

**International Commercial Arbitration in China –
State Involvement in the Pre-Award Stage:
A Comparative Analysis**

Dissertation

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Monika Prusinowska

aus Olsztyn, Polen

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Erstgutachter: Prof. Dr. Hinrich Julius

Zweitgutachter: Prof. Dr. Eckart Brödermann

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Abbreviations

AAA – American Arbitration Association

BAC – Beijing Arbitration Commission

BIAC – Beijing International Arbitration Center

CAA – Chinese Arbitration Association

CAL – Chinese Arbitration Law

CAS – Court of Arbitration for Sport

CCPIT – China Council for the Promotion of International Trade

CCPL – Chinese Civil Procedure Law

CEAC – Chinese European Arbitration Centre

CICC – China International Commercial Court

CIETAC – China International Economic and Trade Arbitration Commission

CMAC – China Maritime Arbitration Commission

CRCICA – Cairo Regional Centre for International Commercial Arbitration

DIS – German Arbitration Institute

FTAC – Foreign Trade Arbitration Commission (China)

FTZ – Free Trade Zone

GZAC – Guangzhou Arbitration Commission

HK – Hong Kong

HKIAC – Hong Kong International Arbitration Centre

HPC – Higher People’s Court

IBA – International Bar Association

ICAC – International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation

ICC – International Court of Arbitration at the International Chamber of Commerce

ICDR – International Centre for Dispute Resolution

IP – Intellectual Property

IPC – Intermediate People’s Court

JAMS – Judicial Arbitration and Mediation Services

JV – Joint Venture

LCIA – London Court of International Arbitration

NPC – National People’s Congress

PRC – People’s Republic of China

PRS – Prior Reporting System

QMUL – Queen Mary University of London, School of International Arbitration

SAA – Singapore (Domestic) Arbitration Act

SAC – Shanghai Arbitration Commission

SCC – Arbitration Institute of the Stockholm Chamber of Commerce

SCIA – Shenzhen Court of International Arbitration

SCIETAC – South-China International Economic and Trade Arbitration Commission

SHIAC – Shanghai International Arbitration Court

SIAA – Singapore International Arbitration Act

SIAC – Singapore International Arbitration Centre

SICC – Singapore International Commercial Court

SIETAC – Shanghai International Economic and Trade Arbitration Commission

SPC – Supreme People’s Court

SWISS – Swiss Rules of International Arbitration

UNCITRAL – United Nations Commission on International Trade Law

WAC – Wuhan Arbitration Commission

WFOE – Wholly Foreign Owned Enterprise

WIPO – World Intellectual Property Organization

Abstract

In face of growing commercial interaction between China and the rest of the world, business disputes are inevitable. In order to address them, efficient dispute resolution mechanisms are needed. International commercial arbitration has proven to be a viable mechanism – and even the preferred one globally. In response to increasing Sino-foreign business disputes, China has been developing its arbitration system in an effort to reach international standards. Nonetheless, there are still some obstacles hindering the attractiveness of international arbitration in China. One of the problems pertains to the Chinese *state's* involvement in the pre-award stage of arbitration.

In general, although arbitration is a private method of resolving disputes, the state plays an important role. This is because the state accepts arbitration as a valid method to resolve disputes, but in exchange, it expects to exercise some level of control. Further, arbitration, a private method, is not equipped with coercive powers, with which only state organs are equipped. Therefore, the state supervises arbitration and offers its support – if it is needed. The role of the *state* in arbitration is typically understood as the role of *state courts* in arbitration. However, in the case of China, the notion of “state” goes beyond the traditional understanding and often extends also to the arbitration institutions, because of strong governmental control over Chinese institutions.

This thesis focuses on the role of the *state* in the pre-award stage of international commercial arbitration in China, and looks at China's peculiarities through a comparative lens. The UNCITRAL Model Law on International Commercial Arbitration, which has been created to unify the practice of various jurisdictions and to suggest an arbitration-friendly direction, as well as representative Model Law jurisdictions – Hong Kong and Singapore serve as the primary points of reference for the discussion on China.

It is claimed that there is too much state *supervision* and not enough state *assistance* provided to arbitration in China. There exists an imbalance of power shared among the arbitral tribunal, the state court, and the arbitration institution, which affects the work of the tribunal tasked with conducting the proceeding in a neutral and efficient way and, likewise – deciding the case. Furthermore, the state limits the independence of the Chinese arbitration institutions and also restricts the functioning of foreign arbitration institutions in China.

This thesis argues the need: (1) to rebalance the distribution of power shared among the arbitral tribunal, the state court, and the arbitration institution; (2) to enhance the independence of the

Chinese arbitration institutions; and (3) to permit the full range of actions of foreign arbitration institutions in China. Together this would help China establish itself as a more efficient, arbitration-friendly jurisdiction and, thus, better facilitate the continuously expanding Sino-foreign businesses.

PART I

Part I of this thesis consists of three Chapters. Chapter 1 introduces the content of the thesis and presents the research questions, the employed methodology and a brief outline of the thesis. Chapter 2 offers an overview of the Chinese arbitration system, which includes: a brief history of arbitration in China,¹ the applicable sources of law, the relevant features of arbitration in China and the main actors on the Chinese arbitration stage. Chapter 3 deals with the relationship between arbitration and the state, and the general functions and powers of the parties, the arbitral tribunal, the state court, and the arbitration institution in international commercial arbitration.

CHAPTER 1: OVERVIEW OF THE THESIS

1.1. International arbitration in China in the context of Sino-foreign disputes

In the fast growing world of international transactions, business partners have a number of methods from which to choose for resolution of their disputes. Empirical studies show that arbitration plays an important role in resolving disputes in the cross-border context, and that there is a variety of reasons behind choosing it over the others. The popularity of arbitration results mainly from the efficient system of enforcing arbitral awards, party autonomy and flexibility in shaping the proceedings, as well as from the very nature of this method as a neutral forum for resolution of disputes.² As pointed by Born, “[w]hile far from perfect, international arbitration is, rightly, regarded as generally suffering

¹ “China”, for the purposes of this thesis, should be understood as “mainland China” only. It is important, because of different legal systems of mainland China, Hong Kong, Macau, and Taiwan. The terms “China”, “mainland China”, and the “People’s Republic of China” (“PRC”) are used interchangeably in this thesis.

² See School of International Arbitration Queen Mary University of London & PricewaterhouseCoopers, “International Arbitration: Corporate Attitudes and Practices 2008,” (2008), 2, 5.; School of International Arbitration Queen Mary University of London, “2013 International Arbitration Survey: Corporate Choices in International Arbitration - Industry Perspectives,” (2013), 4, 6-9.; School of International Arbitration Queen Mary University of London and White & Case, “2015 International Arbitration Survey: Improvements and Innovations in International Arbitration,” (2015), 2, 5-6.; School of International Arbitration Queen Mary University of London, “2018 International Arbitration Survey: The-Evolution of International Arbitration,” (2018), 5-7.

fewer ills than litigation of international disputes in national courts and as offering more workable and effective opportunities for remedying or avoiding those ills which do exist".³

During the last years, China has dramatically increased its interaction on the global stage. By way of example, the Belt and Road Initiative⁴ announced a few years ago by President Xi Jinping is expected to generate cross-border investment valuing trillions in US dollars.⁵ By way of another example, China and the European Union are two of the largest traders in the world. The EU became China's biggest trading partner, and China ranks right behind the United States as the EU's main trading partner. Moreover, China is the largest source of the EU's imports, and, on the other hand, it is also the EU's second-biggest export market. It is estimated that the trade between China and Europe values at approximately one billion euro a day.⁶

Taking the specific example of Germany, the EU's largest economy,⁷ it is China's most important trading partner in Europe. China, similarly, is Germany's most important trading partner worldwide. The bilateral trade volume between China and Germany valued approximately €170 billion in 2016. Moreover, the value of German direct investment in China amounted to €69.5 billion in 2015, while the value of Chinese direct investment in Germany has increased six times since 2004, and mounted to €2.2 billion at the end of 2015.⁸

Such cross-border transactions inevitably increase the risk of disputes and hence, the important issue is how they can be resolved. As mentioned, international commercial arbitration is globally the

³ Gary Born, *International Commercial Arbitration (2nd Ed.)* (Kluwer Law International, 2014), 74.

⁴ The Belt and Road Initiative (originally called "One Belt, One Road") is a development strategy proposed by President Xi Jinping, which focuses on cooperation between China and other countries, especially from the Eurasia region. See Ministry of Foreign Affairs and Ministry of Commerce of the PRC, "Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road Issued by the National Development and Reform Commission," (28 March 2015), http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html (last accessed: 20 November 2018).

⁵ The numbers given in different sources vary, but are estimated between four to even 21 trillion US dollars. See Jingjing Wang, "'One Belt, One Road' Likely to Raise China's GDP," *China Daily* (25 March 2015), http://www.chinadaily.com.cn/business/2015-03/25/content_19908124.htm.; Marcus Ryder, "One Belt, One Road, One Trillion Dollars – Everything You Need to Know in One Essay," *CGTN* (10 January 2017), https://news.cgtn.com/news/3d63544d3363544d/share_p.html. (last accessed: 20 November 2018).

⁶ See the official websites of the Delegation of the European Union to China and the European Commission: https://eeas.europa.eu/delegations/china/15394/china-and-eu_en and <http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/> (last accessed: 20 November 2018).

⁷ See the countries' GDP (current US\$) indicator at the official website of the World Bank: https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?year_high_desc=false (last accessed: 20 November 2018).

⁸ See the official website of the German Embassy in China: <https://china.diplo.de/cn-de/themen/wirtschaft/wirtschaft-bilateral> (last accessed: 20 November 2018).

preferred forum. However, when choosing international arbitration, some questions, such as “where” and “how” to arbitrate, need to be addressed. Answers to these specific questions can be different in each case, and typically depend on the parties’ preferences and their bargaining powers.

In order to facilitate resolution of Sino-foreign disputes specifically, a special arbitration institutions – the Chinese European Arbitration Centre (“CEAC”)⁹ located in Hamburg was even created, a testament to the importance of the relationship and the need for a dispute resolution forum attractive to foreign business partners. As it will be further elaborated in this thesis, there are attempts to reform arbitration laws worldwide, there are also attempts to establish specialized arbitration institution – such as the CEAC, yet, Chinese companies will continue to insist successfully on a „Chinese” arbitration. Moreover, resolving disputes in China and in front of a Chinese arbitration institution can be a reasonable choice, and sometimes, in fact, it is the only way to proceed.¹⁰ Therefore, it is necessary to work with Chinese arbitration law.

China is a country with a long tradition of resolving disputes in ways alternative to litigating. To a large extent, it has been determined by the Confucianism deeply rooted in the Chinese character. Confucianism puts an emphasis on harmony and hesitates to escalate disputes. Accordingly, especially the tradition of mediation (调解 *tiáo jiě*) is very long in China.¹¹ As to arbitration, it was not until the twentieth century that the arbitration system was established by law in China. Following the Opening-Up Policy, as a sign of having its own arbitration system heading toward international standards, China became a party to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“New York Convention”)¹² in 1986. Further, the pillar of arbitration in China – the *China Arbitration Law* (“CAL”)¹³ from 1994 was enacted as, basically, the first comprehensive act after years

⁹ See the official website of CEAC: <https://www.ceac-arbitration.com/> (last accessed: 20 November 2018). Also the city of Hamburg plays an important role in the Sino-European context. It biannually hosts the Hamburg Summit: China Meets Europe – a high-level conference aimed at providing a platform for a dialogue between Europe and China and improvement of the economic relations between the two. Hamburg has also a strong economic relationships with China. By way of example, over 500 Chinese companies are located in Hamburg. See more on the official websites of the Hamburg Summit: China Meets Europe: <https://www.hamburg-summit.com/en/>; and the Hamburg Invest – an agency for relocation and investment: <http://en.hamburg-invest.com/press/4146770/1125-news/> (last accessed: 20 November 2018).

¹⁰ See Chapter 2 p. 36-38.

¹¹ See Kun Fan, *Arbitration in China, a Legal and Cultural Analysis* (Hart Publishing, 2013), 194-196.

¹² The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations diplomatic conference on 10 June 1958, effective from 7 June 1959.

¹³ Arbitration Law of the People's Republic of China (issued on 31 August 1994, effective from 1 September 1995); [中华人民共和国仲裁法, 颁布时间: 1994年8月31日, 实施时间: 1995年9月1日].

of absence of such legislation. Article 1 of the CAL states that it is formulated in order to “ensure fair and timely arbitration of economic disputes [...]”.¹⁴

Over the last 24 years since the enactment of the CAL, China has experienced a remarkable development in arbitration. As an illustration, CIETAC has one of the highest caseloads in the world.¹⁵ In general, China’s efforts to improve its arbitration system cannot be denied. As discussed in greater detail below in this thesis, numerous actions have been taken over the years to modernize and internationalize the system, and the Supreme People’s Court in China (“SPC”) has declared an objective to further promote and support arbitration as an alternative method of resolving disputes.¹⁶ However, a number of shortcomings still exist and impact the desired neutrality and efficiency of the system in China. In the broader picture, these deficiencies can also impact China’s image as a place for arbitration, and even a reliable partner with which to do business.

By way of illustration, empirical studies conducted by the School of International Arbitration, Queen Mary University of London (“QMUL”) report that selecting the seat of arbitration is one of the key decisions in arbitration, and China (together with Russia) was perceived very skeptically as a suitable seat by stakeholders of international commercial arbitration from around the world.¹⁷ In addition, according to the findings of the China Arbitration Survey (presented below), which was conducted to

¹⁴ Art. 1 of the CAL: “The law is formulated with a view to ensure fair and timely arbitration of economic disputes, reliable protection to legitimate rights and interests of parties concerned and a healthy development of the socialist market economy.”

¹⁵ See Born, 94-95. for detailed statistics comparing the caseload of particular arbitration institutions.; see also Markus Altenkirch and Nicolas Gremminger, “Parties’ Preferences in International Arbitration: The Latest Statistics of the Leading Arbitral Institutions,” *Global Arbitration News* (5 August 2015), <https://globalarbitrationnews.com/parties-preferences-in-international-arbitration-the-latest-statistics-of-the-leading-arbitral-institutions-20150805/>. (last accessed: 20 November 2018).

¹⁶ See Xiao Yang, “Opening Address Xiao Yang Chief Justice, President of the Supreme People’s Court of China,” in *New Horizons in International Commercial Arbitration and Beyond*, ed. Albert Jan van den Berg, ICCA Congress Series (Kluwer Law International, 2005), 7-8.; also Lianbin Song, Hui Lin, and Helena Hsi-Chia Chen, “Annual Review on Commercial Arbitration in China ” in *Commercial Dispute Resolution in China: An Annual Review and Preview* (2017), 1-7.; Susan Finder, “Supreme People’s Court President Says Court Reforms in “Deep Water Area”,” *Supreme People’s Court Monitor* (15 March 2015), <https://supremepeoplescourtmonitor.com/2015/03/15/supreme-peoples-court-president-says-court-reforms-in-deep-water-area/>. (last accessed: 20 November 2018).

¹⁷ School of International Arbitration Queen Mary University of London, “2010 International Arbitration Survey: Choices in International Arbitration,” (2010), 17 & 20. For more on the perception of arbitration in China, see also John Savage, “Navigating the Pitfalls of Arbitration with Chinese Parties,” *The Metropolitan Corporate Counsel* (December 2010), <http://ccbjournal.com/pdf/2010/December/41.pdf>.; Nicholas Song, “China: Arbitration in China: Progress and Challenges,” (17 April 2013), <http://www.mondaq.com/x/233922/Arbitration+Dispute+Resolution/Arbitration+In+China+Progress+And+Challenges>.; Dan Harris, “CIETAC Arbitration: Different but Fair,” *China Law Blog* (20 December 2014), <http://www.chinalawblog.com/2014/12/cietac-arbitration-different-but-fair.html>. (last accessed: 20 November 2018); Weixia Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues* (Sweet & Maxwell, 2012), 197.

support this research, there were a number of respondents who perceived the Chinese arbitration environment as “rather unfriendly”. This was true for over one-third of the foreign, Hong Kong/Taiwan/Macau respondents, but also for 9% of the mainland Chinese respondents. Among all the dissatisfied respondents, the majority had substantial experience with arbitrating both in and beyond mainland China. As to why the arbitration environment in China was not perceived as friendly, among the most commonly quoted reasons were the limited powers of arbitral tribunals and the over-involvement of arbitration institutions in arbitration proceedings.¹⁸ Yet, as observed in the QMUL survey cited above, “[r]eputation is not static; it can be built upon and enhanced.”¹⁹

1.2. Research questions and objectives of the thesis

This thesis discusses the role of the state in the pre-award stage of international commercial arbitration, and in particular, concentrates on the situation in China. More specifically, the thesis examines the channels through which the state becomes involved in arbitration, both to exercise control over arbitration and assist it, and discusses a proper equilibrium of power among the arbitral tribunal, the state court, and the arbitration institution. It argues that a proper relationship between arbitration and the state, as well as a proper balance of power shared by the tribunal, the court, and the arbitration institution are essential for the system’s neutrality and efficiency.

In evaluating this, the thesis examines China through a comparative lens. The *United Nations Commission on International Trade Law Model Law on International Commercial Arbitration* (“UNCITRAL Model Law”)²⁰ and two UNCITRAL Model Law jurisdictions – Hong Kong and Singapore serve as a comparison.

The ultimate objective is to: (1) describe the existing divergence between commonly recognized standards in international commercial arbitration and the Chinese law and practice; (2) demonstrate that the discrepancies negatively impact the Chinese arbitration system system’s neutrality and efficiency, and, therefore, attractiveness to foreign partners; (3) argue the need for a more limited supervision of the state over arbitration and an increased assistance to it; and (4) suggest some specific changes.

¹⁸ See Chapter 9 on the China Arbitration Survey p. 195-196, as well as Appendix 1 p. 266-267.

¹⁹ School of International Arbitration Queen Mary University of London and White & Case, (2015), 15.

²⁰ The United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration prepared and adopted by UNCITRAL on 21 June 1985. In 6 July 2006, the UNCITRAL Model Law was amended. Other than specifically indicated, this thesis refers to the 2006 version of the UNCITRAL Model Law.

1.3. Scope and methodology of the thesis

1.3.1. Boundaries of the thesis

Due to the expansive nature of the relationship between state and arbitration, the focus of this thesis is delineated in the following ways.

A. Commercial arbitration

First, the thesis deals only with commercial arbitration, which is arbitration between commercial parties to contracts with an arbitration agreement. It does not deal with investment arbitration, which is arbitration between a host state and a foreign investor investing in that state, due to existing differences between the systems.

B. International / foreign-related arbitration

Second, the thesis deals with international arbitration, not domestic. The level of state's participation in arbitration can and, in practice, often does vary depending on whether arbitration is domestic or international. Globally, there is no universal definition of "international arbitration", but there is general acceptance of some important aspects that should be taken into consideration. In general, the term "international" is typically used in order to distinguish a purely "domestic" arbitration from ones which "in some way transcend national boundaries".²¹ One of the most respected sources of international arbitration law – the UNCITRAL Model Law, which was specifically designed to harmonize the practice of *international* commercial arbitration across countries, provides the following definition of "international arbitration":

"[a]rbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties

²¹ Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration (6th Ed.)* (Oxford University Press, 2015), 7.

have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.”²²

In China, arbitration can be divided into three categories: foreign, foreign-related, and domestic arbitration. Moreover, there are three differing regimes for each. The first of the three, “foreign”, is arbitration before a foreign arbitral tribunal and *seated outside of China*. The second, “foreign-related”, is arbitration that involves a foreign element, but is *seated inside China*. “Foreign” elements in “foreign-related” arbitration can be: (1) where at least one party concerned is a foreign citizen, a foreign legal person or any other organization, or a stateless person; (2) where the habitual residence of a party concerned, or both, is located outside the territory of the PRC; (3) where a subject matter is located outside the territory of the PRC; (4) where legal facts that trigger, change or terminate a civil relation take place outside the territory of the PRC; or (5) any other circumstances that can be determined as foreign-related civil relations.²³ Importantly, arbitration involving Hong Kong, Macau and Taiwan is seen as “foreign-related” for the purpose of the PRC Law.²⁴ The third of the three categories, “domestic”, is arbitration that does not involve any foreign element listed above and is *seated inside China*. So, two of the three categories, “foreign-related” and “domestic”, are seated within China, but have differing arbitration regimes.

As elaborated in Chapter 2, this dual-track for arbitration seated inside China is important, because although the two are not clearly defined as separate legal regimes under the CAL, they are treated differently.²⁵ As a terminological *caveat*, following Tao, the Chinese term “foreign-related arbitration” should equal to what is commonly understood as “international arbitration”.²⁶

²² See more Pieter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions (3rd Ed.)* (Sweet & Maxwell, 2010), 27-30.

²³ Art. 1 of the Interpretation of the Supreme People’s Court on Several Issues Relating to Application of the Law of the People’s Republic of China on Application of Laws to Foreign-related Civil Relations (I), Fa Shi [2012] No. 24, issued on 10 December 2012, effective from 7 January 2013 [《最高人民法院关于适用〈中华人民共和国民事诉讼法〉若干问题的解释（一）》法释 [2012] 24 号, 颁布时间: 2012 年 12 月 10 日, 实施时间: 2013 年 1 月 7 日]. The test was further reconfirmed by Art. 522 of the Interpretations of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China, Fa Shi [2015] No. 5, issued on 30 January 2015, effective from 4 February 2015; [最高人民法院关于适用《中华人民共和国民事诉讼法》的解释, 法释 [2015] 5 号, 颁布时间: 2015 年 1 月 30 日, 实施时间: 2015 年 2 月 4 日]. See more on the definition of foreign-related arbitration in Fan Yang, *Foreign-Related Arbitration in China: Commentary and Cases* (Cambridge University Press, 2015), 19-22. also Chapter 2 p. 36-38.

²⁴ Peter Yuen, Damien McDonald, and Arthur Dong, *Chinese Arbitration Law* (LexisNexis, 2015), 79.

²⁵ See Chapter 2 p. 36-38. Chapter VII of the CAL provides a few special provisions referring only to “foreign-related arbitration”.

²⁶ Jingzhou Tao, *Arbitration Law and Practice in China* (Kluwer Law International, 2012), 117.

C. Pre-award stage of arbitration

Third, the focus of this thesis is on the pre-award stage. As noted above, the state is typically represented by its state courts in international commercial arbitration. Therefore, in the following parts of this thesis, the notion of the “state” should be understood as “state courts”, unless otherwise indicated. Accordingly, the role of the state in arbitration can be divided into three stages: before, during, and after the arbitration proceeding. Again, the focus of this thesis is on the “before” and “during” stages.

Before the arbitration proceeding starts, a state court can help in several ways. It can help by upholding the arbitration agreement in the event one of the parties seeks to litigate in court, despite the agreement to arbitrate. The court can also help with issues pertaining to the forming an arbitral tribunal. In the absence of other mechanisms chosen by the parties, the court can help with appointing arbitrators and removing them if, for example, their independence or impartiality is contested. The court can also assist the parties with interim measures aimed at protection of the parties’ rights and interests. This is especially important when no other possibility of the recourse for interim measures is available to the parties.

During the arbitration proceeding, the court can also assist the proceeding with interim measures in aid of arbitration. The court can order such measures by itself upon the request of a party or can help with the enforcement of interim measures granted by arbitrators. If the law permits, the court can also help with matters pertaining to evidence taking, when, for example, an uncooperative party is not complying with an order of the tribunal to produce a particular piece of evidence.

Finally, after the arbitration proceeding, when the arbitral award is rendered, the court deals with issues of challenges to the award, as well as with the recognition and enforcement of it, in case a losing party is non-compliant with the award.²⁷

This thesis deals primarily with the pre-award stage of arbitration for a number of reasons. First, for the role of state courts in the post-award stage of international commercial arbitration, the New York Convention has allowed a relatively high degree of convergence of practices – despite varying interpretations of the convention by different courts. China, as mentioned, like the majority of the world’s jurisdictions, is a signatory to the New York Convention. Second, the involvement of state court

²⁷ See, generally, Redfern and Hunter, 419-439.

in the post-award stage in China has already been discussed quite extensively in the literature, available also in English.²⁸ Third, in the post-award stage, the question of the balance of power shared among the arbitral tribunal, the state court, and the arbitration institution shifts away from the arbitral tribunal and the arbitration institution to the question of how the court should exercise its role. It is so, because once an arbitral award is rendered, the tribunal's mission is practically finished. The court can proceed with challenges to the award in a setting-aside procedure and with the recognition and enforcement of the award. Accordingly, the role of the arbitral tribunal (and also of the arbitration institution) is very limited in the post-award stage. In practice, the arbitration institution can only technically assist with reaching out to the tribunal requesting a correction or an interpretation of the award. For the above reasons, this thesis concentrates on the earlier stage of arbitration, namely – before and during the arbitration proceeding, where the arbitral award has not been yet rendered.

D. Institutional arbitration

Fourth, the thesis addresses primarily institutional arbitration, not *ad hoc* arbitration. As of today, China, generally, does not allow *ad hoc* arbitration to be conducted within its borders.²⁹ Moreover, the role of the state, and the balance of power shared among the arbitral tribunal, the court, and the arbitration institution in institutional arbitration – where arbitration is administered by a special institution and in *ad hoc* arbitration – where there is no such an institutional administrator, usually differs. Therefore, for the accuracy of the comparison, the thesis deals primarily with institutional arbitration, and only some reference to *ad hoc* arbitration will be made, where appropriate.³⁰

²⁸ See, for example, Clarisse Von Wunschheim, *Enforcement of Commercial Arbitral Awards in China* (Thomson West, 2012), 1 *et seq.* 1; Randall Peerenboom, "Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC," *The American Journal of Comparative Law* 49, no. 2 (2001), 249 *et seq.*; Qisheng He, "Enforcement of Foreign Arbitral Awards in China: Dominant Role of the Supreme People's Court," *World Arbitration & Mediation Review* 7, no. 3 (2013), 573 *et seq.*; Julian Ku, Roger Alford, and Xiao Bei, "Perceptions and Reality: The Enforcement of Foreign Arbitral Awards in China," (2015), http://works.bepress.com/julian_ku/2/. (last accessed: 20 November 2018); Helena Chen, *Predictability of 'Public Policy' in Article V of the New York Convention under Mainland China's Judicial Practice* (Kluwer Law International, 2017), 1 *et seq.*; Guyang Liu and Hongyu Shen, "Recognition and Enforcement of Foreign Arbitral Awards: A Reflection on Court Practices [Original Title: 我国承认和执行外国仲裁裁决的司法实践述评]," *Beijing Arbitration [北京仲裁]* 79 (2012), 1 *et seq.*

²⁹ See Chapter 2 p. 35-36 for the detailed discussion on *ad hoc* arbitration in China and the changes introduced in 2016.

³⁰ See especially Chapter 6 of this thesis dealing with the forming of an arbitral tribunal, p.130 *et seq.*

1.3.2. Review of law and literature

This research is based on an extensive review of the applicable law and literature available in the field. Thus, the sources used include primary sources of law and relevant case law, as well as secondary sources of law, such as commentaries to laws, books, journal articles, discussion papers, and credible websites. A variety of sources, primarily in English, but also in Chinese, written by both Chinese and foreign authors, were consulted in the course of preparation of this thesis.

1.3.3. Comparative perspective

When trying to navigate and discuss the shortcomings of the Chinese arbitration system in the given context, it is necessary to have standards with which to compare the Chinese system. Accordingly, the *UNCITRAL Model Law on International Commercial Arbitration* (“UNCITRAL Model Law”) was selected as the main point of reference. In addition, in order to understand how the UNCITRAL Model Law operates in practice, two principal UNCITRAL Model Law jurisdictions – Hong Kong³¹ and Singapore were selected. These two jurisdictions were specifically chosen, because, as presented below in this Chapter, they are frequently referred to in the context of Sino-foreign disputes. Additionally, the New York Convention and some other sources of law occasionally blend into the comparative perspective. In the following parts of this thesis, this comparative perspective is referred to as “transnational standards”.

A. UNCITRAL Model Law on International Commercial Arbitration

The UNCITRAL Model Law on International Commercial Arbitration was chosen for the following reasons. The United Nations Commission on International Trade Law (“UNCITRAL”) was established in part to help modernize and harmonize international trade law. Accordingly, it plays an important role in improving the legal framework for international trade by preparing various international legislative texts, including conventions, model laws, and rules acceptable worldwide, as well offering non-legislative texts that can be used by commercial parties in negotiating transactions. Furthermore, UNCITRAL gathers and updates information on relevant case law and enactments of uniform commercial law in the world. It also offers its assistance in law reform projects, as well as organizes

³¹ It is important to note the distinction between mainland China and Hong Kong Special Administrative Region. Briefly speaking, between 1898 and 1997, Hong Kong was a British colony, but in 1997, it was transferred back to China. Mainland China and Hong Kong function currently under the doctrine of “one country, two systems” (this includes two legal systems). Until 2047, China allowed Hong Kong to continue to govern itself and maintain the independent system.

various seminars aimed at the discussion on relevant developments of laws.³² The Model Law on International Commercial Arbitration is one of its important and widely accepted legislative texts.

The UNCITRAL Model Law on International Commercial Arbitration was designed to be implemented by national legislatures. The UNCITRAL Model Law, along with the New York Convention, was a significant step towards the development of a more predictable “pro-arbitration” legal framework for commercial arbitration in the world.³³ Among the goals of the UNCITRAL Model Law are: achieving the primary objectives of international commercial arbitration and offering neutral, speedy, cost-efficient proceedings, with an emphasis put on the autonomy of parties, as well as with a limited, but effective judicial support.³⁴

Over the years, the UNCITRAL Model Law has been either adopted by a considerable number of countries³⁵ or has had some influence on national arbitration law.³⁶ The first 1985 version of the UNCITRAL Model Law, which covers the whole of the arbitration proceeding, starting from the arbitration agreement through the arbitral award, was subsequently amended in 2006. Among the main changes introduced in 2006 was the revised version of Art. 7 dealing with the requirement of form for an arbitration agreement to better accommodate the changing international contract practice. It also introduced Chapter IV A establishing a more comprehensive framework for interim measures in aid of arbitration, a topic central to this thesis.

The UNCITRAL Model Law, predictably, has been commonly perceived as an arbitration-friendly regime.³⁷ As stated by Carlevaris, the UNCITRAL Model Law has often served in practice “as the

³² See the official website of the UNCITRAL: <http://www.uncitral.org/> (last accessed: 20 November 2018).

³³ See the Explanatory Notes for the UNCITRAL Model Law from 1985 and 2006; also Howard Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989), v-vii, 1218-1229.; Born, 135-142.; Redfern and Hunter, 62-63.

³⁴ See Holtzmann and Neuhaus, 1220-1224.; also Binder, 7-12.

³⁵ Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been adopted in 80 states and 111 jurisdiction. See the official website of the UNCITRAL: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last accessed: 20 November 2018).

³⁶ This is the case, for instance, for England. See Johan Steyn, "England's Response to the UNCITRAL Model Law of Arbitration," in *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration*, ed. Julian D. M. Lew and Loukas A. Mistelis (2007), 133.; V.V. Veeder and Ricky Diwan, "National Report for England (2018)," in *ICCA International Handbook on Commercial Arbitration*, ed. Jan Paulsson and Lise Bosman (Kluwer Law International, 2018), 2-3.

³⁷ See *supra* note 35. See also Redfern and Hunter, 65.; Michael Hwang and Fong Lee Cheng, "Relevant Considerations in Choosing the Place of Arbitration," *Asian International Arbitration Journal* 4, no. 2 (2008): 202-203.; Stephan Wilske and Todd Fox, "The Arbitrator and the Arbitration Procedure - the Global Competition for the 'Best' Place for International Arbitration – Myth, Prejudice, and Reality Bits," in *Austrian*

benchmark for any jurisdiction hoping to attract more international arbitrations to its shores".³⁸ Yet, as rightly observed, the success of the UNCITRAL Model Law does not solely depend on introducing its provisions into a particular country's law, but also on a number of other factors, such as and importantly, the approach of state courts toward international arbitration cases.³⁹ The "friendliness" of the UNCITRAL Model Law lies in, among others: the limited intervention of state courts in arbitration proceedings, assistance offered to arbitration by the courts when it is needed, various mechanisms designed to avoid unnecessary delays in the proceedings, as well as limited recourse against arbitral awards.⁴⁰ The UNCITRAL Model Law was to some extent taken into account when preparing the CAL in China in 1994, but it was not adopted at that time.⁴¹ Also, on numerous occasions, the UNCITRAL Model Law has been referred to in the context of the need to reform the Chinese CAL.⁴²

As just mentioned, the UNCITRAL Model Law puts an emphasis on protecting the arbitration proceeding from an unpredictable or disruptive court interference by clearly limiting the instances, when the state court can become involved in arbitration (Art. 5 of the UNCITRAL Model Law). The instances when the involvement of the court can take place in arbitration under the UNCITRAL Model Law are basically divided into two categories.

The first category includes: (1) issues pertaining to forming an arbitral tribunal – appointment and removing of arbitrators (Art. 11, 13 and 14);⁴³ (2) the question of the tribunal's jurisdiction (Art. 16);⁴⁴ and (3) the setting aside of an arbitral award (Art. 34). In these situations, state courts (or a court specially designated for the purpose of efficiency) perform these tasks. Also, alternatively, for issues

Arbitration Yearbook (2009), ed. Christian Klausegger, Peter Klein *et al.* (2009), 410.; Jane Jenkins, "Dispute Avoidance and Resolution," in *International Construction Arbitration Law (2nd Ed.)* (Kluwer Law International, 2013), 70-71.

³⁸ Andrea Carlevaris, "The Geography of International Arbitration – Places of Arbitration: The Old Ones and the New Ones," in *The Evolution and Future of International Arbitration*, ed. Stavros L. Brekoulakis, Julian D. M. Lew, and Loukas A. Mistelis (Kluwer Law International 2016), 336.

³⁹ *Ibid.*, 337.

⁴⁰ General conclusion made based on the sources listed in *supra* note 37.

⁴¹ Yuen, McDonald, and Dong, 35.

⁴² See, for example, Manjiao Chi, "Is It Time for Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law," *Asian International Arbitration Journal* 5, no. 2 (2009), 142 *et seq.*; Yulin Zhang, "Towards the UNCITRAL Model Law - a Chinese Perspective " *Journal of International Arbitration* 11, no. 1 (1994), 87 *et seq.*; Peter Thorp, "The PRC Arbitration Law: Problems and Prospects for Amendment," *Journal of International Arbitration* 24, no. 6 (2007), 608.; Lianbin Song, Jian Zhao, and Hong Li, "Approaches to the Revision of the 1994 Arbitration Act of the People's Republic of China," *Journal of International Arbitration* 20, no. 2 (2003), 179.

⁴³ See Chapter 6 p. 131-133 & 137-140.

⁴⁴ See Chapter 4 p. 72-74.

pertaining to forming a tribunal, another authority, for example an arbitration institution, can be designated.⁴⁵ The second category includes: (1) the court's assistance in taking evidence (Art. 27);⁴⁶ (2) the recognition and enforcement of arbitration agreements (Art. 8);⁴⁷ (3) court-ordered interim measures (Art. 9 and Art. 17J);⁴⁸ and (4) the recognition and enforcement of interim measures ordered by the tribunal (Art. 17H and 17I)⁴⁹ as well of arbitral awards (Art. 35 and 36).⁵⁰

It should be noted, however, that despite the general recognition of advantages of the UNCITRAL Model Law, also criticism has been directed against some of its concepts. The highest criticism has probably referred to the issue of interim measures, and especially *ex parte* preliminary orders, as provided under Art. 17B and 17C of the 2006 UNCITRAL Model Law, which allow for granting of some measures against a party without notifying it.⁵¹ Yet, with the awareness that the UNCITRAL Model Law is not free of problems, it is argued that, overall, it constitutes an appropriate point of reference in the context of this thesis.

B. Hong Kong and Singapore as representative UNCITRAL Model Law jurisdictions and preferred choices in the Sino-foreign context

In order to discuss the mechanisms of the UNCITRAL Model Law and their operation in practice, reference is also made to the laws and practice of Hong Kong and Singapore, representative Model Law jurisdictions. As elaborated further down in this Chapter, Hong Kong and Singapore are also among the preferred choices in international arbitration, and also likely choices for resolution of disputes in the Sino-foreign context specifically.

a. Introduction to the arbitration regimes of Hong Kong and Singapore

The current version of the Hong Kong arbitration law, the *Hong Kong Arbitration Ordinance Cap. 609* from 2011 ("HK Arbitration Ordinance"),⁵² provides for a unitary system based on the 2006 version of

⁴⁵ See Chapter 3 p. 54-55.

⁴⁶ See Chapter 7 p. 170-171.

⁴⁷ See Chapter 4 p. 69.

⁴⁸ See Chapter 5 p. 103-106.

⁴⁹ See Chapter 5 p. 112-113.

⁵⁰ See United Nations Commission on International Trade Law, *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006* (2006), para 15-17.

⁵¹ See the criticism of *ex parte* orders available under Art. 17B and 17C of the 2006 UNCITRAL Model Law in Born, 2509-2511.

⁵² Hong Kong Arbitration Ordinance (Cap. 609) ("HK Arbitration Ordinance") in effect from 1 June 2011.

the UNCITRAL Model Law, subject to certain modifications. By “unitary”, this means that the law is applicable to both domestic and international arbitration. On the other hand, in Singapore, there are two separate legal regimes. Domestic arbitration is governed by the *Singapore Arbitration Act* (“SAA”)⁵³ while international arbitration is governed by the *Singapore International Arbitration Act* (“SIAA”).⁵⁴ The domestic regime is largely based on the 1985 version of the UNCITRAL Model Law, although there are some special supervisory powers given to state courts. Concerning the international regime, the 1985 UNCITRAL Model Law, with the exception of Chapter VIII dealing with the recognition and enforcement of arbitral awards, has the power of the force of law in Singapore.

i. Hong Kong

Arbitration has a long history in Hong Kong. Arbitration as a method to resolve disputes has been promoted there for nearly two centuries. Around the times of the beginning of the Colony of Hong Kong (1842-1997), it was a mechanism preferred by Chinese merchants in particular. They preferred to conduct the proceeding in their own language and according to rules with which they were more familiar, as opposed to the English court-style proceeding. Thereafter, there were a few sources of law pertaining to arbitration, and in 1990 (Cap 341), the UNCITRAL Model Law was adopted as the international regime. This was upon the recommendation of the Law Reform Commission of Hong Kong of 1987, which pointed to the need for providing a sound framework for international arbitration.⁵⁵

Major amendments to the Hong Kong arbitration law took place in 1996, and later in 2011 when the current HK Arbitration Ordinance (Cap. 609) came into effect. The present HK Arbitration Ordinance reflects a number of changes made over the past years. This includes the unification of the previously bifurcated regimes (domestic and international), the changes to the UNCITRAL Model Law from 2006, as well as the recognition and enforcement arrangements between Hong Kong and mainland China. Also, some modifications to the UNCITRAL Model Law were made to accommodate Hong Kong, but these modifications do not challenge the underlying principles of the Model Law. The last amendments

⁵³ Singapore Arbitration Act (Cap. 10) (“SAA”) in effect from 1 March 2002, incorporating amendments as of 1 June 2012.

