Prospects of China’s New Arbitration Law: From the Perspective of Balancing Legal Paternalism and Autonomy of Will

FANG Ruian
Shanghai University of Political Science and Law, Shanghai, China

Recently, the Ministry of Justice of China issued a revised draft of the arbitration law for public comments, which means that China’s arbitration law will be revised for the third time, and this time the revision content is quite extensive. It can be expected that China’s new arbitration law will usher in tremendous changes. On the whole, China’s new arbitration law may make great strides towards the direction of party autonomy, but the traces of legal paternalism are still obvious. Legal paternalism in arbitration law is not something that needs to be opposed completely; on the contrary, it will protect the interests of the parties and promote the credibility of arbitration to some extent. A feasible direction is to try to balance the inherent autonomy of will of arbitration and the Chinese legal paternalism tradition. From this perspective, the notion of “Libertarian Paternalism” is a worthy of reference. It will help to improve the arbitration law and enhance the international competitiveness of China’s arbitration industry to avoid coercive rules and replace them with channeling people into making the selections that are best for them.

Keywords: China’s arbitration law, Arbitration Law of the People’s Republic of China (Revision) (Draft for Public Comments), international commercial arbitration, qualifications of arbitrators, legal culture, autonomy of will, public policy, legal paternalism, libertarianism, “Libertarian Paternalism”

International commercial arbitration, as the most charming way of international commercial dispute settlement in this era, has quietly spread to almost every corner of the world like sunshine. The major or minor differences in legal culture between the two main legal systems: common law and civil law (and even each legal region) do not lead to fundamental obstacles of accepting arbitration, but because of the long-term immersion of their different legal cultures, they actually make the degree of difference in the basic values of accepting arbitration. One of the most important manifestations is to what extent the arbitration law of sovereign states has implemented the spirit of autonomy of commercial arbitration.

On July 30, 2021, the Ministry of Justice of China issued Arbitration Law of the People’s Republic of China (Revision) (Draft for Public Comments) (hereinafter referred to as the Revised Draft) and instructions. Since the Fourth Plenary Session of the 18th CPC Central Committee in 2014 proposed to “improve the
arbitration system and enhance the credibility of arbitration”, reform of China’s arbitration system has become an important part of promoting the comprehensive rule of law in China. With the development of China’s market economy and opening-up, the arbitration law draft incorporates a great deal of arbitration practice experience and mature and feasible judicial interpretation norms, and refers to the experience and practice of international arbitration in many aspects. Most importantly, the amendments and additions to the original law in the draft have obvious Chinese mark, and also integrate the essential characteristics of autonomy of commercial arbitration. It can be seen from the draft that legislators are trying their best to balance the potential contradictions between China’s actual national conditions, traditional legal culture and autonomy, and strive to harmonize the new arbitration law.

Brief Introduction of the Revised Draft

On the whole, the Revised Draft expands the scope of arbitrable matters, restructures the effective requirements of the arbitration agreement, endows the arbitral tribunal with the right to decide on temporary measures, and recognizes the arbitral tribunal’s self-adjudication jurisdiction, all of which give the parties a better chance to realize and enforce their arbitral will. The Revised Draft also pays close attention to and is in line with international arbitration practices. It accepts the temporary arbitration system, sets up a special chapter on provisional measures, and introduces the standard of “place of arbitration”, which demonstrates China’s attitude and determination to conform to international standards and create a favorable environment for dispute settlement. In addition, the Revised Draft improves the judicial review and enforcement system of arbitration, integrating the causes for cancellation of an award, abolishing the system of not executing an arbitration award upon the application of a party, adding reconsideration procedures for judicial review, and designing a relief system for an outsider in a case, thus establishing a reasonable interaction between the judiciary and arbitration. To be specific, some of the more notable revisions are as follows:

Tighten the Qualifications of Arbitrators

The Revised Draft improves the relevant provisions on arbitrators, adds provisions on the negative list on the basis of retaining the existing positive requirements, and respects the parties’ right to choose arbitrators and make the list of arbitrators “recommended”; separate provisions are made for arbitrators engaged in foreign-related arbitration.

The qualifications of commercial arbitrators in non-foreign arbitration are stipulated in Article 18:

An arbitration commission shall appoint its arbitrators from among righteous and upright persons. An arbitrator shall meet one of the conditions set forth below: (1) He or she has passed the national uniform legal profession qualification examination and obtained the legal profession qualification, and conducted the arbitration work for eight years or more; (2) To have worked as a lawyer for at least eight years; (3) He or she has served as a judge for eight years or more; (4) To have been engaged in legal research or legal education, possessing a senior professional title; or (5) To have acquired the knowledge of law, engaged in the professional work in the field of economy and trade, etc., possessing a senior professional title or having an equivalent professional level. Under any of the following circumstances, he or she shall not serve as an arbitrator: (1) having no or limited capacity for civil conduct; (2) having been subjected to criminal punishment, except for a crime of negligence; (3) there is any other circumstance in which he is unable to serve as an arbitrator according to law. An arbitration institution may establish a recommended list of arbitrators according to different professionals.
The qualifications of commercial arbitrators in foreign-related arbitration are stipulated in Article 89: “Arbitrators engaged in foreign-related arbitration may be Chinese or foreign professionals who are familiar with foreign-related law, arbitration, economy and trade, science and technology, etc.”.

The Revised Draft makes some innovations in the provisions on the qualifications of commercial arbitrators, liberalizing the scope of arbitrator selection in the field of foreign-related arbitration, and canceling the mandatory list of arbitrators as a whole. But if we look at the domestic non-foreign arbitration, it can be found that the Revised Draft is consistent with the legislative ideas of the arbitration law promulgated in 1994. Since the “negative list” has been added to the original basis, it can even be said that the qualification of commercial arbitrators has been tightened.

