in an opposite scenario where the related civil litigation as the follow-up trial. Specifically, there are three specific situations in which these two articles can be applied: (1) The binding force of the related effective civil judgment on the subsequent civil trial. (2) The binding force of the related effective administrative judgment on the subsequent civil trial judgment. (3) The binding force of the related effective criminal judgment on the subsequent civil trial judgment.³⁸

In addition, based on paragraph 2 under Article 54 of *the Criminal Procedure Law of China*, Articles 75 and 76 of *SPC Judicial Interpretations on the Criminal Procedure Law*, as well as Articles 64 and 65 of *SPP Rules of Criminal Procedure for the People’s Procuratorates*, evidence collected by relevant administrative or supervisory organs in administrative law enforcement or case investigation activities can be used as evidence in relevant subsequent criminal trials. This paper believes that these rules shall be applied to the trial of the crime of law-bending in arbitration or other related penal charges.

Last but not least, it should be noted that, in China, civil and commercial arbitrators may not only be proper subjects to the crime of law-bending in arbitration, but may also bear other types of penal liabilities if their illegal activities triggered other crimes stipulated in *the Criminal Code of China*. “Arbitrators, as natural persons, meet the criteria for criminal subjects in *China’s Criminal Code*. Related authorities should determine whether they have committed a crime based on the specific provisions of *the Criminal Code*.” (Shi, 2021: p. 193) In this regard, there are indeed relevant guilty verdicts in China. For instance, the bribe acceptance conviction against Liu Fan, as well as bribe acceptance convictions against non-state personnel Zhu Wanrun, Li Yubi, and Shi Jinxing.³⁹

6. Conclusions

This paper systematically discusses the issues of whether civil and commercial arbitrators should bear administrative, civil, and criminal responsibilities. The basic

³⁸The Supreme People’s Court holds the opinion that, as for the binding effect of the confirmed facts in the concluded civil and administrative trials upon the related follow-up civil litigation. In principle, these proven facts in concluded civil and administrative litigation shall have the binding effect on subsequent civil litigation. At the same time, the substantiated facts in the concluded criminal trials shall generally have the binding effect upon the related follow-up civil trials. However, there are certain exceptions to this binding effect, which should be limited within a certain scope. For example, as for the proven facts in an effective verdict of not guilty, the specific analyses should be carried out accordingly: (1) The effective verdict of not guilty of the defendant based on the absence of his accused illegal acts or the defendant’s lack of participation in the illegal acts shall have this type of binding effect on the subsequent infringement lawsuit filed on the grounds of the defendant’s illegal acts. (2) The effective verdict of not guilty was rendered due to insufficient evidence and unclear facts of the case, which failed to meet the evidentiary standards of criminal cases, but may satisfy the evidentiary standards of the related civil and administrative litigation. In the civil lawsuit collateral to criminal proceedings or the separately launched follow-up civil litigation or administrative litigation, judgments should be made based on the evidentiary standards and substantive facts of civil and administrative litigation respectively, without being bound by the facts denied by the effective verdict of not guilty. The proposition in the above paragraph can be found in the following literature: Edited by *The First Civil Division of the Supreme People’s Court: Understanding and Application of SPC New Provisions on Civil Evidence* (Part 1), People’s Court Press, 2020 edition, p. 157, p. 159.

³⁹Zhang Zhen’an: *On the Criminal Liabilities to be Assumed by Arbitrators*, the official website of Shanghai Bar Association: <https://www.lawyers.org.cn/info/b8867aa0b6aa48efa1a99f269d5d3004/>.

conclusion of this study is that, when relevant legal conditions are met, civil and commercial arbitrators may bear corresponding administrative responsibilities, civil responsibilities, and criminal responsibilities.

Nonetheless, it shall be pointed out that the conclusion in the preceding paragraph is not the end of this study, but rather another new beginning of this topic's further exploration. The reason is that, from a macro perspective, as this article spans across six departmental laws of China, the breadth and depth of its research apparently exceed the author's professional knowledge. As a result of it, in the long run, the task of thoroughly resolving the complicated problems concerning three types of legal liabilities still requires relevant scholars to "break professional boundaries" and to do a teamwork together. From a micro perspective, there are still many related theoretical doubts yet to be thoroughly probed and clarified. For instance, as mentioned in sub-section III of this paper, there is a conundrum concerning the lack of logically consistent and convincing consensus among the Chinese law practitioners and scholars of different branches regarding the precise meaning as well as the related mutual relationships of the multiple levels of legal jargons, etc.

Due to the existence of such kind of outstanding and unsettled issues in theoretical studies, the relevant "downstream" legislative task has encountered an awkward situation where "the legal framework has been basically erected, but the supporting institutional details have failed to keep pace". For example, the lack of direct and detailed supporting legal provisions for arbitrators to bear civil liabilities mentioned earlier. Likewise, the issues concerning the vagueness of the legal status of China's supervisory regulations mentioned earlier, etc. Furthermore, in terms of this topic, there is a lack of smooth interconnection between relevant departmental laws in China. For instance, can a civil and commercial arbitrator who commits illegal acts be held accountable for all three legal responsibilities simultaneously or sequentially? And why? Will the implementation of this approach result in the violation of the tenet of imposing proportional penalty against unlawful acts? And why? Moreover, whether the three legal responsibilities that law-breaking arbitrators should bear can be offset against each other? And why? In terms of the related criminal supervision with comprehensive and in-depth review characteristics, how to smooth its relationship with the apparently limited civil judicial review against the same set of arbitral awards and related activities? And why? ...

If the theoretical doubts mentioned above cannot be clarified in a timely manner and the corresponding legal loopholes cannot be patched on a later occasion, it will create a negative impression that China's relevant laws and regulations lack clarity, unified applicability, and predictability. Over time, this situation will result in two major adverse consequences: On the one hand, it will be detrimental to China's goal of deepening of reform, opening up, and attracting foreign investment. On the other hand, this situation is also not conducive to achieving the intention of Chinese top decision-makers to use certain regions, such as free trade

zones and the free trade port to innovate supporting legal systems.

Finally, as the theme of this treatise traverse multiple legal research domains in China, and the author is only specialized in the studies of *the Civil Procedure Law of China* and *the New Arbitration Law of China*, errors and omissions are inevitable in the paper; therefore, comments and corrections from all readers are highly welcome.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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