⁵⁴ Singapore International Arbitration Act (Cap. 143A) (“SIAA”) in effect from 27 January 1995, revised edition as of 2002, incorporating amendments as of 1 June 2012.

⁵⁵ See Law Reform Commission of Hong Kong, "Report on the Adoption of the UNCITRAL Model Law of Arbitration (Topic 17)," (1987), 3-6, <https://www.hkreform.gov.hk/en/docs/runcitral-e.pdf>. (last accessed: 20 November 2018).

from 2013 reflect, among others, new provisions allowing the court to enforce interim measures ordered by an emergency arbitrator.⁵⁶

ii. Singapore

Also Singapore's history of arbitration is a long one. The initial framework was imported from England at the beginning of the XIX century, and Singapore had its own arbitration law starting in 1890. The law was subsequently amended in 1953, 1956, and later in 1994 – when the arbitration laws bifurcated into domestic and international regimes, and the UNCITRAL Model Law was implemented. Among the key differences between a domestic regime (governed presently by the SAA) and an international regime (governed by the SIAA) is a degree of judicial supervision over arbitration. This relates, in particular, to a possibility of granting the stay of a court proceeding in favor of arbitration, and an appeal against an arbitral award on the question of law, which are only available in the domestic regime.⁵⁷

The SIAA was enacted to reflect the trends of international commercial arbitration and help develop Singapore as an international arbitration hub.⁵⁸ It was subsequently amended, and the latest changes reflect, among others, relaxing of the requirement for an arbitration agreement to be made in writing, the possibility of an appeal of a negative ruling on jurisdiction given by the tribunal, as well as providing the legislative support for the mechanism of an emergency arbitrator.⁵⁹

⁵⁶ See more on the history and development of arbitration in Hong Kong in Teresa Cheng and Michael Moser, *Hong Kong Arbitration: User's Guide* (Wolters Kluwer Hong Kong, 2014), 45-63.; Giovanna Kwong, "The Influence of the UNCITRAL Model Law in Hong Kong and in China," in *The UNCITRAL Model Law on International Commercial Arbitration: 25 Years* ed. Association for International Arbitration (Maklu, 2010), 61-63.; Hong Kong Department of Justice, "Consultation Paper: Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill," (December 2007), <https://www.doj.gov.hk/eng/public/pdf/2007/arbitration.pdf>. (last accessed: 20 November 2018).

⁵⁷ See more on the differences between domestic and international regimes in Leslie Chew, *Introduction to the Law and Practice of Arbitration in Singapore* (LexisNexis, 2011), 12-18.

⁵⁸ See Singapore Law Reform Committee, "Report of the Law Reform Sub-Committee on Review of Arbitration Laws," (1993), 16-18, http://www.singaporelawwatch.sg/legal/igl/html/freeaccess/lrcr/review_of_arbitration_laws.pdf. (last accessed: 20 November 2018).

⁵⁹ See more on the history and development of arbitration in Singapore in David Joseph and David Foxton, *Singapore International Arbitration: Law and Practice* (LexisNexis, 2014), 1-39.; Chew, 3-18.; Ministry of Law in Singapore, "Proposed Amendments to the International Arbitration Act and the New Foreign Limitation Periods Act," (8 March 2012), <https://www.mlaw.gov.sg/news/press-releases/proposed-amendments-to-the-international-arbitration-act-and-the-new-foreign-limitation-periods-act.html>. (last accessed: 20 November 2018).

b. Reasons for selecting Hong Kong and Singapore as representative UNCITRAL Model Law jurisdictions

Importantly, in addition to being the UNCITRAL Model Law jurisdictions, there are other reasons why Hong Kong and Singapore are chosen specifically for the comparative perspective in the course of discussion on China.

To start with, both Hong Kong and Singapore, as well as their leading arbitration institutions, have consistently been among the preferred choices of parties in international arbitration. This is supported by the findings of the surveys conducted by the School of International Arbitration, Queen Mary University of London together with White & Case in 2015 (“2015 International Arbitration Survey: Improvements and Innovations in International Arbitration”)⁶⁰ and in 2018 (“2018 International Arbitration Survey: The Evolution of International Arbitration”).⁶¹ In general, surveys of the School of International Arbitration, Queen Mary University of London are conducted in order to offer an “empirical investigation into arbitration practices and trends worldwide”.⁶² These surveys from 2015 and 2018 collected data from respondents from all over the world about preferred places of arbitration and arbitration institutions, as well as the reasons behind particular choices.⁶³

The surveys reveal that Hong Kong and Singapore were chosen as the third and fourth most preferred places of arbitration, and the Hong Kong International Arbitration Centre (“HKIAC”) and the Singapore International Arbitration Centre (“SIAC”) were the third and fourth most preferred arbitration institutions.⁶⁴ As to the reasons for the popularity of particular arbitration seats, the general reputation

⁶⁰ School of International Arbitration Queen Mary University of London and White & Case, (2015), 11-12 & 15-17.)

⁶¹ School of International Arbitration Queen Mary University of London, “2018 International Arbitration Survey: The-Evolution of International Arbitration,” (2018), 9-10 & 13.

⁶² See the official website of the QMUL surveys: <http://www.arbitration.qmul.ac.uk/research/2015/> (last accessed: 20 November 2018).

⁶³ The respondent group of the survey in 2015 included: private practitioners (49%), arbitrator and counsel in equal proportion (12%), arbitrators (11%), in-house counsels (8%), academics (4%), arbitration institutions (staff) (2%), expert witnesses (2%), and “others” (12%). Moreover, 70% of the respondents (and 81% of the organizations they represent or with which they are connected) were involved in more than five international arbitration cases within five years preceding the survey.

In 2018, the respondents consisted of private practitioners (47%), arbitrator and counsel (in approximately equal proportion) (12%), full-time arbitrators (10%), in-house counsels (10%), and others (21%). In addition 66% of respondents (and 78% of the organizations they represent or with which they are connected) declared to be involved in more than five international arbitrations cases within five years preceding the survey.

See more on the methodology of the surveys in School of International Arbitration Queen Mary University of London and White & Case, (2015), 51-53.; and School of International Arbitration Queen Mary University of London, “2018 International Arbitration Survey: The-Evolution of International Arbitration,” (2018), 41-42.

⁶⁴ In 2015 – Hong Kong and the HKIAC, and in 2018 – Singapore and the SIAC ranked on the third place.

and recognition as a seat, the neutrality and impartiality of the local legal system, the national arbitration law, as well as the historical data on enforcing of arbitration agreements and awards were indicated as the important factors. Regarding the preferences for particular arbitration institutions, the institution's reputation and recognition, previous experience with the institution, and the selection of the arbitration seat were cited among common factors supporting the respondents' choices.⁶⁵

In addition, in the survey conducted in 2015, the respondents expressed the view that Singapore and Hong Kong are two most improved arbitration seats. As to what specifically has improved in these "improved seats", the respondents cited as key factors: better local arbitration institutions, improvements in national arbitration laws, neutrality and impartiality of the local legal systems, as well as greater efficiency of local court proceedings.⁶⁶ Furthermore, both the HKIAC and the SIAC were found to be the most improved arbitration institutions, mainly because of their reputation and recognition, greater efficiency, and higher level of administration.⁶⁷

Subsequently, both Hong Kong and Singapore and their respective leading arbitration centers have been among popular choices for arbitration in the Sino-foreign context specifically.⁶⁸ This refers also to the choices made for Sino-European disputes. By way of example, both Hong Kong and Singapore

See School of International Arbitration Queen Mary University of London and White & Case, (2015), 11-12, 17; and School of International Arbitration Queen Mary University of London, "2018 International Arbitration Survey: The-Evolution of International Arbitration," (2018), 9 & 12.

Overall, according to the surveys, five most preferred seats of arbitration are: London, Paris, Singapore, Hong Kong and Geneva, and the five most preferred arbitration institutions are: the International Court of Arbitration at the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA"), the Singapore International Arbitration Centre ("SIAC"), the Hong Kong International Arbitration Centre ("HKIAC") and the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC").

⁶⁵ School of International Arbitration Queen Mary University of London and White & Case, (2015), 14 & 19; School of International Arbitration Queen Mary University of London, "2018 International Arbitration Survey: The-Evolution of International Arbitration," (2018), 10-11 & 13-14.

⁶⁶ School of International Arbitration Queen Mary University of London and White & Case, (2015), 16.

⁶⁷ *Ibid.*, 20-21.

⁶⁸ See, for example, Michael Moser, *Managing Business Disputes in Today's China: Duelling with Dragons* (Kluwer Law International, 2007), 96-98.; Daniel Fung and Shengchang Wang, *Arbitration in China: A Practical Guide* (Sweet & Maxwell Asia, 2004), 104-105.; Paul Friedland and Bing Yan, "Negotiating and Drafting Arbitration Agreements with Chinese Parties –Special Considerations Paul of Chinese Law and Practice," *Journal of International Arbitration* 28, no. 5 (2011): 474-475.; Fernando Miguel Dias Simões, *Commercial Arbitration between China and the Portuguese-Speaking World* (Wolters Kluwer Law & Business, 2014), 106.; Steven Finizio and Kate Davies, "Arbitration in Asia: Going Beyond the Big Three," *Commercial Dispute Resolution: Asia-Pacific Region* (2011): 26-27.

have been frequently referred to in the context of Sino-German disputes, in particular as an alternative to arbitrating in China is sought.⁶⁹

Concerning a particular example of Sino-German disputes, statistical data⁷⁰ confirm that German parties often appear in front of the Singaporean SIAC. According to the SIAC statistics for 2017, Germany was the fifth top foreign user of the SIAC (68 instances of the participation of German parties in 2017), and an increase in the number of the parties from Germany was reported by the SIAC.⁷¹ Some, although more limited, participation of the German parties has been also noted by the HKIAC.⁷² As to China, both the SIAC (77 instances of the participation of Chinese parties) and the HKIAC are frequently used by the Chinese parties. China mainland is the top non-Hong Kong user of the HKIAC and the second top foreign user of the SIAC.⁷³

⁶⁹ See, for example, Tobias Freudenberg, "Wie Man in China Recht Bekommt," *Handelsblatt* (5 April 2010): 1-2, <http://www.handelsblatt.com/finanzen/steuern-recht/recht/schiedsvereinbarungen-wie-man-in-china-recht-bekommt/3404772.html>. (last accessed: 20 November 2018); Björn Etgen, "Schiedsverfahren Richtig Vorbereiten," *Asia Bridge* (December 2014), 46-47.; Bernard-Uwe Stucken and Felix Hess, "Sourcing-Vertraege Mit China - Was Sie Unbedingt Beachten Sollten (2nd Ed.)," in *China Sourcing: Beschaffung, Logistik Und Produktion in China*, ed. Peter Faust and Gang Yang (Springer Gabler, 2013), 166.

⁷⁰ It needs to be noted that various arbitration institutions offer various types of statistics and data. While some of them provide for rankings of the most popular users by nationality (the HKIAC), others provide for specific numbers of instances in which the parties of various nationalities appear (the SIAC, the SCC, the ICC), or for a percentage share of the party nationalities involved (the LCIA). Also, the data available refers to the choice of particular arbitration institutions. Yet, it can be concluded that a choice of a particular institution is often connected with the choice of the seat of arbitration, where a particular institution is established. This is the case for, for example, the HKIAC (in 2017, all arbitrations commenced were seated in Hong Kong; see the official website of the HKIAC: <http://www.hkiac.org/about-us/statistics>), and the SCC (in 2017, a vast majority of cases were seated in Sweden; see the official website of the SCC: <http://www.sccinstitute.com/statistics/>). (last accessed: 20 November 2018). The SIAC does not provide for relevant information in this regard.

⁷¹ Singapore International Arbitration Centre, "SIAC Annual Report 2017," (2018), 14, http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf. (last accessed: 20 November 2018).

⁷² Hong Kong International Arbitration Centre, "HKIAC Annual Report: 2016 Reflections," (2017), 11. See, in particular, domain name disputes. See also the HKIAC statistics for previous years available at the HKIAC official website: <http://www.hkiac.org/about-us/statistics> (last accessed: 20 November 2018).

⁷³ See *ibid.*, 10-11.; Singapore International Arbitration Centre, 14.

For the sake of comparison, the ICC is commonly used by both Chinese and German parties (see the statistics of the ICC available at the official website of the ICC: <https://iccwbo.org/media-wall/news-speeches/icc-announces-2017-figures-confirming-global-reach-leading-position-complex-high-value-disputes/>; Germany ranked as the top second user, and China, counted as both mainland China and Hong Kong, as the top seventh user of the ICC). In the context of the ICC arbitration, it is noteworthy that Singapore is among the top choices as a seat of arbitration in the ICC cases (see the official website of the ICC: <https://iccwbo.org/media-wall/news-speeches/icc-report-confirms-singapore-as-a-leading-asia-arbitration-hub/>).

The LCIA statistics show a very limited participation of both German and Chinese parties (see London Court of International Arbitration, "Facts and Figures: 2017 Casework Report," (2018).)

The choice of Hong Kong and Singapore by the parties in the context of Sino-foreign disputes can be a result of various factors. It can be caused by the development of international commercial arbitration in Hong Kong and Singapore, geographical convenience, and the perception that arbitrators from Hong Kong and Singapore are more culturally familiar with the practice of business in China.⁷⁴ This can also be a part of a bargain, and not necessarily the preference of the parties.

Not unrelated to the popularity of both Hong Kong and Singapore is the fact that both have extensive experience with international commercial arbitration and the practice of arbitration is deep-rooted. Their relevant laws are regularly updated in order to accommodate developments in international commercial arbitration and the expectations of its users. By way of example, both Hong Kong and Singapore recently amended their laws to cover the extensively-discussed issue of third-party funding, which permits the funding of costs of legal proceedings by an entity not having a direct interest in the outcome of a case.⁷⁵

Additionally, as discussed in greater detail in the following parts of this thesis, the pro-arbitration courts in both Hong Kong and Singapore have continuously supported international commercial arbitration proceedings. This includes helping to enforce arbitration agreements, as well as assisting with the enforcement of orders granted by arbitrators (such as those relating to interim measures and evidence taking) and of arbitral awards.⁷⁶

It should be mentioned that there are other jurisdictions that are successful in international commercial arbitration and are perceived as arbitration-friendly. According to the above quoted QMUL

As to the SCC, Germany is its top second foreign user (10 cases in which the German parties appeared in 2017), and mainland China is the top fifth foreign user (seven cases in which the mainland China parties appeared in 2017; see the official website of the SCC: <http://www.sccinstitute.com/statistics>).

The German leading institution – the German Arbitration Institute (“DIS”) in 2016 reported to have one, and in 2017 – two instances of the participation of Chinese parties (see the official website of the DIS: <http://www.disarb.org/upload/DIS-Verfahrensstatistik%202017.pdf>, p. 6 (last accessed: 20 November 2018)).

The data on the CEAC statistics was not available at the time of writing of the thesis.

⁷⁴ Moser, *Managing Business Disputes in Today's China: Duelling with Dragons*, 97.

⁷⁵ On 10 January 2017, the Parliament in Singapore passed the Civil Law (Amendment) Bill, which allows the third-party funding in international arbitration and in the related proceedings before the Singaporean courts. In Hong Kong, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 was passed on 14 June 2017.

⁷⁶ See more in Chapter 4 p. 74-77, Chapter 5 p. 106-108 & 113-115, and Chapter 7 p. 171-173. See also for Hong Kong, Cheng and Moser, 95-97.; and for Singapore, Chew, 75-87.

surveys, these are, in particular, the English,⁷⁷ French, and Swiss systems.⁷⁸ However, none of these jurisdictions has based its arbitration law on the UNCITRAL Model Law on International Commercial Arbitration.⁷⁹

And finally, additional reasons why Hong Kong and Singapore were selected to support this research are the following. First, both Hong Kong and Singapore are examples that are looked at in practice as model roles in the context of various aspects pertaining to the modernization of arbitration in the region of Asia.⁸⁰ Second, as supported by the numbers introduced above, these are also China's competitors in the region. Third, both the unitary system (Hong Kong) and the dual system with separate regimes for domestic and international arbitrations (Singapore) are represented. Fourth, as discussed in greater detail below, the HKIAC and the SIAC recently opened their representative offices in China with declared aims of: encouraging best international arbitration practices via cooperation with the local authorities and arbitration institutions and providing professional training to Chinese arbitrators and practitioners.⁸¹ One could, therefore, imagine that the presence of the HKIAC and the SIAC in China could have some impact on the future of the Chinese arbitration law and practice.

For all the reasons listed above, as well as, importantly, due to the limitations of this thesis, the choice was made to primarily concentrate on the UNCITRAL Model Law and Hong Kong and Singapore as representatives of it.

⁷⁷ English arbitration law system refers here to England and Wales. Scotland and of Northern Ireland have the separate systems. Scotland adopted the UNCITRAL Model Law.

⁷⁸ London, Paris, and Geneva were chosen as the first, the second and the fifth preferred seats for arbitration by the respondents to the QMUL surveys. See School of International Arbitration Queen Mary University of London, "2018 International Arbitration Survey: The-Evolution of International Arbitration," (2018), 9-11.

⁷⁹ See the status of jurisdictions enacting the UNCITRAL Model Law at the official website of the UNCITRAL: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last accessed: 20 November 2018).

⁸⁰ Michael Moser, "How Asia Will Change International Arbitration," in *International Arbitration: The Coming of a New Age?*, ed. Albert Jan van den Berg, ICCA Congress Series (2013), 65.

⁸¹ See the news on the official websites of the HKIAC: <http://www.hkiac.org/zh-hant/node/1697>; the SIAC: <http://www.siac.org.sg/69-siac-news/467-opening-of-siac-office-in-shanghai>; and the ICC: <http://www.iccwbo.org/News/Articles/2016/New-Shanghai-office-lays-groundwork-for-ICC-Asia-developments/> (last accessed: 20 November 2018). See more Chapter 8 p. 187-188.

C. New York Convention

The *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“New York Convention”) from 1958, adopted by the vast majority of the world jurisdiction,⁸² is also on a few occasions referred to in his thesis. The New York Convention is said to be “by far the most significant contemporary legislative instrument relating to international commercial arbitration”.⁸³ The New York Convention requires the courts of contracting states to give effect to arbitration agreements and to recognize and enforce arbitral awards made in other states – either in other states in general or in other New York Convention signatory states.⁸⁴ There is no comparable treaty of such scale dealing with the recognition and enforcement of state court judgements. As to the particular interest of this thesis, the New York Convention deals with the question of the enforceability of arbitration agreements and it imposes the duty to recognize and enforce them, so that arbitration can take place.

D. Other sources

Some reference is also be made to certain internationally recognized instruments of soft law, such as those produced by the International Bar Association (“IBA”). The IBA is an association of international legal practitioners, bar associations, and law societies from around the world. Furthermore, since institutional arbitration is a central focus of this thesis, institutional rules of particular arbitration institutions will support the discussion as well. This refers especially to the arbitration rules of the HKIAC and the SIAC.

Finally, an occasional reference is made to jurisdictions other than Hong Kong and Singapore, which are also generally perceived as arbitration-friendly. This relates in particular to Chapter 7, which deals with evidence taking in arbitration.⁸⁵ A reference there is made to Switzerland in order to provide an

⁸² As of 20 November 2018, there were 159 signatory parties to the New York Convention; see the official website of the New York Convention: <http://newyorkconvention.org/contracting-states/list-of-contracting-states> (last accessed: 20 November 2018).

⁸³ Born, 100.

⁸⁴ Two types of reservations are available under the New York Convention and hence, a contracting state can choose to apply the New York Convention in a restrictive way. One reservations is called “reciprocity reservations” and it means that states can limit the application of the New York Convention to awards from other contracting states. The other one is called “commercial reservation” and it means that states may limit the application of the New York Convention to awards relating to commercial matters (see Art. 1(3) of the New York Convention).

⁸⁵ See Chapter 7 p. 173-174.

example of a civil law jurisdiction, in contrast to common law jurisdictions of Hong Kong and Singapore. It is done so, since traditionally civil and common law systems have had differing approaches as to evidence taking, and this can have an impact on the distribution of power in the area of evidence taking in arbitration.

1.3.4. *The China Arbitration Survey*

In the course of preparation of this thesis, a survey titled “China Arbitration Survey” was conducted by the author to support this research. The China Arbitration Survey was designed to collect data on the practice of China in the areas of this thesis. It features both experiences and expectations of various participants of arbitration proceedings involving foreign elements, but seated in China. The China Arbitration Survey concentrated mainly on the division of power among the arbitral tribunal, the state courts, and the arbitration institution in the pre-award stage of arbitration proceedings in China. It surveyed respondents from mainland China, Hong Kong/Taiwan/Macau, and all other regions of the world, of various age, various types of involvement in arbitration proceedings, as well as with various amounts of experience. The survey consisting of 41 questions was created in a form of an online questionnaire, and resulted in 64 fully completed responses. Eventually, 58 responses were taken into account, due to the fact that six respondents lacked the relevant experience with the cases involving foreign elements and seated in China.

The author is aware of empirical research on the state’s participation in the post-award stage of arbitration in China.⁸⁶ However, to the best of the author’s knowledge, empirical research on the state’s participation in the pre-award stage of arbitration has been more limited. Therefore, this survey can provide some insights into the pre-award area. This survey’s findings support particular arguments in the following parts of this thesis. Also, a detailed section dedicated to the China Arbitration Survey, including its methodology and all of the findings, can be found in Chapter 9 of this thesis, as well as in Appendix 1 attached to it.

1.3.5. *Outline of the thesis*

This thesis consists of three Parts and ten Chapters. In Part I, there are three Chapters. The present Chapter provides a general introduction, presents the research questions, describes the employed methodology, and offers a brief outline of the thesis. Chapter 2 provides an overview of the Chinese

⁸⁶ See, for example, Peerenboom, 249 *et seq.*; Liu and Shen, 1 *et seq.*; Ku, Alford, and Bei. (last accessed: 20 November 2018).

arbitration system and presents a brief history of arbitration in China, sources of law, relevant features of arbitration in China and main actors on the Chinese arbitration stage. Chapter 3 deals with the general question of the state's involvement in arbitration and the functions and powers shared among the parties, the arbitral tribunal, the state court, and the arbitration institutions in international commercial arbitration.

In Part II, there are five Chapters. The first four Chapters discuss four situations, where the interaction between arbitration and the state can take place in the pre-award stage of international commercial arbitration. This interaction happens because it is either needed for the supervision of arbitration or it is desirable for assisting in the arbitration proceeding. These four Chapters (Chapters 4 to 7) deal with: (1) the enforcement of an arbitration agreement and objections to jurisdiction of arbitrators; (2) interim measures in aid of arbitration; (3) forming an arbitral tribunal; and (4) evidence taking in arbitration. The discussion in each of these Chapters follows the same pattern: it starts with a general introduction of the issue and transnational standards in the area discussed, followed by an analysis of the Chinese situation, and concluding with critical observations on the Chinese law and practice, plus ways of possibly improving the Chinese system, where applicable. In addition, Chapter 8 deals with the question of the status and powers of foreign arbitration institutions in states other than where they are established. The discussion in this Chapter also follows the pattern set above.

Part III consists of two Chapters. Chapter 9 discusses in greater detail the China Arbitration Survey. Final Chapter 10 provides the summary of recommendations for the direction of changes in China, as well as other possible responses to the existing shortcomings of the Chinese arbitration system.

CHAPTER 2: OVERVIEW OF THE CHINESE ARBITRATION SYSTEM

This Chapter serves as an introduction to the arbitration system of China. It starts with an overview of the brief history and development of arbitration in China. It subsequently moves to the analysis of the applicable sources of law. Next, it examines the relevant characteristics of Chinese arbitration and lastly, it introduces the main players on the Chinese arbitration stage.

2.1. Brief history and development of arbitration in China

While discussing the history and development of dispute resolution methods in China, it is important to stress that the Chinese social and cultural background is heavily influenced by Confucian philosophy, which emphasizes harmony and discourages the escalation of conflicts. Against such a background, litigation was traditionally seen as a sign of a breakdown in social harmony, and therefore, was an undesirable way to resolve disputes. This induced the development of alternative ways of resolving disputes, with mediation being one of the key instruments.⁸⁷

China has followed its unique path to the recent arbitration system and, thus, an understanding of its history and development is important to comprehend the characteristics of the Chinese arbitration system today. Arbitration in China is not a transplant of western concepts, and its development was, in fact, rather limited until the early 1990's. There were a number of reasons for a limited development of arbitration in China at that time, with the main one being China's socialist, political, legal, and economic model of an isolationist character, which did not require any substantial development of an arbitration system, let alone a foreign-related/international framework. The post-1990's reforms of the Chinese system have resulted in the expansion of arbitration in China in the caseload, various sources building a system of arbitration, and development of local arbitration institutions.⁸⁸

Although, it is possible to trace the roots of arbitration in China back to the Qing dynasty, when self-regulating merchants' guilds were developing dispute resolution mechanisms suitable for them, the proper start of arbitration in China actually dates back to the beginning of 20th century, when the first arbitration institutions resembling the Western model of arbitration were created. Importantly,

⁸⁷ See Fan, *Arbitration in China, A Legal and Cultural Analysis*, 194-196.

⁸⁸ See Yuen, McDonald, and Dong, 11-13.

however, “commercial arbitral bodies”, which were then created, were restricted by the Ministry of Justice, and arbitral awards rendered by them were not final and were binding upon the parties only if the parties accepted the result of arbitration.

The founding of the People’s Republic of China (“PRC”) in 1949 ushered in a period of a limited development of arbitration. The newly established PRC with its socialist influences in politics, economy, and law totally distanced itself from the Western models of resolving disputes. The need for commercial arbitration was rather limited. Yet, although the interaction of China with the outside world around that time was sporadic, it is important to stress that the so called, “dual track” regime, which means separate regimes for domestic and foreign-related arbitration, had already developed at that time.⁸⁹ Accordingly, two types of arbitration were handled by different arbitration bodies and different sets of rules were applied.

As to the domestic regime, in the period between 1955 and 1966, all domestic disputes were exclusively handled by local economic institutions, which were administrative bodies subordinated to the state. A party dissatisfied with an award could appeal to higher instance within a particular institution. Subsequently, in the period around the Cultural Revolution, between 1966 and 1976, arbitration was practically non-existent. In the times following the Cultural Revolution, arbitration co-existed with litigation and this co-existence resulted in multiple proceedings involving both arbitration institutions and courts for resolution of commercial disputes. This was then followed by the period after 1982, in which the parties were able to choose between arbitration and litigation, but in case of dissatisfaction with an award, a dissatisfied party still had recourse to state courts. Eventually, since 1993, the parties’ choice for arbitration excluded the possibility to argue before the court, and arbitral awards became final and binding upon the parties.

Summarizing, although generally referred to as “arbitration”, arbitration available during that period of time can be described as “administrative arbitration” or “governmental arbitration”, because the state actually performed the role of an arbitrator, failed to respect the party autonomy, and the administrative color was involved in the whole arbitration proceeding.⁹⁰

⁸⁹ As presented below in this Chapter (p. 36-38), the elements of this dichotomy and the “dual track” are also present in the Chinese arbitration system today.

⁹⁰ See Wei Sun and Melanie Willems, *Arbitration in China* (Kluwer Law International, 2015), 3.; Yuen, McDonald, and Dong, 22, 28, 32.

For the purposes of foreign trade, a special institution, the Foreign Trade Arbitration Commission (“FTAC”),⁹¹ was created in 1956 within the China Council for the Promotion of International Trade (“CCPIT”). The FTAC was initially designated to handle only foreign-related cases and its caseload was rather limited until 1979.⁹² In general, this foreign-related arbitration regime adhered much more to the basic principles of international commercial arbitration. The FTAC operated as a non-governmental organization, arbitration proceedings to some extent observed the principle of party autonomy and arbitral awards were final and binding upon the parties. With the Open-Up policy set in place by Deng Xiaoping after the death of Mao Zedong, in the face of the transition from a centrally-planned economy to a more market-oriented system and an increased integration with the outside world, further development of arbitration was needed in order to offer dispute resolution mechanisms that would be more willingly accepted, especially by foreign parties.

In 1987, China became a signatory state to the New York Convention, which meaningfully improved the situation of the recognition and enforcement of foreign arbitral awards in China. China decided to sign the New York Convention, because it was important for China to show its willingness to obey international standards in the area recognition and enforcement of awards, as well as to enhance its reputation as a jurisdiction favorable for international arbitration.⁹³

Another landmark development in China’s arbitration dates back to 1994, when the Chinese Arbitration Law (“CAL”), the pillar of the current system, was enacted.⁹⁴ In the face of the challenge to offer a private dispute resolution mechanism that would be acceptable to foreign parties, on the one hand, and not permitting the system to evade the state’s control on the other hand – the CAL was passed. The CAL brought the Chinese practice significantly closer to internationally accepted standards. Among the most important changes introduced by the CAL were: the endorsement of the principle of party autonomy, increased independence of arbitration, as well as the finality of the arbitral award. The further, post-1994 developments include these on the side of arbitration institutions, as well as on the side of the Supreme People’s Court (“SPC”) playing a leading role in explaining the application of arbitration law in China.⁹⁵

⁹¹ The FTAC was subsequently renamed to the Foreign Economic and Trade Arbitration Commission in 1980, and to CIETAC in 1988.

⁹² Yuen, McDonald, and Dong, 25-26.

⁹³ See Fung and Wang, 19.; Moser, *Managing Business Disputes in Today's China: Duelling with Dragons*, 49.

⁹⁴ Arbitration Law of the People's Republic of China, issued on 31 August 1994, effective from 1 September 1995; [中华人民共和国仲裁法, 颁布时间: 1994年8月31日, 实施时间: 1995年9月1日].

⁹⁵ See more on the history and development of arbitration in China in Yuen, McDonald, and Dong, 11-53.; Tao, *Arbitration Law and Practice in China*, 1-45.; Sun and Willems, 1-8.

2.2. Sources of law

There is a fair number of sources of law relevant for the Chinese arbitration system. As named above, the core of the system is the CAL enacted in 1994. In addition, there are other pieces of legislations, such as the *Chinese Civil Procedure Law* (“CCPL”),⁹⁶ the *Chinese Contract Law*,⁹⁷ and the *Law on Application of Laws to Foreign-Related Civil Relations*,⁹⁸ international sources, such as the above mentioned New York Convention; as well as numerous documents produced by various bodies in support of arbitration, especially by the SPC.

2.2.1. Chinese Arbitration Law

The CAL can be perceived as a piece of law struggling between, on the one hand, accommodating the expectations of private businesses toward dispute resolution mechanisms, including foreign expectations, and on the other hand, developing the socialist market economy.⁹⁹ The drafting of the CAL started in 1991, and members of the historically most important arbitration institution in China – CIETAC were also members of the National People’s Congress (“NPC”) drafting committee of the law.¹⁰⁰ The CAL to some extent was inspired by international sources, including the UNCITRAL Model Law. However, the UNCITRAL Model Law eventually was not adopted in China, because adopting the UNCITRAL Model Law would mean the substantial removal of the state’s participation in the arbitration system, and this was not compatible with the overall system in China, keeping also in mind that the CAL was intended to embrace both domestic and foreign-related arbitration.¹⁰¹

The CAL was, however, a great leap forward when comparing it to previous legal arrangements. Before the enactment of the CAL, China’s arbitration system was governed by a number of fragmentary

⁹⁶ Civil Procedure Law of the People's Republic of China, issued on 31 August 2012, effective from 1 January 2013; [中华人民共和国民事诉讼法, 颁布时间: 2012 年 8 月 31 日, 实施时间: 2013 年 1 月 1 日].

⁹⁷ Contract Law of the People's Republic of China, issued on 15 March 1999, effective from 1 October 1999; [中华人民共和国合同法, 颁布时间: 1999 年 3 月 15 日, 实施时间: 1999 年 10 月 1 日].

⁹⁸ Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations, issued on 28 October 2010, effective from 1 April 2011; [中华人民共和国涉外民事关系法律适用法, 颁布时间: 2010 年 10 月 28 日, 实施时间: 2011 年 4 月 1 日].

⁹⁹ Yuen, McDonald, and Dong, 33-34.; See more Yangran Gu, "Explanation Concerning the Arbitration Law of People's Republic of China (Draft) [Original Title: 关于《中华人民共和国仲裁法（草案）》的说明]," 28 June (1994), http://www.npc.gov.cn/wxzl/gongbao/2001-01/02/content_5003212.htm. (last accessed: 20 November 2018).

¹⁰⁰ Yuen, McDonald, and Dong, 34.

¹⁰¹ *Ibid.*, 35.

regulations dispersed in various sources. Song, Zhao, and Li point to 14 laws, 82 administrative regulations, and 190 local regulations, which contained various provisions on arbitration, but also often contradicted with each other.¹⁰² The basic principles of arbitration, such as the independence and separability of an arbitration agreement, the party autonomy (though limited),¹⁰³ independence of arbitration and arbitration institutions (also limited),¹⁰⁴ and the finality of the arbitral award were introduced into the system. The CAL is, therefore, described as a “pragmatic piece of legislation designed to deal with the problems of a transitioning economy in the 1990’s”.¹⁰⁵ The significance of the CAL has been noted also by foreign commentators, yet, at the same time, some insufficiencies of that piece of law have been pointed by the same observers as well.¹⁰⁶

2.2.2. Sources of law produced by the Supreme People’s Court

In general, national legislation in China lays down only broad principles and, thus, various supplementary sources are often needed in practice. Likewise, in the area of arbitration, there exists a need to fill the gaps, and especially the sources provided by the SPC have performed such a function. This function of the SPC has been crucial in the post-1994 times, because of the lack of experience of the Chinese courts with arbitration. The general condition of the Chinese courts, especially around that time, paired with the tendency to apply law strictly and narrowly, was not the best environment for the implementation of the CAL. In light of that, the SPC has played a critical role in supporting the implementation of the new arbitration law.¹⁰⁷

According to Art. 45 of the *Chinese Legislation Law*,¹⁰⁸ the formal power to interpret the laws is given to the Standing Committee of the NPC. However, since, in fact, the Standing Committee of the NPC

¹⁰² Song, Zhao, and Li, 172.

¹⁰³ See Chapter 10 p. 206-207.

¹⁰⁴ See Chapter 6 p. 150-153.

¹⁰⁵ Yuen, McDonald, and Dong, 38.

¹⁰⁶ See, for example, Thorp, 607 *et seq.*; Michael Moser, "CIETAC Arbitration: A Success Story?," *Journal of International Arbitration* 15, no. 1 (1998), 28 *et seq.*

¹⁰⁷ Yuen, McDonald, and Dong, 57 & 60.

¹⁰⁸ Legislation Law of the People’s Republic of China, issued on 15 March 2000; amended on 15 March 2015; [中华人民共和国立法法（2000年3月15日第九届全国人民代表大会第三次会议通过根据2015年3月15日第十二届全国人民代表大会第三次会议《关于修改〈中华人民共和国立法法〉的决定》修正）].

Art. 45 of the Legislation Law: “The power to interpret a national law shall vest in the Standing Committee of National People’s Congress. The Standing Committee of National People’s Congress shall give interpretation to a national law in any of the following circumstances: (1) the specific meaning of a provision of such legislation requires further clarification; (2) a new situation arises after enactment of such legislation, thereby requiring clarification of the basis of its application.”

rarely provides legislative interpretations, sources produced by the SPC constitute an important source of the Chinese law.¹⁰⁹ The authority of the SPC to interpret laws and regulations is derived from the *Organic Law of People's Courts*¹¹⁰ and the *Resolution of the Standing Committee of the NPC on Strengthening of Legal Interpretive Work*.¹¹¹ In the case of an SPC interpretation conflicting with later laws, the interpretation will remain in force to the extent to which it is not inconsistent with the later law. Furthermore, the SPC's interpretation can expressly repeal or cancel the earlier interpretations.¹¹²

As noted above, although in 1994, the introduction of the CAL was a great leap forward for the development of arbitration in China, one of the practical problems was the limited experience with arbitration of the Chinese courts. In order to address a variety of problems arising in practice, the SPC took the lead. In that context, the SPC can be described as a designer of changes and directions the Chinese arbitration system should go. Therefore, the SPC's role in integrating the system and moving the arbitration environment toward a more arbitration-friendly one is of great importance.¹¹³ Since the enactment of the CAL in 1994, the SPC has made numerous efforts to explain and/or update the system by promulgating various sources of law to guide especially the courts in their decisions related to arbitration.¹¹⁴

The Prior Reporting System (事先报告制度, *shì xiān bào gào zhì dù*, "PRS") established by the SPC's notice of 1995,¹¹⁵ and subsequently extended by the SPC's notice of 1998,¹¹⁶ can serve as an example

¹⁰⁹ See Chenguang Wang, "Lawmaking Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes," *Frontiers of Law in China* 1, no. 4 (2006), 533-534.

¹¹⁰ The Organic Law of the People's Courts of the People's Republic of China, issued on 1 July 1979, effective on 1 January 1980, amended in 1983, 1986 and 2006; [中华人民共和国人民法院组织法, 颁布时间:1979年7月1日, 实施时间:1980年1月1; 1983年, 1986年, 2006年修改]. Art. 32: "The Supreme People's Court gives interpretation on questions concerning specific application of laws and decrees in judicial proceedings."

¹¹¹ Resolution of the Standing Committee of the NPC on Strengthening of Legal Interpretive Work issued on and effective from 10 June 1981; [全国人民代表大会常务委员会关于加强法律解释工作的决议; 1981年6月10日生效日期]. Art. 2: "Issues of applying laws and regulations in court proceedings shall be interpreted by the Supreme People's Court".