**Improve Arbitration Agreement Provisions**

In light of this part, the autonomy of will of the parties is prioritized in terms of the conditions for an arbitration agreement to take effect and the seat of arbitration. With regard to the conditions required for an arbitration agreement to take effect, the Revised Draft only requires the parties to “express their intention to apply for arbitration” (Article 21) and no longer requires the parties to agree on the “matters submitted to arbitration” and the “selected arbitration commissions”. In the light of judicial interpretation and practical experience, guiding provisions (Article 35) have been made on the absence or ambiguity of arbitration commissions in arbitration agreements to ensure the smooth progress of arbitration.

**Increase and Standardize the “Ad Hoc Arbitration”**

As the “original” form of arbitration and international common practice, ad hoc arbitration has been widely existed in the international community and recognized by laws of various countries and international conventions. Considering the fact that China has joined the New York Convention and thus foreign ad hoc arbitral awards can be recognized and enforced in China, China should treat internal and external arbitration equally and add the stipulation of “ad hoc arbitration” system, but according to China’s national conditions, the application scope of ad hoc arbitration is limited to “foreign-related commercial disputes”; the Revised Draft provides necessary norms for the core procedures of ad hoc arbitration, such as court formation and withdrawal.

The core provisions on “ad hoc arbitration” are stipulated in Article 91 of Chapter 7 “Special Provisions on Foreign-related Arbitration” of the Revised Draft:

The parties to a commercial dispute involving foreign elements may agree on an arbitration institution for arbitration or may directly agree on a special arbitration tribunal for arbitration. The arbitration procedure of an ad hoc arbitration tribunal shall commence on the date when the respondent receives the application for arbitration. If the parties have not agreed on the place of arbitration or the agreement is not clear, the arbitration tribunal shall determine the place of arbitration according to the circumstances of the case.

**Autonomy of Will in Commercial Arbitration**

Autonomy is undoubtedly the essential feature of commercial arbitration, and can also be interpreted as the “party autonomy”. By “party autonomy” in merchant law will be meant the power of the parties in a commercial transaction to stipulate the rules by which all questions of formal and substantive validity arising from that transaction are to be determined (Tuchler, 1967, p. 181). A fundamental principle governing international arbitration agreement is that of party autonomy and it is the backbone or a cornerstone of
arbitration proceeding (Ansari, 2014). After all, the authority of arbitral tribunals comes solely from agreements between parties and arbitration only exists as a result of party consent (Born, 2001, p. 560). The fundamental principle that party autonomy underlies arbitration is recognized now by nearly all international arbitration laws, rules, and conventions (Gaillard, 2004, pp. 185, 199). For example, this principle can be seen in the English Arbitration Act 1996: “the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest”.¹ In 1981, the Connecticut Supreme Court offered an insightful paradigm and confirmed the position of this principle in arbitration as well: “Arbitration is a contractual remedy designed to expedite informal dispute resolution. Its autonomy requires a minimum of judicial intrusion”.² From this point of view, one of most the important purposes of arbitration is to exclude the intervention of national law and make national law dispensable. The impression of self-sufficiency is enhanced by the exclusion of national courts and the referral to arbitration instead (Cordero-Moss, 2015, p. 186). It can be said that arbitration is a private matter between the parties and there are not many connecting points with the state. Therefore, the content that a country’s arbitration law should regulate may only point to the connection between arbitration and state affairs in theory, such as what may be subject to arbitration, when an award is deemed to conflict with public policy, what the criteria are for an arbitration agreement to be binding on the parties, what mandatory rules of procedure apply, and when an award is valid (Radicati Di Brozolo, 2013).

To be specific, the issue of arbitrability which is based on public policy explicitly rules out the marriage and family disputes (Shore, 2009). Analogously, because of the public policy, anti-trust disputes, insolvency disputes, bribery and corruption disputes, and the disputes as to natural resources may also be ambiguous in terms of the arbitrability. In fact, in addition to the basic issue of arbitrability, in the arbitration legislation and judicial practice of various countries, there are many examples of restricting the autonomy of the parties, which is sufficient to show that autonomy of the will in arbitration is not without boundaries. There in Soleimany v. Soleimany, which is another example of the validity of the arbitration agreement, a father and a son smuggled some carpets out of Iran under a contract. Actually, this smuggling was unlawful according to Iranian revenue laws. A dispute arose between them and then they decided to resolve this dispute through arbitration. They submitted their dispute before the Beth Din which applied Jewish Law. According to Jewish Law, even if the contract was illegal, it had no effect on the rights of the parties. After the award was made, one of the parties applied to English Court of Appeal in order to obtain the enforcement of the award. However, English Court of Appeal refused this application on the ground of public policy and the Court stated that public policy did not allow the enforcement of an illegal contract (Dursun, 2012).³ This also fully reflects that whether to restrict the autonomy of will, what kind of restriction, and how the degree of restriction may differ in different jurisdictions. Even on some issues, in order to protect or promote the interests, good or welfare of business subjects, the government will tend to legal paternalism.

**Legal Paternalism in China’s Arbitration Law**

Legal paternalism is the view that the law should, at least sometimes, require people to act (a) against their

¹ English Arbitration Act 1996, s 1(b).
will, (b) for their own good, in that way protecting them from the undesirable consequences of their own actions (Hospers, 1980, p. 255). There are three conditions for an act to be paternalistic. The paternalist (1) interferes with the subject’s liberty, (2) acts primarily out of benevolence toward the subject (i.e., his goal is to protect or promote the interests, good, or welfare of the subject), (3) acts without the consent of the subject (Garren, 2006; 2007).

As an old saying goes, “Arbitration is only as good as arbitrators” (Bond, 1991, p. 1). Whether a country or region has a wide or strict stipulation on the qualification of arbitrators becomes a “touchstone”, which can highlight its value judgment on “autonomy of will” to the greatest extent. Therefore, let’s make the qualification of arbitrators as an example. In fact, many rules in China’s arbitration law have similar considerations. For example, the 1994 Arbitration Law prohibits “ad hoc arbitration”, and only institutional arbitration is allowed also for the protection of commercial subjects.

The Qualification of Arbitrators as an Example

Article 13 of the Arbitration Law of the People’s Republic of China in 1994 is very strict on the qualification of commercial arbitrators:

An arbitration commission shall appoint its arbitrators from among righteous and upright persons. An arbitrator shall meet one of the conditions set forth below: (1) To have been engaged in arbitration work for at least eight years; (2) To have worked as a lawyer for at least eight years; (3) To have served as a judge for at least eight years; (4) To have been engaged in legal research or legal education, possessing a senior professional title; or (5) To have acquired the knowledge of law, engaged in the professional work in the field of economy and trade, etc., possessing a senior professional title or having an equivalent professional level. An arbitration commission shall have a register of arbitrators in different specializations.

In 2017, the qualifications of arbitrators of Arbitration Law of the People’s Republic of China (2017 Amendment) are further strictly regulated. In Article 13.1 of Arbitration Law of the People’s Republic of China (2017 Amendment), an individual conducted the arbitration work for eight years or more must pass the national uniform legal profession qualification examination and obtain the legal profession qualification, so that he/she can meet the condition of the qualifications of arbitrators. Furthermore, as mentioned above, since the “negative list” has been added to the original basis, the qualification of commercial arbitrators in Revised Draft 2021 has been much more tightened.

The legislative mode of strict qualification of commercial arbitrators has two main legislative purposes: One is to ensure that high-quality people serve as arbitrators, so that they can make high-quality arbitration awards fairly and reasonably; second, under the premise that the court and the public have not fully established trust in arbitration, the high standard requirements for the appointment of arbitrators can dispel concerns and promote the development of arbitration (Ma, 2015). When the first arbitration law was adopted in mainland China in 1994, it is undoubtedly understandable that the legislative model of strict qualification was adopted. Its inherent logic lies in the syntactic proverb: The quality of arbitration depends on the quality of the arbitrator. In addition, at least in the legislation, the legislators think that the parties in the dispute lack the ability to determine qualified and high-quality arbitrators, so they will be blind in the selection of arbitrators, while the national legislators can replace the parties to confirm qualified and high-quality arbitrators, so as to ensure that the parties can obtain more fair and high-quality arbitration services.
This kind of legislative purpose behind the strict legislative mode of the China’s arbitration law on the qualification of commercial arbitrators is very close to legal paternalism. Legal paternalism is the view that the law should, at least sometimes, require people to act (a) against their will, (b) for their own good, in that way protecting them from the undesirable consequences of their own actions (Hospers, 1980, p. 255). However, if in the context of commercial arbitration, it seems to be incompatible, since the essential feature of commercial arbitration is autonomy of will. It originated in the Western World, grew in the Western World, and influenced the whole world. More importantly, it goes along with the legislative idea of libertarianism in the Western World.

Libertarians, of course, are vigorously anti-paternalistic, believing as they do that people should absorb the consequences of their own actions, and that in any case the state has no right to legislate what people should do as long as their actions harm no one else (Hospers, 1980, p. 256). In the context of commercial arbitrators’ qualifications, libertarianism is often reflected in the loose mode, as opposed to the strict mode. Its legislative purpose lies in the essential need of commercial arbitration, that is, the parties’ autonomy of will. The loose mode means that any ordinary person can become arbitrator, which is the practice of most countries at present, and the UNCITRAL Model Law on International Commercial Arbitration also adopts this mode. This legislative mode, in which the state only sets minimum legal requirements for the qualifications of commercial arbitrators with complete civil capacity or even does not make any provisions or regulations, reflects the state’s respect for the value of the autonomy of the parties in arbitration and its trust in the ability of the parties to make their own decisions. This mode advocates that the state power should prudently intervene in the decision of the qualification of commercial arbitrators, and grant the right to determine the qualification of commercial arbitrators to the parties, rather than the state making mandatory high standard requirements for the conditions of commercial arbitrators. Accordingly, there will be no mandatory roster of arbitrators in this mode.

However, the legal paternalism in China’s arbitration law has a fierce struggle in the face of commercial arbitration, which was born in traditional Chinese culture, and legislators could not easily accept that commercial disputes were liberated from the national judicial system and directly handed over to the parties to deal with. In addition to the concerns about the impartiality of arbitrators chosen by the parties themselves, when the reform and opening up just entered the right track in the 1990s and commercial subjects were not as vigorous as today, legislators were more worried about the lack of limited rationality, which would bring risks to the commercial subjects themselves and even affect the whole market order. Therefore, legislators in the Eastern paradigm believe that Chinese commercial subjects are unable or unwilling to choose high-quality arbitrators due to their insufficient understanding of arbitration. If the qualification restrictions are loosed, the commercial subjects will be harmed.