¹¹² Yuen, McDonald, and Dong, 61. (see also note 26 on p. 61-62).

¹¹³ See Fan, *Arbitration in China, A Legal and Cultural Analysis*, 234.; Yuen, McDonald, and Dong, 39-40.; Tao, *Arbitration Law and Practice in China*, 18-21.

¹¹⁴ See Tao, *Arbitration Law and Practice in China*, 18-21.

¹¹⁵ Notice of the Supreme People's Court on the Handling of Issues Concerning Foreign-related Arbitration and Foreign Arbitration by People's Courts, Fa Fa [1995] No. 18, issued on and effective from 28 August 1995; [最高人民法院关于人民法院处理与涉外仲裁及外国仲裁事项有关问题的通知, 法发(1995)18号, 颁布时间:1995年8月28日, 实施时间:1995年8月28日].

¹¹⁶ Notice of the Supreme People's Court on Setting Aside Arbitral Awards Involving Foreign Elements by People's Court, issued on and effective from 23 April 1998, Fa Fa [1998] No. 40; [最高人民法院关于人民法院

of the SPC's efforts to improve the system. The PRS, which is discussed in greater detail below in Chapter 4, is a mechanism designed in order to fight the local protectionism and to disallow the Chinese courts to easily disregard arbitration agreements and arbitral awards involving a foreign interest.¹¹⁷ The PRS was primarily created in order to tackle and prevent misapplications of the New York Convention by the courts, and by doing so, to enhance the confidence of foreign investors in China.¹¹⁸

The PRS mechanism provides that if the court determines that an arbitration agreement is invalid, or it wants to set aside an arbitral award, or it refuses to enforce it, such action has to be reported to a higher level court for approval. Further, in case the court making a decision within the PRS system upholds the validity of an arbitration agreement, a party cannot subsequently raise an argument of the invalidity of this agreement when seeking to set aside an award or when resisting the enforcement of it.¹¹⁹

The PRS was implemented even before the CAL came into effect. As such, it was not a response to the existing practice of the courts in China based on the new arbitration law, but rather a preventative mechanism designed to supervise the implementation of the CAL from the beginning. Despite the lack of a requirement to publish the courts' decisions made within the PRS system, the SPC has published a number of its replies to the lower level courts with the purpose of explaining, educating, and harmonizing the practice of the courts across China.¹²⁰ As discussed more extensively in Chapter 4, the SPC at the end of 2017 produced another document relevant for the functioning of the PRS mechanism.¹²¹

撤销涉外仲裁裁决有关事项的通知; 法发(1998) 40 号, 颁布时间: 1998 年 4 月 23, 实施时间: 1998 年 4 月 23 日].

¹¹⁷ See Chapter 4 p. 79-80

¹¹⁸ Yuen, McDonald, and Dong, 84.

¹¹⁹ See, for example, Reply of the Supreme People's Court on Request for Instructions Regarding Enforcement of Award No. 224 [2007] of the CIETAC from 12 September 2008; [最高人民法院于是否应不予执行[2007] 中国贸仲沪裁字第 224 号仲裁裁决请示的答复, 2008 年 9 月 12 日].

¹²⁰ Yuen, McDonald, and Dong, 39-40.

¹²¹ Provisions of the Supreme People's Court on a Number of Issues Pertaining to Judicial Reporting in Supervision of Arbitration, Fa Fa [2017] no. 21 issued on 26 December 2017, effective from 1 January 2018; [最高人民法院于仲裁司法审查案件报核问题的有关规定, 法释 (2017) 21 号, 发布时间: 2017 年 12 月 26 日, 实施时间: 2018 年 1 月 1 日]. See Chapter 4 p. 80.

There are a number of interpretive sources that can be issued by the SPC. Presently, these documents are prescribed in the *Provisions of the SPC on the Judicial Interpretation Work*.¹²² The range of sources that can be produced by the SPC is limited compared with past practice.¹²³ As of now, the SPC can issue: interpretations (解释 *jiě shì*), provisions (规定 *guī dìng*), replies (批复 *pī fù*), and decisions (决定 *jué dìng*).¹²⁴ These sources are “legally effective” (interpretations)¹²⁵ or otherwise binding on the lower courts.¹²⁶ Article 6 of the *Provisions of the SPC on the Judicial Interpretation Work* provides an explanation of what particular sources are.

An “interpretation” is a judicial interpretation on the application of a certain law and it comments the operation and meaning of its parts or of the entire law. The interpretation performs the role of a secondary source of law explaining some of the critical issues under the primary legislation. One of the key interpretations in the context of arbitration in China is the *Interpretation of the SPC concerning Some Issues on Application of the Arbitration Law of the PRC* from 2006 (“SPC 2006 Interpretation”).¹²⁷ The SPC 2006 Interpretation deals with a number of important issues, such as those related to the validity of an arbitration agreement.

“Provisions” should be understood as a formulation of norms or opinions necessary for the trial work. The provisions are made in line with the legislative intent. They are, generally, similar to court rules, and deal with the administration of justice, rather than with how to apply a particular piece of law.¹²⁸ An example of provisions is the *SPC’s Provisions on the Recognition and Enforcement of Arbitral Awards made in the Taiwan Region*.¹²⁹ These particular provisions deal with issues, such as requirements

¹²² Provisions of the Supreme People's Court on the Judicial Interpretation Work, no. 12, 23 March 2007; [最高人民法院于司法解释工作的规定; 法发〔2007〕12号 2007年3月23日].

¹²³ See Yuen, McDonald, and Dong, 61.; see more for the situation before 2007 in Wang, "Lawmaking Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes", 536-537.

¹²⁴ Art. 6 of the Provisions of the Supreme People's Court on the Judicial Interpretation Work.

¹²⁵ Art. 5 of the Provisions of the Supreme People's Court on the Judicial Interpretation Work: “The judicial interpretations issued by the Supreme People's Court *shall have full legal force.*” (the original wording is “具有法律效力”, *jù yǒu fǎ lǜ xiào lì*).

¹²⁶ See Yuen, McDonald, and Dong, 61.; also Art. 5 of the Provisions of the Supreme People’s Court on the Judicial Interpretation Work.

¹²⁷ Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China, Fa Shi [2006] No. 7, issued on 23 August 2006, effective from 9 August 2006; [最高人民法院于适用《中华人民共和国仲裁法》若干问题的解释, 法释[2006]7号, 颁布时间: 2006年8月23日, 实施时间: 2006年8月9日].

¹²⁸ See Yuen, McDonald, and Dong, 61.

¹²⁹ Provisions of the Supreme People’s Court on Recognition and Enforcement of Arbitral Awards made in the Taiwan Region, issued on 2 June 2015, effective from 1 July 2015; [《最高人民法院于认可和执行台湾地区仲裁裁决的规定》颁布时间: 2015年6月2日, 实施时间: 2015年7月1日].

toward the form of an arbitral award and a power of attorney, due process requirements, and time periods for the examination of the award.

A “reply” is made upon a request for an instruction on the application of law in a specific case by a lower level court. Whether replies are binding on the courts in subsequent cases is unclear. The most common view is that, although they are highly persuasive, they do not have a formally binding nature. The reason is the fact that a reply is aimed at addressing a particular concern of a particular court in a particular case, and not at establishing a universal principle. In practice, however, some replies have had implications for the entire practice of arbitration in China and have been published by the SPC.¹³⁰ An example of a reply is the SPC’s reply how to handle the jurisdictional issues resulting from the split of one of the leading arbitration institutions in China – CIETAC.¹³¹ This clarification was a response to requests from the Shanghai Higher People’s Court, the Jiangsu Higher People’s Court, and the Guangdong Higher People’s Court. In another reply, the SPC addressed the issue whether an arbitration clause providing for a non-Chinese arbitration institution to administer a dispute in a China-seated arbitration is valid under the Chinese law.¹³² This reply addressed the question coming from the Anhui Higher People’s Court. In both of these cases, the replies of the SPC were published and made available to a wider audience.

A “decision” is a form for the amendment or an abolishment of a previous interpretation. Also, it needs to be added that there are some SPC documents produced in the past that still have legal meaning for the Chinese arbitration system, but the *Provisions of the SPC on the Judicial Interpretation Work* do not provide for these forms anymore. These are, for example, circulars, such as the Circular of the SPC on *Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China*.¹³³

¹³⁰ See Yuen, McDonald, and Dong, 61-62.

¹³¹ Reply of the Supreme People’s Court’s on the Judicial Supervision and Review of the Jurisdiction and Arbitral Awards in Cases Involving Arbitration Agreements for Arbitration at the CIETAC South-China Sub-Commission and the CIETAC Shanghai Sub-Commission; Fa Shi [2015] No. 15 issued on 15 July 2015, effective from 17 July 2015; [《最高人民法院关于对上海市高级人民法院等就涉及中国国际经济贸易仲裁委员会及其原分会等仲裁机构所作仲裁裁决司法审查案件请示问题的批复》，法释（2015）15号，颁布时间：自2015年7月15日，实施时间：2015年7月17日].

¹³² Reply of the Supreme People’s Court regarding the Dispute on the Validity of an Arbitration Agreement between Anhui Longlide Packing and Printing Co., Ltd. and BP Agnati S.R.L; issued on 25 March 2013, effective from 25 March 2013; [《最高人民法院关于申请人安徽省龙利得包装印刷有限公司与被申请人 BP Agnati S.R.L.申请确认仲裁协议效力案的复函；[2013]民四他字第13号；颁布时间：自2013年3月25日，实施时间：2013年3月25日].

¹³³ Circular of Supreme People’s Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China, issued on and effective from 10 April 1987; [最高人民法院关于执行

2.2.3. Sources of law produced by higher people's courts

Other important *de facto* rule makers on the Chinese arbitration stage are Higher People's Courts ("HPC"). Being authorized by the SPC, HPCs can issue their own documents on the application of law within their own jurisdictions.¹³⁴ Moreover, HPCs located in the major Chinese cities, such as Beijing, Shanghai, or Shenzhen, have issued a number of sources actually relevant across the country. One example is *the Opinion of the Shanghai Higher People's Court concerning Several Issues on the Handling the Implementation of the Arbitration Law* issued in 2001. This opinion provides that in case a party to an arbitration agreement was acquired, separated, or terminated, state courts have the power to decide whether the original arbitration agreement continues to bind the successor.¹³⁵

2.2.4. Chinese Civil Procedure Law and other relevant laws

The Civil Procedure Law of the PRC also contains a number of provisions related to arbitration, like those pertaining to interim measures in aid of arbitration.¹³⁶ Other relevant pieces of law include the *Chinese Contract Law* and the *Law on Applicable Laws to Foreign-Related Civil Relations*.¹³⁷

2.2.5. New York Convention

China acceded to the New York Convention in 1987. It made both reservations available under the New York Convention – namely, the reciprocity and commercial reservations. This means that China applies the New York Convention only with regard to arbitration agreements and awards made in other contracting states and to disputes arising out from contractual and non-contractual commercial relationships. At this point, it is important to add that Hong Kong, Taiwan, and Macau have special,

我国加入的《承认及执行外国仲裁裁决公约》的通知, 颁布时间: 1987 年 4 月 10 日, 实施时间: 1987 年 4 月 10 日].

¹³⁴ See Yuen, McDonald, and Dong, 62.; also *Several Opinions on Regulating the Trial Work Relations between the People's Courts at Different Levels*, Fa Fa [2010] no. 61 issued on 8 December 2010; [最高人民法院印发《关于规范上下级人民法院审判业务关系的若干意见》的通知法发〔2010〕61号(2010年12月8日)].

¹³⁵ Art. 4 of the *Opinion of the Shanghai Higher People's Court concerning Several Issues on the Handling the Implementation of the Arbitration Law*, issued on 3 January 2001, effective from 1 February 2001; [上海市高级人民法院关于执行《中华人民共和国仲裁法》若干问题的处理意见; 颁布时: 2001 年 1 月 13 日, 实施时间: 2001 年 2 月 1 日].

¹³⁶ See more Chapter 5 p. 115-116.

¹³⁷ *Supra* notes 97 and 98.

separate legal arrangements with mainland China for arbitration-related matters, including the recognition and enforcement of arbitral awards.¹³⁸

2.2.6. Case law

China is a civil law country, and traditionally, cases do not have a binding power. In practice, cases have been referred to as persuasive instruments. Notably, however, the SPC publishes periodically the “guiding cases”, which lower level courts are obliged to follow.¹³⁹ At the time of writing, there was one guiding case pertaining to arbitration. It addresses the issue of extending the time limits for bringing the enforcement action on a foreign-related arbitral award in China.¹⁴⁰ Also, interestingly, recently there have been some indications of devoting more attention to case law in the Chinese practice, in general. Namely, in one of its policy documents, effective as of 1 May 2017, the SPC required judges to search and consult similar cases for the purpose of standardizing and unifying the application of law across the country.¹⁴¹

2.2.7. Arbitration institutions and their role in creating law relevant for arbitration

The leading Chinese arbitration institutions, which are introduced in greater detail below in this Chapter, also play an important role in shaping the arbitration system of China. First of all, since, in principle, only institutional arbitration is allowed in China, arbitration rules produced by arbitration institutions supplement the existing regulations in practice. Moreover, the leading arbitration institutions in China take on the important role of “pushers of changes” in modernizing the arbitration system.¹⁴² With the aim of internationalizing practice and reaching out to more international users, the leading institutions design their arbitration rules following the trends of international commercial arbitration to the extent possible. There exist, however, some limitations imposed by Chinese law and,

¹³⁸ See Tao, *Arbitration Law and Practice in China*, 230-239.

¹³⁹ See the official website of the China Guiding Cases Project: <https://law.stanford.edu/china-guiding-cases-project/> (last accessed: 20 November 2018).

¹⁴⁰ One as of 20 November 2018 (the SPC Guiding Case No. 37 extending time limit for bringing an enforcement action on a foreign-related arbitration award in mainland China). See more the China Guiding Cases Project, Stanford Law School, Guiding Case No. 37 available at: <https://cgc.law.stanford.edu/guiding-cases/guiding-case-37/?lang=en> (last accessed: 20 November 2018).

¹⁴¹ Art. 6 of the Supreme People’s Court’s Opinion on Putting a Judicial Responsibility System in Place and Improving Mechanisms for Trial Oversight and Management (Provisional), Fa Fa [2017] no. 11 issued on 12 April 2017, effective from 1 May 2017; [最高人民法院关于落实司法责任制完善审判监督管理机制的意见（试行）]法发〔2017〕11号, 颁布时间: 2017年4月12日, 实施时间: 2017年5月1日].

¹⁴² See Chapter 4 p. 81-84, Chapter 5 p. 117-118, Chapter 6 p. 145, and Chapter 7 p. 175.

hence, some of the innovations introduced by the institutions will not be fully effective in China. This is the case, for example, for the use of the emergency arbitrator mechanism available under the CIETAC and the BAC rules.¹⁴³

Additionally, the leading arbitration institutions occasionally create soft law instruments, such as the *Guidelines on Evidence* produced by CIETAC.¹⁴⁴ This specific document aims at systematizing, explaining, and modernizing the arbitration practice in China in the area of evidence taking. The *CIETAC Guidelines on Evidence* are not a binding source, but they can be adopted by the parties in order to assist them, their counsels, and arbitral tribunals in dealing with the questions pertaining to more efficient evidence taking.¹⁴⁵ Finally, some of the arbitration institutions, for example CIETAC, report directly to the State Council on the overall situation of arbitration in China and provide suggestions on how to further improve the system.¹⁴⁶

2.3. Relevant characteristics of arbitration in China

Chinese arbitration law and practice in some ways vary from what is commonly understood as characteristics of international commercial arbitration. Below, the most important issues are highlighted. In addition, the special role of the Shanghai Free Trade Zone (“FTZ”) in China arbitration is introduced.

2.3.1. Institutional character of arbitration

As mentioned, in principle, only institutional arbitration is allowed in China and *ad hoc* arbitration cannot be conducted within its borders. According to Art. 16 and 18 of the CAL, an arbitration agreement without designating an arbitration institution should be deemed invalid. The subsequent sources of law, such as the above introduced SPC 2006 Interpretation helped (particularly the state courts) to understand and interpret this requirement in a more arbitration-friendly way. Nevertheless, still, there must be a clear indication of an arbitration institution in order to have a valid agreement

¹⁴³ See more Chapter 5 p. 117-118.

¹⁴⁴ China International Economic and Trade Arbitration Commission (“CIETAC”) *Guidelines on Evidence* effective from 1 March 2015 [中国国际经济贸易仲裁委员会 证据指引，从 2015 年 3 月 1 日起施行].

¹⁴⁵ The preamble of the CIETAC *Guidelines on Evidence*.

¹⁴⁶ China's Foreign Trade, "Promote Chinese Arbitration Work into an International One - an Interview with Mr. Wang Shengchang, Secretary General of CIETAC," *China's Foreign Trade* 《中国对外贸易(英文版)》 February 2004, 2004, http://en.cnki.com.cn/Article_en/CJFDTOTAL-ZDWY200402011.htm. (last accessed: 20 November 2018).

under the current legal regime. China, however, recognizes and enforces foreign *ad hoc* arbitral awards, since it is bound to do so by the New York Convention.¹⁴⁷

Interestingly, at the end of 2016, the SPC in its *Opinion on the Judicial Safeguards for the Construction of Free Trade Zones* (“SPC FTZ Opinion”)¹⁴⁸ made a move that can be seen as a subtle “door opening” for the *ad hoc* arbitration in China. This is because Art. 9(3) of the SPC FTZ Opinion provides that the companies registered in the free trade zones (“FTZ”) have a possibility to validly enter into an *ad hoc* arbitration agreement if such an agreement contains: (1) a specified location in China; (2) a specified set of arbitration rules; and (3) specified arbitrators. There are, however, some limitations and uncertainties surrounding this move. First, the *ad hoc* possibility is available only in cases, where all of the parties are registered in the FTZ. Furthermore, there is no clear guidance as to, for example, how arbitrators should be designated in the arbitration agreement. Should specific names or a list of potential arbitrators be given, or would any other way of designation suffice? An answer to this question is not fully clear as of today.

2.3.2. Dual-track system

To reiterate, arbitration in China can be divided into: foreign, foreign-related, and domestic arbitration. Accordingly, “foreign arbitration” is arbitration conducted by a foreign arbitral tribunal and seated *outside* of China. “Foreign-related arbitration” is arbitration, which involves (a) foreign element(s), but is seated *inside* China. Such “foreign” elements refer to the following circumstances: (1) where a party concerned or both parties concerned is/are (a) foreign citizen(s), (a) foreign legal person(s) or any other organization, or (a) stateless person(s); (2) where the habitual residence of a party concerned or both parties concerned is located outside the territory of the PRC; (3) where a subject matter is located outside the territory of the PRC; (4) where the legal facts that trigger, change or terminate a civil relation take place outside the territory of the PRC; or (5) any other circumstances that can be determined as foreign-related civil relations.¹⁴⁹ Finally, “domestic arbitration” is arbitration not involving any of the foreign elements listed above and seated *inside* China.

¹⁴⁷ See Yuen, McDonald, and Dong, 127.; see more in Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 21-24.

¹⁴⁸ Opinion of the Supreme People’s Court on the Judicial Safeguards for the Construction of Free Trade Zones, Fa Fa [2016] no. 34 issued on and effective from 30 December 2016 [最高人民法院为自由贸易试验区建设提供司法保障的意见（2016）34号, 颁布时间: 2016年12月30日, 实施时间: 2016年12月30日].

¹⁴⁹ Art. 1 of the SPC 2012 Interpretation. The test was further reconfirmed by the Art. 522 of the Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, Fa Shi [2015] No. 5, issued on 30 January 2015, effective from 4 February 2015; [最高人民法院为适用《中

This division and the dual-track regime for arbitration seated *inside* China is important, because domestic and foreign-related arbitration proceedings are treated differently; domestic arbitration is more severely scrutinized than foreign-related arbitration. The most important ramifications of the division are the following: (1) domestic arbitration cannot be seated outside of China and can only be administered by a Chinese arbitration institution; (2) domestic arbitration can only apply Chinese law as a substantive law; and (3) domestic awards are subject to a wider review by the Chinese courts.¹⁵⁰

Therefore, it can be a vital issue whether a particular case involves a “foreign element” or not. Traditionally, the Chinese courts held the conservative view that a dispute between two foreign-invested enterprises (“FIE”) registered under the Chinese law does not contain a “foreign element”, unless some other foreign factors (as required by law) are involved. Therefore, even in cases where all the parties were wholly foreign-owned enterprises (“WFOE”), and the sources of capital, management and control, as well as the beneficiaries were all foreign – such a dispute still could be deemed a domestic one.¹⁵¹

Importantly, the understanding of a “foreign element” has expanded recently. At the end of 2016, following the case of *Shanghai Golden Landmark Co. Ltd v. Siemens International Trade*, in which the Chinese court for the first time exercised its discretion to navigate a “foreign element” under “other circumstances” (as prescribed by Art. 1(5) of the SPC’s interpretation from 2012),¹⁵² the SPC issued the

华人民共和国民事诉讼法》的解释, 法释[2015] 5 号, 颁布时间: 2015 年 1 月 30 日, 实施时间: 2015 年 2 月 4 日] (“SPC 2015 Interpretation”).

¹⁵⁰ See Art. 237 of the CCPL for the additional grounds to deny the enforcement of a domestic arbitral award. These are the situations where the court finds that: (1) the evidence based on which an award was rendered was falsified; (2) the other party concealed the evidence from an arbitral tribunal, which is sufficient to affect the impartiality of an award; or (3) arbitrators were involved in any of conducts of embezzlement, bribery, practicing favoritism for him or herself or relatives, twisting the law in rendering an award.

See, generally, for a more extensive discussion on the ramifications of the dual track in China in Chen, *Predictability of 'Public Policy' in Article V of the New York Convention under Mainland China's Judicial Practice*, 176-184. (Note, however, that as explained in Chapter 4 p. 80, the PRS mechanism discussed by Chen applies now to both foreign-related and domestic cases.)

¹⁵¹ For example, in *Beijing Chaolaixinsheng Sports and Leisure v. Beijing Suowangzhixin Investment Consulting*, the SPC stated that the fact that a WFOE is a party to a dispute does not itself constitute a “foreign” element, and as such, it refused to enforce an award made by the Korean Commercial Arbitration Board in the dispute involving a WFOE owned by a Korean investor. See more Lijun Cao and Leilei Lu, “To Be or Not to Be: The Practical Implications of Choosing Foreign Arbitration for Purely Domestic Contracts,” *Kluwer Arbitration Blog* (6 March 2015), <http://kluwarbitrationblog.com/2015/03/06/to-be-or-not-to-be-the-practical-implications-of-choosing-foreign-arbitration-for-purely-domestic-contracts/>. (last accessed: 20 November 2018).

¹⁵² In *Shanghai Golden Landmark Co. Ltd v. Siemens International Trade*, both parties were WFOEs. As per their arbitration agreement, the SIAC-administered tribunal decided the dispute. A losing party objected to the enforcement of an award arguing that the dispute did not contain any “foreign element”. However, the Shanghai court confirmed the validity of the arbitration agreement in this case and enforced the award. The

above mentioned SPZ FTZ Opinion. It provided that two WFOEs incorporated in the FTZ can resolve their disputes *outside* of China. In such a case, a Chinese court should not invalidate an arbitration agreement merely on the ground that there is no “foreign element”.¹⁵³

In addition, Art. 9(2) of the SPC FTZ Opinion stipulates that the court should reject the objections against enforcement of an award rendered in arbitration seated outside of China solely on the ground that there is no “foreign element” in cases where: (1) at least one of the parties was a foreign-invested enterprise (“FIE”) registered in the FTZ; (2) the parties entered into an agreement for arbitrating outside of China; and (3) the party objecting to the enforcement is a claimant initiating an arbitration proceeding or a respondent participating in arbitration and not raising the objections toward the validity of the agreement until the enforcement phase. Although this development can be assessed as a positive step toward the further internationalization of the Chinese arbitration system, it needs to be noted that this expansion of the understanding of a “foreign element” is, as of today, limited to the enterprises established in the FTZs and is subjected to the conditions described above.

2.3.3. Special role of the Shanghai Free Trade Zone

According to the description available on the official website of the Shanghai FTZ, “[t]he establishment of Shanghai Free Trade Zone is major decision made by the Central Committee of the Communist Party of China in response to new challenges posed by the new situation. It is envisioned to explore new paths and accumulate good experience for all-round reform and opening-up.”¹⁵⁴

The Shanghai FTZ performs the role of a laboratory for testing various innovations, including legal innovations. The innovations tested with satisfactory results within the limited area of the FTZ, have then the chance to be applied across the country. So far, for arbitration, the Shanghai FTZ has performed its special role when, for example, it witnessed the opening of the first foreign arbitration institutions in China – the HKIAC, the SIAC and the ICC, details of which are discussed in Chapter 8 of this thesis.¹⁵⁵ Also, as discussed above, the SPC issued recently a document (the SPC FTZ Opinion) offering more arbitration options to the FTZ-established enterprises.

court found that although at a *prima facie* check, the dispute did not contain a “foreign element”, but it should be classified, in fact, as containing such an element, because of the characteristics of the parties (the companies solely owned and controlled by foreigners, and established in the Shanghai FTZ), and because the performance of the contract involved foreign elements. See more in *ibid.* (last accessed 20 July 2018).

¹⁵³ See Art. 9(1) of the SPC FTZ Opinion.

¹⁵⁴ See the official website of the Shanghai FTZ: <http://en.shftz.gov.cn/about-ftz/introduction/> (last accessed: 20 November 2018).

¹⁵⁵ See Chapter 8 p. 187-188.

2.4. Main players on the Chinese arbitration stage

2.4.1. Arbitration institutions

It is initially important to clarify some terminology. Whereas in international commercial arbitration the term “arbitration institution” is typically used, in China, its English equivalent is rather “arbitration commission” (仲裁委员会, *zhòng cái wěi yuán huì*). This translation is closer to the term commonly used in China, including the provisions of the CAL, where “*zhòng cái*” means arbitration and “*wěi yuán huì*” stands for “commission”, “committee”, or “council”. However, for consistency reasons, both in the context of the Chinese and international practice, the term “arbitration institution” is used in this thesis.

There are over 230 arbitration institutions in China these days.¹⁵⁶ Yet, this number was already greatly reduced after 1995, when many old domestic arbitration institutions were reorganized or dissolved. At the same time, some new arbitration institutions have been created, like those in the pilot cities of Beijing, Shanghai, and Tianjin.¹⁵⁷ As of today, when concerning the number of cases and amount in dispute, the Wuhan Arbitration Commission (“WAC”), the Guangzhou Arbitration Commission (“GZAC”), CIETAC and the Beijing Arbitration Commission (“BAC”) seem to have the most in both numbers and amount.¹⁵⁸ However, for foreign-related disputes, the CIETAC, the BAC, as well as the Shanghai Arbitration Commission (“SAC”), the Shanghai International Arbitration Centre (“SHIAC”), and the Shenzhen Court of International Arbitration (“SCIA”) seem to play the key roles.¹⁵⁹

A. Architecture, financing, and nature of the arbitration institutions in China

According to Art. 10 of the CAL, arbitration institutions in China can be set up in designated municipalities, and the establishment is handled by the relevant departments and chambers of commerce under the coordination of the people's governments of the cities, where they are established. Articles 11-13 of the CAL prescribe a number of requirements that an arbitration institution needs to satisfy, such as having a name, residence, statute, property, specific structure, and

¹⁵⁶ Sun and Willems, 4-7.

¹⁵⁷ Yuen, McDonald, and Dong, 40. (there were approx. 3640 arbitration institutions in China before 1995)

¹⁵⁸ For more on the detailed statistics of the arbitration institutions in China and their caseload, see Sun and Willems, 4-8. The statistics refer to the period from before 2012 and therefore, one needs to be aware of the subsequent name changes after the CIETAC's split (see more on p. 45-46 of this Chapter).

¹⁵⁹ See Yuen, McDonald, and Dong, 56.; see also Appendix 1 on the findings of the China Arbitration Survey p. 265.

arbitrators. Furthermore, according to Art. 14 of the CAL, arbitration institutions should be independent of any administrative organ and without any subordinate relationship with any of the administrative organs. Interestingly, Art. 15 of the CAL provides that the arbitration institutions in China should be supervised by the China Arbitration Association (“CAA”). Yet, as discussed below in this Chapter, the CAA has not been created until now and as of today, there is no clear indication whether it will be established in the near future.

In the period of transition after 1995, many arbitration institutions in China were dissolved and many were reorganized. In general, the Soviet model of administrative arbitration controlled by the state was largely abandoned. Yet, not entirely. One of the challenges in the post-1995 era was to equip the arbitration institutions with staff. In the process of reorganization, the first members of the institutions were to be appointed by the local governments from candidates recommended by various governmental departments. Therefore, at the initial stage of restructuring, the vast majority of the arbitration institutions’ leadership was composed of government officials. However, the practice of having governmental officials in the institutions’ management continued also after the initial period of reorganization, and as such, the fact is that as of today, with the notable exception of a few leading arbitration institutions, in many local institutions, government officials still perform the function of the institutions’ members.¹⁶⁰

Furthermore, Art. 12 of the CAL provides that the arbitration institution should be composed of a chairman, two to four vice-chairmen, and seven to 11 members, who should be experts in law and economy and trade with the practical work experience. No less than two-thirds of the institution members should be experts in law, economy and trade. Yet, as Chen’s empirical studies suggest, this is not necessarily the reality for all of the institutions in China.¹⁶¹

As to the financing of the Chinese arbitration institutions, the situation varies. Initially, it is important to emphasize that because of a high number of institutions in China (over 230 at the time of writing), unsurprisingly, some of them are busier and some less busy in terms of their work and accordingly – the income they are able to generate. Therefore, while some of the institutions in China declare that

¹⁶⁰ See *ibid.*, 235-236.; Sun and Willems, 8-9.; Fan, *Arbitration in China, A Legal and Cultural Analysis*, 135.; Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 104-107. and Chapter 6 p. 151-153.

¹⁶¹ Fuyong Chen, *The Unfinished Transformation: An Empirical Study of the Current Status and Future Trends of China Arbitration Institutions* [Original Title: 未竟的转型：中国仲裁机构现状与发展趋势实证研究] (Law Press China, 2010), 36-43.

they do not rely on any of government's help for their financing (as it is the case for CIETAC and the BAC),¹⁶² there are institutions, which need the governmental support for their very survival.¹⁶³

Quite likely for the reason that unprofitable arbitration institutions needed the financial support, the Ministry of Finance introduced a regulation that obliges the institutions to report their revenues to the Ministry (or its local branches) for the purpose of a subsequent redistribution of resources. The redistribution should be done based on the budgets approved by the relevant ministerial departments. The Ministry scheme is commonly referred to as "income and expenses separate" management (收支两条线管理, *shōu zhī liǎng tiáo xiàn guǎn lǐ*).¹⁶⁴ Moreover, financing obtained by the arbitration institutions within this system has a limited relation to the revenues reported by them.¹⁶⁵

The alternative way of financing, though permitted only in exceptional cases and also commercially uneasy, is discussed below in the context of the BAC.¹⁶⁶ Briefly speaking, the BAC managed to obtain a status of a business enterprise and it pays taxes in exchange for its financial freedom. Summarizing, except for the few leading arbitration institutions, the majority of the institutions in China are "still operated in the shadow of local governments in many respects, in terms of personnel, funding and so on".¹⁶⁷

As to the nature of the arbitration institutions in China, the CAL does not address this issue. The local legal community represents mainly two views on that point. One of the groups believes that arbitration institutions should be considered as "public institutions" (事业单位, *shì yè dān wèi*), which refers to "organizations run by state organs or other organizations using state-owned assets for the purpose of social and public interests and conduct activities such as education, science and technology, culture,

¹⁶² See Moser and Yu, 557.; Shengchang Wang, "CIETAC's Perspective on Arbitration and Conciliation Concerning China," in *New Horizons in International Commercial Arbitration and Beyond ICCA Congress Series* ed. Albert Jan van den Berg (Kluwer Law International, 2005), 35.; Fuyong Chen, "Striving for Independence, Competence, and Fairness: A Case Study of Beijing Arbitration Commission," *American Review of International Arbitration* 18, no. 3 (2007), 325.

¹⁶³ See Yuen, McDonald, and Dong, 235. also Fan, *Arbitration in China, A Legal and Cultural Analysis*, 134-135.; Song, Zhao, and Li, 176.

¹⁶⁴ Notice of the Ministry of Finance, the National Development and Reform Commission, the Ministry of Supervision and the National Audit Office on Strengthening the Two-Channel Management of the Receipts and Disbursements of the Administrative Charges and Other Revenues of Central Departments and Entities (Circular 29) from 9 May 2003. [财政部、国家发展和改革委员会、监察部、审计署关于加强中央部门和单位行政事业性收费等收入“收支两条线”管理的通知, 财综[2003]29号, 2003年5月9日]. See also Chen, "Striving for Independence, Competence, and Fairness: A Case Study of Beijing Arbitration Commission," 326.

¹⁶⁵ Sun and Willems, 9.

¹⁶⁶ See this Chapter p. 47-48.

¹⁶⁷ Yuen, McDonald, and Dong, 225.

and public health, etc.”¹⁶⁸ According to the other group, arbitration institutions should be considered as “social organizations” (社会团体 *shè huì tuán tǐ*), which are “non-profit-seeking social organizations voluntarily composed of Chinese citizens that perform activities in accordance with the articles of association for the realization of the common desires of the membership.”¹⁶⁹ It seems that under the current legal framework, the arbitration institutions in China are more like “public institutions”, and the direction to follow is rather toward the “social organizations” operating for public good, but independently from the governmental bodies. The limitation of the reliance on the governmental bodies seems to be the view supported by the whole community – irrespective of the doctrinal disagreement presented above.¹⁷⁰

B. Role of the arbitration institutions in arbitration in China

An arbitration institution is “at the center of Chinese arbitration”.¹⁷¹ This is because, as mentioned, China, in principle, does not permit *ad hoc* arbitration. Furthermore, arbitration institutions are involved practically at every stage of an arbitration proceeding. It starts with accepting a request for arbitration, assisting the parties with interim measures and all issues pertaining to the forming an arbitral tribunal, until often – the scrutiny of an arbitral award. As elaborated below in this thesis, although many types of involvement of institutions in arbitration proceedings are not unique to the Chinese system, yet, there are also instances of the involvement, which, indeed, are exceptional for China. This refers particularly to the institutions’ decisions on challenges to jurisdiction of arbitrators, as well as their involvement in the process of obtaining interim measures in aid of arbitration, details of which are discussed below in Chapters 4 and 5, respectively.¹⁷²

Another important role of the leading arbitration institutions in China is their work on promoting reforms and developing the Chinese arbitration system. The leading institutions, with CIETAC and the BAC at the forefront, have on numerous occasions sought to innovate and provide for solutions that would bring China’s practice closer to internationally recognized standards – despite the limitations of the CAL. This has been reflected by the amendments introduced into the institutions’ arbitration rules. By way of example, some institutions, including CIETAC and the BAC, sought to remedy one of the shortcomings of the CAL – namely, the distribution of power to decide jurisdictional objections. Under

¹⁶⁸ Sun and Willems, 25 note 10.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*, 25.

¹⁷¹ Yuen, McDonald, and Dong, 85.

¹⁷² See Chapter 4 p. 78-81 and Chapter 5 p. 119-120.

the CAL, this power is shared by the state court and the arbitration institution. The institutional rules provided for the possibility of delegating this power from the institution to the tribunal, and thus, allow the arbitrators to decide on their own competence.¹⁷³ Furthermore, the leading institutions produce sources of law, which are intended to facilitate arbitration proceedings in China – like the above mentioned CIETAC’s Guidelines on Evidence. The institutions are also actively involved in various activities aimed at education of the local community, and promotion of arbitration in China, as well as promotion of Chinese arbitration abroad.¹⁷⁴

C. Leading arbitration institutions in China

Due to the leading role in the field of international commercial arbitration measured by the caseload and amount in dispute in the cases involving foreign elements,¹⁷⁵ the active involvement in internationalization and promotion of arbitration, as well as due to the limits of this thesis, CIETAC and the BAC are the main objects of this thesis’ analysis. However, where relevant, the reference will be also made to the other prominent arbitration institutions in China.

a. CIETAC

CIETAC was originally created as the Foreign Trade Arbitration Commission (“FTAC”) in 1956. The FTAC was subsequently renamed to the Foreign Economic and Trade Arbitration Commission in 1980, and then CIETAC in 1988. The jurisdiction of CIETAC expanded over the years. Initially, it was created to handle only foreign-related cases, but after 1996, it was also allowed to deal with domestic disputes. CIETAC is headquartered in Beijing and has sub-commissions in the major Chinese cities: Shenzhen, Shanghai, Tianjin, Chongqing, Hangzhou, Wuhan, and Fuzhou. Moreover, in 2012, CIETAC established its Hong Kong Arbitration Centre. All of the CIETAC’s sub-commissions apply the same set of arbitration rules and use the same Panel of Arbitrators. In 2017, CIETAC handled in total 2298 cases, out of which 476 were foreign-related cases.¹⁷⁶

¹⁷³ See more Chapter 4 p. 81-84.

¹⁷⁴ By way of example, both CIETAC and the BAC regularly serve as platforms for education and dialogue on international commercial arbitration, and organize (by themselves or in cooperation with other international arbitration organizations) numerous events, such as conferences, summits *etc.* See for example, the China Arbitration Week organized primarily by CIETAC: <http://www.arbitrationweek.org/eng/>; and the Summits on Commercial Dispute Resolution in China organized by the BAC: <http://annualreport.bjac.org.cn/en> (last accessed: 20 November 2018).

¹⁷⁵ See *supra* notes 158 and 159.

¹⁷⁶ For the statistics, see the official website of CIETAC: <http://www.cietac.org/index.php?m=Article&a=show&id=15422&l=en> (last accessed: 20 November 2018).

CIETAC is a related agency of the China Council for the Promotion of International Trade (“CCPIT”).¹⁷⁷ The CCPIT is a governmental agency dealing with issues of trade and investment promotion.¹⁷⁸ Article 4 of the Constitution of the CCPIT stipulates that upon the authorization of the Chinese government, the CCPIT undertakes the related work and accepts the government’s guidance.¹⁷⁹ The CCPIT’s funding comes from the government.¹⁸⁰ CIETAC is established within the CCPIT, and the CIETAC’s chairman (as well as the other key personnel) are engaged by the CCPIT.¹⁸¹ Also, arbitration rules of CIETAC come into force upon the approval given by the CCPIT.¹⁸² Hence, in that context, the CCPIT can be described as an umbrella organization of CIETAC.