**Chinese Traditional Legislative Thought Against Libertarians**

As mentioned above, legislators’ acceptance of “autonomy of will”, the core value of arbitration, will greatly affect the legislative mode of arbitration law. The “autonomy” is essentially derived from the commercial tradition and corresponding ideology of western society for a long time (Watkins, 1948, p. 241). This is embodied in three aspects: One is the spirit of urban autonomy which is closely related to commercial changes in the Western history of development; the other is the extensive commercial guild organization in the
Middle Ages (Pirenne, 2014); the third is the legal and dispute settlement mode developed by merchants. The spirit of autonomy even formed a stable ideology, which directly affected the institutional changes of later generations. These systems and concepts have accumulated for several centuries, thus forming the so-called “shared concepts” in institutional theory. Although they cannot directly determine the corresponding institutional setting, they will always steadfastly influence the possible “choice set” of institutional reform and roughly regulate the direction of institutional reform (Dimaggio, 1988).

As early as in ancient Greece, “city-state autonomy”, developed from the level of collective autonomy of citizens within the city-state, by which citizens jointly manage their public affairs, began to sprout. Under the imperial structure of ancient Rome, the cities of the provinces enjoyed considerable autonomy. In the process of ancient Rome’s continuous war, there was no time to take into account the management and control of the local cities, and the loose provincial system made the big cities have quite independent autonomy. In the Middle Ages, once commercial activities began, merchants became “free men” to a certain extent. Medieval cities were not much bigger than ancient Greek city-states, but they laid the foundation of modern individualism on the basis of commercial civilization. At this point, the so-called spirit of freedom and autonomy is further solidified. Max Weber analyzed the differences between Eastern and Western cities from the perspective of social economy and came to the conclusion: Western European cities have autonomy, composite community organization and obvious characteristics of rational city law system. Comparatively, Eastern cities did not have the “community” inherent in Western cities (especially medieval cities), did not struggle for autonomy and freedom, did not have the emergence of municipal democratic institutions and the development of “urban law”, and so on (Weber & Gerth, 1953).

Moreover, various commercial guilds played an important role in the movement of urban autonomy in Western Europe in the Middle Ages and became another important factor affecting the spirit of autonomy in the West. According to a legal system created by the guilds, disputes were generally solved within the guilds. The execution of the decisions was assured by the reputation of the merchants. Nowadays, the loss of reputation could be a reason for a decrease in commercial transactions or even the total loss of it; however in the medieval period the loss of reputation generally resulted in expulsion from the guild (Volckart & Mangels, 1999, p. 440). In medieval England, the statutes of many guilds, such as the Clothworkers or St. John of Beverley of the Hans House, required that disputes between members be submitted to the guilds for arbitration (Pollock & Maitland, 1898, p. 668). Marc Bloch, a French historian, once noted that parties often agree to seek their own arbitrators or those of others rather than court decisions, preferring to reach private agreements (1961, p. 359).

In the Middle Ages, merchants also formed their own Lex Mercatoria. For example, in Britain, Lipson believes that the law governing the commercial life of medieval traders is not the common law of the country, but the Lex Mercatoria (1947, p. 258). Merchants tend to rely more on rules, courts, and informal controls established within their communities than on the absolute application of a law made by government bureaucrats and government courts. It was better able to respond substantially to the needs of trade, and better able to understand and predict than to expect arcane legal analysis and the conclusions of lawyers reconciling opposing interests, than principles formulated by rulers at a high level and applied by learned judges. In addition to substantive merchant law, which was based on commercial custom, Britain developed courts of piepowder, meaning that judgments fell as quickly as dust or were removed from the feet of litigants. And this
kind of person that the court’s decision is often including the bazaar in the city or town within the scope of the
owner of land and live all merchants often visited the city set or market, and in addition to the court clerk, the
lords and knights names were registered in the file or files on people (Salzman, 1931, p. 161), and have a quick
procedure and summary procedure to improve efficiency. Such a representative, highly autonomous and highly
efficient dispute settlement mechanism has been deeply imprinted on the rule of law civilization in the West, so
that when we look at commercial arbitration, we can hardly avoid thinking about it and can easily understand
its logical inheritance.

For this reason, when modern Western commercial arbitration is presented to the West with a high degree
of autonomy, those who understand the history of western commercial development will not have any
hesitation. Legislators with this gene in their blood will naturally uphold the value judgment of autonomy of
private law and self-risk when selecting arbitrators and let merchants choose freely. These countries and
regions are willing to believe that the selection of high-quality commercial arbitrators is in line with the
interests of the parties involved in commercial disputes. Therefore, based on the most basic premise of Western
economics, the “rational economic man” hypothesis, that is, everyone can optimize the selection of all
opportunities and goals they face and the means to achieve the goals through cost-benefit or the principle of
seeking benefits, avoiding harms, obtaining information and making decisions during the selection of
arbitrators. To them, arbitrary interference in this issue is incomprehensible. However, as mentioned above,
cities in the East have no history of autonomy, especially the Chinese civilization, which lacks commercial
blood in the long history and has been immersed in the centralized system for a long time. On the contrary, it
has bred a value trend that conflicts with “autonomy of will”. But this kind of value tendency also has
rationality, consistent with the system logic of eastern civilization.

The legislative idea of legal paternalism has the historical foundation of traditional Chinese legislative
thought. Such legal paternalism as Professor Sun Xiao-xia concludes:

The government’s intervention in citizens’ life and compulsory “love” to citizens, regardless of whether citizens
agree or not, are outward manifestations of a return to the pre-modern legal system, but it can be relatively compatible
with the confluence and connection of China’s legal tradition and local resources. (Sun & Guo, 2006, p. 53)

The traditional Chinese Confucian culture contains the people-oriented thought of “benevolent government”. In
the development process of thousands of years of feudal history, this thought has been deepened and gradually
becomes a universal ruling thought. In today’s era, it still radiates a unique charm, which is embodied in both
subjective and objective aspects: from the subjective aspect, the government’s subjective love for the people in
the implementation of benevolent governance; from the objective aspect, the policies and systems implemented
under the concept of benevolent governance, including the guidance of citizens’ actions and even the
restrictions on some freedoms.

To sum up, the Chinese experience illustrates the Kahn-Freund theory of legal transplant to a great extent,
in the sense that laws must not be separated from their purpose or from the circumstances in which they are
made (Kahn-Freund, 1974). When law and legal institutions of a society are transplanted into another society,
there will be a constant struggle between the imported rules, institutions, and ideas and the deeply embedded
local culture.
Is Legal Paternalism Justified in Arbitration Law?

Although we admit that the legal paternalism in the Eastern World has its cultural basis, it does not necessarily lead to the conclusion that its application in the field of arbitration is legitimate. We still need to answer: How to choose the conflict between the two legislative values? Which is better? Is there room for reconciliation? Generally speaking, the arbitration law should uphold the core value of commercial arbitration “autonomy of will” as much as possible; otherwise, it may lose its fundamental foothold. But where is the boundary of freedom? Does this mean that we can allow the self-mutilation of the commercial subjects? And whether the selection of arbitrators considered by legislators as “non-quality” by commercial subjects necessarily means self-mutilation?

In fact, if these questions are summed up, we basically need to answer two questions: (1) Does legal paternalism always bring better results? (2) If the commercial subjects insist on choosing self-harm, is it necessary to protect them even if it goes against their will?

Commercial Subjects Are Not Always Rational—The Premise of Legal Paternalism

As Mill puts it: “[e]ach is the guardian of his own health”, and people ought to be able to make the wrong choices as a consequence. The core of the Harm Principle is that if one knows everything about his or her own interests and still decides to act against them, the state should not interfere (Mill, 2013, p. 17; Da Silva, 2014). The value of this principle is highlighted in the field of commercial arbitration. We need to pay attention to the particularity of commercial activities, that is, the autonomy of merchant law. The merchant is the best judge of his or her own interests and the practitioner of commercial rules. The complicated commercial practice requires the adjustment of the rules of merchant autonomy. The maintenance of the value of business freedom by merchant law and the concept of merchant autonomy reflected by merchant law cannot be shaken by the intervention of the state in economic activities.

However, there is a premise that is easy to be ignored, that is: Whether the commercial subject has really realized the risks and consequences, and has persevered in going forward, and has the courage to bear the risks and consequences? John Mill offers a classic bridge scenario in On Liberty:

If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there was no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river. Nevertheless, when there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk: in this case, therefore, (unless he is a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty) he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it. (Mill, 2013, p. 102)

Smoking is a case in point. There is a finding: a disconnect between smokers’ short-term desire for self-gratification and their long-term desire for good health, and suggesting that cigarette taxation can help smokers exercise the self-control needed to act on behalf of their long-term interests (Gruber, 2002, p. 52). Therefore, the choices people are making do not always reflect their desires and preferences, and a lack of information, immaturity, or unwillingness can hinder the fulfillment of wishes. Joel Feinberg makes a distinction between hard (strong) and soft (weak) paternalism. The distinguishing feature is whether the subject’s conduct which is susceptible for intervention is “substantially voluntary” (Feinberg, 1986, pp. 11-12).
By soft paternalism the intervention is defended and justified, as protection from harm caused to the individual by conditions beyond his control. Also, a temporary intervention is permissible as long as the degree of voluntariness of the action in question (the autonomy of the subject) is unknown or uncertain and needs to be established. In certain cases when consent is statistically rare, involuntariness is presumed and even an upright prohibition can be justified by the costs of administering an exception for verified voluntariness (Feinberg, 1986, pp. 9-12, 174-175). So back to the specific context of commercial arbitration, for irrational commercial subjects, it is in line with their interests to select high-quality arbitrators, and the intervention of legal paternalism helps to recover the losses caused by the lack of limited rationality. This is why some scholars put forward that the term legal paternalism is inherently incompatible with freedom on the surface, but in many cases, this kind of hardness and severity on the surface is just for the realization and guarantee of freedom.

Actually, research by psychologists and economists over the past three decades has raised questions about the rationality of many judgments and decisions that individuals make. People often use heuristics that can lead them to make systematic blunders, exhibit preference reversals, suffer from problems of self-control, and make different choices depending on the framing of the problem (Tversky & Kahneman, 1973; Sunstein, Kahneman, Schkade, & Ritov, 2002; Frederick, Loewenstein, & O’Donoghue, 2002; Johnson, Hershey, Meszaros, & Kunreuther, 1993; Wilson & Gilbert, 2005).

Another similar opinion is that, where people’s preferences are short-lived or temporary, rather than “settled”, this may justify, on moral grounds, paternalist intervention. For example, people (especially young people) may choose to smoke and claim that they are happy to accept the associated risks. However, given that we may almost certainly assume that these people are likely to subsequently regret their choice to take up smoking, especially when its impacts are felt, there are grounds for justifiable paternalism to protect them from their current selves (Goodin, 1995, p. 124). Therefore, such behavior of self-harm may be overturned by the parties themselves later, so paternalism is still meaningful.

Thus, the assumption that every business agent is rational has been disproved in behavioral economics and psychology, and legal paternalism makes sense for people who aren’t aware of the risks of crossing the bridge from the perspective of the bridge scenario, because they obviously do not want to fall into the river.

**Is Legal Paternalism in Arbitration Law Necessarily Welfare-Promoting?**

We have already discussed that legal paternalism may have the rationality and to some extent may promote autonomy of will, but in fact another intentional premise is often ignored as well, that is, whether legal paternalism necessarily has better utility in a particular domain. In other words, does giving commercial subjects full freedom really harm their interests? In Mill’s view, the problem with outsiders, including government officials, is that they lack the necessary information. The “Harm Principle” raised by Mill instead relies on the idea that people know better than the government what is in their best interest. For Mill, the most important argument against interference is that the state is likely to be wrong.