Structurally, CIETAC consists of one chairman, a number of vice-chairmen, and other members. The chairman performs the functions and duties assigned to him or her by the arbitration rules. The vice-chairmen may perform the duties of the chairman, as well as those assigned by the chairman. Both the headquarter and all of the sub-commissions have their secretariats headed by secretary-generals, which deal with the daily work of the institution. There are also some specialized committees within CIETAC, which serve as advisory bodies on issues, such as complex legal matters of both procedural and substantive nature, arbitration rules, and training of the CIETAC’s arbitrators. The specialized committees also publish yearbooks with cases and awards, and also review the qualifications and performance of the CIETAC’s arbitrators.¹⁸³ According to Art. 34 of the CIETAC’s Articles of Association, the financing of CIETAC comes from: (1) arbitration fees paid by the parties; (2) income from organizing events or providing other services; (3) the government sponsorship and public donations; and (4) other

¹⁷⁷ See the official website of the CCPIT:
http://en.ccpit.org/info/info_8a8080a94fd37680014fd3c885fc0006.html (last accessed: 20 November 2018).

¹⁷⁸ See the official website of the CCPIT:
http://en.ccpit.org/info/info_40288117521acbb80153a75e0133021e.html (last accessed: 20 November 2018).

¹⁷⁹ The original wording of Art. 4 of the CCPIT Constitution is: “第四条: 根据中国政府的授权, 中国贸促会承办相关工作, 并接受政府的指导.” (translation by the author of this thesis: “Article 4: Upon the authorization of the Chinese government, the China Council for the Promotion of International Trade undertakes relevant work and accepts the guidance of the government.”)

¹⁸⁰ Art. 16 of the Constitution of the CCPIT.

¹⁸¹ Art. 5 of the Articles of Association of CIETAC, revised and approved by the 18th Members’ Council of CIETAC (“CIETAC’s Articles of Association”).

¹⁸² Art. 28 of the CIETAC’s Articles of Association.

¹⁸³ For the organizational structure of CIETAC, see Art. 5-24 of the CIETAC’s Articles of Association.

lawful incomes. Nevertheless, CIETAC declares itself to be financially self-sufficient and independent.¹⁸⁴

CIETAC regularly revises and modernizes its arbitration rules, and the most recent version is from 2015.¹⁸⁵ Some notable changes implemented in the CIETAC's arbitration rules over the years include: the empowering of the arbitral tribunal to order interim measures in aid of arbitration (introduced in 2012) and adding an emergency arbitrator procedure (in 2015).¹⁸⁶ Also, although CIETAC maintains a Panel of Arbitrators to sit on a case, the appointment, subject to the confirmation by the CIETAC's chairman, can be made outside of the panel list already since 2005.¹⁸⁷ Under the most recent CIETAC Panel of Arbitrators, 71.8% of arbitrators come from mainland China, and the remaining from Hong Kong, Macau, Taiwan, and foreign countries – representing in total 65 countries and regions.¹⁸⁸

Finally, for an overview of the CIETAC, it is important to mention the story of an internal conflict allegedly caused by a struggle of power between the CIETAC's Beijing headquarter and its Shanghai and South-China (Shenzhen) sub-commissions. The conflict resulted in a division of the CIETAC, whereby the Shanghai and the South-China sub-commissions declared the independence from the CIETAC's headquarter in Beijing.

It is believed that the crisis was triggered by the 2012 version of the amended arbitration rules, which gave the Beijing headquarter the exclusive power to handle cases if the parties had not expressly designated a specific sub-commission of CIETAC in their agreement. Before the proposed changes, when an arbitration agreement provided that, for example, the CIETAC rules apply, but the hearings should take place in Shanghai, this was a sufficient basis for the administration of a case by the Shanghai sub-commission. The new allocation of power could potentially reduce the caseload of the other sub-commissions to the benefit of the Beijing office, and therefore, this was not acceptable to the Shanghai and the South-China sub-commissions.¹⁸⁹

¹⁸⁴ See Moser and Yu, 557.; Wang, in *New Horizons in International Commercial Arbitration and Beyond ICCA Congress Series*, 35.

¹⁸⁵ See the CIETAC Arbitration Rules revised and adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce on 4 November 2014, effective as of 1 January 2015.

¹⁸⁶ For more details on the changes introduced by specific versions of arbitration rules, see Tao, 24-36.; Man Sing Yeung, "The CIETAC Arbitration Rules 2015," *Asian Dispute Review* 2015, no. 3 (2015), 136 *et seq.*

¹⁸⁷ Art. 26 of the 2015 CIETAC Rules.

¹⁸⁸ See the CIETAC's Panel of Arbitrators effective from 1 May 2017 to 30 April 2020: <http://cietac.org/index.php?m=Article&a=show&id=14241&l=en> (last accessed: 20 November 2018).

¹⁸⁹ Yuen, McDonald, and Dong, 241-242.

The conflict proceeded with the Shanghai and South-China sub-commissions declaring their independence and the CIETAC Beijing disqualifying the other two sub-commissions from accepting and administering cases. Subsequently, the Shanghai and the South-China sub-commissions changed their names to the Shanghai International Arbitration Centre/Shanghai International Economy and Trade Arbitration Commission (“SHIAC” aka. “SIETAC”) and the Shenzhen Court of International Arbitration South/China International Economic and Trade Commission (“SCIA” aka. “SCIETAC”), respectively, and adopted their own sets of arbitration rules. In the later stage of the conflict, CIETAC reorganized its previous Shanghai and South-China sub-commissions, which then continued to operate under the CIETAC’s rules. In the period of dispute, however, there were a number of conflicting announcements regarding the jurisdiction of the actors involved.

Consequently, the split caused a substantial amount of confusion and unpredictability for arbitration users and local courts concerning jurisdictional issues. As a result, different (even contradictory) rulings followed. The SPC entered into matter and initially established a system by which any case, where the jurisdictional question was caused by the CIETAC split, had to be reported to a court of a higher level for approval.¹⁹⁰ At the later stage, the SPC issued a judicial interpretation addressing the jurisdictional confusion and assigned the authority in cases involving CIETAC, its reorganized sub-commissions, and the newly created arbitration institutions in Shanghai and Shenzhen.¹⁹¹ The CIETAC split, indeed, caused uncertainty and, to some extent, might have influenced the reputation of CIETAC. However, the SPC’s interpretation from 2015 provided more predictability, and as of today, CIETAC remains one of the leading arbitration centers in China, while the newly formed commissions continue to operate as well.

¹⁹⁰ Notice on the Certain Issues Relating to Correct Handling of Judicial Review of Arbitration Matters, No. 194 from 4 September 2013 [最高人民法院关于正确审理仲裁司法审查案件有关问题的通知, (2013) 194 号, 发布日期: 2013 年 9 月 4 日].

¹⁹¹ The Reply of the Supreme People’s Court’s on the Judicial Supervision and Review of the Jurisdiction and Arbitral Awards in Cases Involving Arbitration Agreements for Arbitration at the CIETAC South-China Sub-Commission and the CIETAC Shanghai Sub-Commission; Fa Shi [2015] No. 15, issued on 15 July 2015, effective from 17 July 2015; [《最高人民法院关于对上海市高级人民法院等就涉及中国国际经济贸易仲裁委员会及其原分会等仲裁机构所作仲裁裁决司法审查案件请示问题的批复》, 法释〔2015〕15 号, 颁布时间: 自 2015 年 7 月 15 日, 实施时间: 2015 年 7 月 17 日]. The SPC’s interpretation technically was a reply to the requests coming from the Shanghai High People’s Court, the Jiangsu High People’s Court, and the Guangdong High People’s Court.

See more on the CIETAC split in Yuen, McDonald, and Dong, 241-246.; Matthew Townsend, "New Judicial Guidance on the CIETAC Split – Closure after Three Years of Uncertainty?," *Kluwer Arbitration Blog* (5 August 2015), <http://kluwerarbitrationblog.com/2015/08/05/new-judicial-guidance-on-the-cietac-split-closure-after-three-years-of-uncertainty/>. (last accessed: 20 November 2018).

b. Alternative model: the BAC

The Beijing Arbitration Commission (“BAC”), also called the Beijing International Arbitration Center (“BIAC”), was established on 28 September 1995. It is headquartered in Beijing. The BAC can be called an “alternative model” of an arbitration institution in China.¹⁹² Its “alternativeness” lies in a number of factors. The first important issue is the way the BAC is financed. Although at the beginning of its existence, the BAC was funded by the Beijing Municipal Government, shortly after (in 1999), it declared to achieve full financial independence.¹⁹³ Further, in 2002, the BAC received a status of an “institution managed as an enterprise”, which allowed it to gain substantial freedom to dispose its revenues while paying the taxes.¹⁹⁴ This means that the BAC is not a part of the ministry financing scheme of reporting revenues and redistributing resources that the Chinese arbitration institutions are typically embraced by. Instead, the BAC pays the business tax based on its revenues, which for the BAC is approximately 23%.¹⁹⁵

The governing body of the BAC, the BAC Committee, consists of one chairperson, four vice-chairpersons, and ten other committee members. The BAC Committee members are various experts and scholars from the area of law or economics and trade.¹⁹⁶ The BAC Committee deals with the governing of the institution. This includes designing and reviewing the work plans of the BAC, appointing its secretary general, as well as reviewing and approving the financial reports submitted by the secretary general.¹⁹⁷

The BAC claims to be independent in its decision making in all areas, including the personnel-related decisions.¹⁹⁸ In order to reach that aim, a member position in the BAC Committee is unpaid, and the work is deemed to have a *pro-bono* character. Besides, the BAC introduced some special decision-making mechanisms, such as quorums needed to make decisions.¹⁹⁹ In further enhancing its

¹⁹² Yuen, McDonald, and Dong, 43.

¹⁹³ Fuyong Chen and Wei Sun, "Looking Beyond Rules - an Analysing Insight into the Competitive Attractions of BAC," *LexisNexis Dispute Resolution Law Guide* (2014), 2.

¹⁹⁴ Chen, "Striving for Independence, Competence, and Fairness: A Case Study of Beijing Arbitration Commission," 325.

¹⁹⁵ Sun and Willems, 9-10.

¹⁹⁶ See the official website of the BAC: <http://www.bjac.org.cn/english/page/gybh/organize.html> (last accessed: 20 November 2018).

¹⁹⁷ Art. 8 of the BAC's Articles of Association.

¹⁹⁸ Chen and Sun, 1.

¹⁹⁹ Chen, "Striving for Independence, Competence, and Fairness: A Case Study of Beijing Arbitration Commission," 324-25.

independence, the BAC decided that the chairperson and the BAC staff cannot concurrently serve as arbitrators, while the BAC's vice-chairpersons and committee members can only act as arbitrators if they are jointly appointed by the parties.²⁰⁰ The BAC's secretary general and the secretariat deal with the daily work of the institution and with the case management. The BAC also emphasizes its high standards for selecting and training its personnel and arbitrators.²⁰¹

As of the time of writing, the BAC had 506 arbitrators on its Panel of Arbitrators from 21 different countries and regions, including 22 arbitrators from Hong Kong and Taiwan and 105 foreign arbitrators.²⁰² The most recent version of the BAC's arbitration rules was effective from 1 April 2015.²⁰³ Similarly, like in case of CIETAC, the subsequent revisions of the BAC's arbitration rules have incorporated numerous changes in a direction of international practice. By way of example, the most recent version of the BAC rules vests the arbitrators with the power to order interim measures and also provides for an emergency arbitrator mechanism to support international commercial arbitration proceedings.²⁰⁴ Interestingly, the BAC was recognized by the Economist Intelligence Unit (a research and analysis division of the Economist Group dealing with forecasting and advisory services) as "the only local arbitration commission which meets or surpasses global standards".²⁰⁵

D. Foreign arbitration institutions in China

Concerning foreign arbitration institutions, the question whether they can fully administer the cases seated in China has been a long-time topic of discussion. Chinese courts faced with that question have provided different conclusions.²⁰⁶ This issue has come in to the spotlight again after the two occurrences. The first was the SPC's stance expressed in the *Longlide* case,²⁰⁷ where an "ICC in Shanghai"

²⁰⁰ *Ibid.*, 342-343.

²⁰¹ See *ibid.*, 328-39.; also Zhiwei Lin, "Believing in the Marketization of BAC," *BAC* (12 August 2016), <http://www.bjac.org.cn/english/news/view?id=2783>. (last accessed: 20 November 2018).

²⁰² See the official website of the BAC: http://www.bjac.org.cn/english/page/gybh/introduce_index.html (last accessed: 20 November 2018).

²⁰³ Revised and adopted at the First Meeting of the Fifth Session of the BAC on 9 July 2014, effective from 1 April 2015.

²⁰⁴ See Art. 62 and Art. 63 of the 2015 BAC Rules.

²⁰⁵ See the official website of the BAC: http://www.bjac.org.cn/english/page/gybh/introduce_index.html (last accessed: 20 November 2018); also Chen, "Striving for Independence, Competence, and Fairness: A Case Study of Beijing Arbitration Commission," 316.

²⁰⁶ See Yuen, McDonald, and Dong, 91-95.

²⁰⁷ Reply of the Supreme People's Court regarding the Dispute on the Validity of an Arbitration Agreement between Anhui Longlide Packing and Printing Co., Ltd. and BP Agnati S.R.L; issued on 25 March 2013, effective from 25 March 2013; [《最高人民法院关于申请人安徽省龙利得包装印刷有限公司与被申请人 BP Agnati

arbitration clause was at stake. The second was the opening of offices by foreign institutions (the HKIAC, the SIAC, and the ICC) in the Shanghai FTZ.²⁰⁸ Nonetheless, the general status of foreign arbitration institutions in China remains unclear. What is known is that the Chinese arbitration law neither explicitly permits nor prohibits the conduct of arbitration in China by them.²⁰⁹

The fact that the HKIAC, the SIAC, and the ICC recently opened their representative offices in the Shanghai FTZ is an important move. It is the first official presence of foreign arbitration institutions on the mainland. However, as of today, the Shanghai FTZ offices of the HKIAC, the SIAC, and the ICC do not administer cases, and concentrate rather on the market development. Chapter 8 of this thesis deals specifically with the question of a status and powers of foreign institutions in China.²¹⁰

2.4.2. Chinese courts

According to the Organic Law of the People's Courts of the PRC, the judicial authority in China is exercised by: local people's courts at various levels, military courts and other special people's courts, as well as the Supreme People's Court ("SPC"). The local people's courts at various levels are divided into: basic people's courts, intermediate people's courts, and higher people's courts.²¹¹ In general, the Chinese courts seem not to enjoy the greatest reputation, and are often said to be plagued by numerous problems, such as the lack of independence, corruption, local protectionism, and the overall low level of performance.²¹² Nevertheless, it should be also noted that the Chinese judicial system has

S.R.L.申请确认仲裁协议效力案的复函; [2013]民四他字第 13 号; 颁布时间: 自 2013 年 3 月 25 日, 实施时间: 2013 年 3 月 25 日].

²⁰⁸ See more Chapter 8 p. 187-188.

²⁰⁹ See Jingzhou Tao, "Challenges and Trends of Arbitration in China" in *New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series* (Kluwer Law International, 2005), 84-85.; Yuen, McDonald, and Dong, 88-91. The court practice toward the arbitral awards issued by foreign arbitration institutions in the cases seated in China has varied, with a significant part of judgements refusing to enforce such awards. See more Chapter 8 p. 187-188.

²¹⁰ See Chapter 8 p. 183-188.

²¹¹ Art. 2 of the Organic Law: "The judicial authority of the People's Republic of China is exercised by the following people's courts:

- (1) local people's courts at various levels;
- (2) military courts and other special people's courts; (Revised on September 2, 1983); and
- (3) the Supreme People's Court.

The local people's courts at various levels are divided into: basic people's courts, intermediate people's courts and higher people's courts."

²¹² See, for example, Weixia Gu, "Judicial Review over Arbitration in China: Assessing the Extent of the Latest Pro-Arbitration Move by the Supreme People's Court in the People's Republic of China," *Wisconsin International Law Journal* 27, no. 2 (2009), 257-264.; Randall Peerenboom and He Xin, "Dispute Resolution in

been systematically reformed, and its further improvement is among the top priorities of the Chinese government.²¹³ With that said, it is worth noting that the courts in the main business cities of China such as Beijing, Shanghai, or Shenzhen are deemed better prepared to deal with legal problems, especially in a Sino-foreign context, than the courts placed in the more remote areas of China.²¹⁴

A. Special role of the Supreme People's Court

As mentioned, the SPC plays a very special role in the Chinese arbitration system. In general, the SPC is the highest judicial authority in China. It supervises the judicial work of lower level courts via the appeal procedures, review of cases, and by issuing various sources of law.²¹⁵ As for the specific considerations of this thesis, the SPC plays a pivotal role, because the SPC enjoys and effectively uses its *de facto* rule-making power in the context of arbitration in China.²¹⁶ In practice, this is realized through various sources produced by the SPC, such as the above discussed judicial interpretations, opinions, replies, and decisions. The SPC's leadership is needed and valuable, especially in face of the modest and out-of-date provisions of the CAL. Not only courts, but also other stakeholders of arbitration in China have benefited from various types of guidance provided by the SPC. The SPC is also a frequent participant in various arbitration-related events, during which it offers its views and shares its practice in the discussed areas.²¹⁷

China: Patterns, Causes and Prognosis," *Legal Studies Working Paper Series, La Trobe University School of Law* 2008/9 (2008), <http://ssrn.com/abstract=1265116>. (last accessed: 20 November 2018); David Wang, "Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System," *Santa Clara Law Review* 48, no. 3 (2008), 649 *et seq.*

²¹³ See the White Paper of the SPC dedicated to the issue of judicial reform of the Chinese courts at the official website of the Chinese SPC: http://english.court.gov.cn/2016-03/03/content_23724636.htm; also Changhao Wei, "Translation: 13th NPC Standing Committee Five-Year Legislative Plan," *NPC Observer* (7 September 2018), <https://npcobserver.com/2018/09/07/translation-13th-npc-standing-committee-five-year-legislative-plan/>. (last accessed: 20 November 2018).

²¹⁴ Fan, *Arbitration in China, A Legal and Cultural Analysis*, 113.

²¹⁵ Art. 127 of the Constitution of the People's Republic of China adopted and issued on 4 December 1982 with the last revisions as of 14 March 2004 [中华人民共和国宪法; 公布日期 1982 年 12 月 4 日; 施行日期 1982 年 12 月 4 日; 最新修正 2004 年 3 月 14 日]: "The Supreme People's Court is the highest judicial organ. The Supreme People's Court supervises the administration of justice by the local people's courts at different levels and by the special people's courts [...]."

²¹⁶ Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 48-49.

²¹⁷ See, for example, the SPC's participation in the ICC/CIETAC conference "International Arbitration without Frontiers" and the speech given by Shen Hongyu – Chief Judge of the Fourth Civil Division of the SPC: <https://iccwbo.org/event/international-arbitration-without-frontiers-2/> (last accessed: 20 November 2018).

2.4.3. China Arbitration Association

Article 15 of the CAL provides for the creation of the China Arbitration Association (“CAA”). The CAA is supposed to be an institutional legal person with the separate arbitration institutions as its members. The statute of the CAA should be formulated by a national congress of the association, and it is supposed to be a self-disciplinary organization for all the arbitration institutions for the purpose of supervising them, their members, and arbitrators. The main task of the CAA should be the formulation of arbitration rules according to both the CAL and the Chinese Civil Procedure Law (“CCPL”).

However, over almost 25 years after the introduction of the CAL, the CAA still has not been created and recently, the talks on establishing it seem to be rather limited. As to the reasons why the CAA has not been formed, Tao points to the disagreement in Chinese arbitration circles as to the necessity of the establishment of the CAA, its nature, legal status, as well as its duties and functions.²¹⁸ How realistic is creating of the CAA as of today? What should be the specific tasks undertaken by the CAA? And finally – since according to the CAL, it seems to be a quite powerful organization – who should constitute, lead, and supervise the CAA? So far, these questions remain unanswered. Yet, the core issue is actually whether such an organization is needed at all. This is because the Chinese arbitration system has been operating for over two decades without it and also because of the controversial character of the CAA.

²¹⁸ Tao, *Arbitration Law and Practice in China*, 41.

CHAPTER 3: ARCHITECTURE OF FUNCTIONS AND POWERS IN INTERNATIONAL COMMERCIAL ARBITRATION

3.1. General remarks

This Chapter serves as an introduction to the relationship of the state and arbitration, as well as the resulting division of functions and power among the arbitral tribunal, the state court, and the arbitration institution. It starts with the discussion on why states permit international arbitration as a method of resolving disputes, and their reasons to supervise and support it. It then moves to the analysis of the functions and powers of the arbitral tribunal, the state court, and the arbitration institution. This latter part, however, starts with taking a look at the parties. This is because arbitration is a product of a consent of the parties and therefore, the parties are at the very center of any arbitration. The Chapter concludes with the issue of importance of the proper balance of power in arbitration.

3.2. The state and arbitration

3.2.1. General interest of the state in accepting and supporting international commercial arbitration

Arbitration, as a private and consensual method of resolving disputes, nonetheless depends on the willingness of the states to support it; and the states typically find it important to support arbitration for a number of reasons. The main one is needs of business community. In the face of globalization and internationalization of business transactions, international business parties have sought to efficiently resolve their disputes, and litigation has not been an optimal solution for this. Concerning litigation in the cross-border context, the parties can be concerned about issues, such as the protectionism of local courts, problems with the enforcement of foreign court judgements, and the lack of familiarity with foreign national procedural rules and languages.

Against such a background, international commercial arbitration has developed as a mechanism able to offer numerous advantages, such as flexibility in structuring the proceeding, neutrality and efficiency, and enforcement mechanisms. As such, it has become the preferred option for addressing cross-border commercial disputes.²¹⁹ Accordingly, a state seeking to strengthen its commercial

²¹⁹ See *supra* note 2. See also, generally, Born, 70-91.; Julian Lew, Loukas Mistelis, and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), 1-9.; Redfern and Hunter,

influence and encourage cross-border transactions has an incentive to permit international commercial arbitration and to support it.

Moreover, being a leading arbitration hub can be a source of income for the local economy. Workplaces for local and foreign law practitioners are needed, as well as conference rooms, travel and hospitality facilities for the parties, their counsels, witnesses, and arbitrators. Acting as a host to arbitration can also build the commercial prestige of a particular state.²²⁰ Beyond that, arbitration can also help reduce the caseload of local courts.

For these reasons, states typically not only “tolerate” international commercial arbitration, but take steps to develop their arbitration regimes by, for example, modernizing their laws and arbitration institutions, and by acceding to relevant international treaties, such as the New York Convention. It can be also observed that numerous states compete in order to attract international arbitration cases, and they do so in a number of ways. This includes legal reforms that aim at updating arbitration-related regulations and supporting the modernization of the local arbitration infrastructure.²²¹

3.2.2. Need for the state’s involvement in arbitration

As mentioned above, although arbitration in its nature is a private system of resolving disputes, the relation between arbitration and the state is essential. It is so for a number of reasons. The state recognizes arbitration as a valid method of resolving disputes, but in exchange expects to exercise some degree of control over the arbitral process and its outcome – the arbitral award.²²² It is important for making sure that arbitration provides a fair way of resolving disputes.

Also, there are situations, where the assistance of the state to the arbitration proceeding is crucial to the effectiveness of the proceeding and its outcome. This is because arbitration, as a private method, is not equipped with coercive powers. Thus, arbitrators cannot force the parties to do or refrain from doing something – only the state court with its coercive powers can do that. Correspondingly, arbitration’s reach is limited to the parties, which agreed to arbitrate. Therefore, if any involvement of a non-party is required (for example, if there is a need to preserve the property in dispute, but this

1-6 & 28-31.; Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2012), 1-5.

²²⁰ Wilske and Fox, in *Austrian Arbitration Yearbook (2009)*, 384, 386-389.

²²¹ See, generally, *ibid.*; Carlevaris, in *The Evolution and Future of International Arbitration*, 331 *et seq.* ; Moser, "How Asia Will Change International Arbitration," in *International Arbitration: The Coming of a New Age?*, 62 *et seq.*

²²² Redfern and Hunter, 58.

property is in possession of a non-party), arbitrators have no power over non-parties and again, only the state court is able to take a relevant action.

3.2.3. Specific variations of the state's involvement in arbitration

There are various instances when the state can become involved in arbitration. This role of the state is most visible at the stage of enforcement of an arbitral award, where a losing party is not voluntarily complying with the award and, thus, the winning party has to turn to the state court to coercively enforce the award.

However, there are other instances when the state can supervise arbitration or assist it. At the beginning of the arbitration proceeding, the state, typically represented by its courts, can help the parties enforce an arbitration agreement, if, despite the existence of the agreement, one of the parties turns to the court seeking to resolve the dispute there. In such an instance, the court can support the arbitral process by declining to accept the case and directing the parties to arbitration. Furthermore, the court can also help with interim measures in aid of arbitration, when, for example, a measure for property preservation is sought. Also, the court can assist with obtaining evidence needed for the purpose of arbitration. In some situations, the court (or other authority as discussed below in this Chapter) can also help the parties to form an arbitral tribunal, which will then hear the dispute. Finally, the court has the power to set aside an arbitral award in appropriate situations.

3.2.4. Channels through which the state becomes involved in arbitration

As mentioned, the state is typically represented in arbitration by its state courts. However, the UNCITRAL Model Law allows for a state to designate a specific court or “other authority” (or both) to perform certain functions. To be more specific, Art. 6 of the UNCITRAL Model Law permits a state, which is enacting the Model Law as its enabling legislation, to designate a body – a court or “other authority” – that will perform certain functions necessary to the smooth operation of arbitral proceedings. These necessary functions include matters pertaining to the forming an arbitral tribunal (including the appointment of arbitrators, the challenge to an arbitrator, and other instances of termination of the arbitrator’s mandate), review of jurisdictional decisions of the tribunal, as well as setting-aside of an arbitral award.

Designation in the enabling legislation of a specific court or “other authority” for the purpose of handling these issues has a number of advantages. It helps the parties, and in particular foreign parties, to identify the relevant authority to turn to in the course of the arbitration proceeding. It also enables the designated court(s) or “other authority” to acquire a level of expertise in arbitration matters.

The use of “other authority”, as prescribed by Art. 6, is especially practical for the issue of appointment of arbitrators. This function of an “appointing authority” (an authority empowered to appoint an arbitrator in the situation where parties fail to appoint one) can be better performed by a specialized body, such as an arbitration institution, rather than a court. An arbitration institution, which is familiar with the pool of arbitrators, is likely better prepared to appoint a suitable arbitrator for a particular case and can do so more quickly.²²³

In Hong Kong and Singapore, the courts of higher level and the leading arbitration institutions are both designated to deal with arbitration-related matters. Concerning Hong Kong, the HKIAC is a statutory appointing authority, while the Court of First Instance of the High Court is designated to perform all remaining functions prescribed under Art. 6 of the UNCITRAL Model Law.²²⁴ Similarly, in Singapore, the SIAC deals with the appointment of arbitrators, while the High Court in Singapore deals with the other matters prescribed under Art.6.²²⁵

It should be noted that Art. 6 does not list all instances when the state can become involved in the arbitration proceeding under provisions of the UNCITRAL Model Law. Article 6 does not mention Art. 27 addressing the court assistance in evidence taking, as well as Art. 35 and Art. 36 dealing with the recognition and enforcement of an award. The UNCITRAL Model Law does not include these specific functions in the functions performed by a *designated* court or “other authority”, because they are to be performed by a court, where evidence, witnesses, or the property of a losing party is located. Further, Art. 8 of the UNCITRAL Model Law dealing with the referral to arbitration by the court in case there is an arbitration agreement, and Art. 9 concerning the interim measures requests are not listed in Art. 6. This is because these matters can only be addressed by a particular court to which a party turns when seeking to resolve a dispute before the court – despite the existence of an arbitration agreement, or when applying for an interim measure.

Accordingly, the role of the *state* in arbitration is typically understood as the role of *state courts* in arbitration, or alternatively an “other authority” for matters of appointment of arbitrators. However, it is argued that in the case of China, the notion of the “*state*” goes beyond the traditional understanding and extends to the Chinese *arbitration institutions*. It is so, because of first, the strong

²²³ See Holtzmann and Neuhaus, 240-241.; Binder, 71-73.

²²⁴ Section 13 of the HK Arbitration Ordinance.

²²⁵ Section 8 of the SIAA. Note also that according to Section 8(3), “any other person” can be designated by the Chief Justice to perform the appointment functions under article 11 (3) and (4) of the UNCITRAL Model Law if he or she thinks fit.

governmental control over the arbitration institutions in China, and second, some extraordinary powers that they are given, in particular, deciding jurisdictional objections in arbitration.²²⁶

3.3. The role of the parties, the arbitral tribunal, the state court, and the arbitration institution

3.3.1. Parties

A consent of the parties to arbitrate is typically reflected in an arbitration agreement contained in an underlying contract, although the parties can also agree to arbitrate once a dispute has occurred. The principle of party autonomy is one of the key concepts of arbitration.²²⁷ That means that the parties are free to design their arbitration proceeding, and only a few mandatory rules of law place limits on the autonomy of the parties. The concept of party autonomy is reflected also in Art. 19(1) of the UNCITRAL Model Law, which provides: "[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". The mandatory rules exist primarily to secure the fairness of the proceeding and hence, they cannot be excluded by the parties. By way of example, the parties cannot decide that only one of the parties will have the right to present its case before the tribunal. It would be against a commonly accepted mandatory rule of the equal treatment of the parties, which is also enshrined in Art. 18 of the UNCITRAL Model Law.²²⁸

Yet, respecting the mandatory rules, the parties have wide autonomy in designing their arbitration proceedings. They can, for example, chose a seat of arbitration, arbitration institution, number and profiles of arbitrators, and language of the proceeding. The parties can also design how an evidentiary hearing should be conducted, for example, by excluding document production. Therefore, because the parties and their agreement are the starting point for any arbitration, they are at the center of it.

²²⁶ See Chapter 4 p. 78-79.

²²⁷ See, generally, Born, 85-87, 2130-2144.; Lew, Mistelis, and Kröll, 4, 523-524.; Redfern and Hunter, 187-190.

²²⁸ See more on the mandatory rules in arbitration in Born, 2154-2186.

3.3.2. *Arbitral tribunal*

The main task of the arbitral tribunal is to make a decision, which is binding upon the parties. In this regard, the tribunal's power is compared to the role of a judge in a state court.²²⁹ The power of the arbitral tribunal derives from the parties' agreement and it is in practice delineated by the law applicable in a particular case, which typically means arbitration rules and the law of the seat of arbitration. The arbitral tribunal conducts an arbitration proceeding in accordance with the parties' agreement, and in case of the lack of such an agreement – in a manner it considers appropriate. Furthermore, in conducting the proceeding and rendering an award, the tribunal should treat the parties equally and should be impartial, independent, fair, and efficient.²³⁰ In addition, among the commonly accepted powers of the arbitral tribunal are the power to rule on its own jurisdiction and the power to order interim measures in aid of arbitration.²³¹

Securing a range of powers is essential in order for the arbitral tribunal to conduct the arbitration proceeding efficiently. Nevertheless, as mentioned, the assistance of the state equipped with coercive powers can be essential to arbitration. This aspect is further elaborated below in this Chapter when the role of the state court in arbitration is discussed.

3.3.3. *Arbitration institution*

When analyzing the role of the arbitration institution in the arbitration proceeding, it is important to emphasize that the institution, with very limited exceptions, such as being a default appointing authority in *ad hoc* arbitration, plays a role only in institutional arbitration. Accordingly, "institutional arbitration" should be defined as arbitration conducted pursuant to arbitration rules of a particular arbitration institution and *overseen* by an administrative authority responsible for various aspects relating to the proceeding, such as the constitution of an arbitral tribunal or determining the compensation of arbitrators. "*Ad hoc* arbitration", on the contrary, is conducted without the involvement of such an administrative authority and is subjected only to the parties' arbitration agreement and the applicable national arbitration law.

²²⁹ Lew, Mistelis, and Kröll, 279-280.

²³⁰ See more Redfern and Hunter, 319-331.; Born, 1986-2011.; Lew, Mistelis, and Kröll, 279-283.; See also Art. 18 and Art. 19 of the UNCITRAL Model Law.

²³¹ See Art. 16 and Art. 17 of the UNCITRAL Model Law.; also Born, 1073-1075, 2427.; Lew, Mistelis, and Kröll, 332-334 & 588-589.; Redfern and Hunter, 313-314 & 339-341.

In institutional arbitration, the main role of the arbitration institution is to administer and oversee the arbitration proceeding. The level of “overseeing” can, and in practice does, vary from institution to institution.²³² Nevertheless, it is important to strike the proper balance between the functions and powers of the arbitration institution and the arbitral tribunal. A crucial issue is that the institution should not decide the dispute of the parties. The dispute should be decided by the arbitral tribunal. Thus, the arbitration institution, to the extent possible, should not deal with merits of the cases it administers.²³³ Summarizing the relationship between the arbitration institution and the arbitral tribunal, Fouchard stated: “[t]he arbitrator's task is judicial in character and [...] the purpose of the arbitration center’s activity is to encourage its satisfactory completion.”²³⁴

Arbitration institutions publish their arbitration rules, according to which the arbitration proceeding is to be conducted. Arbitration rules are also the source of power of a particular institution. The participation of the institution is vital to the smooth commencement and subsequent running of the proceeding by the tribunal.²³⁵

Therefore, the arbitration institution plays an important role at the initial stage of the proceeding, when the arbitral tribunal has not yet been constituted. The institution will usually receive a submission from a claimant and will notify a respondent about the commencement of arbitration. It can also decide whether a particular case is manifestly beyond the jurisdiction of a particular institution (with a *prima facie* standard being applied). Further, it can assist with the forming an arbitral tribunal. However, once the tribunal is in place, it takes a leading role in the proceeding, while the institution maintains a supportive, administrative function. As mentioned, the scope of activities undertaken by the arbitration institutions varies from institution to institution. By way of example, some institutions scrutinize the drafts of arbitral awards once they are prepared by arbitrators, while others do not.²³⁶

²³² For various level of the institutions’ involvement, see Rémy Gerbay, *The Functions of Arbitral Institutions* (Kluwer Law International, 2016), 59-116.

²³³ See Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International, 2010), 37.; Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), 603. Compare also with Gerbay, *The Functions of Arbitral Institutions*, 214 & Chapter 5., where Gerbay argues that nowadays, in the “administering” actions of the arbitration institutions, generally, there is some level of making an impact on the outcome of cases and hence, it is unrealistic to claim that the arbitration institutions are pure administrators of the proceedings, with no material decision-making power. In that context Gerbay describes arbitration institutions as “ancillary participants in the adjudicative process”.

²³⁴ Philippe Fouchard, “Relationships between the Arbitrator and the Parties and the Arbitral Institution,” *ICC Special Supplement 1995: The Status of the Arbitrator* (1995), 24.

²³⁵ See McIlwrath and Savage, 36-39.

²³⁶ For example, the SIAC has a practice of scrutinizing awards (Art. of the 30(3) of the 2017 SIAC Rules), while the HKIAC does not. See also Gerbay, *The Functions of Arbitral Institutions*, 99-100.

In addition, for the purposes of this thesis, it is important to assess the professionalism and independence of arbitration institutions. This is particularly important in the context of the institutions making the decisions that can be relevant to the outcome of arbitration. Such decisions include the appointment of arbitrators and deciding the challenges to the arbitrators' independence and impartiality. It is argued that these types of decisions are not of a purely administrative nature, since they can have a significant impact on the outcome of a case. Therefore, it is important that the institutional decision-makers act professionally and independently.

3.3.4. State court

As mentioned, there is an inevitable interaction between arbitration and the state, which is typically represented by its state courts. As stated by Lew: "[n]ational court involvement in international arbitration is a fact of life, as prevalent as the weather".²³⁷ In short, the role of state court in arbitration can be regarded as exercising supervision over and providing support to arbitration.

As to the aspect of supervision, the control is exercised on a territorial basis: first, over arbitration conducted in the territory of the state concerned, and second – over arbitral awards brought into the territory of the state for the purpose of their recognition and enforcement.²³⁸ The state retains a level of control over issues, such as whether there was a valid agreement to arbitrate, whether a dispute is arbitrable, whether arbitration was conducted in a fair manner and in accordance with the agreement of the parties. The supervision of the court is usually exercised after an arbitral award is rendered. It can happen in a setting aside procedure – before the court of the seat of arbitration, or before the court of the state, where the enforcement of the award is sought. Yet, as argued more extensively in Chapter 4, certain control can be also exercised at the outset of arbitration.²³⁹

As to the aspect of providing the assistance to arbitration, as stated, arbitration depends on the support of state courts, since only the courts are equipped with the coercive powers that can help to "rescue the system when one party seeks to sabotage it".²⁴⁰ Generally, arbitrators have limited options as to consequences, which can be imposed on the party not complying with their orders. An important tool available to the tribunal in case of the non-compliance is a possibility of drawing an adverse inference from the party's behavior. This, indeed, can be a powerful tool, since the adverse inference

²³⁷ Julian Lew, "Does National Court Involvement Undermine the International Arbitration Processes?," *American University International Law Review* 24, no. 3 (2006), 489.

²³⁸ Redfern and Hunter, 58-59.

²³⁹ See Chapter 4 p. 71-74.

²⁴⁰ Redfern and Hunter, 415.

can be then reflected in a final award.²⁴¹ Yet, at the end of the day, the tribunal cannot coercively force the party to do or to refrain from doing something. This is of particular relevance when a losing party does not comply with the award, since in this instance, drawing of an adverse inference by the tribunal, which actually just finished its mission when rendering the award, is of no use. A winning party will then need to turn to a court if it seeks to coercively enforce the award.

In addition, also in the pre-award stage of arbitration, the assistance of the court can be important to the arbitration proceeding. This is because also in the pre-award stage, the arbitral tribunal's range of actions is limited. For instance, the tribunal cannot compel the party to refrain from disposing assets of a JV company in dispute. Even more importantly, due to a consensual character of arbitration, the tribunal does not exercise powers over third persons – non-parties to arbitration. If, for example, a piece of evidence, which needs to be preserved, is in a possession of such a non-party, the arbitrators' influence over this non-party will be very limited. Hence, also in such scenarios, arbitration may need to be assisted by the courts equipped with coercive powers.

Therefore, although by choosing arbitration, the parties substantially free themselves from the involvement of state courts in resolving their disputes, there still exists an important relationship between arbitration and the courts, where the court's general role is to supervise arbitration and offer its assistance in order to ensure the proper conduct of it. Over the years, the attitude of the states toward arbitration and the participation of the courts in the arbitration proceeding has significantly changed. It has moved from the considerable skepticism toward arbitration, which in the past resulted in an extensive intervention of the state court in arbitration, toward recognizing arbitration as a viable dispute resolution method and a more limited interference by the court.²⁴² This trend of limiting the courts' interference is reflected in Art. 5 of the UNCITRAL Model Law, which stipulates that "no court shall intervene except where so provided in this Law".²⁴³ Also, Art II(3) of the New York Convention stipulates that the court seized with a matter embraced by the arbitration agreement should refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

²⁴¹ See more on the tool of an adverse inference in arbitration in Born, 2391-2393.; Redfern and Hunter, 387-388.; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), 775-778.; Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration*, vol. 12, *International Arbitration Law Library* (Kluwer Law International, 2005), 241-243.

²⁴² See Redfern and Hunter, 416.; Lew, Mistelis, and Kröll, 356.; Born, 2189-2197. See also the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 – B. Salient features of the Model Law 1. Special procedural regime for international commercial arbitration b) Delimitation of court assistance and supervision.

²⁴³ See more Holtzmann and Neuhaus, 216-219.; Binder, 64-68.

Generally, modern arbitration laws while limiting the intervention of the court on the one hand, on the other hand, provide for the court's assistance to the arbitration proceeding. By way of example, the UNCITRAL Model Law provides for a possibility of the court's assistance, if it is needed for obtaining interim measures in aid of arbitration, taking of evidence, and enforcement of arbitral awards (and also for forming an arbitral tribunal in *ad hoc* arbitration, if the court was designated to perform this task).²⁴⁴ It is worth mentioning that in the pre-award stage of arbitration, the assistance of the court is typically needed only if the coercive enforcement of relevant orders granted by the arbitral tribunal is requested. Therefore, a risk of doubling costs and time due to the involvement of the court in such instances is limited. Indeed, in contrast, the court in the courts proceeding is able to offer its comprehensive services, without any need to turn to other bodies for help, which is an advantage of litigation. Yet, as mentioned in Chapter 1, there can be a variety of reasons as to why the parties may prefer arbitration over litigation in the context of cross-border transactions.²⁴⁵

When discussing the relationship between arbitration and the state court, it is noteworthy that although by choosing arbitration, the parties, generally, want to free themselves from the involvement of the courts, yet, some resort to the courts seems to be, in fact, desired by the parties. A Belgian experiment from 1985 can serve as an illustration of it. In 1985, the Belgian legislator, with hopes to attract more of arbitration cases to Belgium, provided for no court review of arbitral awards in case of the disputes between foreign parties. However, contrary to the legislator's expectations, business seemed not to be attracted by such a bold solution to deny the review of the awards by the courts. In 1998, Belgium revised its law to again permit the parties to have recourse to the court, unless the parties opted it out.²⁴⁶

The coexistence between arbitration and the state court is compared to a relay race, in which the state court and the arbitration pass each other a relay baton. At the beginning, before the arbitral tribunal is constituted, the baton is in the hands of the court, whose role is primarily to help enforce an arbitration agreement. Additionally, the court can also assist with obtaining interim measures pending resolution of a dispute. This is especially important when there is nobody else to turn to with such a request, because the arbitral tribunal has not been yet constituted and an emergency arbitrator relief is not available. Next, during the arbitration proceeding, the baton is primarily in the hands of the

²⁴⁴ See Art. 8, 9, 11(3), 13, 14(1), 16(3), 17, 27, 34, and 36 of the UNCITRAL Model Law.

²⁴⁵ See Chapter 1 p. 1-2.

²⁴⁶ See Albert Jan Van den Berg, "Belgium," in *Yearbook Commercial Arbitration 1999 - Volume XXIVA*, *Yearbook Commercial Arbitration* (Kluwer Law International, 1999), 551-553.; see also Redfern and Hunter, 592.; William Park, "Amending the Federal Arbitration Act," *American Review of International Arbitration* 13, no. 75 (2002), www.williamwpark.com/documents/Amending%20the%20FAA.doc., 27 (last accessed: 20 November 2018).

arbitrators conducting the proceeding and deciding a dispute. Finally, after the arbitral award is rendered, in order to secure the award's effectiveness, the baton is again with the courts, which can assist with the enforcement. Nonetheless, as observed by Lord Mustill, it is impossible to talk about the clear-cuts in this relay, and the state court may play an occasional role when the baton is principally in the hands of the arbitral tribunal.²⁴⁷

Accordingly, the role of the state court in particular stages of arbitration can be described in the following way: (1) before the arbitration proceeding starts, the court helps to enforce an arbitration agreement, can assist the parties with interim measures in aid of arbitration, as well as with forming an arbitral tribunal; (2) during the arbitration proceeding, the court can assist with interim measures in aid of arbitration and with obtaining evidence; (3) after the arbitral award is rendered, the court deals with setting aside of the award, as well as the recognition and enforcement of it.²⁴⁸ As noted, the role played by the court in arbitration can be described as supervisory and supportive to the arbitration proceeding. Yet, it should have nothing to do with the over-interference by the court. As noted by Moses, "there is a wavering line between helpful assistance and unhelpful interference".²⁴⁹ Therefore, the key issue is to draw lines, where the reliance of arbitration on the court should start and where it should end.

3.4. Importance of a proper balance of power in arbitration

A graphic illustration below represents the interplay of the arbitral tribunal, the state court, and the arbitration institution in the arbitration proceeding. In addition, in the center of this relationship, the parties in arbitration are placed. The parties are the very impulse of any arbitration, and to a large extent, they are also architects of the arbitration proceeding. Their designs are reflected in the arbitration agreement and subsequent choices made by them in the proceeding.

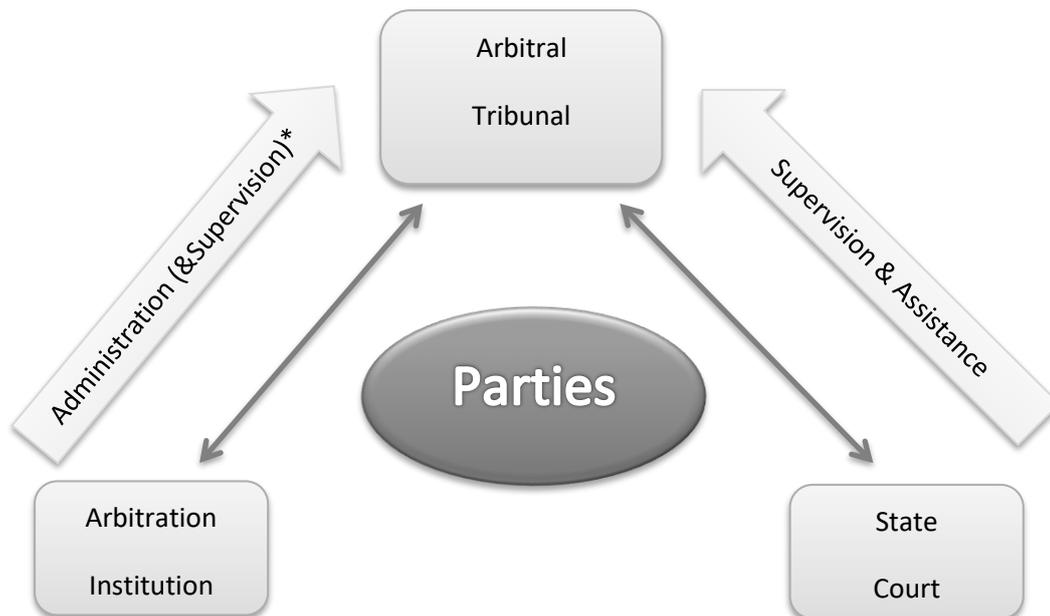
Next, at the top of the chart, the arbitral tribunal is placed, because the tribunal is entrusted by the parties with a mission of resolving their dispute. Further, the tribunal in institutional arbitration is assisted by the arbitration institution, which deals primarily with the administration of the arbitration

²⁴⁷ This "relay race" comparison comes from Lord Mustill, a former senior English judge. See Redfern and Hunter, 418-419.

²⁴⁸ See more for a detailed description of the involvement of state courts in particular stages of the arbitration proceeding in *ibid.*, 415-439.

²⁴⁹ Moses, 88.

proceeding. As indicated, this can also include some level of supervision over the tribunal's work. Finally, the court offers its assistance to arbitration and supervises it, if necessary.



*A level of "supervision" can differ in various arbitration institutions.

A proper balance of power shared among the arbitral tribunal, the state court, and the arbitration institution is essential to secure respect toward the party autonomy, as well as the neutrality and efficiency of the arbitration proceeding. The following parts of this thesis discuss in greater detail the significance of this proper balance in the pre-award stage of international commercial arbitration.

Concerning the issue of efficiency specifically, it is important to stress that international commercial arbitration has been recently criticized for not being as efficient as promised. Accusations have been particularly directed toward the promise of arbitration to be fast and cheap. By way of example, respondents to the QMUL 2015 and 2018 surveys mentioned the cost and the lack of speed as some of the worst features of international commercial arbitration.²⁵⁰

A number of various factors have been quoted as contributing to such criticism. Among them is a growing sophistication of arbitration and its players. It has been observed that arbitration has lost its

²⁵⁰ School of International Arbitration Queen Mary University of London and White & Case, (2015), 7.; School of International Arbitration Queen Mary University of London, "2018 International Arbitration Survey: The Evolution of International Arbitration," (2018), 7-8. See also Lucy Reed, "More on Corporate Criticism of International Arbitration," *Kluwer Arbitration Blog* (16 July 2014), <http://kluwarbitrationblog.com/2010/07/16/more-on-corporate-criticism-of-international-arbitration/>. (last accessed: 20 November 2018); Christian Bühring-Uhle, *Arbitration and Mediation in International Business* (2nd Ed.), vol. 13, *International Arbitration Law Library* (2006), 107-110.

original simplicity and has become more and more complex.²⁵¹ This can lead to, for example, behaviors of counsels, which are aimed at abusing the arbitration process for the benefit of their clients. By way of example, a counsel seeking to stall the progress of the arbitration proceeding, in the client's interest, can raise ungrounded challenges to arbitrators or have extensive requests for the production of documents, in case the law applicable permits that. These practices have been commonly referred to as "guerilla tactics" in arbitration.²⁵²

Also, arbitrators have been accused of suffering from the so called "due process paranoia" symptom. The "due process paranoia" describes a phenomenon, wherein arbitrators honor various requests coming from the parties and are unable to act decisively. They do it in order to avoid subsequent accusations of the lack of due process, because any of the parties was unable to fully present its case.²⁵³ Further, since the longer arbitration proceeding can be a financial benefit to arbitrators, they may have a limited incentive to act timely.

In order to combat these problems, numerous efforts have been undertaken, especially by arbitration institutions. By way of example, the SIAC requires now that in case of a challenge to an arbitrator, a challenging party has to pay in advance a non-refundable fee, and if the fee is not paid, the challenge is considered withdrawn.²⁵⁴ The HKIAC introduced an arbitration evaluation system, which allows the users to assess the conduct of the arbitration proceeding and the performance of arbitrators. According to the HKIAC, the data obtained through this evaluation system is used subsequently by the HKIAC to further improve its services.²⁵⁵

It is argued that in light of all of these problems and criticism, securing the efficiency of international commercial arbitration proceedings is of high importance. A proper balance of power shared among the arbitral tribunal, the state court, and the arbitration institution, with the tribunal having a relevant arsenal of powers to capably direct the arbitration proceeding, is the key aspect to the proceeding's

²⁵¹ See, for example, Redfern and Hunter, 27.; Jesús Almoguera, "Arbitration and Mediation Combined. The Independence and Impartiality of Arbitrators," in *Liber Amicorum Bernardo Cremades*, ed. Miguel Ángel Fernández-Ballesteros and David Arias (La Ley, 2010), 104-105.

²⁵² See, generally, on guerilla tactics in arbitration in Günther Horvath and Stephan Wilske, *Guerrilla Tactics in International Arbitration* (Kluwer Law International, 2014), 1 *et seq.*; Waincymer, 411-413.

²⁵³ See more School of International Arbitration Queen Mary University of London and White & Case, (2015), 10.; Remy Gerbay, "Due Process Paranoia," *Kluwer Arbitration Blog* (6 June 2016), <http://arbitrationblog.kluwerarbitration.com/2016/06/06/due-process-paranoia/>. (last accessed: 20 November 2018); also Bernardo Cremades Sanz-Pastor, "The Use and Abuse of "Due Process" in International Arbitration," *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* 9, no. 3 (2016), 661 *et seq.*

²⁵⁴ Art. 15(3) of the 2016 SIAC Rules.

²⁵⁵ See the official website of the HKIAC: <http://www.hkiac.org/news/rate-your-experience-hkiac-launches-arbitration-evaluation-system> (last accessed: 20 November 2018).

efficiency. Beyond the efficiency aspect, the proper balance of power is also essential for the neutrality of international commercial arbitration.

PART II.

Part II of this thesis consists of five Chapters, and discusses in greater detail the role of the state and a proper balance of power among the arbitral tribunal, the state court, and the arbitration institution in the pre-award stage of arbitration. First, it looks at four particular stages of the arbitration proceeding before the arbitral award is rendered. Chapter 4 deals with the enforcement of an arbitration agreement and resolving jurisdictional objections. Chapter 5 discusses interim measures in aid of arbitration. Chapter 6 deals with forming an arbitral tribunal. Chapter 7 addresses the aspect of evidence taking. The last Chapter of this Part, Chapter 8, explores the issue of status and powers of foreign arbitration institutions in other states. The discussion in each of the Chapters is largely conducted in the following manner: first, the issue is introduced; next, transnational standards in the specific area are illustrated; subsequently, the Chinese law and practice are presented; and finally, where appropriate, some criticism of the Chinese law and practice is offered, along with recommendations as to how to improve the arbitration system in China.

CHAPTER 4. ENFORCEMENT OF AN ARBITRATION AGREEMENT AND CHALLENGES TO JURISDICTION

4.1. General remarks

A valid arbitration agreement lies at the heart of any arbitration. This is because arbitration takes place only because the parties agreed to it. Also, equally important is that arbitrators do not go beyond their mandate and do not adjudicate, where there is no arbitration agreement provided in respect to that particular dispute. A valid arbitration agreement obliges the parties to submit particular disputes to arbitration and not to state courts, unless the parties subsequently decide to waive their right to arbitrate. Therefore, in case the parties chose arbitration as a dispute resolution method, one of the primary roles of the courts in the states that permit and support arbitration is to help the parties to realize this choice. Accordingly, the court should deny its jurisdiction if one of the parties seeks to resolve the dispute in front of it, despite the existence of an arbitration agreement, and instead – it should refer the parties to arbitration.

Objections to jurisdiction²⁵⁶ of the arbitral tribunal, despite the existence of an arbitration agreement, are not uncommon in practice. There can be various types of objections. A total objection means that the very existence or validity of an arbitration agreement is contested. This could be the case if, for example, one of the parties alleges that it was forced to enter into the arbitration agreement. A partial objection means that the existence or validity of an arbitration agreement is not denied, but some other objections are raised, such as the fact that a particular dispute does not fall into the category of disputes that the parties agreed to resolve through arbitration.

There are various ways how a party can contest the jurisdiction of the tribunal. It can, for example, ignore a request for arbitration and avoid replying to that at all, or it can respond to the request, but contest the jurisdiction in its reply. Some objections to jurisdiction are raised in good faith, because a party truly believes that there is no jurisdiction of arbitrators. Some challenges, however, can be raised as dilatory tactics, and can be aimed at obstructing the arbitration proceeding.²⁵⁷ By way of example, a party may be unwilling to arbitrate or it may seek to postpone rendering of justice, because it is a defaulting buyer who did not pay a contract price. By objecting to the jurisdiction of the tribunal, such a defaulting party can potentially gain more time in order to, for instance, collect money that is due to the other party. Yet, in practice, it may be difficult to identify whether the real purpose of the objection is in good faith or aims at delaying the proceeding.²⁵⁸

The parties typically contest the jurisdiction of the arbitral tribunal at the outset of an arbitration proceeding. However, a losing party can also raise the objection at the stage of setting aside of the award, or when resisting its enforcement. An important question is “who should decide jurisdictional objections”. In a post-award scenario, the answer to this question is easy. When the award is already rendered and the mission of the arbitral tribunal is completed, it is either the court of the seat of arbitration – if a party seeks to set aside an award, or the court before which the enforcement of the award is sought – if it opposes the enforcement on the ground that there was no valid arbitration agreement.

²⁵⁶ The terms “objections/challenges to jurisdiction” and “jurisdictional objections” are used interchangeably in this thesis, and embrace all types of jurisdictional objections, including objections to the validity of an arbitration agreement and to the scope of matters to be arbitrated.

²⁵⁷ See, for example, Lew, Mistelis, and Kröll, 331.; also Jean-Pierre Ancel, “Measures against Dilatory Tactics: The Cooperation between Arbitrators and the Courts,” in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ed. Albert Jan van den Berg (Kluwer, 1999), 411.

²⁵⁸ Lew, Mistelis, and Kröll, 331.

On the other hand, as to the objections raised at the outset of an arbitration proceeding, a couple of issues need to be considered. Who should make a decision in case of the objection made at the pre-award stage, and why? Should this decision be made by the tribunal, the state court, or perhaps the arbitration institution? What should be the role of the court in this regard, if any?

This Part of the thesis concentrates on the enforcement of an arbitration agreement and allocation of power to decide jurisdictional objections in the pre-award stage of arbitration. First, transnational standards in the area are introduced. Subsequently, the Chinese solutions are presented. Finally, some deficiencies of the Chinese system are discussed, and also some recommendations as to how they can be improved are offered. Since the main focus of this Chapter lies in the question of distribution of power, a number of related, but not core issues are beyond the scope of this thesis, and are only briefly signaled. This relates, in particular, to standards of review applied when an arbitration agreement is examined.²⁵⁹

4.2. Enforcement of an arbitration agreement and allocation of power to decide jurisdictional objections

4.2.1. Transnational standards

A. Enforcement of an arbitration agreement

The question of allocation of power can be first raised when there is a need to enforce the agreement itself. If the parties chose arbitration as a method to resolve their disputes, the primary role of state courts in the states that permit and support arbitration is to help them to realize that goal. As a result, if one of the parties refers to the court asking it resolve a particular dispute, despite the existing arbitration agreement, the court should decline and enforce this arbitration agreement by referring the parties to arbitration instead. Support for this position is found in Art. II(3) of the New York Convention, which provides that the state court seized of an action in a matter in respect of which the parties reached the arbitration agreement should, at the request of one of the parties, refer the parties to arbitration, unless it finds the agreement null, void, inoperative or incapable of being performed. It is suggested that the standards provided in Art. II(3) of the New York Convention should be applied narrowly.²⁶⁰

²⁵⁹ See, for example, *ibid.*, 341-350.

²⁶⁰ *ibid.*, 342.

a. UNCITRAL Model Law

The need to refer the parties to arbitration for claims subjected to an arbitration agreement is also reflected in Art. 8 of the UNCITRAL Model Law, which has a similar wording to the New York Convention. It states that the court before which an action is brought in a matter subjected of an arbitration agreement shall, if the party requests so not later than when submitting its first statement on the substance of dispute, refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Further, Art. 8(2) stipulates that the arbitration proceeding can be commenced or continued and the arbitral award can be rendered while the issue is pending before the court. The practical effect of this provision is to delegate to the arbitral tribunal, rather than to the state court, the decision as to whether arbitration should proceed while the application to refer the case to arbitration is pending before the court.²⁶¹ Although this can potentially cause the risk of conflicting decisions made by the tribunal and the court, and possibly needless arbitration, Art. 8(2) was justified on the basis that it aims to reduce both the incentive to use the objections as dilatory tactics and the court's unnecessary intervention.²⁶² However, it should be noted that the tribunal can also decide to wait until the court makes its decision, in particular, when the tribunal's jurisdiction is seriously disputed.²⁶³

As to the standard of review of validity, operativeness, performability, and applicability of the arbitration agreement by the court under Art. 8 of the UNCITRAL Model Law (especially whether this should be a full or merely a *prima facie* review standard), the Model Law does not offer an answer to this question. In practice, Model Law jurisdictions have differed on this point.²⁶⁴

²⁶¹ See United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012), 33.; also Stavros Brekoulakis, John Ribeiro, and Laurence Shore, "UNCITRAL Model Law on International Commercial Arbitration 1985/2006," in *Concise International Arbitration (2nd Ed.)*, ed. Loukas A. Mistelis (Kluwer Law International, 2015), 855-56.; Binder, 122-126.

²⁶² See Holtzmann and Neuhaus, 306.; Brekoulakis, Ribeiro, and Shore, in *Concise International Arbitration (2nd Ed.)*, 859.

²⁶³ Binder, 126.

²⁶⁴ See United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, 44-46. for the review of case law regarding different standards of interpretation. See the criticism of the lacking clear standard under Art. 8 of the UNCITRAL Model Law and the suggestions on how to remedy it in Brekoulakis, Ribeiro, and Shore, in *Concise International Arbitration (2nd Ed.)*, 855-857.; see also Born, 1082-1094.

b. Hong Kong and Singapore

Both Hong Kong and Singapore largely follow the solution of Art. 8 of the UNCITRAL Model Law.²⁶⁵ The language of Hong Kong and Singaporean laws provides that upon the application of a party, the court must stay the legal proceeding, unless it finds an arbitration agreement to be null and void, inoperative or incapable of being performed.²⁶⁶

Some adjustments to Art. 8 of the UNCITRAL Model Law were introduced by Hong Kong and Singapore. Hong Kong added provisions stipulating that (1) the decision of the court referring the parties to arbitration under Art. 8 is not appealable, while (2) the decision refusing to refer the parties to arbitration can be appealed only with the leave of the court that made a decision.²⁶⁷ Singapore modified the content of Art. 8 in the area of timing. As such, Section 6 of the SIAA requires that a stay application to resist the jurisdiction of the court should be made by the party before the filing of pleadings or taking *any* steps in the proceeding – which means at the earliest possible opportunity.²⁶⁸ In addition, after staying the court proceeding and referring the parties to arbitration, the court in Singapore has the power to issue an order aimed at the preservation of property in dispute for the sake of satisfying a subsequent arbitral award.²⁶⁹

Both in Hong Kong and Singapore, the party requesting the stay of a court proceeding is normally only required to demonstrate on a *prima facie* basis that a valid arbitration agreement exists.²⁷⁰

²⁶⁵ Section 20 of the HK Arbitration Ordinance; Section 6 and 7 of the SIAA. See more for Hong Kong in Cheng and Moser, 103-105.; and for Singapore in Joseph and Foxton, 177-183.

²⁶⁶ Section 20(5) of the HK Arbitration Ordinance and Section 6(1)(2) of the SIAA.

²⁶⁷ Section 20(8)(9) of the HK Arbitration Ordinance. See also Cheng and Moser, 105.

²⁶⁸ See Joseph and Foxton, 182-83.; Chew, 60-63.

²⁶⁹ Sections 6(3) and 7 of the SIAA. See also Section 20(6)(7) of the HK Arbitration Ordinance applicable to the cases of Admiralty (maritime) proceedings.

²⁷⁰ For Hong Kong, see Cheng and Moser, 103. and *PCCW Global Ltd. v. Interactive Communications Service Ltd.*, High Court of Hong Kong, Court of Appeal, 16 November 2006, [2006] HKCA 434, in which a judge agreeing with the application of a *prima facie* standard stated “[i]f the judge were to go into the matter more deeply, he would in effect be usurping the function of the arbitrator. Whilst, clearly, the judge had to make a judgment as to whether there existed an underlying agreement to arbitrate, he could do no more than to form a *prima facie* view.”; for Singapore, see Joseph and Foxton, 180. and *Malini Ventura v Knight Capital Pte Ltd and others*, 27 August 2015, [2015] SGHC 225.

B. Challenges to jurisdiction: the principle of competence-competence

In discussing the allocation of power to decide jurisdictional issues, the next to address is the arbitral tribunal and the principle of competence-competence (often denominated “Kompetenz-Kompetenz”).²⁷¹ It is commonly accepted that the arbitral tribunal has the power to rule on the question of its jurisdiction to decide a particular dispute. The logic of the principle of competence-competence was well explained by a French court in 1968, when it stipulated that “[t]he principle is that the judge hearing a dispute has jurisdiction to determine his own jurisdiction. This necessarily implies that when that judge is an arbitrator, whose powers derive from the agreement of the parties, he or she has jurisdiction to examine the existence and the validity of such agreement.”²⁷² The principle of competence-competence is core to arbitration for a number of reasons. This is because it reflects the key aspect of arbitration, which is an agreement of the parties to refer their disputes for any of reasons to arbitration (be it the neutrality, confidentiality, flexibility of arbitration, or the enforcement regime), and not to state courts.

In addition, one of the main practical advantages of the principle of competence-competence is avoiding frivolous recourses to the court used as a tactical delay. If recourse to the court can stall the arbitration proceeding, a party may have the incentive to contest the jurisdiction for strategic reasons to delay the proceeding while the issue is dealt with by the court. However, if the parties know that contesting the jurisdiction before the court will not stall the proceeding, the motivation for such frivolous challenges should be limited. As noted above, the cost and time-efficiency have been recently found to be among the main concerns of the users of international commercial arbitration.²⁷³ Therefore, the efficient start and progress of the arbitration proceeding is of great importance, and the ability to obstruct the proceeding for strategic reasons should be prevented.

When discussing the principle of competence-competence and the primacy of the arbitral tribunal in addressing the questions of jurisdiction, one possible concern can be that the tribunal can be overly friendly if it is designated to address the question of its own jurisdiction. It can be so, because deciding the entire case is a source of income for arbitrators. However, it should be noted that because the

²⁷¹ See, generally, on the principle of competence-competence: Born, 1047-1076.; Redfern and Hunter, 340-341.; Lew, Mistelis, and Kröll, 332-334.; Gaillard and Savage, 213-214 & 395-401.; Moses, 91-95.

²⁷² The judgment of 29 November 1968, *Impex v. P.A.Z.*, 1968 Rev. arb. 149, 155 (Colmar Cour d’appel). See Born, 1062.

²⁷³ See Chapter 3. p. 64-65.

arbitral award that was rendered without the tribunal's jurisdiction can be subsequently set-aside or refused enforcement, the tribunal, generally, has a strong disincentive to declare its jurisdiction over the cases, where, in fact, it does not have it. This is because a cancelled or non-enforced award amounts to a waste of time and money by the parties. Thus, for the sake of their own reputation and subsequent appointments, arbitrators have the motivation to choose to render effective and enforceable awards.

The doctrine of competence-competence, which gives the arbitral tribunal the right to rule on its jurisdiction, is commonly accepted in international commercial arbitration. However, it is also commonly accepted that the power of the tribunal is not unlimited and its decision is subjected to the review by the state court. Nonetheless, there are different views and arguments as to the point when the intervention of the court should take place. According to one approach, the tribunal should decide on its jurisdiction first, and the control by the court should be postponed to the post-award stage. At this point, control by the court can take place when a party seeks to set aside an award or when it resists its enforcement.²⁷⁴ The key argument behind this solution is preventing the use of jurisdictional objections as a tactical delay. An additional argument supporting this approach pertains to the centralization of examination of the existence and validity of an arbitration agreement in the hands of the court that also reviews the arbitral award.²⁷⁵

Another view is that the tribunal has the power to address jurisdictional objections, but also that an interlocutory review of jurisdiction by the court should be permitted at any stage of the arbitration proceeding. The reasoning behind this approach is that the court's control at the early stage of arbitration can help to eliminate the risk of unnecessary time and money invested in arbitrating, when there is no valid arbitration agreement, but the arbitration proceeding continues to be refuted only after the award is rendered.²⁷⁶

²⁷⁴ See Emmanuel Gaillard and Yas Banifatemi, "Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators," in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. Emmanuel Gaillard and Domenico diPietro (Cameron May, 2008), 258-260. This solution is used, for example, in France. Article 1448 (read in conjunction with Art. 1506(1), 1520 and 1525) of the French Law on International Arbitration (Book IV of the Code of Civil Procedure): "When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable. A court may not decline jurisdiction on its own motion."

²⁷⁵ *Ibid.*, 260-261.

²⁷⁶ See Holtzmann and Neuhaus, 485. This is the case, for example, in Sweden. See section 2(1) of the Swedish Arbitration Act (1999): "The arbitrators may rule on their own jurisdiction to decide the dispute. The aforesaid shall not prevent a court from determining such a question at the request of a party. The arbitrators may continue the arbitral proceedings pending the determination by the court."

a. UNCITRAL Model Law

The UNCITRAL Model Law, recognizing the rationality of all the arguments cited above, positions itself somewhere in the middle between the two approaches. The UNCITRAL Model Law gives the priority to rule on the question of jurisdiction to the arbitral tribunal. However, the decision of the tribunal is neither exclusive nor final. An interlocutory consideration by the court is permitted, yet, as discussed below, in a limited way.

Article 16 of the UNCITRAL Model Law provides that the arbitral tribunal has the competence to decide on its jurisdiction. The tribunal can do it on its own motion or upon the objection raised by a party.²⁷⁷ As to the timing of the objection, a party should raise it not later than when submitting the statement of defense. Furthermore, a plea that the tribunal exceeds the scope of its authority should be made as soon as the matter that allegedly goes beyond the scope of the tribunal's authority is raised during the arbitration proceeding. The UNCITRAL Model Law allows the tribunal to admit a late plea in case it finds the delay to be justified.

According to Art. 16(3) of the UNCITRAL Model Law, the tribunal can decide the objection as a preliminary question or in an award on the merits. Further, if the ruling was made at the preliminary stage and the tribunal decided that it has jurisdiction, a dissatisfied party has the right to appeal this decision to the court. This kind of an immediate control by the court helps to address the problem of wasting time and money on arbitrating where, in fact, there is no basis for it.²⁷⁸ However, some procedural safeguards are also provided in order to reduce the incentive to use the objection as a dilatory tactic. First, the time to appeal the tribunal's decision on jurisdiction to the court is relatively short and so, the party seeking to appeal this decision has 30 days from when it received the tribunal's ruling. Second, the subsequent court's decision is not appealable. Third, during the time the court is making its decision, the tribunal may proceed with arbitration.

In addition, it needs to be stressed that in case a decision confirming the jurisdiction of the tribunal is given in an award on the merits, there is still a possibility of recourse to the court in a setting aside procedure or when opposing the enforcement of an award.²⁷⁹ However, if a party failed to object to

²⁷⁷ See *ibid.*, 479.; United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, 78. See more on Art. 16 in Binder, 213-220.

²⁷⁸ See United Nations Commission on International Trade Law, "Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006," 30.

²⁷⁹ See Art. 34 and Art. 36 of the UNCITRAL Model Law.

jurisdiction within the time limits prescribed in Art. 16, it, generally, should not be allowed to contest the jurisdiction later on in the arbitration proceeding, as well as after the award is rendered in a setting aside procedure or when resisting the award's enforcement. This is subject to certain limits such as violation of public policy by the award, what includes non-arbitrability of particular disputes.²⁸⁰

Article 16 of the UNCITRAL Model Law allows the arbitral tribunal to choose to issue a preliminary ruling or an award on the merits (which will then result in different types of possible review by the court), and to assess which form is more suitable in a particular case. A preliminary ruling can help to save time and money, if the tribunal's jurisdiction would be overturned by the court in the post-award stage. However, there might be instances, where it is more reasonable to include the decision on jurisdiction in a final award on the merits. This could happen if, for example, a particular jurisdictional question relates closely to the merits of the case and requires a deeper examination, when the tribunal considers the objection to be of a purely tactical nature, or a case is simple and little cost would be incurred.²⁸¹

b. Hong Kong and Singapore

The compromise position of the UNCITRAL Model Law as to the allocation of power to address jurisdictional objections is followed by Hong Kong²⁸² and Singapore.²⁸³ By way of illustration, the High Court of Hong Kong summarized Hong Kong's position in 1991:

“[a]rbitrators should not pull down the shutters on the arbitral process as soon as one party objects to the jurisdiction of the tribunal. The arbitrator can rule on the question as to whether he has jurisdiction but he cannot make a binding and final

²⁸⁰ See Holtzmann and Neuhaus, 482-483.; United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, 78-79. See also *Astro Nusantara Int'l BV v. PT Ayunda Prima Mitra*, Singapore High Court, 23-25 July; 28 August; 22 October 2012 [2012] SGHC 212 in support of this position (in this case a preliminary decision on jurisdiction was given by the tribunal and the party decided not to bring an appeal under Art. 16(3) of the UNCITRAL Model Law).

²⁸¹ See Holtzmann and Neuhaus, 486. See also Geoffrey Ma and Denis Brock, *Arbitration in Hong Kong: A Practical Guide (3rd Ed.)* (Sweet&Maxwell, 2015), 415. suggesting that whenever possible, the decision should rather take a form of a preliminary ruling; see also *Fung Sang Trading Limited v. Kai Sun Sea Products and Food Company Limited*, High Court of Hong Kong, Court of First Instance, 29 October 1990, [1991] HKCFI.

²⁸² Sections 20 and 34 of the HK Arbitration Ordinance. See more in Ma and Brock, 186-192., Neil Kaplan and Robert Morgan, "National Report for Hong Kong (2018)," in *ICCA International Handbook on Commercial Arbitration*, ed. Jan Paulsson and Lise Bosman (Kluwer Law International, 2018), 28-29.

²⁸³ Art. 16 of the UNCTRAL Model Law read together with Sections 3(1) and 10 of the SIAA. See also Joseph and Foxton, 179-91.; Chew, 45-46.

decision on that issue as the matter can always be taken to court either by direct challenge or at the setting aside or enforcement stage.”²⁸⁴

In Singapore, the High Court in *Malini Ventura v Knight Capital Pte Ltd and others* confirmed in 2012 that if the parties agreed to submit disputes to arbitration, the court “must give way” to the tribunal’s jurisdiction as required by Section 6 of the SIAA and Art. 16 of the UNCITRAL Model Law (and also the SIAC Rules in the given case). That means that the arbitral tribunal is empowered to decide on the question of jurisdiction. However, the High Court also confirmed that a party that is dissatisfied with the tribunal’s finding can still turn to the court and ask it to review a preliminary decision on jurisdiction, or it can challenge an award on the merits. Therefore, the state court has the final say on jurisdictional matters.²⁸⁵

There are, however, some points on which the UNCITRAL Model Law jurisdictions differ when applying Art. 16. One particular point is whether a negative ruling on jurisdiction stating that the tribunal *does not* have jurisdiction is reviewable under Art. 16(3), or whether such review is only available for a decision of the tribunal confirming its jurisdiction. The language of Art. 16(3) does not expressly refer to the review of a negative jurisdictional ruling made by the tribunal. It rather suggests that only a positive decision confirming the jurisdiction should be a subject to appeal. The *travaux préparatoires* of the UNCITRAL Model Law support this latter stance. Nonetheless, the position of Model Law jurisdictions has differed in this regard.²⁸⁶

As to Hong Kong, the language of Section 34(4) of the HK Arbitration Ordinance, being in line with Article 16(3) of the UNCITRAL Model Law, plainly stresses that only a decision *confirming* the jurisdiction of the tribunal is appealable under Art. 16(3). This has been confirmed by the Hong Kong judiciary.²⁸⁷ Generally, the main reason for this position is the inappropriateness of compelling the arbitrators who have made a negative ruling to continue as arbitrators.²⁸⁸

²⁸⁴ *Fung Sang Trading Limited v. Kai Sun Sea Products and Food Company Limited*, High Court of Hong Kong – Court of First Instance, 29 October 1991, [1991] HKCFI 190.

²⁸⁵ See *Malini Ventura v Knight Capital Pte Ltd and others*, 27 August 2015, [2015] SGHC 225.

²⁸⁶ See United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, 81-82.

²⁸⁷ See *Kenon Engineering Ltd. v. Nippon Kokan Koji Kabushiki Kaisha*, High Court of Hong Kong, Court of First Instance, 2 July 2003, [2003] HKCFI 568.

²⁸⁸ See Holtzmann and Neuhaus, 487.

The SIAA in Singapore, on the other hand, since 2012, allows also an appeal of a decision of the tribunal that it *does not* have the jurisdiction.²⁸⁹ The language of Section 10 of the SIAA titled “Appeal on ruling of jurisdiction” refers to both positive and negative jurisdictional decisions. It provides explicitly that “10.(1) This section shall have effect notwithstanding Article 16(3) of the Model Law. [...] (3) If the arbitral tribunal rules [...] (b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction, any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.” The change in the SIAA was reasoned on a few bases, including the fact that, in view of the legislator, denying the review of negative jurisdictional decisions undermines the purpose of an arbitration agreement. This should be understood that without such review, the parties who originally selected arbitration in a neutral territory as a method to resolve disputes are forced instead to do it via the court. This typically would be the home state court of one of the parties, which is a scenario often sought to be avoided. Also, in the course of discussion on the amendment of the SIAA, it was pointed that the parties should be given the equal right to appeal both types of jurisdictional decisions for the reason that inequity can arise both from erroneous negative jurisdictional decisions and from erroneous positive jurisdictional decisions.²⁹⁰

Furthermore, in contrast to the language of the UNCITRAL Model Law text and the position of Hong Kong, Singapore’s regulation differs from Art. 16(3) of the UNCITRAL Model Law in the sense that Section 10(4)(5) of the SIAA allows a party to *appeal* the court’s decisions in the area of jurisdiction. Yet, in that instance, Section 10(5)(6) of the SIAA provides that the High Court’s decision can be appealed to the Court of Appeal only with the leave granted by the High Court, and that there is no appeal against the decision refusing to grant the leave.

Concerning the continuation of the arbitration proceeding while the court is dealing with the tribunal’s jurisdictional decision under Art. 16(3), the language of the Hong Kong Arbitration Ordinance mirrors the language of the UNCITRAL Model Law. It provides that the tribunal “may” continue with arbitration while the jurisdictional decision is appealed by a party to the court.