> [W]ith respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else. The interference of society to overrule his judgment and purposes in what only regards himself, must be grounded on general presumptions [that may be generally wrong or may not apply to the case]. (Mill, 2013, p. 89)
Other scholars have held a similar view that “such policies ‘appear to tone down a fundamental tenet of liberal societies: Namely, that the individual is best placed to know what is in his or her interests’” (New, 1999, p. 63). State interventions to protect people from risk lead them to believe that they are safe and to undertake riskier behaviors as a result (Berg, 2010). But Sunstein endeavors to show that this argument fails and that one should instead support libertarian paternalist regulations (Sunstein, 2014, pp. 6-7). Actually, it is the biggest challenge to legal paternalism that whether and why the government is always true.

Let’s turn to legal paternalism in arbitration law from the perspective of a fair third party. Again, we take the qualification of commercial arbitrators as an example. The question we need to face here is whether stricter qualification restrictions can more effectively promote the fairness of arbitration, the justice of arbitral awards, and the healthy development of the arbitration industry. According to China’s arbitration law, the qualifications of commercial arbitrators focus on the length of their career. However, do more experienced arbitrators in legal practice necessarily represent better arbitrators? An experienced judge, lawyer, or even a university professor has its unique advantages from the perspective of common sense, but it does not necessarily follow that the above-mentioned subjects are superior to other subjects in arbitration work. A typical counterexample is that industry experts, rather than legal experts, may be more prominent in a highly specialized arbitration case, such as maritime affairs, intellectual property, artificial intelligence, and so on. Thus, depending on the case, so-called “high quality” arbitrators may not have permanent portraits.

Just like a parent who intends to interfere with a child’s freedom to choose a career, such interference may be justified under the economic and social environment at that time, but who can guarantee that the child’s choice of career will glow differently in the future? Moreover, we ignore the subjective initiative of children; it is possible that even if it is an ordinary occupation, children can draw wonderful pictures through their own efforts.

Therefore, the conclusion here is: “It depends”. Legal paternalism in arbitration law is not always welfare-promoting. However, this does not completely undermine the rationality of legal paternalism in the arbitration law. After all, for the vast majority of commercial subjects, conservative rather than radical selection of the arbitrator who understands the law better and more experienced is more likely to bring good results.

Should We Allow Commercial Subjects to Self-Harm?

The last but not the least, even though the commercial subject is fully aware of the risk and its consequences, and such legal paternalism can indeed improve the situation and improve welfare, the commercial subject still stubbornly chooses to trap himself/herself in the risk. At this time, can policy makers protect the commercial subject and restrict his/her freedom?

Besides, if we take the Harm Principle as the golden rule, as long as there is no negative externality in commercial behavior, there is no need to regulate it. On the surface, even if a commercial subject chooses a poorly qualified arbitrator or an irregular arbitration procedure in commercial arbitration activities, it will only affect the interests of both parties in the dispute and will not produce negative externalities to the third party. By analogy with contract law, a contract is valid as long as it is free from fraud, coercion, violation of other

---

4 Here we refer to the domestic non-foreign related arbitration. After all, the Revised Draft has loosed the restrictions on the qualification of arbitrators in arbitration concerning foreign affairs. See Article 89 of the Revised Draft.
laws or damage to the public interest. In this way, it seems that there is no reason for us to protect and regulate self-harm of commercial subjects, and most of the liberal rules of the UNCITRAL Model Law on International Commercial Arbitration that favor full autonomy in arbitration should be taken as scripture. However, does the commercial behavior of the commercial subject really only harm itself?

If we carefully comb the development process of Harm Principle in theory and practice, we will find Harm Principle has undergone an “ideological drift” (Balkin, 1993, pp. 870-872). Despite the complementary construction of liberal theorists like prominently Professors H. L. A. Hart and Joel Feinberg (Hart, 1963, pp. 4-5), the Harm Principle is more frequently incorporated into the toolbox of conservatives. The Harm Principle is now used in turn to regulate the conducts that were previously justified by the Harm Principle, such like pornography, public drinking, drugs, and gambling. In a wide array of contexts, the proponents of regulation and prohibition have turned away from arguments based on morality, and turned instead to harm arguments (Harcourt, 1999, p. 110). For example, in the pornography debate, Professor Catharine MacKinnon proposed influential administrative and judicial measures to regulate pornographic material similarly; her enforcement recommendations are not based on the immorality of pornography. Instead, the main reason is that pornography and commercial sex cause multiple harms to women. “These materials change attitudes and impel behaviors in ways that are unique in their extent and devastating in their consequences” (MacKinnon, 1985, p. 1). Homoplastically, recent crackdowns on commercial sex places in New York City like voyeuristic shows, strip clubs, adult book rooms, and video stores have been carried out in the name of tourism, crime rates, and property values, rather than on moral grounds (Bratton, 1995, p. 781).

The situation is similar in commercial arbitration as well. Although autonomy of will and self-risk are the essential characteristics of commercial arbitration, it does not mean that the irrational behavior of commercial subjects will not bring negative externalities and harm social interests. The easiest one to understand is the credibility of arbitration, which China urgently needs to further promote and build. This is only at the macro level, and the damage to the third party and social welfare in specific cases is much more difficult to calculate and concrete. Therefore, in China, where there is a strong tendency of quasi-judicial in arbitration (Zhu, 2018, p. 13; Fan, 2012, pp. 76-78), it is difficult for us to fully embrace the view of libertarianism and ignore the harm to social welfare caused by non-rational self-harm behavior in arbitration (Kim, 1996, p. 25).5

Is There Room to Reconcile Libertarianism with Legal Paternalism?