Also in Singapore, the appealing procedure will not automatically lead to the stay of the arbitration proceeding and hence, arbitration can continue during the court’s decision-making.²⁹¹ However, the

²⁸⁹ Before 2012 and the amendment of the SIAA, the position in Singapore was consistent with the UNCITRAL Model Law. See, for example, *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*, 1 December 2006, [2006] SGCA 41.

²⁹⁰ See Law Reform Committee of the Singapore Academy of Law, “Report of the Law Reform Committee on the Right to Judicial Review of Negative Jurisdictional Rulings,” (January 2011), 5-6.

²⁹¹ Art. 16(3) of the UNCITRAL Model Law read together with Sections 3(1) and 10(9) of the SIAA. See Antony Crockett and Daniel Mills, “A Tale of Two Cities: An Analysis of Divergent Approaches to Negative Jurisdictional Rulings,” *Kluwer Arbitration Blog* (8 November 2016), <http://kluwerarbitrationblog.com/2016/11/08/a-tale-of->

language used by the SIAA is stronger than the “may” wording of the UNCITRAL Model Law. Section 10(9) of the SIAA provides explicitly: “[w]here an application is made pursuant to Article 16(3) of the Model Law or this section — *such application shall not operate as a stay of the arbitral proceedings or of execution of any award or order made in the arbitral proceedings* unless the High Court orders otherwise [...]” (emphasis added). Accordingly, once the tribunal confirms its jurisdiction, it should proceed and render the award without waiting for the court’s decision on jurisdiction. Yet, if the award is rendered, but there is a subsequent finding by the court that there was no jurisdiction of the tribunal, the award can be set aside under Art. 34 of the UNCITRAL Model Law.²⁹² Similarly, under the SIAA, an appeal from the court’s decision rendered under Art. 16(3) will not suspend the arbitration proceeding, or the execution of an award, or order made in the arbitration proceeding, unless the High Court or the Court of Appeal orders otherwise.

As to the applicable standards of review under Art. 16(3) of the UNCITRAL Model Law, the issue has not been answered consistently by the courts in Model Law jurisdictions.²⁹³ Notably, however, in this regard, the High Court of Singapore stated that the court intervening based on Art. 16(3) of the UNCITRAL Model Law should be free to “make [...] an independent determination of the issue of jurisdiction and is not constrained in any way by the findings or the reasoning of the tribunal.”²⁹⁴

4.2.2. Chinese standards

A. Enforcement of an arbitration agreement

In China, Art. 5 of the CAL seems to express the principle that a valid arbitration agreement excludes the jurisdiction of the state court. It stipulates: “[w]hereas the parties concerned have reached an agreement for arbitration, the people's court shall not accept the suit brought to the court by any one single party involved, except in a case where the agreement for arbitration is invalid.”

Further, Art. 26 of the CAL deals with the timing for raising the objection before the court in order to exclude the court’s jurisdiction. It stipulates that if the court that was unaware of the existence of an arbitration agreement has already accepted the case, a party asserting that a dispute should be

two-cities-an-analysis-of-divergent-approaches-to-negative-jurisdictional-rulings/. (last accessed: 20 November 2018). See also, generally, Joseph and Foxton, 184-191.

²⁹² Joseph and Foxton, 188.

²⁹³ See United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, 80-81.

²⁹⁴ *PT Tugu Pratama Indonesia v Magma Nusantara Ltd*, 10 September 2003, [2003] SGHC 204. See also Born, 1107-1110. pointing out that the language of Art. 16(3) arguably implies *de novo* judicial review.

resolved through arbitration needs to bring its objection and submit the arbitration agreement before the first hearing in a court proceeding. Otherwise, it should be deemed have waived its right to arbitrate, and the court may continue to hear the case. Article 14 of the SPC 2006 Interpretation further clarifies that the "first hearing" in this context should be understood as the first court hearing of a case conducted by the court after the expiration of the time limit for defense, excluding activities carried out in a pre-trial process.

B. Challenges to jurisdictions

As pointed by Tao, the exclusion of the courts' jurisdiction provided in Art. 5 of the CAL is, in fact, more partial than absolute. This is because in China, the court is given the priority in deciding jurisdictional challenges.²⁹⁵ Article 20 of the CAL vests the power to address jurisdictional objections in the hands of the *court* and the *arbitration institution* – with the supremacy given to the court. The role of the arbitral tribunal in this regard is not even mentioned in the CAL. Therefore, it should be understood that the principle of competence-competence is not fully recognized in China, and the arbitral tribunal does not have the power to decide on its jurisdiction under the CAL.²⁹⁶

To be more specific, Art. 20 of the CAL stipulates that in case of doubts as to the validity of an arbitration agreement, a request for a decision can be made to either the *court* or the *arbitration institution*. It also further provides that if one of the parties turns to the court, and the other one to the arbitration institution for a ruling, the court will have the priority in making a relevant decision.²⁹⁷ The arbitral tribunal is given no power in this regard under the CAL. However, as argued further in this Chapter, the leading arbitration institutions took some steps to share their power with the tribunal. These two aspects of the Chinese solution are discussed below one by one.

a. Arbitration institution v. state court

As noted, Art. 20 of the CAL gives the priority in deciding jurisdictional objections to the court – in case requests for a ruling were made to both the court and the arbitration institution. This distribution of power was further clarified by the SPC's Reply from 1998, in which it was provided that if the requests

²⁹⁵ Tao, *Arbitration Law and Practice in China*, 96-97.

²⁹⁶ See Yuen, McDonald, and Dong, 211.; Fan, *Arbitration Law and Practice in China*, 56-57.; Yang, *Foreign-related Arbitration in China: Commentary and Cases*, 15.

²⁹⁷ The exact wording of Art. 20 of the CAL is: "Whereas parties concerned have doubt on the validity of an agreement for arbitration, a request can be made to the arbitration commission for a decision or to the people's court for a ruling. If one party requests the arbitration commission for a decision while the other party requests the people's court for a ruling, the people's court shall pass a ruling. A doubt to the effectiveness of an arbitration agreement, should be raised before the first hearing at the arbitration tribunal."

were made to both, the court should not accept the case if the arbitration institution had already accepted the request and decided the issue. However, if the request was accepted by the institution, but it has not yet decided the matter, the court should decide it. It also should ask the arbitration institution to suspend the arbitration proceeding until it reaches its decision.²⁹⁸

Article 20(2) of the CAL provides that if a party seeks to object to the validity of an arbitration agreement, it can do so before the first arbitration hearing. Otherwise, it is considered to have waived the objection. Moreover, as prescribed by Art. 13 of the SPC 2006 Interpretation, if a party failed to object to the validity of an arbitration agreement prior to the first arbitration hearing, and subsequently, it applies to the court seeking to invalidate the agreement, the court will dismiss such an application. Further, it is provided that where the arbitration institution had already made its decision on the validity of an arbitration agreement, and a party subsequently applies to the court seeking to invalidate it, the court will reject this application. In addition, according to Art. 27 of the 2006 SPC Interpretation, if a party has not raised the objection to the validity during the arbitration proceeding, but it subsequently pursues to set-aside an award, or object to its enforcement based on the ground that the arbitration agreement was invalid, the court will reject such a request.

Article 12 of the SPC 2006 Interpretation assigns which courts should have the authority to hear the challenges to jurisdiction and it designates the intermediate level court for both domestic cases and those involving foreign elements (foreign-related cases). This is a positive step, because judges at higher level courts in China are believed to be equipped with higher qualifications and more experience than judges from district courts. Furthermore, this shift of power can help to reduce local influences.²⁹⁹ In addition, Art. 15 of the SPC 2006 Interpretation provides that in order to decide the validity of an arbitration agreement, the court of an intermediate level must form a collegiate panel. This is also a positive development, because it potentially increases the likelihood that the arbitration agreement will be upheld.

Prior Reporting System

Power to decide jurisdictional claims shifts in another important way in China. If the court denies the validity of an arbitration agreement under Art. 20 CAL, the case will be directed onto the track of the

²⁹⁸ Reply of the Supreme People's Court on Several Questions Regarding the Determination of the Validity of Arbitration Agreements, Fa Shi [1998] No. 27, issued on 26 October 1998, effective from 5 November 1998; [《最高人民法院关于确认仲裁协议效力几个问题的批复》法释(1998)27号; 颁布时间: 1998年10月21, 实施时间: 1998年11月5].

²⁹⁹ See Gu, "Judicial Review over Arbitration in China: Assessing the Extent of the Latest Pro-Arbitration Move by the Supreme People's Court in the People's Republic of China," 235.; *Fan, Arbitration in China, A Legal and Cultural Analysis*, 113.

Prior Reporting System (“PRS”). As mentioned in Chapter 2, the PRS, which is a unique mechanism of the Chinese arbitration system, was originally designed to help protect the arbitration agreements and arbitral awards involving foreign elements by introducing a special system of reporting decisions against such agreements and awards to courts of a higher level for approval.³⁰⁰ As of today, concerning foreign-related cases, that means that if a court of an intermediate level decides: (1) not to enforce an arbitration agreement; (2) not to enforce an arbitral award; or (3) decides to set aside an award, it has to report its decision to a higher level court for approval. If a higher level court subsequently agrees with a lower level court – it has to report to the SPC for a final determination of the matter.

It should be noted that a source produced by the SPC in 2017 (“SPC 2017 Provisions no. 21”)³⁰¹ brought significant changes to the functioning of the PRS mechanism. One of the changes is to extend the application of the PRS mechanism to domestic cases.³⁰² In the past, the PRS mechanism only targeted foreign-related cases. This was pointed as problematic by, among others, the respondents to the China Arbitration Survey.³⁰³ The application of the PRS mechanism embraces now also domestic cases and as such, for example, a Sino-foreign joint venture or a WFOEs involved in a dispute will now enjoy the benefits of the PRS mechanism – even if a particular case is classified as a domestic one under the Chinese law. Yet, for domestic cases, a higher level court (High People’s Courts), and not the SPC, will have a final say.

It is noteworthy that if a decision of a court is to endorse the validity of an arbitration agreement (or enforce an award), it does not require any further reporting. Also, once the court affirms the validity of an arbitration agreement, the argument of the invalidity cannot be subsequently asserted by a party seeking to set aside or resisting the enforcement of the award based on such an agreement.

b. Arbitration institution v. arbitral tribunal

As introduced above, according to the provisions of the CAL, the competence to decide jurisdictional objections is shared by the state court and the arbitration institution in China. The role of the arbitral

³⁰⁰ See Chapter 2 p. 30. See also Weidong Zhu, "Determining the Validity of Arbitration Agreements in China: Towards a New Approach," *Asian International Arbitration Journal* 6, no. 1 (2010), 50.

³⁰¹ See Provisions of the Supreme People’s Court on the Number of Issues Pertaining to the Judicial Reporting in the Supervision of Arbitration, Fa Fa [2017] no. 21 issued on 26 December 2017, effective from 1 January 2018; [最高人民法院关于仲裁司法审查案件报核问题的有关规定, 法释〔2017〕21号, 发布时间: 2017年12月26日, 实施时间: 2018年1月1日].

³⁰² See Art. 2 of the SPC 2017 Provisions no. 21.

³⁰³ See Chapter 9 on the China Arbitration Survey p. 197-198, as well as Appendix 1 to this thesis p. 283-284. See also Gu, "Judicial Review over Arbitration in China: Assessing the Extent of the Latest Pro-Arbitration Move by the Supreme People’s Court in the People’s Republic of China," 240.

tribunal in this regard is not even mentioned in the CAL. To the best of knowledge of the author of this thesis, China is the only country in the world, where once the arbitral tribunal was constituted, the power to decide jurisdictional objections is given to the arbitration institution, rather than to the tribunal.³⁰⁴

Regarding the timing for deciding the objection when the arbitration institution is designated to do that, there is no time limit prescribed under the CAL and the arbitration rules. In case of CIETAC, the objection is typically raised at the beginning of the arbitration proceeding, and it is often decided by CIETAC within a month.³⁰⁵ As to who specifically deals with the objection once the arbitration institution is put in charge, a clear answer cannot be found either in the CAL or in arbitration rules. By way of example, as to the BAC's practice, according to Chen, it is a case-handling secretary.³⁰⁶

It should be noted that if the objection was decided by the arbitration institution and the validity of an arbitration agreement was affirmed, a party disagreeing with the decision of the institution does not have immediate recourse to the court. However, like in case of virtually all jurisdictions, recourse to the court is available after the award is rendered. This can happen when a dissatisfied party seeks to set aside the award or when it resists its enforcement.³⁰⁷

Developments of the leading arbitration institutions

Over the last years, China has been more and more exposed to the practice of international commercial arbitration. Not only foreign parties, arbitrators, and counsels take part in the arbitration proceedings in China, but also more and more international arbitration institutions, such as the HKIAC, the SIAC, and the ICC, have appeared on the Chinese arbitration stage offering their help and assistance in further improving the arbitration environment of China.³⁰⁸ The leading arbitration institutions in China seem to be aware of the shortcomings of the Chinese system. Hence, they try to innovate in order to bring China's practice closer to internationally recognized standards, and also – to become more

³⁰⁴ See also Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 96 note 38.

³⁰⁵ Yuen, McDonald, and Dong, 215.

³⁰⁶ Chen, "Striving for Independence, Competence, and Fairness: A Case Study of Beijing Arbitration Commission," 336.

³⁰⁷ For China, see Art. 58(1)(1) and (2) and 63 of the CAL read together with Art. 237(1) and (2) of the CCPL. Also Art. V (1)(a) and (c) of the NYC will be relevant for the enforcement of foreign arbitral awards. For the UNCITRAL Model Law, see Art. 34 and Art. 36; for Hong Kong see, Sections 81, 86, and 89 of the HK Arbitration Ordinance; and for Singapore, see Art. 34 and 36 of the UNCITRAL Model Law read together with Section 3(1) of the SIAA.

³⁰⁸ See more Chapter 8. p. 187-188.

competitive as service providers. This can be observed, for example, in the area of allocating the power to decide objections to jurisdiction.

The BAC was the first arbitration institution in China that officially introduced a mechanism of delegating the power to decide jurisdictional objections from the *arbitration institution* to the *tribunal* in 2004.³⁰⁹ Article 6(4) of the 2004 BAC Rules provided that the BAC or the tribunal, if authorized by the BAC, shall have the power to rule on the objections to the validity of an arbitration agreement. It was provided that the tribunal's decision could take a form of an interim or final award. This is carried forward into the most recent version of the 2015 BAC Arbitration Rules.³¹⁰

CIETAC officially introduced this delegation mechanism in its arbitration rules from 2005. However, Gu argues that the delegation of the competence was already present in the CIETAC's practice even before the amendment of the arbitration rules in 2005. A case from 2002 illustrates these joint efforts of both the tribunal and CIETAC in deciding jurisdictional matters. Gu terms this the "underground" practice.³¹¹

The case from 2002 involved a contract concluded between a Hong Kong and a Chinese company with an arbitration clause providing for the CIETAC arbitration. After a dispute arose, on 19 February 2002, a respondent objected to the tribunal's jurisdiction claiming the non-existence of a clause naming CIETAC. A few months later, on 24 June 2002, before the arbitral tribunal was established, CIETAC carried out a preliminary examination. Based on a *prima facie* review, it concluded that the arbitration clause existed and hence, the dispute should be arbitrated. On 2 July 2002, the respondent again challenged the jurisdiction of the tribunal claiming that the clause had not been signed and therefore, should be deemed invalid. In response, CIETAC informed the respondent that the issue of the existence and validity of the signature would be determined by the tribunal. As a final result, on 20 January 2003, the tribunal confirmed the existence and validity of the signature and as such, upheld the initial affirmative decision made by the institution. After the findings by the tribunal, CIETAC reaffirmed its decision as to the jurisdiction on 27 June 2003.

As mentioned, an official endorsement of this practice by CIETAC took place in its arbitration rules from 2005. This move was welcomed in Chinese arbitration circles, and is referred to as the CIETAC's

³⁰⁹ The 2004 BAC Rules were effective as of 1 March 2004.

³¹⁰ Art. 6(4) of the 2015 BAC Rules: "The BAC, or the Arbitral Tribunal as authorised by the BAC, may determine an objection as to jurisdiction. The Arbitral Tribunal may make its decision on jurisdiction either during the arbitral proceedings or in the arbitral award".

³¹¹ Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 110-111.

determination in advancing the principle of competence-competence in China.³¹² Article 6 of the 2005 CIETAC Rules provided the following:

“(1) CIETAC has the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. CIETAC may, where necessary, delegate such power to the arbitral tribunal.

(2) Where CIETAC is satisfied by *prima facie* evidence that a valid arbitration agreement exists, it may make a decision based on such evidence that it has jurisdiction over the arbitration case. Such a decision shall not prevent CIETAC from making a new decision on jurisdiction based on facts and/or evidence found by the arbitral tribunal during the arbitral proceedings that are inconsistent with the *prima facie* evidence.”

What needs to be noted is the fact that Art. 6(2) of the 2005 CIETAC Rules (as well as its subsequently amended versions) provide that CIETAC first employs a *prima facie* standard to decide on the validity of an arbitration agreement. This, generally, is in line with international practice, whereby the arbitration institution receiving the case will decide on a *prima facie* basis whether it accepts it or not.³¹³ Yet, that which is different from international practice is a possibility that CIETAC will subsequently make a new decision on jurisdiction, based on the facts and/or evidence found by the tribunal during the arbitration proceeding. That kind of practice is absent in arbitration laws and arbitration rules of the leading international arbitration institutions, where any subsequent jurisdictional decisions can be made by the arbitral tribunal only.³¹⁴

The wording of the CIETAC’s provision can be read as a careful construction made due to the restrictions in Art. 20 of the CAL, which explicitly grants the power to the arbitration institution, and not to the tribunal. CIETAC kept this concept of delegation of power in its subsequent versions of arbitration rules in a nearly identical language.³¹⁵

Although these actions of the leading arbitration institutions should be seen as positive developments, one theoretical question relates to their effectiveness. In China, like elsewhere, arbitration rules need to comply with existing national laws. Hence, there is a theoretical problem of the compatibility of the arbitration rules’ innovations with Art. 20 of the CAL. Nevertheless, it occurs to be a common practice in arbitration in China that in face of constantly changing needs of arbitration users, the leading

³¹² See *ibid.*, 112.

³¹³ See, for example, Art. 19(5) of the 2018 HKIAC Rules and Art. 28(1) of the 2016 SIAC Rules.

³¹⁴ Compare with Art. 19(5) of the 2018 HKIAC Rules, Art. 28(1)(2) of the 2016 SIAC Rules, and also with Art. 16 of the UNCITRAL Model Law.

³¹⁵ See Art. 6 of the 2015 CIETAC Rules.

arbitration institutions tackle problems before legislation is able to address them. In case the improvements made by the institutions do not interfere with views of the authorities, they are permitted in practice. Additionally, this might be also an indication that the authorities recognize the need for change. A positive aspect of this practice is the fact that innovations can first be tested, before official reforms take place.³¹⁶

4.2.3. Criticism of the Chinese law and practice

A. Lack of the full recognition of the principle of competence-competence

A number of Chinese and foreign scholars and practitioners have criticized the allocation of power to determine jurisdictional objections in the arbitration proceeding in China under the CAL, where the power is shared by the *state court* and the *arbitration institution*, and the *arbitral tribunal* is not designated to decide this issue. Accordingly, the full recognition of the principle of competence-competence has been urged.³¹⁷ There have been a number of reasons for the criticism and relevant suggestions.

First, the Chinese approach has been criticized for limiting the contractual character of arbitration and party autonomy.³¹⁸ When the parties choose arbitration as a method to resolve their disputes, one should safely arrive at the conclusion that this is what they, indeed, mean – to use arbitration to resolve their disagreements, including those pertaining to jurisdiction. Moreover, as mentioned at the beginning of the thesis, by choosing arbitration, the parties often mean to limit the interference of state courts, for example, due to concerns over the neutrality of courts or the parties' limited familiarity with local court rules.³¹⁹ In China, however, these ideas are not fully implemented, and as a consequence, a Chinese court can step into the arbitration proceeding at its initial stage, and it will then have the exclusive power to address jurisdictional objections.

³¹⁶ Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 113.

³¹⁷ See, for example, Zhu, "Determining the Validity of Arbitration Agreements in China: Towards a New Approach", 51-52.; Xiao Dong, "Reflections on the Application of Competence-Competence Rule to Arbitration Practice in Mainland China [Original Title: 关于自裁管辖权原则应用于我国仲裁实践的思考]," *Arbitration Reserach 仲裁研究* 37 (2013), 78 *et seq.*; Thorp, 616.; see also, generally, Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, Ch. 5, p. 91-118.

³¹⁸ Fan, *Arbitration in China, A Legal and Cultural Analysis*, 57.

³¹⁹ See Chapter 1. p. 1-2.

B. Suspension of the arbitration proceeding while the court is dealing with a jurisdictional objection

It is important to note that if the court in China deals with a jurisdictional challenge, it should order the arbitration institution to suspend the arbitration proceeding for the time of its decision-making.³²⁰ This, however, poses a risk of approaching the court with objections, if one seeks to obstruct the proceeding. It is an especially attractive option to the party wishing to delay the proceedings in light of the lack of clear time limit for the court to make its decisions, which is further elaborated below in this Chapter.

Interestingly, according to Art. 6(5) of the 2015 CIETAC Rules, “[t]he arbitration shall proceed notwithstanding an objection to the arbitration agreement and/or jurisdiction over the arbitration case.” However, it is arguable whether this permission to proceed refers to resolving a jurisdictional challenge by the arbitration institution (here CIETAC) only, or regardless whether CIETAC or the court deals with the objection. Again, at least a theoretical problem lies in the need for arbitration rules to comply with the existing national laws. The BAC seems to take a more careful approach and provides in Art. 6(3) of the 2015 BAC Arbitration Rules that: “[t]he raising of any objection to jurisdiction by any party *with the BAC* shall not affect the progress of arbitral proceedings” (emphasis added). Accordingly, it needs to be concluded that whether arbitration will proceed during the time when the court resolves the jurisdictional challenge is, at best, unclear – based on the law that applies in this context.

C. Shortcomings of the Prior Reporting System

a. Lack of clear time limits for the court to make its decision

Apart from the suspension of the arbitration proceeding for the time in which the court makes its decisions on jurisdictional objections, the situation becomes even more problematic, because the time limit for rendering a decision by the court is unclear. Actually, the time limit is also unclear for the decisions made by the arbitration institution, since neither the CAL nor the institutional rules provide for such time limit. However, in case of the arbitration institution, the issue seems to be less problematic, since it should be in the best interest of the institution to smoothly proceed with a case due to, for example, its own reputation. As to the court, the lack of clear time limits is more problematic. Both the CAL and the CCPL are silent on that issue. However, what needs to be taken into account is

³²⁰ Art. 3 of the Supreme People’s Court’s Reply on Several Questions Regarding the Determination of the Validity of Arbitration Agreements, Fa Shi [1998] No. 27, issued on 26 October 1998, effective from 5 November 1998; [《最高人民法院关于确认仲裁协议效力几个问题的批复》法释(1998)27号; 颁布时间: 1998年10月21, 实施时间: 1998年11月5].

the fact that in case the court refuses to enforce an arbitration agreement, it triggers the use of the Prior Reporting System (“PRS”).

A problematic issue relates to the fact that there are no specific time limits for the courts to make their decisions within the PRS. As pointed by Zhu, this can cause delays in determining the validity of an arbitration agreement.³²¹ When trying to navigate time limits applicable within the PRS, the *Notice of the SPC on Setting Aside Arbitral Awards Involving Foreign Elements by People’s Court*³²² is referred by some authors.³²³ This notice provides two kinds of time limits for the court to report its decisions on setting aside of an award to the court of a higher level for approval. These time limits, depending on the level of reporting, are 30 days from accepting a particular case for an intermediate level court to report it to a higher level court, and 15 days from the receipt of a reported case by a higher level court to further report it to the SPC for a final determination.

Another relevant piece produced by the SPC in the context of the PRS are the *Provisions of the SPC on the Fees and Review Periods Regarding the Recognition and Enforcement of Foreign Arbitral Awards*.³²⁴ This source provides a time limit within which a court refusing to enforce an award should report this case to the SPC for approval, which is two months from when it received an application for the enforcement. Nonetheless, it is more difficult to navigate time limits for the scenario, wherein the enforcement of an arbitration agreement is at stake.³²⁵

Accordingly, at best, it can be concluded, that there are some time limits within the PRS, but they do not refer to the enforcement of an arbitration agreement. Also, it seems that the courts in China do not necessarily meet the deadlines introduced above, and the practice of reporting and obtaining final

³²¹ See Zhu, "Determining the Validity of Arbitration Agreements in China: Towards a New Approach", 50. See also Jingzhou Tao, "Salient Issues in Arbitration in China," *American University International Law Review*, Vol. 27, No. 4 27, no. 4 (2012), 830.

³²² Notice of the Supreme People’s Court on Setting Aside Arbitral Awards Involving Foreign Elements by People’s Court, issued on and effective from 23 April 1998, Fa Fa [1998] No. 40; [最高人民法院关于人民法院撤销涉外仲裁裁决有关事项的通知; 法发(1998) 40 号, 颁布时间: 1998 年 4 月 23, 实施时间: 1998 年 4 月 23 日].

³²³ For example, Sun and Willems, 345-346.; Gu, "Judicial Review over Arbitration in China: Assessing the Extent of the Latest Pro-Arbitration Move by the Supreme People’s Court in the People’s Republic of China," 232-234.; Yuen, McDonald, and Dong, 74.

³²⁴ Provisions of the Supreme People’s Court on the Fees and Review Periods Regarding the Recognition and Enforcement of Foreign Arbitral Awards, Fa Shi [1998] No. 28, issued on 21 October 1998, effective from 21 November 1998; [最高人民法院于承认和执行外国仲裁裁决收费及审查期限问题的规定, 法释 (1998) 28 号; 颁布时间: 1998 年 10 月 21, 实施时间: 1998 年 11 月 21].

³²⁵ See Von Wunschheim, *Enforcement of Commercial Arbitral Awards in China*, 53.; Yuen, McDonald, and Dong, 380.

decisions takes much longer in reality.³²⁶ By way of example, the respondents to the China Arbitration Survey reported that in a majority of cases, the PRS proceeding reached the level of the SPC. In case the PRS proceeding finished at a higher people's court level, the respondents pointed to the fact that in a majority of cases, the time in such scenario was over four months. In cases where the PRS proceeding finished at the SPC level, most respondents reported that in a vast majority of cases, the time exceeded six months.³²⁷

Indeed, in general, it is not unique that precise time limits for state courts to make their decisions are not available, and the same applies, for example, to the situation in Hong Kong and Singapore. However, as argued above, in line with the principle of competence-competence, in other jurisdictions, the arbitral tribunal is designated to deal with jurisdictional objection. As such, there is a limited involvement of the court at that stage. Moreover, even if the court is involved, as prescribed under Art. 8 and Art. 16(3) of the UNCITRAL Model Law, the arbitration proceeding can continue while the court is dealing with the issue. As a consequence, there is a limited concern for the lack of clear time limits for the courts in other jurisdictions in this respect. Yet, this is not the case for China.

One relevant issue in this context is the risk of the arbitral tribunal being slow in making jurisdictional decisions, since, generally, it is not bound by a specific time limit either. By way of example, Art. 14 of the UNCITRAL Model Law seeks to respond to this concern and provides that if an arbitrator becomes *de jure* or *de facto* unable to perform his or her functions, or for other reasons fails to act without undue delay, his or her mandate can be terminated. If the arbitrator does not withdraw from office, or if the parties fail to agree on termination of his or her mandate, any party can resort to the court (or other authority specified in Art. 6 of the UNCITRAL Model Law) to resolve this controversy, and there is no appeal to this decision. Both Hong Kong and Singapore adopted Art. 14 of the UNCITRAL Model Law unchanged.³²⁸

More importantly, however, in institutional arbitration, there are a number of other ways to urge the arbitrators to act expeditiously. Generally, arbitration institutions have an incentive to urge arbitrators

³²⁶ See in the context of PRS used at the stage of resisting the enforcement of an award: Yingwei Cai, "The Internal Reporting System for the Recognition and Enforcement of Foreign Arbitral Awards and Foreign-Related Arbitral Awards [Original Title: 外国仲裁裁决和涉外仲裁裁决承认与执行程序中的内部报告制度]," (26 November 2012), http://blog.sina.com.cn/s/blog_69af4df20101990j.html ; Fan, *Arbitration in China, A Legal and Cultural Analysis*, 89.; Yves Hu and Clarisse Von Wunschheim, "Reforms on the "Prior Reporting System" — a Praiseworthy Effort by the PRC Supreme People's Court, or Not?," *Kluwer Arbitration Blog* (8 January 2018), <http://arbitrationblog.kluwerarbitration.com/2018/01/08/reforms-prior-reporting-system-praiseworthy-effort-prc-supreme-peoples-court-not/>. (last accessed: 20 November 2018).

³²⁷ See Chapter 9 on the China Arbitration Survey p. 197, as well as Appendix 1 p. 277-279.

³²⁸ See Section 27 of the HK Arbitration Ordinance, and Art. 14 of the UNCITRAL Model Law read together with Section 3(1) of the SIAA.

to act promptly, because of their interest in good reputation. As reported by Gerbay, arbitration institutions exercise a number of general supervisory powers over the arbitration proceeding, which often include monitoring of the time spent by the tribunal over the case in order to secure that the proceeding is conducted as expeditiously as possible.³²⁹ Gerbay not only mentions this monitoring aspect, but also describes some possible sanctions that can be imposed on arbitrators if they fail to act promptly. By way of example, numerous arbitration rules provide that where an arbitrator fails to act without undue delay, his or her mandate can be terminated by the institution.³³⁰

By way of further illustrations of how the arbitration institutions seek to discipline arbitrators, as discussed in Chapter 3 of this thesis, the HKIAC introduced an arbitration evaluation system, which allows the users to assess the conduct of the arbitration proceeding and performance of particular arbitrators.³³¹ In addition, arbitration rules typically provide for a time limit, within which an arbitral award should be rendered. For instance, for the HKIAC, the SIAC, CIETAC, and the BAC, it is six months from when the tribunal is constituted, unless exceptional circumstances occur and so, the institution can extend this limit.³³² Finally, arbitrators may prefer to act swiftly, as it is normally expected by the arbitration institution and arbitration users, for the sake of own reputation and future appointments.³³³

b. Participation of the parties in the PRS proceeding

Another problematic issue in the functioning of the PRS mechanism pertains to the limited participation of the parties in the PRS proceeding. The PRS has been considered to be an internal procedure between the courts of different levels. Therefore, a court of a higher level normally relies on the presentation of facts and law by a court of a lower level reporting the case. The parties, generally, have not been given a chance to participate in the PRS proceedings, though it has been suggested that

³²⁹ See Gerbay, *The Functions of Arbitral Institutions*, 95-99.

³³⁰ See, for example, Art. 17(3) of the 2016 SIAC Rules, Art. 33(1) of the 2015 CIETAC Rules, and Art. 23(2) of the 2015 BAC Rules.

³³¹ See Chapter 3. p. 64.

³³² See Art. 42.2(f) of the 2018 HKIAC Rules, Art. 5.2(d) of the 2016 SIAC Rules, Art. 48 of the 2015 CIETAC Rules, Art. 68 of the 2015 BAC Rules (for the BAC, see also Art. 47 of the 2015 BAC Rules and a four-month limit in domestic cases).

³³³ Gerbay, *The Functions of Arbitral Institutions*, 99.

occasionally, some lawyers were informed about the proceedings and were informally given an opportunity to present their views before the court.³³⁴

According to the findings of the China Arbitration Survey, a majority of the respondents did not have a chance to participate in the PRS proceedings as a party or a party counsel. A number of the respondents had such a chance, but only in a minority of cases. One respondent (reporting to witness four to ten PRS cases) reported being able to participate in a majority of cases.³³⁵ A limited participation of the parties in the PRS proceedings has been also pointed as problematic by the respondents to this survey.³³⁶ What seems to be especially problematic in this context is the fact that the court reporting its refusal to support the arbitration agreement or arbitral award will likely portray the circumstances of a reported case in a way that led this court to conclude that the agreement or award should not be enforced.³³⁷

In this regard, it should be noted, however, that Art. 5 of the SPC 2017 Provision no. 21 provides now that if the court to which the case was reported is not clear about case facts, it *can* invite the parties to participate in the PRS proceeding for the purpose of supplementing the facts (emphasis added).³³⁸ With this new wording introduced by the SPC, there seems to be more space for the parties' participation in the PRS proceeding. Yet, it should be also noted that the decision whether the parties will take part in the proceeding lies in the discretion of the court. It remains to be seen how this recently added provision will function in practice.

In general, all but one of the respondents of the China Arbitration Survey who have had personal experience with the PRS proceedings pointed to some insufficiencies of the mechanism. Among reasons given by the respondents, the overall lack of transparency of the system was reported most commonly. This was followed by the lack of clear deadlines for the courts to make decisions and the lack of possibility for the parties to participate in the PRS proceedings.³³⁹

Summarizing, despite some improvements introduced by the SPC and the leading arbitration institutions, due to the limitations of the PRS mechanism, and the suspension of the arbitration proceeding for the time when the court is dealing with jurisdictional objections, the parties can have

³³⁴ Yuen, McDonald, and Dong, 380.

³³⁵ See Chapter 9 on the China Arbitration Survey p. 197-198, as well as Appendix 1 p. 281.

³³⁶ See Chapter 9 on the China Arbitration Survey p. 198, as well as Appendix 1 p. 283-284.

³³⁷ Hu and Von Wunschheim. (last accessed: 20 November 2018).

³³⁸ The word „can” used in the Chinese version of Art. 5 of the SPC 2017 Provisions no. 21 is “可以” (*kě yǐ*).

³³⁹ See Chapter 9 on the China Arbitration Survey p. 198, as well as Appendix 1 p. 284.

an incentive to use jurisdictional challenges as strategic delays. By way of example, the author of this thesis heard from one Chinese counsel that raising an objection before the court and inducing the use of the PRS mechanism “allowed” counsel to postpone the start of arbitration by a year. In addition, this can also give the court an incentive to intentionally postpone its decisions, if, for example, local interests would be benefitted by such a move.³⁴⁰

D. Defects on the side of the arbitration institution deciding jurisdictional objections

Examining the other option available under the CAL, whereby this law designates the arbitration institution to deal with jurisdictional objections, the first concern is that it is doubtful whether arbitration institutions are in a good position to address this issue. Some authors express doubts as to whether the arbitration institution is a truly capable body to do that, and the main issue here is that the institution should primarily deal with the administration of a case, and it does not have the competence and expertise necessary to make a decision on the effectiveness of an arbitration agreement.³⁴¹

Besides, there is a practical question of who specifically makes a decision within the “arbitration institution” – is it a secretary general, a tribunal secretary, other staff of the arbitration institution?³⁴² What procedural steps are taken when the arbitration institution makes this decision? Can the parties take part in this proceeding and present their positions? These are questions without clear answers.³⁴³ Also, as previously noted (and further elaborated in Chapter 6), the Chinese arbitration institutions, with a few exceptions, are to various extents linked to the government in terms of their personnel and financing.³⁴⁴ This can add concerns about possible influences in the decisions-making process of the arbitration institution.

³⁴⁰ See more on the risk of local protectionism reported in China in the context of arbitration in Chi, "Is It Time for Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law", 156 & 160.; Peerenboom, 269-271, 276-281. Also, the SPC itself reported about the problem of local protectionism in China (see White Paper of the Supreme People's Court on the issue of judicial reform in China (2012): http://english.court.gov.cn/2015-07/17/content_21312834_4.htm (last accessed: 20 November 2018)). See also Jerome A. Cohen, "Settling International Business Disputes with China: Then and Now," *Cornell International Law Journal* 47, no. 3 (2014), 562. arguing the government's influence over decisions of the arbitration institutions.

³⁴¹ See Tao, "Salient Issues in Arbitration in China," 814.; Dong, "Reflections on the Application of Competence-Competence Rule to Arbitration Practice in Mainland China", 81-82.

³⁴² As noted above, in case of the BAC, it is a case-handling secretary. See p. 81 of this Chapter.

³⁴³ See Denghua Hou and Yingxue Zhao, "Competence-Competence Theory and Its Practice in China [Original Title: 仲裁庭管辖理论及其在我国的实践路径]," *Hebei Law Science [河北法学]* 32, no. 7 (2014), 189.

³⁴⁴ See Chapter 2 p. 40-42 and Chapter 6 p. 150-153.

What is more, Gu presents a CIETAC case to illustrate that giving the competence to decide jurisdictional objections to the arbitration institution, and thereby allowing some review of the case merits, can result in subsequent contradictory findings. In the case quoted by Gu, the arbitration institution that was addressing the objection decided after six months that since the parties performed the contract, their arbitration agreement was valid and hence, the tribunal should have jurisdiction. In its final award, however, the tribunal found that the contract actually was not performed by the parties.³⁴⁵

In addition, there exists a risk that a decision made by the arbitration institution, which often explores the merits of a case, can cause a problem of pre-judgement and/or can influence a following decision of the tribunal by presenting a dilemma about whether to follow the findings of the institution or to be free to depart from it.³⁴⁶ It is so, because arbitrators may prefer to act according to the institutions' expectations for the sake of future appointments. This can be even more problematic in China, since in practice, as discussed in greater detail in Chapter 6, if one wants to be an arbitrator of a particular arbitration institution in China, he or she should be on a panel list of the institution.³⁴⁷ Therefore, some arbitrators may prefer to act in line with the findings of the arbitration institution, rather than decide to the contrary. It is argued that this can reflect on the tribunal's independent decision-making.

As to the development introduced by the leading arbitration institutions in the area of sharing the power to decide jurisdictional objections with the tribunal, in general, it should be seen as a positive direction. Nevertheless, such delegation mechanism available in some institutional rules is not entirely free from problems. A major concern pertains to the issue of uncertain criteria for the delegation of the competence. Under what circumstances should/can the institution delegate the power to the tribunal? The arbitration rules do not provide for a clear answer to this question stating only "where necessary" in case of the CIETAC Rules. This, again, is likely done so due to the fact that although the delegation mechanism is prescribed in the institutional rules, such practice in theory conflicts with the provisions of the CAL. Therefore, the institutions may prefer to keep this practice "half-underground", and understatement in the rules are possibly an intentional self-protection in order to avoid offending the legislative mandates.³⁴⁸

³⁴⁵ Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 96.

³⁴⁶ *Ibid.*, 96-97.

³⁴⁷ See Chapter 6. p. 143.

³⁴⁸ See Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 112.; Hou and Zhao, 189.

Also, it is not certain how often actually such delegations take place. It is pointed that in practice, a party prepares a draft of objections addressed to both the arbitration institution and the arbitral tribunal – in case the tribunal is already constituted. In addition, if the tribunal is already in place, the arbitration institution will normally consult the objections with the tribunal, and if, in the view of the institution, the jurisdictional objection raises some substantive questions that require a hearing for a proper determination, it will typically confer the task upon the tribunal.³⁴⁹

Finally, it is noteworthy that this innovative delegation mechanism is rather limited to the leading arbitration institutions in China.³⁵⁰ Some other local institutions have not yet progressed in this regard. The reasons can be numerous, and as suggested by Gu, they may include the financial and structural dependency of the arbitration institutions in China on the local authorities, as well as the lack of willingness to interfere with the existing regulations.³⁵¹

E. Remaining observations

The Chinese allocation of power under the CAL, generally, runs counter to the overall efficiency of the arbitration proceeding and leads to the waste of human resources.³⁵² Interestingly, the findings of the China Arbitration Survey suggest that concerning the time needed for dealing with the objections, the arbitration institution takes least time, the arbitration tribunal slightly more, but still considerably less than the state court.³⁵³ Following the observation made in the context of the CIETAC practice, whereby CIETAC tasks the tribunal with more complicated jurisdictional questions requiring a hearing, this could be a possible explanation as to why the survey's findings reflected the shortest time taken by the arbitration institution.

The Chinese approach, with the enlarged powers of the court and the arbitration institution, is mentioned as being aimed at the promotion of consistency and accuracy of decisions, keeping in mind the limited development of arbitration in China.³⁵⁴ However, a question to be asked is whether such reasoning holds true today. If one of China's concerns when deciding how to allocate the power to

³⁴⁹ Yuen, McDonald, and Dong, 213.

³⁵⁰ In addition to CIETAC and the BAC, some other institutions, including the GZAC, the WAC, and the SHIAC provide for the delegation mechanism as well.

³⁵¹ Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 113.

³⁵² See Hou and Zhao, 189.; Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 46.

³⁵³ See Chapter 9 on the China Arbitration Survey p. 196-197, as well as Appendix 1 p. 271-273.

³⁵⁴ Yuen, McDonald, and Dong, 212.

address jurisdictional objections was the lack of competency of arbitrators to deal with this matter, then having in mind: the restrictive criteria provided by the CAL for being an arbitrator in China,³⁵⁵ the closed-panel system of arbitrators,³⁵⁶ the general lack of permission for *ad hoc* arbitration in China,³⁵⁷ as well as the overall development of arbitration over the last 24 years since the enactment of the CAL, this concern seems to be less justified today. This is also relevant when comparing the competence of arbitrators with the competence and requirements toward judges in China, as well as when taking into consideration the judges' familiarity with arbitration-related matters, which is not assessed as high across the country.³⁵⁸

Looking at the problem specifically from the perspective of the stakeholders of international commercial arbitration, it should be noted that one of the reasons as to why arbitration is frequently chosen by parties is to avoid, or at least to minimize, the involvement of particular state courts in

³⁵⁵ See Art. 13 of the CAL: “[...] An arbitrator shall meet one of the following requirements:

1. At least eight years of work experience in arbitration.
2. At least eight years of experience as a lawyer.
3. At least eight years of experience as a judge.
4. Engaging in law research and teaching, with a senior academic title.

An arbitration commission shall prepare the list of arbitrators according to different specialities.”;

and Art. 67 of the CAL: “Members of a foreign arbitration commission may appoint arbitrators from among foreign nationals with specialized knowledge in law, economy and trade, science and technology.”

³⁵⁶ See Chapter 6 p. 143.

³⁵⁷ See Chapter 2 p. 35-36.

³⁵⁸ The general requirements for a judge in China are lower than the requirements for an arbitrator. See Art. 9 of Judges Law of the People's Republic of China issued on 28 February 1995, effective from 1 July 1995 (with 2001 and 2017 amendments); [中华人民共和国法官法, 颁布时间 1995 年 2 月 28 日, 实施时间: 1995 年 7 月 1 日起施行 (2001 和 2017 修正)].

Article 9: “A judge shall possess the following qualifications: (1) to be of the nationality of the People's Republic of China; (2) to have reached the age of 23; (3) to endorse the Constitution of the People's Republic of China; (4) to have fine political and professional quality and to be good in conduct; (5) to be in good health; and (6) to have engaged in the legal work for at least two years in the case of graduates of law major of colleges or universities or from non-law majors of colleges or universities but possessing the professional knowledge of law, and among whom those to assume the posts of judges of superior People's Courts and of the Supreme People's Court shall have engaged in the legal work for at least three years; or to have engaged in the legal work for at least one year in the case of those who have Master's Degree of Law or Doctor's Degree of Law, or those who have Master's Degree or Doctor's Degree of non-law majors but possess the professional knowledge of law, and among whom those to assume the posts of judges of superior People's Courts and of the Supreme People's Court shall have engaged in the legal work for at least two years. [...]”

However, as noted above, the situation differs across the country, and especially in major coastal cities, like Beijing, Shanghai, or Shenzhen, the courts and judges are better prepared to perform their arbitration-related tasks than the judges in more remote areas. See also Shizhou Wang, *Civil Procedure in China* (Wolters Kluwer, 2014), 36-38.

resolving disputes.³⁵⁹ Unfortunately, in China, it can happen that the very first place, where an arbitration case lands is exactly in a Chinese court – the place to be avoided. It happens when a party raises a jurisdictional objection before the court, which then has the exclusivity to deal with the issue.

Overall, the Chinese atypical allocation of power in the area discussed leads to placing China among countries, where legislation is seen as “reserved or even hostile to the doctrine [of competence-competence]”.³⁶⁰ This certainly is not a category that an arbitration-friendly jurisdiction wants to belong to. It is also important to note that the division of power shared among the arbitral tribunal, the state court, and the arbitration institutions in China in this regard happens at the very expense of the arbitral tribunal. As to one other possible consequence, this can potentially discourage non-Chinese arbitrators, who are used to having a more extensive range of powers, from accepting the appointments in China-seated cases. This can then contribute to limiting the further internationalization of arbitration in China.³⁶¹

The allocation of power under the CAL and the recent efforts to improve the situation by the leading arbitration institutions reflect the transitional struggle of a socialist market economy in China. Arbitration is said to be a product of a free market economy with its contractual, privately-oriented approach. However, China’s arbitration was born in a planned economy environment, where there were no individual market subjects, the government-appointed authorities were the only authoritative power in arbitration proceedings, and the tribunal’s role was limited to assisting in handling individual cases.³⁶² Therefore, the lack of full recognition of the principle of competence-competence in China and the limited role of the arbitral tribunal are attributable to a general administrative dominance of the state in arbitration in China, with a significant role played by the court and the arbitration institution.

Also, the traditional reliance of Chinese people on the power of office and preference for institutions (especially governmental ones) over individuals in resolving problems has been cited as a source of such allocation of power in China.³⁶³ Chinese parties have been believed to tend to treat arbitration

³⁵⁹ See Chapter 1 p. 1-2.

³⁶⁰ Born, 1064.

³⁶¹ This is in addition to a financial disincentive. Arbitrators in China are paid less than their counterparts in the cases administered by other major arbitration institutions. See Tao, *Arbitration Law and Practice in China*, 134.; Matthias Scherer, "Arbitral Institutions under Scrutiny," *Kluwer Arbitration Blog* (5 October 2011), <http://arbitrationblog.kluwerarbitration.com/2011/10/05/arbitral-institutions-under-scrutiny/>. (last accessed: 20 November 2018).

³⁶² Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 99-100.

³⁶³ *Ibid.*, 23-24 & 98-101.

proceedings as led by the arbitration institution, which in a consequence, diminishes the role of the tribunal and subordinates it to the arbitration institution.³⁶⁴ As such, in China, the court is given the priority in deciding jurisdictional objections in arbitration, and if the court is to share this power, it is to be done with another institution – the arbitration institution, and not with individual arbitrators.

4.2.4. Recommendations

A. Full recognition of the principle of competence-competence

Scholars and practitioners from China and abroad have supported the full recognition of the principle of competence-competence in China.³⁶⁵ In addition, the vast majority of the respondents to the China Arbitration Survey (almost three-fourths) chose the arbitral tribunal as in the best position to decide jurisdictional objections in the arbitration proceeding conducted in China. This was followed by 14% of the respondents choosing the arbitration institution, and only 10% – the state court.³⁶⁶

The full recognition of the principle of competence-competence and giving the relevant powers to the tribunal would: (1) better reflect the parties' agreement to arbitrate; (2) help prevent the premature contesting of jurisdiction used as a dilatory tactic; and (3) help promote the overall efficiency of the arbitration proceeding in China. It is also recommended that the power of the arbitral tribunal to rule on its own jurisdiction should not be affected by the existence of the arbitration institution. As such, the tribunal, and not the arbitration institution, should resolve the questions pertaining to the arbitrators' authority to decide particular cases. Having the tribunal determining jurisdictional objections eliminates the problems of not only conflicting decisions rendered by the tribunal and the institution, but also a potential risk of the decision of the arbitration institution influencing the decision of the tribunal.

In response to the concerns that arbitrators may not be competent enough to rule on their own jurisdiction in China, if this is what the parties are concerned about, this can be resolved by the exclusion of the tribunal's competence in an arbitration agreement. However, the author of this thesis is not aware of such terms in arbitration agreements, which seems to be an indication that the incompetence of the tribunal is not what the parties are concerned about.

³⁶⁴ Yuen, McDonald, and Dong, 3. For more on the cultural analysis of Chinese arbitration see, generally, Fan, *Arbitration in China, A Legal and Cultural Analysis*, 1 *et seq.*

³⁶⁵ See *supra* note 317.

³⁶⁶ See Chapter 9 on the China Arbitration Survey p. 197, as well as Appendix 1 p. 274.

What needs to be emphasized in the course of the discussion on bringing China closer to internationally recognized standards is the fact that state courts in virtually all systems recognizing the principle of competence-competence do have the ultimate power to control the arbitral award rendered in a situation, where the arbitral tribunal lacked the jurisdiction. As mentioned, this can happen in a setting aside procedure or by refusing the award's enforcement.

The UNCITRAL Model Law approach can serve as a point of reference for future reforms in China. If China is concerned about the limited control in case the arbitral tribunal decides on its jurisdiction, then an interlocutory review by the court, as prescribed by Art. 16(3) of the UNCITRAL Model Law, caters to this need. As argued above, in addition to a post-award control, the UNCITRAL Model Law permits also an extra layer of the court's control over the tribunal's jurisdiction. Namely, the court can review the preliminary decision made by the tribunal. The text of the UNCITRAL Model Law provides specifically that if the ruling on a jurisdictional objection is made at the preliminary stage of the arbitration proceeding, and the tribunal decides that it has the jurisdiction (a positive decision), a dissatisfied party has the right to appeal the tribunal's decision to the court. However, in order to prevent frivolous objections, there is a short period of 30 days to appeal the tribunal's decision to the court. In addition, the subsequent decision of the court is not appealable, and during the time the court is deciding the matter, arbitration can proceed.

In designing future changes by adopting or drawing inspirations from the UNCITRAL Model Law, some solutions implemented specifically by Hong Kong and Singapore can be taken into consideration. To start, following the Singaporean solution, court review mechanism should include both positive and negative preliminary decisions on jurisdiction made by the tribunal. Although both positions discussed above – namely, that of the text of the UNCITRAL Model Law (and Hong Kong) on the one hand, as well as that of Singapore, on the other hand, have their well-argued rationales, the Singaporean approach, in fact, does not contradict with the main argument of the opponents of court review of the negative jurisdictional decisions (meaning that it is inappropriate to force the arbitrators to decide the case once they found not to have the jurisdiction). As argued by Born, in case a reviewing court determines that an arbitration agreement is valid, the arbitrators seem to be capable of reconsidering their prior decision, and proceeding to hear the case merits “just as a lower court that has been reversed on appeal can do so”.³⁶⁷ From another point of view, among the benefits of the Singaporean solution are equating the situation of the parties and assisting them in realizing their choice of submitting the dispute to arbitration and not to state courts.

³⁶⁷ Born, 1104-1105.

With regard to the lack of appeal from the court's decision made under Art. 16(3) of the UNCITRAL Model Law, the position of the Singaporean SIAA whereby the court's decisions is subject to appeal, this development is not recommended to China. This is because, as demonstrated above on the occasion of the discussion on the PRS, the Chinese courts have shown that timely decisions by them can be problematic. Therefore, once the decision is made by the court, it should not be further appealable and the parties should instead be able to move on with resolving their dispute.

The other issue refers to the continuation of arbitration while the court is in the process of reviewing a jurisdictional decision made by the tribunal. In this regard, Singapore decided to use stronger language than one used by the UNCITRAL Model Law text, which is "arbitral tribunal *may* continue the arbitral proceedings [...]" (emphasis added). Instead, according to the wording of the SIAA, an application made pursuant to Article 16(3) of the UNCITRAL Model Law "shall not operate as a stay [...]". Such clearer language can help avoid the doubts as to whether the arbitration proceeding should or should not continue.

In the same spirit, in order to limit the incentive of the parties to initiate a court proceeding in order to stall arbitration, at least until the moment when the court renders its decision on jurisdiction, the solution adopted by the UNCITRAL Model Law in Art. 8(2) should be followed by China. As such, the arbitration proceeding would have the opportunity to be initiated or continued, despite the fact that a case in respect of which an arbitration agreement was concluded, was nonetheless brought before the court. However, it should be also noted that the tribunal can decide to wait until the court makes its decision.

In the scenario, in which the Chinese atypical allocation of power to decide jurisdictional objections is to be kept, some changes can nonetheless be introduced. First, it would be desirable that the BAC's, CIETAC's, and a few other institutions' practice of delegating the power to address jurisdictional objections from the arbitration institution to the arbitral tribunal is endorsed across the country. This could possibly be done by the SPC and one of its documents. Furthermore, the arbitration proceeding should be allowed to continue, despite the fact that either the court or the arbitration institution is deciding the matter. The awareness of the parties that strategical objections will not stall the arbitration proceeding would likely reduce the motivation to use them.

B. Further improvements of the Prior Reporting System

Concerning the functioning of the PRS mechanism, despite some developments introduced recently, there still exist some shortcomings that affect the efficiency of it, and therefore, they should be addressed. The overall suggestion is to continue to bring more transparency to the entire PRS system.

In this regard, it is important to clarify the time limits for the decisions of the courts once the use of the PRS mechanism was triggered. As demonstrated above, the SPC already introduced some time limits for the PRS mechanism in reference to two other instances – namely, when the court seeks to set aside an award or when it refuses to enforce it. It is postulated that the relevant time limits for the enforcement of an arbitration agreement are introduced. However, as also demonstrated above, it seems that in practice, the Chinese courts not always obey even the existing time limits, and that it takes much longer to render the decisions within the PRS proceedings. Therefore, as suggested by von Wunschheim, it would be useful to consider some type of sanctions (possibly of an administrative or disciplinary nature) in case the court does not comply with the time limits provided within the PRS.³⁶⁸

Moreover, the parties should be allowed to participate in the PRS proceedings, if they see such a need. This is supported overwhelmingly by the respondents to the China Arbitration Survey.³⁶⁹ Finally, publishing the data relevant to the PRS would have at least two positive consequences. It would not only be an educational material for the courts, academics, and practitioners, but it would also boost the transparency of the entire system. These types of actions would help to better realize the goal for which the PRS mechanism was established – namely, to prevent the local protectionism and enhance the confidence of foreign investors in China’s arbitration system.

³⁶⁸ Von Wunschheim, *Enforcement of Commercial Arbitral Awards in China*, 53.

³⁶⁹ See Chapter 9 on the China Arbitration Survey p. 198, as well as Appendix 1 p. 282.

CHAPTER 5: INTERIM MEASURES IN AID OF ARBITRATION

5.1. General remarks

A central question of this part of the thesis is who should be given the power to effectively order interim measures in aid of arbitration, which includes their granting, modification, suspension and termination. Interim measures in aid of arbitration are measures that are aimed at the protection of the parties' rights and interests pending a final resolution of disputes.³⁷⁰ It can happen that the relief sought in the principal proceeding is insufficient to effectively protect the rights and interest of an allegedly innocent party, because of the time gap between the commencement of the arbitration proceeding and obtaining the final relief. In such a time gap, one of the parties may frustrate the other party's rights and interests by, for example, destroying important evidence in the case, or by dissipating assets. This can then result in subsequent problems in proving the case or difficulties (or even the impossibility) in effectively enforcing the arbitral award. Therefore, the parties should be given the right to seek to protect their rights and interests by appropriate interim measures.³⁷¹

For the purpose of this thesis, the term "interim measure" should be understood as "any temporary measure ordered by the arbitral tribunal pending the issuance of the award by which the dispute is finally decided".³⁷² In practice, the term "interim measure" is used interchangeably with similar terms, such as: "provisional measure", "preliminary measure", "emergency/interim relief" etc. There is a variety of types of interim measures, and different jurisdictions have their own views as to the availability of particular measures. Yet, following the typology of the UNCITRAL Model Law, they include measures, wherein the party against which the measure is directed is ordered to: (1) preserve the *status quo* pending the determination of a dispute; (2) take action or refrain from taking action that is likely to cause harm or prejudice to the arbitral process itself; (3) provide means of preserving

³⁷⁰ See Ali Yesilirmak, "Provisional Measures," in *Pervasive Problems in International Arbitration*, ed. Julian D. M. Lew and Loukas A. Mistelis (Kluwer Law International, 2006), 186.

³⁷¹ See Lew, Mistelis, and Kröll, 586.; Born, 2426.; Redfern and Hunter, 313-314.; Waincymer, 618-619.

³⁷² UNCITRAL Working Group on Arbitration Thirty-fourth Session, *21 May-1 Jun 2001 Report a/Cn.9/Wg.II/Wp.113 New York* (2001), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V01/820/74/PDF/V0182074.pdf?OpenElement>. (last accessed: 20 November 2018).

assets out of which a subsequent award may be satisfied; or (4) preserve evidence that may be relevant and material to the resolution of a dispute.³⁷³

Traditionally, the task of ordering interim measures in aid of arbitration was assigned to the state court, because of associating interim measures with coercive powers, which are only enjoyed by the court. Yet, as discussed in greater detail below, this view has been gradually abandoned by a majority of jurisdictions, and a popular approach today is that both the state court and the arbitral tribunal are equipped with the power to order interim measures in aid of arbitration.

A related issue naturally arises concerning the enforceability of an interim measure granted by an arbitral tribunal, because arbitration, being a private and consensual method of resolving disputes, lacks coercive powers and it should not affect non-parties. Thus, the cooperation between the arbitration proceeding and the state court in the area of interim measures is of great importance. As explained below, it is not that the arbitral tribunal has no command when ordering interim measures. Rather, the effectiveness of a measure ordered by the tribunal is limited and, thus, the court assistance in enforcing such interim measures can be essential.

This Chapter concentrates on the distribution of power in the area of interim measures in aid of arbitration. It first presents common standards in international commercial arbitration. Subsequently, it moves to the analysis of the situation in China, and addresses some deficiencies of the Chinese system. Finally, some suggestions as to how the Chinese arbitration system can be improved are offered. A number of issues that are relevant in the given context, but that do not pertain precisely to the distribution of power are not discussed in detail in this thesis. This includes, in particular, specific types of interim measures, standards for ordering them, *ex parte* orders, and court-ordered interim measures in support of foreign arbitration proceedings.³⁷⁴

³⁷³ See Art. 17 of the UNCITRAL Model Law.

³⁷⁴ For types of interim measures in aid of arbitration, see Yesilirmak, *Provisional Measures in International Commercial Arbitration*, 204-219.; Born, 2483-2503.; Lew, Mistelis, and Kröll, 595-602.; Gaillard and Savage, 721-734.; also Art. 17(2) of the UNCITRAL Model Law.

For the standards for granting an interim measure, see Yesilirmak, *Provisional Measures in International Commercial Arbitration*, 170-187.; Born, 2467-2483.; also Art. 17A of the UNCITRAL Model Law.

For *ex parte* measures, see Yesilirmak, *Provisional Measures in International Commercial Arbitration*, 220-222.; Born, 2508-2511.; also Art. 17B and 17C of the UNCITRAL Model Law.

For court-ordered interim measures in support of the foreign arbitration proceedings, see Yesilirmak, *Provisional Measures in International Commercial Arbitration*, 80-83.; Born, 2555-2560.; also Art. 17J and 17H of the UNCITRAL Model Law.

5.2. Allocation of power to order interim measures

5.2.1. Transnational standards

A. Who has the power to order interim measures in aid of arbitration?

There are basically two answers to the question who should be given the power to order interim measures in the arbitration proceeding. In some jurisdictions, though in a minority, this power is exclusively given to the state court; as discussed below, this is the situation in China. Nevertheless, in a majority of jurisdictions, including the UNCITRAL Model Law jurisdictions, and as such Hong Kong and Singapore, both the state court and the arbitral tribunal have the power to order interim measures.³⁷⁵

Historically, state courts were the only forum to which the parties could effectively turn when seeking interim measures in arbitration. This historical view in part relied on limited trust toward arbitration and the understanding that an interim measure is a coercive measure; therefore, only state courts that are equipped with coercive powers should order it. Indeed, the arbitral tribunal lacks the power to directly require a party to do or refrain from doing something. As a result, if an interim measure ordered by the arbitral tribunal needs to be coercively enforced, the state court must be approached for that purpose: in this indirect way, the tribunal does have access to coercive powers. As noted by Born, the historical classification of interim measures is inaccurate. The view that only state courts should be able to decide the appropriateness of interim measures in aid of arbitration has been commonly abandoned and the arbitral tribunal has been permitted to decide the matter.³⁷⁶

Rationales for the arbitral tribunal's power to order interim measures

There are numerous reasons to support the power of the tribunal to order interim measures. To start with, arbitrators are adjudicators in particular cases and, thus, are most familiar with the merits of the case. This allows the arbitral tribunal to not only be equipped with the relevant knowledge of a case, which is needed to make a decision in the situation of urgency, but also to assess which applications may be mere dilatory tactics. The tribunal is normally well oriented whether there genuinely exists a need for an interim measure. In addition, it has a number of tools that can be used to prevent frivolous requests. This includes ordering security as a condition for granting of the measure or awarding damages in case the measure should not have been granted.

³⁷⁵ See Born, 2440.

³⁷⁶ See *ibid.*, 2432-2433.; Yesilirmak, *Provisional Measures in International Commercial Arbitration*, 64-66.

Some additional reasons supporting the power of the arbitral tribunal are: the respect for the parties' choice of arbitration as a method to resolve disputes, privacy and confidentiality of the arbitration proceeding, as well as flexibility of arbitrators in designing the most appropriate measures.³⁷⁷ The power of the arbitral tribunal to order interim measures is essential for the overall fair and effective resolution of disputes. Therefore, according to Born, denying the right of the tribunal to safeguard the parties' rights via interim measures is a potential frustration of a fair and efficient arbitration proceeding.³⁷⁸

Rationales for the court's power to order interim measures

The arbitral tribunal's authority to order interim measures typically is not exclusive. There can be instances where turning to the court when seeking an interim measure can be a sensible approach. Even more, sometimes, in fact, this is the only way to proceed. There might be instances, where an interim measure relates to a non-party. In such a situation, it may be necessary to approach the court, since in line with a consensual nature of arbitration, the tribunal does not have the power over non-parties, and only the court's decision can be binding upon them. By way of example, in a case where an interim measure orders a shipper to release perishable goods to a buyer in an arbitration between the buyer and the seller, it is more effective to turn to the court in order to get the shipper (a non-party) to perform the duty of releasing goods.³⁷⁹

It may also be that in some instances turning to the court can be faster, in particular where the arbitral tribunal consists of several arbitrators of different backgrounds, experience, and positions toward granting of interim measures.³⁸⁰ Furthermore, the court may be a preferred forum when the quick coercive enforcement is needed.³⁸¹ In addition, a question may arise as to whom to turn in case the arbitral tribunal has not been yet constituted, and there is a need for an interim measure. As discussed

³⁷⁷ See Born, 2432-2434.; Yesilirmak, *Provisional Measures in International Commercial Arbitration*, 49-54.

³⁷⁸ Born, 2426.

³⁷⁹ Lijun Cao and Schenchang Wang, "The Role of National Courts and Lex Fori in International Commercial Arbitration " in *Pervasive Problems in International Arbitration*, ed. Julian D. M. Lew and Loukas A. Mistelis (Kluwer Law International, 2006), 169.

³⁸⁰ Yesilirmak, *Provisional Measures in International Commercial Arbitration*, 74.

³⁸¹ For other reasons when turning to the court, rather than to the tribunal might be a better idea when seeking to obtain an interim measure in aid of arbitration, see Joseph and Foxton, 257.; Susan Field, "Narrowing the Powers of the National Courts to Grant Interim Measures – a Measure Too Far?," *Kluwer Arbitration Blog* (27 August 2015), <http://arbitrationblog.kluwerarbitration.com/2015/08/27/narrowing-the-powers-of-the-national-courts-to-grant-interim-measures-a-measure-too-far/>. (last accessed: 20 November 2018).

in greater detail below in this Chapter, numerous arbitration rules provide now for the access to an emergency arbitrator in such instances. Nevertheless, it can also be a practicable idea to turn to the court. In general, if state courts work efficiently and are able to effectively help with interim measures, approaching them with the requests for interim measures can be a sensible option in any number of instances.

In the context of states giving the power to order interim measures in aid of arbitration only to the state court, this has numerous shortcomings. They include the lack of neutrality, privacy, and confidentiality of relevant proceedings, which can be especially relevant if these were the reasons why the parties agreed to arbitrate in the first place. Some other problematic issues include delays by courts in some jurisdictions and the complexity of proceedings in large cross-border disputes involving multiple jurisdictions.

a. UNCITRAL Model Law

One of the most significant modifications introduced by the 2006 version of the UNCITRAL Model Law, when comparing it with the preceding version from 1985, is that it addresses extensively the issue of interim measures. Articles 9 and 17 both refer to the power to order interim measures of both the arbitral tribunal and the court. Article 9 provides that “[i]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.” Furthermore, Art. 17(1) stipulates that “[u]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.”

The content of Art. 9 was included in the 2006 version of the UNCITRAL Model Law in an unchanged shape. In general, the need for Art. 9 was driven by the study on the New York Convention and the divergent positions of state courts as to whether they can grant interim measures (and in particular attachments) in matters governed by arbitration agreements. While some courts refused to do that, because in their view, such court-granted measures would hinder the expeditious arbitration proceeding, some other courts agreed to grant them, because they found that such measures did not impede arbitration, but rather guaranteed the subsequent successful enforcement of arbitral awards. The drafters of the UNCITRAL Model Law decided that the interim measures granted by state courts were compatible with arbitration.³⁸²

³⁸² Holtzmann and Neuhaus, 332.

As to Art. 17, it was significantly revised by the 2006 version of the UNCITRAL Model Law. The original version of Art. 17, as adopted in 1985, provides that unless the parties agreed otherwise, the arbitral tribunal can, upon the request of a party, order any party to take a measures of protection it considers necessary in respect to the subject-matter of a dispute. Further, in ordering the measure, it can require the party to provide an appropriate security.³⁸³ It should be stressed that the wording “any party” defines the limits of this provision and excludes non-parties, which is in line with the contractual character of arbitration.³⁸⁴

According to the drafters of the 2006 version of the UNCITRAL Model Law, the revision of Art. 17 was considered to be “necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration”.³⁸⁵ The Working Group of the UNCITRAL Model Law agreed that due to the uncertainties existing under the 1985 Model Law provisions and some national laws on the scope of interim measures available, conditions for ordering them, as well as the enforcement regime, the effectiveness of international arbitration might be at stake. Regarding the aspect of the enforcement specifically, the Working Group stressed that, in practice, an enforceable interim measure may be equally as important as a final award on the merits.³⁸⁶ The issue of the enforcement of interim measures is dealt with in greater detail below in a separate section of this Chapter.

Chapter IV A was also added to the 2006 version of the 2006 UNCITRAL Model Law. It is titled “Interim Measures and Preliminary Orders” and keeps the substance of the original Art. 17, but adds a number of new provisions (Art. 17 to Art. 17J). As to the amendment of Art. 17, a revised provision extends the authority of the tribunal by deleting the phrase that interim measure can be granted “in respect of the subject-matter of the dispute”. It was so decided, because the original wording from 1985 could suggest limiting the tribunal’s authority to issue some interim measures such as freezing the assets that are not the subject matter of a particular dispute. Further, the revised version of Art. 17 provides

³⁸³ See more on the legislative history of Art. 17 in *ibid.*, 530-533.

³⁸⁴ See *ibid.*, 532.; Brekoulakis, Ribeiro, and Shore, in *Concise International Arbitration (2nd Ed.)*, 870-871.

³⁸⁵ United Nations Commission on International Trade Law, “Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006,” para 4. See also Sundaresh Menon and Elaine Chao, “Reforming the Model Law Provisions on Interim Measures of Protection,” *Asian International Arbitration Journal* 2, no. 1 (2006), 1 *et seq.* for the assessment of the changes introduced in 2006.

³⁸⁶ Howard Holtzmann et al., *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 2015), 165.

for the above mentioned definition and categories of interim measures.³⁸⁷

Concerning the distribution of power to order interim measures, Art. 17J, titled “Court-ordered interim measures”, was added. It provides that “[a] court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.” Hence, Art. 17J confirms that the court has the power to order interim measures in aid of arbitration, and this power is extended to measures in support of an arbitration proceeding taking place outside of this court’s jurisdiction. This extension of the power to support foreign arbitration was dictated by the character of international arbitration and the need to secure assets, evidence, or particular actions in jurisdictions other than the place of arbitration. Further, in ordering interim measures in aid of arbitration, the court refers to its own procedural laws, while taking into account the special characteristics of international arbitration.

The remaining articles of Chapter IVA deal with a number of issues, including types and conditions for ordering interim measures. In ordering interim measures, the arbitral tribunal may require an appropriate security, as well as the disclosure of any change of circumstances based on which the measure was requested or granted. The tribunal can also modify, terminate, and suspend the interim measure it granted. It can also decide on the cost and damages, if it subsequently determines that the measure should not have been granted.³⁸⁸ Finally, Section 2 of Chapter IV A of the 2006 UNCITRAL Model Law deals with the so called “preliminary orders”, which allows *ex parte* measure applications that can be granted if the tribunal finds that a prior disclosure of the request for an interim measure to the party against which the measure is directed would risk frustrating the purpose of this measure.³⁸⁹

Based on the UNCITRAL Model Law text, both the arbitral tribunal and the state court have the power to order interim measures in aid of arbitration. However, there is a question of the relationship between Art. 9, Art. 17, and Art. 17J. Namely, whether the tribunal and the court have coexisting jurisdiction to grant interim measures and, thus, a party has a truly free choice to turn to either of the

³⁸⁷ See p. 99-100 of this Chapter.

³⁸⁸ Art. 17A, 17D, 17E, 17F, 17G of the 2006 UNCITRAL Model Law. See the legislative history of these articles in Holtzmann *et al.*, 166-172 & 176-183.

³⁸⁹ Art. 17B and Art. 17C of the 2006 UNCITRAL Model Law. See also *ibid.*, 172-175.

two, or whether one of them is given the priority. In practice, there have been different answers to this question in Model Law jurisdictions. The language of the UNCITRAL Model Law seems to suggest the simultaneous power of the tribunal and the court, without any particular priority. Article 9 provides that a party can request an interim measure from the court “before or during arbitral proceedings”, and Art. 17 stipulates without any further clarification that “a tribunal may, at the request of a party, grant interim measures”.³⁹⁰ It is suggested by the explanatory note to the 2006 version of the UNCITRAL Model Law that Art. 17J was added in order to eliminate the doubts that despite the existence of an arbitration agreement, both the tribunal and the state court can be approached for obtaining an interim measure, and the choice is in the hands of a party requesting a relief.³⁹¹

The other position is that that once the arbitral tribunal is in place, the state court should only have the subsidiary jurisdiction to order interim measures in aid of arbitration. That means that the court has the power to order the measure, but only in instances where the tribunal is not able to do so itself. This position is supported by the laws and practice of Hong Kong and Singapore, as discussed below.

b. Hong Kong and Singapore

Hong Kong considerably follows the solutions of the 2006 version in the area of interim measures in aid of arbitration.³⁹² It adopted Art. 9 of the UNCITRAL Model Law by virtue of Section 31 of the HK Arbitration Ordinance, and Art. 17 is applied by Section 35.³⁹³ However, Art. 17J of the UNCITRAL Model Law, dealing with court-ordered interim measures, does not have effect in Hong Kong. Instead, Section 45 of the HK Arbitration Ordinance makes a more detailed explanation as to court-ordered interim measures. According to Section 45, on the application of any party, the court can grant an interim measure in aid of arbitration irrespective of whether or not the arbitral tribunal is also vested

³⁹⁰ See also Brekoulakis, Ribeiro, and Shore, in *Concise International Arbitration (2nd Ed.)*, 860.

³⁹¹ United Nations Commission on International Trade Law, “Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006,” para 30.; see also United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, 94. See, generally, on the UNCITRAL Model Law regime for interim measures in Binder, 232-275.

³⁹² See Sections 35–45, 56, 60 and 61 of the HK Arbitration Ordinance. See also, generally, Ma and Brock, 549-563.; Cheng and Moser, 133-139. for the issue of interim measures in aid of arbitration in Hong Kong.

³⁹³ In addition, Art. 17A-17G of the UNCITRAL Model Law is applicable through Sections 36-42 with no changes. As to Art. 17H dealing with the enforcement of tribunal-ordered interim measures, Section 61 has effect in substitution of it. Article 17I dealing with the grounds for refusing the enforcement, and Art. 17J on court-ordered interim measures do not have effect in Hong Kong (Art. 17J is substituted by Section 45 of the HK Arbitration Ordinance). For interim measures in Hong Kong, also Sections 61 (on the enforcement of the tribunal’s orders and directions), 56 (on general powers of the tribunal), and 60 (on the court’s powers in arbitration) are relevant.

with similar powers in relation to the same dispute. However, the court can refuse to grant the measure, if it is currently the subject of the arbitration proceeding and it considers that it is more appropriate for the tribunal to deal with this issue.

Such preference of having the arbitral tribunal deciding on an interim measure in the situation where it can be granted by both the tribunal and the court was articulated in *Leviathan Shipping Co Ltd v. Sky Sailing Overseas Co Ltd*.³⁹⁴ In this case, a Hong Kong court supported the position that the power of the state court “should be exercised sparingly, and only where there are special reasons to utilise it.”³⁹⁵ The court in this case further elaborated that such special reasons could include a situation where the arbitral tribunal does not have the power to grant all of the relief sought in a single application. In such a situation, rather than applying to the tribunal for some of the relief, and to the court for the other part, it would make more sense to file a single application to the court. Correspondingly, among the examples cited as requiring the use of the court’s power are situations wherein (1) the arbitration proceeding was commenced, but the tribunal has not been yet appointed, as well as (2) where an order would refer to non-parties.

As to the situation in Singapore, it is important to stress that Singapore adopted the 1985 version of the UNCITRAL Model Law, and Chapter IV A. of the 2006 version was not adopted there.³⁹⁶ Article 9 and Art. 17 of the UNCITRAL Model Law are applicable together with Sections 12 and 12A of the SIAA, but there some modifications.³⁹⁷ Namely, under the SIAA (Section 12A), although both the state court and the arbitral tribunal can order interim measures, a party seeking to obtain the measure should first approach the tribunal with its request. Only if the requested measure cannot be given by the tribunal, because it has no power to order it, or it is unable for the time being to act effectively, the party can turn to the court. The position that the court’s power in the area of interim measures is of a supportive nature, and is not substitutive for the tribunal’s power was confirmed by a court in *NCC International AB v. Alliance Concrete Singapore Pte Ltd.*, in which it was stated that under the

³⁹⁴ *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd*, Hong Kong Court of First Instance, 18 August 1998, [1998] 4 HKC 347.

³⁹⁵ *Ibid.* See also Ma and Brock, 561-562.; Cheng and Moser, 135-137.

³⁹⁶ Singapore decided not to adopt all of the amendments of the UNCITRAL Model Law from 2006 due to the lack of the industry support for it. Only new Art.17J was reflected in the revised version of the SIAA. See Joseph and Foxton, 225 note 2. See also the same source p. 225-260 for the general overview of interim measures in aid of arbitration in Singapore.

³⁹⁷ See Art. 9 and Art. 17 of the UNCITRAL Model Law read together with Art. 3(1) and Art. 12 & 12A of the SIAA. Section 12 of the SIAA deals in greater detail with the powers of the arbitral tribunal. Section 12A reflects the idea of Art. 17J of the UNCITRAL Model Law, however, there are some modifications.

provisions of the SIAA:

“[p]arties ought not to be allowed to bypass seeking interim measures from an arbitral tribunal merely because curial assistance is conceivably available. Rather, help from the court is to be sought only when arbitration is inappropriate, ineffective or incapable of securing the particular form of relief sought. In summary, under the IAA regime, although the court has concurrent jurisdiction with the arbitral tribunal to order interim measures, the court will nevertheless scrupulously avoid usurping the functions of the arbitral tribunal in exercising such jurisdiction and will only order interim relief where this will aid, promote and support arbitration proceedings.”³⁹⁸

The court in this case further pointed that the instances where a party can turn to the court include: the situations where non-parties are involved, where matters are very urgent, or where the coercive power is required for the sake of enforcement. Finally, under Section 12A(7) of the SIAA, a court’s order in the area of interim measures should cease to have effect if the tribunal makes an order that expressly relates to the order given by the court. This division of power was dictated by the approach of the Singaporean legislator to reduce the role of the state court to primarily support arbitration with interim measures, if genuinely needed.³⁹⁹

Free or restricted choice between the court and the arbitral tribunal?