Firstly, behavioral economists in recent years, put forward the idea of “asymmetric paternalism”, which helps those whose rationality is bounded from making a costly mistake and harms more rational folks very little. Such policies should appeal to everyone across the political spectrum and can potentially shift the debate from one about whether or not paternalism is justified, to one about whether the benefits of mistake prevention are larger than the harms imposed on rational people (Rabin et al., 2003). For example, with COVID-19 sweeping the world recently, many local governments in China have introduced policies requiring all urban citizens not

5 The quasi-judicial tendency of arbitration is relatively common in the East such as Korea. “The Korean Commercial Arbitration Board, both in name and reality, as a quasi judicial institution to receive disputes arising from commercial transactions both within and outside the country, is exercising juxta positioning, duplicating and selective systems for dispute settlement along with the state court.”
to take public transport without wearing masks. There have been some doubts on the Internet that for the vast majority of healthy citizens, the policy actually infringes on their freedom and restricts citizens’ right to access public supplements and travel, even if it may benefit their health and safety. However, it is obvious that rational subjects would choose to wear masks for self-protection in public space, without additional costs. At the same time, this policy has the value of protection and significance of reminder for the subjects who relatively lack of rationality. Therefore, this policy improves social welfare on the whole. The Oriental paradigm has such characteristics to some extent. For commercial subjects who may not be able to make the best choice, the minimum guarantee of arbitrator qualification and the mandatory roster selected by arbitration committees are beneficial to their well-being. On the other hand, for fully rational commercial subjects, it is difficult to draw a conclusion that strict legislative mode will cause disadvantage or cost to them, because these rational commercial subjects would also choose high-quality arbitrators.

Based on the wave of behavioral economics described above, in recent years, some scholars in law have put forward the concept of “Libertarian Paternalism”, and the debates in related fields have attracted great attention. Libertarian paternalism begins with the behavioral economist’s view that sometimes individuals are not the best judges of their own welfare. Indeed, given the propensity of human beings for cognitive errors (e.g., the availability bias) and the complexity of decisions that need to be made (e.g., choosing prescription plans), individuals often make mistakes. Enter here the idea of the nudge—the deliberate effort to channel people into making the selections that are best for them. The key thing about a nudge is that it’s noncoercive and there’s always an opt out (Schlag, 2010, p. 913). Libertarian paternalism is a relatively weak and nonintrusive type of paternalism, because choices are not blocked or fenced off. In its most cautious forms, libertarian paternalism imposes trivial costs on those who seek to depart from the planner’s preferred option. But the approach nonetheless counts as paternalistic, because private and public planners are not trying to track people’s anticipated choices, but are self-consciously attempting to move people in welfare-promoting directions. One of the relatively strongest arguments in favor of libertarian paternalism is that preferences are unstable and sensitive to the way in which choices are framed, and public and private institutions that control choice frames will inevitably shape the preferences of choosers (Sunstein & Thaler, 2003, p. 1162).

Sunstein and Thaler, the creators of the concept of libertarian paternalism, cite the “cooling-off” period as an example. Aware that people might act impulsively or in a way that they will regret, regulators do not block their choices, but ensure a period for sober reflection. Note in this regard that mandatory cooling-off periods make best sense, and tend to be imposed, when two conditions are met: (1) People are making decisions that they make infrequently and for which they therefore lack a great deal of experience, and (2) emotions are likely to be running high. These are the circumstances of bounded rationality and bounded self-control respectively in which consumers are especially prone to make choices that they will regret (Sunstein & Thaler, 2003, pp. 1187-1188).

However, there still some challenges coming to libertarian paternalism. Such like when is a nudge a shove? Or to paraphrase, when is a coercive measure, not a “nudge” at all. This, as Sunstein and Thaler say at the end of their book, is a tricky matter (Thaler & Sunstein, 2008, p. 251). Now turning to the Chinese context, from January 1, 2021, the Civil Code of the People’s Republic of China came into force. In order to implement the provisions of the Civil Code on the cooling-off period system for divorce, the Ministry of Civil Affairs adjusts
the marriage registration procedure and adds a cooling-off period in the divorce procedure, and this shall be a representative example of libertarian paternalism. However, if we note the great controversy and even resistance that cooling-off period system for divorce have received in China, we can understand that libertarian paternalism has not always been accepted by libertarians. It can be seen that libertarian paternalism, which restricts freedom in order to improve overall welfare, cannot necessarily be understood and accepted by libertarians, much less most of the opponents cannot be considered libertarians, but only reject the restriction on freedom of divorce.

Thus, whether choices are blocked or fenced off or not may be defined subjectively, not objectively. When judging whether nudging is coercive, we have to gauge the acceptability of our subjects in terms of local cultural traditions and real national conditions. The project team in which the author is located recently conducted a survey including 23 well-known enterprises in China-SCO Local Economic and Trade Cooperation Demonstration Area (hereinafter referred to as the “SCODA”). In this programme, the project team raised a question, that is: If the new arbitration law of China finally allows the selection of ad hoc arbitration for the settlement of foreign economic and trade disputes, “do you prefer institutional arbitration or ad hoc arbitration in foreign trade disputes?” In this survey, the results show that 14 of 23 enterprises in the SCODA have clearly indicated that they will choose institutional arbitration, and only one enterprise is inclined to choose ad hoc arbitration. The reasons generally include that institutional arbitration is more rigorous quality and procedures of arbitrators, more standardized management, and more trust from judicial organs. We have to admit that to some extent this perception is not necessarily accurate, but it does reflect that although the current arbitration law of China restricts commercial subjects from choosing ad hoc arbitration to resolve disputes, it does not subjectively bring commercial subjects the sense of being deprived of autonomy.\(^6\) After all, they do not have the enthusiasm to choose ad hoc arbitration.

The issue of arbitrators’ qualifications is similar. Arbitration in China has long had obvious quasi-judicial traces, which make the image of high-quality arbitrators in the heart of commercial subjects close to that of judges. Therefore, it is foreseeable that even if China’s arbitration law adopts the open arbitrator selection rule in the future, it will not bring about the subversive change in the selection of arbitrators by commercial subjects. Thus, this may have formed a nudge instead of fencing off or blocking choices in a sense.

To sum up, there is room for reconciliation between legal paternalism and libertarianism. If properly used, it can guarantee and promote people’s negative freedom, positive freedom, and substantive freedom. We still need to pay attention to the particularity of commercial activities, that is, the character of autonomy of merchant law. The merchant is the best judge of his/her own interests and the practitioner of commercial rules. The complicated commercial practice requires the adjustment of the rules of merchant autonomy. The maintenance of the value of autonomy by merchant law and commercial activities reflected by merchant law cannot be shaken by the intervention of the state in economic activities. Therefore, although the current legislative concept of legal paternalism has legitimacy, it still needs to keep enough restraint, so as to realize the adjustment with the concept of autonomy of will. For example, while setting the minimum threshold to protect

\(^6\) Of course, the current China’s arbitration law has been in effect for nearly 30 years, and it is inevitable to exert a subtle guiding effect on commercial subjects. Because of this, commercial subjects may be more intimate and familiar with institutional arbitration and thus reject ad hoc arbitration.
the interests of commercial subjects, appropriately allowing non-legal industry experts to enter the scope of arbitrators’ qualification rules, or negative listing of arbitrators’ qualifications in the form of “negative list” will be a meaningful direction of progress and conform to the characteristics of “nudging”.

**Conclusion**

The Western World has a profound tradition of party autonomy, and “autonomy of will” behind it essentially comes from the commercial tradition and corresponding ideology of western society for a long time. However, since the time of “hundred schools of thought” in the Eastern society, the idea of “benevolent government” has been bred, which coincides with legal paternalism.

More importantly, when we discuss the impact of differences in legislative ideas on the differences in rules, it will inevitably become a castle in the air if we make general remarks divorced from the reality of national conditions. The current arbitration law on the Chinese mainland was adopted on August 31, 1994, and only minor amendments were made in 2009 and 2017, when the development of the rule of law was not comparable to that of today. With the development of the rule of law, its influence on commercial arbitration should not be overlooked.

If we look back to China’s modern history, starting from the late Qing Dynasty, the construction of modern rule of law in China has a history of more than 100 years. Due to the strong demonstration effect of Western pioneers and the great time pressure of latecomers, latecomers like China must choose the road of government-driven legal modernization. This government-led approach tends to make the law become a tool for carrying out political policies, and thus legal institutions become the appendages of political groups to carry out their political will. This complex background makes handling cases in accordance with the law and impartial administration of justice the most basic requirements for the development of the rule of law in China. However, when the arbitration law was promulgated in 1994, the system and philosophy may restrict the realization of this requirement. Generally speaking, in the current stage of the development of the rule of law in China, the fair administration of justice is a major issue that still needs to be improved, and the public is still in a state of longing for it. In other words, as a country moving towards the rule of law at that time, China focused on getting rid of the interference of power with political factors on the fair value, thus striving for fairness and justice in arbitration and giving consideration to autonomy of will. Moreover, in China’s civil discourse, even the judiciary as the bottom line may have external interference and affect the justice, according to the “argumentum maiore ad minus”, the commercial arbitration with the fundamental feature of autonomy is more difficult to gain the unconditional trust of Chinese society. Therefore, especially in 1994 when the arbitration law was just issued, it was in line with the development stage of the rule of law in China at that time to ensure the quality of arbitration and the credibility of commercial arbitration of China. However, with the continuous improvement of the construction of the rule of law in China, the arbitration law should respond to it and adjust it timely to meet the different time points of the process of the rule of law.

At the same time, current international commercial arbitration market competition turns increasingly heating up; international commercial arbitration institutions are optimizing and reforming themselves in order to seize the commercial arbitration market. China has also proposed to “build an Asia-Pacific arbitration center facing the world to better serve China’s comprehensive opening-up”, hoping to make full use of Shanghai’s
unique advantages, strive to build Shanghai into an important center of communication, and establish a brand image of China’s arbitration. In such process, the appeal of China’s arbitration institutions is largely influenced by China’s ARBITRATION Law. Whether China’s arbitration law endows parties with enough freedom and choice space may be an important factor for competitiveness.

Therefore, a feasible direction is to try to balance the inherent autonomy of will of arbitration and the Chinese legal paternalism tradition. It is undoubtedly gratifying that China may give priority to liberalizing the rules in the field of foreign-related commercial arbitration as can be seen from the Revised Draft, which means that China is making great strides in the direction of autonomy of will. The future amendment of non-foreign arbitration rules should be based on the core goal of protecting the rights and interests of the parties, promoting the credibility of arbitration in China, and ensuring the healthy development of the socialist market economy. Just as stipulated in the Article 1 of the Revised Draft, the purpose of China’s arbitration Law is that “This Law is formulated to ensure fair and timely arbitration of economic disputes, protect the legitimate rights and interests of the parties, ensure the healthy development of the socialist market economy, and promote international economic exchanges”.

References
Gaillard, E. (2004). The role of the arbitrator in determining the applicable law. In L. Newman and R. Hill (Eds.), The leading arbitrators’ guide to international arbitration (pp. 185-216). Huntington: Juris Net LLC.