Although both the arbitral tribunal and the state court are given the power to order interim measures in aid of arbitration, there are various positions as to whether both of them could be approached in any instance and a party is truly free to make a choice, or whether there should be a priority given to the tribunal and the court plays only a supportive role in cases where the tribunal cannot act fully effectively. There are arguments to support both of these positions. As to the free choice approach, the main advantage is the fact that the parties can decide which forum they find to be more practicable in a particular case. On the contrary, it is argued that a free choice between the fora goes against the parties’ choice of arbitration as a method to resolve disputes, and can lead to abuses.⁴⁰⁰

While acknowledging the arguments listed above, the position of this thesis is that offering the parties

³⁹⁸ *NCC International AB v. Alliance Concrete Singapore Pte Ltd.*, 26 February 2008, Court of Appeal [2008] SGCA 5. See also Joseph and Foxton, 257-260.

³⁹⁹ Chan Leng Sun, "The International Arbitration Act of Singapore," *Official website of the Singapore Chamber of Maritime Arbitration* (October 2015): 5, http://www.scma.org.sg/pdf/rules_iaa.pdf. (last accessed: 20 November 2018).

⁴⁰⁰ Yesilirmak, *Provisional Measures in International Commercial Arbitration*, 87-89.

a free choice between the arbitral tribunal and the court for the purpose of obtaining interim measures in aid of arbitration is the preferred one. It increases the probability of tackling various individual situations in arbitration and as such, can help to make the arbitration proceeding even more effective. If the parties are concerned with the courts' involvement, they should be allowed to exclude or limit the relevant powers by agreement. It should be also noted that the tribunal has some tools to discourage the abusive recourse to the court. This includes reflecting such abusive practices in the decision on the costs of arbitration.

The restricted approach can result in problems in practice. By way of example, in case a party applies to the court, but the court finds that it should not assume jurisdiction and sends the applicant back to the tribunal, this can pose a risk of an unwanted waste of time, which is particularly problematic, where the urgency plays a critical role. Another possible uncertainty refers to precluding the power of the court where an emergency arbitrator mechanism, which is discussed immediately below, is available. That seems to be against the intention of the arbitration rules' drafters, which is to offer the parties more, and not less, choices through the incorporation of the emergency arbitrator solution to the rules.⁴⁰¹

Recent development: emergency arbitrator

An emergency arbitrator is an arbitrator who gets appointed in the situation, where an arbitral tribunal has not been yet constituted, but there is an urgent need for an interim measure. The emergency arbitrator decides specifically the matter of interim measure, and his or her decision can be revised by a subsequently appointed tribunal.⁴⁰² The mechanism of an emergency arbitrator has been adopted by numerous leading arbitration institutions. This includes: the HKIAC, the SIAC, as well as the Chinese leading arbitration institutions, like CIETAC and the BAC.⁴⁰³

By way of example, the HKIAC Rules introduced the provisions on the emergency arbitrator to its rules

⁴⁰¹ See Ben Knowless and Will Land, "Emergency Relief: Court or Tribunal? Your Options May Be More Limited Than You Thought," *Kluwer Arbitration Blog* (22 October 2016), <http://arbitrationblog.kluwerarbitration.com/2016/10/22/emergency-relief-court-or-tribunal-your-options-may-be-more-limited-than-you-thought/>. (last accessed: 20 November 2018).

⁴⁰² See more on the mechanism of an emergency arbitrator in Born, 2451-2454.; Patricia Shaughnessy, "The Emergency Arbitrator," in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer*, ed. Patricia Shaughnessy and Sherlin Tung (Kluwer Law International, 2017).; Waincymer, 672-676.; Yesilirmak, *Provisional Measures in International Commercial Arbitration*, 114-157.

⁴⁰³ See Schedule 4 of the 2018 HKIAC Rules, Art. 30 of the 2016 SIAC Rules, Art. 23(2) of the 2015 CIETAC Rules, and Art. 63 of the 2015 BAC Rules.

in 2013. Schedule 4 of the following version of the rules, the 2018 HKIAC Rules, is dedicated to the emergency arbitrator procedure. The opening paragraph 1 prescribes that “[a] party requiring Emergency Relief may submit an application for the appointment of an emergency arbitrator to HKIAC (a) before, (b) concurrent with, or (c) following the filing of a Notice of Arbitration, but prior to the constitution of the arbitral tribunal.” As to some procedural details, if the HKIAC decides that it should accept an application for an emergency arbitrator, it should appoint the emergency arbitrator within 24 hours after receipt of both the application and application deposit. Further, the emergency arbitrator should make a decision, in principle, within 14 days from when the HKIAC transmitted the files to him or her.⁴⁰⁴

The SIAC introduced the emergency arbitrator mechanism in 2010. The most recent version of the SIAC Rules from 2016 prescribes in Schedule 1 the procedural aspects of an emergency relief. Section 1 of this Schedule defines, in a way similar to the HKIAC, that “[a] party that wishes to seek emergency interim relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, file an application for emergency interim relief with the Registrar.” Further, as to some procedural aspects, if the SIAC finds that an application for an emergency arbitrator should be accepted, the emergency arbitrator should be appointed within one day of the receipt of the application and related fees by the SIAC Registrar. Within two days of his or her appointment, the emergency arbitrator should establish a schedule, which will provide the parties with a reasonable opportunity to be heard. This can include a proceeding by telephone, video conference, or in a form of written submissions. A decision of the emergency arbitrator should be, in principle, made within 14 days from the date of his or her appointment.⁴⁰⁵

The emergency arbitrator mechanism is, in general, seen as a positive development.⁴⁰⁶ Although it is perhaps too early to talk about specific trends in this area, in the early years of practice, some data is already available. The SIAC reported to receive and accept 19 applications to appoint the emergency

⁴⁰⁴ See Schedule 4 of the 2018 HKIAC Rules.

⁴⁰⁵ See Schedule 1 of the 2016 SIAC Rules. See also Eric Lai, "SIAC 2016 Rules: The Key Changes," *Singapore International Arbitration Blog* (11 July 2016), <https://singaporeinternationalarbitration.com/2016/07/11/siac-2016-rules-the-key-changes/>. (last accessed: 20 November 2018).

⁴⁰⁶ See, for example, Christopher Boog, "Swiss Rules of International Arbitration – Time to Introduce an Emergency Arbitrator Procedure?," *ASA Bulletin* (2010), 462 *et seq.*; Jan Schäfer, "Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter IV: Jurisdiction of Arbitral Tribunal," in *Arbitration in Germany: The Model Law in Practice (2nd Ed.)*, ed. Karl-Heinz Böckstiegel, Stefan Kröll, and Patricia Nacimiento (Kluwer Law International, 2015), 236-237. But also see some concerns over the emergency arbitrator mechanism in Eun Young Park and Joel Richardson, "Rush to Judgment: Speed V Fairness in International Arbitration," *Asian Dispute Review* 2016, no. 4 (2016), 74 *et seq.*

arbitrator in 2017, which brings the total number of the applications accepted by the SIAC to 72 since the introduction of the mechanism.⁴⁰⁷ The HKIAC received four emergency arbitrator applications in 2017, which gives a total of 12 applications as of the date of publishing of the statistics.⁴⁰⁸

B. Enforcement of interim measures ordered by the arbitral tribunal

As to the power of the tribunal to order interim measures in aid of arbitration, one important issue needs to be stressed. Namely, even if this power is given to the tribunal under applicable law, this can be of a limited use if the tribunal's order is not adequately supported by the court helping with its enforcement – in case this is needed. The support of the court can be important, because, as mentioned, the tribunal is not equipped with coercive powers to force a party to do or to refrain from doing something.

Despite this lack of coercive powers, however, the tribunal, being the ultimate adjudicator in arbitration, has some tools to press the parties to obey its orders. In particular, it can draw an adverse inference from the actions taken or not taken by a party against which the measure is directed, and subsequently reflect this in the final award.⁴⁰⁹ This itself can be a severe consequence and, thus, the parties normally prefer to obey the tribunal's orders. Yet, there might be instances, when a measure granted by the tribunal needs to be actually enforced, and the adverse inference is not a fully satisfactory solution. In cases where an interim measure really matters, the parties may risk the consequence of drawing an adverse inference by the tribunal for obtaining the countervailing benefits. For example, this could happen in a case where the core of a dispute pertains to the ownership of a disputed property, which cannot be easily reclaimed after it is already transferred to a third party.⁴¹⁰ Therefore, in some instances, the effectiveness of an interim measure ordered by the arbitral tribunal can ultimately depend on the approach of the court in facilitating its enforcement.

⁴⁰⁷ Singapore International Arbitration Centre, 17.

⁴⁰⁸ The official website of the HKIAC: <http://www.hkiac.org/about-us/statistics> (last accessed: 20 November 2018).

⁴⁰⁹ See more on the issue of an adverse/negative inference in international commercial arbitration in Waincymer, 775-778.; Born, 2391-2393.; Simon Greenberg and Felix Lautenschlager, "International Commercial Arbitration, Chapter 9: Adverse Inferences in International Arbitral Practice," in *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, ed. Stefan Kröll, Loukas Mistelis et al. (Kluwer Law International, 2011), 179 *et seq.*; Yesilirmak, *Provisional Measures in International Commercial Arbitration*, 241-242.

⁴¹⁰ Born, 2248, 2460. See also, Chester Brown, "The Enforcement of Interim Measures Ordered by Tribunals and Emergency Arbitrators in International Arbitration," in *International Arbitration: The Coming of a New Age?*, ed. Albert Jan van den Berg (International Arbitration: The Coming of a New Age?: ICCA Congress Series, 2013), 287.; Yesilirmak, *Provisional Measures in International Commercial Arbitration*, 238-240.

a. UNCITRAL Model Law

The UNCITRAL Model Law provides for the court support in enforcing interim measures granted by the arbitral tribunal. Under the 2006 version of the UNCITRAL Model Law, an interim measure can have a form of an order or an award. Article 17H provides that a tribunal-ordered interim measure, regardless of the form in which it is issued, should be recognized as binding and enforced by the court upon the party's application, unless there are grounds to refuse the recognition and enforcement, as prescribed by the Art. 17I. Furthermore, a party seeking to enforce the measure (or has already enforced it) is obliged to promptly inform the court about any termination, suspension, or modification of that measure, so that the court can terminate, suspend, or modify the measure accordingly. Additionally, the court before which the enforcement is sought can order security in cases where the tribunal has not yet decided on the security, or if such a decision is necessary to protect the rights of third parties.⁴¹¹

Article 17I of the UNCITRAL Model Law prescribes the “only” grounds under which the recognition and enforcement of tribunal-ordered interim measures can be refused by the court. These grounds have been largely modeled on Art. 36 of the UNCITRAL Model Law addressing the grounds for refusing the recognition and enforcement of arbitral awards, and they include: (1) those at the request of the party against which the measure is directed, and (2) those upon the finding of the court. Notably, the word “only” was used when listing the grounds in order to stress that the circumstances under which the court can refuse the enforcement are limited to those provided in the provision. Also, the drafters of the UNCITRAL Model Law added a footnote to the title of Article 17I, which is addressed to prospective legislators who intend to enact a law based on the Model Law. The footnote informs that the conditions provided in Art. 17I “are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure” and further that “[i]t would not be contrary to the level of harmonization sought to be achieved [...] to adopt fewer circumstances in which enforcement may be refused”.⁴¹²

The first category of grounds for refusal refers to situations where: (1) reasons to refuse the recognition and enforcement of arbitral awards exists (as prescribed by Art. 36(1)(a)(i), (ii), (iii) and (iv) of the UNCITRAL Model Law, which include: the invalidity of an arbitration agreement, incapacity of

⁴¹¹ See more on the legislative history of Art. 17H of the UNCITRAL Model Law in Holtzmann *et al.*, 183-184.

⁴¹² This proposition was modeled on the footnote accompanying Art. 35(2) of the UNCITRAL Model Law, which deals with the recognition and enforcement of arbitral awards.

any party to the arbitration agreement, lack of a proper notice of the appointment of arbitrators or arbitration proceeding or any other inability to present its case by the party, a decision exceeding the scope agreed by the parties, the composition of the tribunal or the procedure not in line with the parties' agreement); (2) the requirement of providing security has not been complied with; as well as (3) the measure has been terminated or suspended by the tribunal or, where so empowered, by the court of the seat of arbitration or under the law under which the measure was granted.

The second category of the grounds includes situations, where the court finds that: (1) an interim measure is incompatible with the powers conferred upon it, unless the court decides to reformulate the measure to make it enforceable without modifying the substance of it; and (2) any of the grounds provided by Art. 36(1)(b)(i) or (ii) of the UNCITRAL Model Law applicable to the recognition and enforcement of an interim measure exists (which means that a subject-matter of a dispute is non-arbitrable under the law of the enforcing state, or the recognition and enforcement of an award would be contrary to the public policy of the enforcing state). It is stressed in Art. 17H(2) that the court dealing with the enforcement should not review the substance of an interim measure.

b. Hong Kong and Singapore

In Hong Kong, Article 17H of the UNCITRAL Model Law dealing with the recognition and enforcement of tribunal-ordered interim measures is replaced by Section 61 of the HK Arbitration Ordinance. According to Section 61, an interim measure granted by the tribunal in a form other than an award will be enforceable in the same manner as an order or direction of the court that has the same effect, but only with the court's permission. Further, the court's decision as to whether it grants such permission is not appealable.

In addition, Section 53(3) of the HK Arbitration Ordinance provides that in case of the party's failure to comply with the tribunal's order or direction, the tribunal can make a peremptory order prescribing the time for compliance. Then, in case of a failure to comply with such a peremptory order, without affecting Section 61, the tribunal may decide that a party is not entitled to rely on any allegations or material that was the subject matter of a particular peremptory order. The tribunal can also draw an adverse inference from the non-complying behavior, render an award based on materials available, as well as reflect the non-complying behavior when allocating the proceeding costs.

As to the enforcement of interim measures granted in the form of an award, the regime for the

enforcement of arbitral awards (Section 84 of the HK Arbitration Ordinance) applies.⁴¹³ Accordingly, Art. 17I of the UNCITRAL Model Law prescribing the grounds based on which the enforcement of an interim measures can be refused was not adopted in Hong Kong.

Concerning the situation in Singapore, as to the form of tribunal-granted interim measures, the 1985 version of the UNCITRAL Model Law is silent. However, Section 12(1) and Section 12(6) of the SIAA stipulate that these should have the form of an order (or direction). The 1985 version of the UNCITRAL Model Law also does not provide for the enforcement regime. Yet, Section 12(6) of the SIAA fills this gap, and provides that all orders or directions made or given by the tribunal in the course of arbitration, which includes interim measures, shall by permission of the court be enforceable in the same manner as if they were orders made by the court.⁴¹⁴

As to the enforceability of interim measures ordered by an emergency arbitrator, the UNCITRAL Model Law does not specifically address this issue. This is because the last version of the UNCITRAL Model Law was adopted in 2006, which was at the time when the emergency arbitrator mechanism was adopted in the pioneering institutional rules. In practice, a number of issues have been raised as to the enforcement of emergency arbitrator decisions, and this has resulted in some level of uncertainty. One of the central uncertainties pertains to the issue of whether an emergency arbitrator should be considered to be an arbitral tribunal for the sake of enforcement.⁴¹⁵

In order to facilitate the enforcement of the measures granted by emergency arbitrators, some jurisdictions, including Hong Kong and Singapore, revised their laws in order secure their enforceability. In Hong Kong, Part 3A titled "Enforcement of Emergency Relief" was added to the HK Arbitration Ordinance in 2013. Section 22B of this part provides that the emergency relief granted both in and outside of Hong Kong by an emergency arbitrator is enforceable in the same manner as an order or direction of the court that has the same effect, on condition that that the court's permission is

⁴¹³ See Kaplan and Morgan, in *ICCA International Handbook on Commercial Arbitration*, 58. and Section 35(3) of the HK Arbitration Ordinance.

⁴¹⁴ See Joseph and Foxton, 236-239.

⁴¹⁵ See, for example, Brown, in *International Arbitration: The Coming of a New Age?*, 286-287.; Paata Simside, "Indirect Enforceability of Emergency Arbitrator's Orders," *Kluwer Arbitration Blog* (15 April 2015), <http://arbitrationblog.kluwerarbitration.com/2015/04/15/indirect-enforceability-of-emergency-arbitrators-orders/>. (last accessed: 20 November 2018); Born, 2521-2522. Among other issues raising the controversy around the enforcement of the interim measures granted by an emergency arbitrator is (non-)finality of such a decision.

obtained.⁴¹⁶ In Singapore, the statutory definitions of “arbitral tribunals” and “arbitral awards” in Section 2(1) of the SIAA were modified. As a result, the term “arbitral tribunals” also encompasses “emergency arbitrators”, and the decision of an emergency arbitrator should be seen as an arbitral award for the purpose of enforcement.⁴¹⁷

5.2.2. Chinese standards

A. Who has the power to order interim measures in aid of arbitration?

a. Principal role of the state court

Under the current legal regime, the Chinese court plays the major role in the area of interim measures in aid of arbitration, and not the tribunal – as envisioned by the Model Law and as implemented by model jurisdictions. Articles 28 and 46 of the CAL provide for the relevant powers of the court. Article 28 deals with property preservation, and it stipulates that if due to acts of the other party or for any other reasons, an arbitral award can be hard or impossible to be executed, a party concerned can apply for placing a property under custody. Further, it is stipulated that in case of errors in the application, the applicant is obliged to compensate the other party for the losses resulting from the measure that was granted. Article 46 of the CAL addresses evidence preservation. It prescribes that in cases where evidence is vulnerable to being destroyed or missing, and it would be hard to recover it, the party concerned can apply to place this evidence under custody.

Notably, until 2012 and the most recent amendment of the CCPL, the measures of property and evidence preservation in aid of arbitration were only available *after* the commencement of the arbitration proceeding. After 2012, however, the access has been significantly improved and as a result of the amendment, preservative measures can be now also granted *before* the arbitration proceeding starts. This matter is regulated by Art. 81 and Art. 101 of the CCPL, as amended in 2012. Further, in case of both property and evidence preservation, depending on whether a particular case is domestic or foreign-related,⁴¹⁸ different levels of courts will have the jurisdiction. In domestic proceedings – basic people’s courts, and in proceedings with a foreign element – intermediate people’s courts will

⁴¹⁶ See Kaplan and Morgan, in *ICCA International Handbook on Commercial Arbitration*, ii.

⁴¹⁷ See Joseph and Foxton, 235.

⁴¹⁸ The distinction between “domestic” and “foreign-related” arbitration cases, as well as its relevance are discussed in Chapter 2 p. 36-38.

assume the jurisdiction.⁴¹⁹

The provisions of the CAL and CCPL are silent on the power of the arbitral tribunal in the given context. Interestingly, in 1956, CIETAC in its arbitration rule no. 45 provided for the possibility of the CIETAC chairman (but not the tribunal) to order interim measures (the exact wording referring to interim measures used in this provision is: 临时办法 *lín shí bàn fǎ*).⁴²⁰ This solution was endorsed by the Central People's Government Administration Council (later "the State Council") in its decision on the Establishment of the Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade.⁴²¹ Nonetheless, the rule was subsequently modified in 1988, and as a consequence, CIETAC receives the application for an interim measures from a party and transfers it to the court that will then decide the issue. The arbitration institution will not make any decision itself.⁴²² Xing, when addressing why the wording taken by CIETAC in the arbitration rules from 1956 was abandoned later on, points to Art. 194 of the 1982 version of the Chinese Civil Procedural Law. Article 194 provided that if the arbitration institution, upon the application of a party, finds it necessary to take preservative measures, it needs to request an order from a relevant intermediate people's court.⁴²³

b. Limited role of the arbitral tribunal

Despite the principal role of the state court in ordering interim measures in aid of arbitration, two

⁴¹⁹ Regulation of the Supreme People's Court on the Issues of Enforcement, Fa Shi [1998] No. 15, issued on 8 July 1998, effective from 18 July 1998; [最高人民法院关于人民法院执行工作若干问题的规定（试行），法释（1998）15号，颁布时间：1998年7月8日，实施时间：1998年7月18日].

⁴²⁰ See Zhang, "Towards the UNCITRAL Model Law - A Chinese Perspective", 112.; see the original rule from 1956, Art. 45 of the Interim Rules on Arbitration Proceeding; 《仲裁程序暂行规则》第十五条规定：“仲裁委员会主席依一方当事人的声请，对同当事人有关的物资、产权等可以规定临时办法，以保全当事人的权利。” [translation by the author of this thesis: “In order to preserve the rights of the parties, the chairman of the arbitration commission on the application of a party can order interim measure directed against the relevant property.”]

⁴²¹ Art. 8 of the Decision on the Establishment of the Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade by the Central People's Government Administration Council from 1956; [1956 中央人民政府政务院《关于在中国国际贸易促进委员会内设立对外贸易仲裁委员会的决定》，第八条：“仲裁委员会审理争议案件时，为保全当事人之权利，对与当事人有关的物资、产权等得规定临时办法。”]; [translation by the author of this thesis: “In order to protect the rights of the parties, arbitration commission in deciding the dispute will order interim measure directed against the relevant property.”]

⁴²² See Art. 13 of the CIETAC Arbitration Rules (1988 edition), effective from 1 January 1989; [中国国际经济贸易仲裁委员会仲裁规则 (1988年版), 实施时间：1989年1月1日].

⁴²³ Xiusong Xing, "Revision of CIETAC Arbitration Rules: Interim Measures in the Arbitration Proceeding [Original Title: 贸仲仲裁规则的修改：仲裁程序中的临时措施]," (1 December 2011), http://blog.sina.com.cn/s/blog_8c0346950100vtn2.html. (last accessed: 20 November 2018).

issues are worth noting when investigating the arbitral tribunal's power to order interim measures in China. One of the issues pertains to developments of the leading Chinese arbitration institutions through which the power was given to the tribunal by the arbitration rules. The other one relates to particular types of interim measures that can be potentially ordered by the tribunal.

i. Developments of the Chinese arbitration institutions

Similar to the distribution of power in the area of jurisdictional objections (as discussed in Chapter 4),⁴²⁴ also in the area of interim measures in aid of arbitration, the leading Chinese arbitration institutions have gradually taken steps to introduce into China solutions commonly accepted elsewhere in international commercial arbitration. More specifically, the power to order interim measures was given to the arbitral tribunal by institutional rules. By way of example, Art. 23(3) of the 2015 CIETAC Rules stipulates that at the request of a party, the tribunal can decide to order *any* interim measure it deems necessary or proper (emphasis added). Article 62(1) of the 2015 BAC Rules, which is applicable to international commercial arbitration proceedings, provides for a similar solution.⁴²⁵ As discussed in Chapter 4, there is a question of the compatibility of such institutional provisions with the CAL.⁴²⁶ Nonetheless, it seems that the use of this conferral of power is limited in practice. Case in point is the findings of the China Arbitration Survey, wherein a large majority of the respondents reported that they have never experienced a scenario where the tribunal would order property or evidence preservation.⁴²⁷

Another recent innovation introduced by the leading arbitration institutions in China is to permit the actions of an emergency arbitrator. Both Art. 23(2) of the 2015 CIETAC Rules and Art. 63 of the 2015 BAC Rules applicable to international proceedings offer this possibility. Yet, again, although the option of recourse to the emergency arbitrator is prescribed in the arbitration rules, in fact, it seems to be of limited use in practice.⁴²⁸ It is rather suggested that the introduction of the emergency arbitrator

⁴²⁴ See Chapter 4 p. 81-84.

⁴²⁵ Art. 62(1) of the 2015 BAC Rules: "At the request of the parties, the Arbitral Tribunal may order any interim measures it deems appropriate in accordance with the applicable law. An order for interim measures may take the form of a decision of the Arbitral Tribunal, an interim award [Article 49], or any other form permitted by the applicable law. Where necessary, the Arbitral Tribunal may require the requesting parties to provide appropriate security."

⁴²⁶ See Chapter 4 p. 83-84.

⁴²⁷ See Chapter 9 on the China Arbitration Survey p. 198, as well as Appendix 1 p. 288.

⁴²⁸ On 1 September 2018, Sun reported about the first emergency arbitration case requested by a claimant in China. See Wei Sun, "First Emergency Arbitrator Proceeding in Mainland China: Reflections on How to Conduct an EA Proceeding from Procedural and Substantive Perspectives," *Kluwer Arbitration Blog* (1 September 2018),

mechanism was aimed at targeting the proceedings using these institutional rules, but taking place outside of mainland China, in the jurisdictions endorsing the actions of emergency arbitrators, such as Hong Kong or Singapore.⁴²⁹ Yu Jianlong, the past vice-chairman and secretary-general of CIETAC, when explaining the importance of having the emergency arbitrator mechanism in the CIETAC Rules, pointed to the fact that it not only helps to protect the parties' lawful rights, but also resembles a cornerstone of arbitration – the party autonomy and, thus, is an essential supplement to court-ordered interim measures.⁴³⁰ Interestingly, three out of 58 respondents to the China Arbitration Survey reported to witness the interim measure granted by an emergency arbitrator in China, which is more than expected in light of the above discussion.⁴³¹

ii. Limited types of interim measures that can be ordered by the arbitral tribunal

Despite the fact that various types of interim measures that can be granted in aid of arbitration are not the main issue dealt with in this Chapter, this aspect has some relevance to the distribution of power in China. Namely, although the *property* and *evidence preservation* are, indeed, beyond the reach of the arbitral tribunal in China, the tribunal should be able to order other types of interim measures.

Xing separates the measures of property and evidence preservation from other activities in the nature of interim measures, such as requiring the parties to a joint venture company in dispute not to distribute profits.⁴³² Xing argues that the term "preservation measure" (保全措施 *bǎo quán cuò shī*), used in the CAL in reference with property preservation (财产保全 *cái chǎn bǎo quán*) and evidence preservation (证据保全 *zhèng jù bǎo quán*), does not equal a more general term of "interim measure" (临时措施 *lín shí cuò shī*). Therefore, in light of the current legal framework, deciding on property preservation and evidence preservation is, indeed, in the exclusive competence of the Chinese court. Yet, any measure that is not property or evidence preservation should be then available for the tribunal

<http://arbitrationblog.kluwerarbitration.com/2018/09/01/first-ea-proceeding-mainland-china-reflections-conduct-ea-proceeding-procedural-substantive-perspectives/>. (last accessed: 20 November 2018).

⁴²⁹ Arthur Dong, "Interim Measures in Support of Commercial Arbitration in China," *Lexis®PSL Arbitration* (2015), https://www.lexisnexis.com/uk/lexispsl/arbitration/document/407801/5F5W-TWC1-DXSN-650F-00000-00/Interim_measures_in_support_of_arbitration_in_China. (last accessed: 20 November 2018)

⁴³⁰ See Sun and Willems, 435-436.

⁴³¹ See Chapter 9 on the China Arbitration Survey p. 198, as well as Appendix 1 p. 289.

⁴³² See, for example, the CIETAC's practice in Xing. (last accessed: 20 November 2018).

to decide on.⁴³³

Lu comes to a similar conclusion when analyzing the introduction of the power of the arbitral tribunal to order interim measures in the 2012 CIETAC Rules. In a similar spirit, Lu argues that Art. 21 of the 2012 CIETAC Rules⁴³⁴ does not contradict the CAL, because the CAL explicitly addresses only two types of interim measures – property and evidence preservation – as being assigned to the competence of the court. Hence, other types of interim measures⁴³⁵ should be in the reach of the tribunal, when the tribunal deems it is necessary or proper to use them.

In addition, Cao points to Art. 43 and Art. 44 of the CAL, which provide for the possibility to investigate the facts of a dispute by the tribunal as the justification for some of measures that should be in the reach of the tribunal. Cao suggests also that in the practice of CIETAC, some investigative measures (such as an appraisal or inspection of the quality of disputed contractual goods) are frequently ordered by the tribunals in China.⁴³⁶

Nonetheless, it is important to stress that preservation measures, including property and evidence preservation, lie at the heart of interim measures in arbitration and can play an important role in the arbitration proceeding. This is because these measures are aimed at preserving property for the subsequent realization of the arbitral award, or at preserving evidence that is important for proving the case facts – if there is a risk that these can be lost or difficult to obtain in the future. However, as seen, these measures cannot be effectively ordered by the tribunal in China, and as of today, only the state court can do that.

⁴³³ *Ibid.*

⁴³⁴ Art. 21 of the 2012 CIETAC Rules (which is similar to Art. 23(1)(3) of the 2015 CIETAC Rules):

“1. Where a party applies for conservatory measures pursuant to the laws of the People’s Republic of China, the secretariat of CIETAC shall forward the party’s application to the competent court designated by that party in accordance with the law.

2. At the request of a party, the arbitral tribunal may order any interim measure it deems necessary or proper in accordance with the applicable law, and may require the requesting party to provide appropriate security in connection with the measure. The order of an interim measure by the arbitral tribunal may take the form of a procedural order or an interlocutory award.”

⁴³⁵ Lu refers to, among others, maintaining or restoring the *status quo* pending the determination of dispute as provided by Art. 17 of UNCITRAL Model Law. See Song Lu, "The New CIETAC Arbitration Rules of 2012," *Journal of International Arbitration* 29, no. 3 (2012), 306-308.

⁴³⁶ Lijun Cao, "Interim Measures of Protection in the Context of Arbitration in China," *International Arbitration Law Review* 8, no. 3 (2005), 109.

c. Participation of the arbitration institution

According to the provisions of the CCPL, if a party seeks to apply for evidence preservation before the arbitration proceeding starts, it has to go directly to a people's court that has jurisdiction. However, after the arbitration proceeding commences, the party needs to submit its request for an interim measure to the arbitration institution (but not the arbitral tribunal). The arbitration institution itself does not decide on the fate of the measure. Its role is merely reduced to being a "postman" forwarding the party's application to the court. The practice is that the arbitration institution does not consider the appropriateness of the application, but attaches to the party's application a letter that explains the matter, entrusts the decision to the court, and informs the court that in case any further information is needed, it can be obtained directly from the parties.⁴³⁷ Subsequently, the court makes a decision as to whether or not it should grant an interim measure.⁴³⁸

B. Enforcement of the interim measure granted by the arbitral tribunal

As noted above, the CAL and the CCPL do not address the power of the arbitral tribunal in the area of interim measures. Correspondingly, there is no relevant legislative framework for the enforcement of the measures granted by the tribunal.⁴³⁹ Therefore, even despite the efforts of the leading arbitration institutions in China, which have given the arbitral tribunal the relevant powers, if the enforcement of property or evidence preservation is to be sought in China, the power vested under the institutional rules will not be fully realized. Similarly, there is no regime for the enforcement of the measures ordered by emergency arbitrators. As such, the above discussed developments introduced by the institutions can be effectively used only beyond China, in jurisdictions that (1) recognize the arbitral tribunal's power to order interim measures, and (2) have the state courts ready to assist with the enforcement, if needed. As to the measures other than property and evidence preservation, which, as argued above, can be potentially ordered by the tribunal, an answer to the question of whether these measures can count on the coercive support of the Chinese court is not fully clear.

⁴³⁷ *Ibid.*, 107.

⁴³⁸ See Art. 81, 101, 102, 272 of the CCPL.

⁴³⁹ Yuen, McDonald, and Dong, 166.

5.2.3. Criticism of the Chinese law and practice

A. Denial of the power of the arbitral tribunal to order interim measures and the lack of the courts' support for the enforcement of tribunal-ordered measures

The denial of the tribunal's power to order interim measures in China is perceived as one of the biggest deficiencies of the Chinese arbitration system and a fundamentally defective solution reflecting "China's long-rooted distrust in arbitration".⁴⁴⁰ It is important to stress that although some of the measures can be ordered by the tribunal, the principal measures of property and evidence preservation are beyond the tribunal's reach.

Over two-thirds of the respondents to the China Arbitration Survey expressed dissatisfaction with the current regulation in the area of interim measures in aid of arbitration in China. As to the reasons for dissatisfaction, almost the full two-thirds pointed to the limited powers of the tribunal in ordering interim measures. This was followed by 15% of the respondents pointing to the limited types of interim measures available in China, and 10% citing the lack of possibility to apply for an interim measure directly before the court once the arbitration proceeding started.⁴⁴¹

A debate on the reasons why China entrusts the power to order interim measures exclusively to the court, to some extent, centers on a traditional view that matters pertaining to interim measures, which in nature are coercive measures, should be reserved for state courts only.⁴⁴² However, as discussed above, this view has been almost universally abandoned, because when the tribunal issues a relevant order (or an award), and the party against which the measure is directed does not comply, the tribunal still does not have the power to coerce the compliance. The coercive enforcement can only be obtained through the involvement of the court. The question is merely in which forum is the initial decision made. As such, the legislation denying the tribunal's right to order interim measures is characterized as "antique domestic legislation harking back to a time when the power to grant such measures was considered to be a prerogative of the national courts for public policy reasons".⁴⁴³

As argued above, the arbitral tribunal is in a good position to order interim measures in arbitration, in

⁴⁴⁰ Manjiao Chi, "Are We "Paper-Tigers": The Limited Procedural Power of Arbitrators under Chinese Law," *Journal of Dispute Resolution* 2011, no. 2 (2011), 279. See also Chi, "Is It Time for Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law," 154-155; Thorp, 612.

⁴⁴¹ See Chapter 9 on the China Arbitration Survey p. 199, as well as Appendix 1 p. 297-298.

⁴⁴² Yuen, McDonald, and Dong, 171.

⁴⁴³ Redfern and Hunter, 421.

particular, because of its familiarity with the circumstances of a particular case. Besides, arbitrators, generally, feel the need to have the power to order interim measures, and they prefer to have it for the sake of the overall efficiency of the arbitration proceeding.⁴⁴⁴ The findings of the China Arbitration Survey show that the same refers to the arbitrators in China. The arbitrators with the experience of hearing the cases seated in China, when asked whether they would feel competent to order interim measures in the China-seated proceedings, in a great majority of cases answered that they, indeed, would feel so. Similarly, a large majority of the survey respondents expressed the view that the overall situation of proceedings can improve if the tribunal can effectively decide on interim measures in China.⁴⁴⁵

Certainly, even in the rather limiting environment of the CAL, the tribunal is not entirely powerless, and at least theoretically, it still can order the party to do or not to do something. This is, however, with the awareness that the consequences of the tribunal's order will be limited to drawing an adverse inference in case of the non-compliance, because the assistance of the Chinese courts in enforcing the measure would most likely be unavailable. Yet, a pertinent question is whether arbitrators (especially those with limited experience with interim measures in arbitration), aware of the limitations of the Chinese system, would be eager to order such measures – even for the sake of an adverse inference? As supported by the China Arbitration Survey, an answer to this question is – perhaps not.⁴⁴⁶

In addition, Zheng argues that the lack of power of the arbitral tribunal to order interim measures can be disadvantageous for an arbitration proceeding conducted in China, but where an interim measure is sought abroad. Zheng presents an example of the Hong Kong courts, where these courts are rather reluctant to grant an interim measure in support of foreign arbitration, if a relevant application is not first approved by the tribunal deciding the case. It is realistic to conclude that the Chinese tribunals, aware of their limited powers in the area discussed, would be reluctant to take actions such as endorsing the application for an interim measure sought abroad in a case seated in China.⁴⁴⁷

As suggested by Gu, one of the signals that the courts in China do not feel fully competent or comfortable with deciding on interim measures in aid of arbitration is the fact that the courts

⁴⁴⁴ Born, 2461-2462.

⁴⁴⁵ See Chapter 9 on the China Arbitration Survey p. 199, as well as Appendix 1 p. 291.

⁴⁴⁶ See Chapter 9 on the China Arbitration Survey p. 198, as well as Appendix 1 p. 288.

⁴⁴⁷ Patrick Zheng, "China: The Achilles Heel of China Arbitration?," *International Financial Law Review* (2011), <http://www.iflr.com/Article/2836687/China-The-Achilles-heel-of-China-arbitration.html>. (last accessed: 20 November 2018).

commonly ask for security when ordering these measures. It is done to ensure that a wrongly granted measure can be then compensated.⁴⁴⁸ In the process of an application for an interim measure made before the arbitration proceeding commences, an applicant *must* provide security. Otherwise, the application will be rejected by the court. In case of an application upon the commencement of arbitration, the court *may* ask for security. In practice, however, security is commonly required by the Chinese courts.⁴⁴⁹ Such routine security, in practice often up to the amount of the property to be preserved, can be also seen as an additional discouragement in applying for an interim measure. In addition, on a practical note, one needs to keep in mind that the local courts' expectations toward the standards of the application for an interim measure can (and in practice often do) vary from province to province, from court to court in China.⁴⁵⁰ Therefore, getting legal advice from local lawyers in the place where the measure is to be obtained is often necessary. This may also be seen as a disincentive when considering the application.

B. Inability of the parties to apply for interim measures directly to the court after arbitration commences

One other problem pertains to the inability of the parties to apply for an interim measure directly before the court after arbitration commenced. The application needs to go through the arbitration institution, which will then forward it to the court. Although neither the provisions of the CAL nor the provisions of the CCPL explicitly prohibit the parties from applying for an interim measure directly before the court, the judicial practice in China shows that in reality, the parties are limited in doing that. Chi offers an example of the Higher Court of Shanghai, which clearly declared that a direct application of the party to the court for the issuance or termination of an interim measure should be rejected.⁴⁵¹

⁴⁴⁸ Weixia Gu, "Arbitration in China," in *International Commercial Arbitration in Asia*, ed. Tim Ginsburg and Ali Shahla (2013), 109. See also Song Lu, "National Report for China (2018)," in *ICCA International Handbook on Commercial Arbitration, (Supplement No. 80)*, ed. Jan Paulsson and Lise Bosman (Kluwer Law International, 2018), online access.

⁴⁴⁹ See Jingzhou Tao, "Arbitration Law of the PRC," in *Concise International Arbitration (2nd Ed.)*, ed. Loukas A. Mistelis (Kluwer Law International, 2015), 940.; Lu, "National Report for China (2018)," in *ICCA International Handbook on Commercial Arbitration, (Supplement No. 80)*, online access. See also Art. 152 of the 2015 Interpretation confirming that in case of the pre-commencement proceeding, an applicant for property preservation *must*, and in the post-commencement proceeding *can* be asked to provide security. The amount of security is in the discretion of the court – and might be up to the amount under the application for preservation.

⁴⁵⁰ Sun and Willems, 186. note 7.

⁴⁵¹ Chi, "Is It Time for Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law," 154. See the Opinion on Certain Issues of the Enforcement of Chinese Arbitration Law by the Higher People's Court of Shanghai Municipality, issued on 3 January 2001, effective from 1 February 2001; [上海市高级人民法院关于印发《上海市高级人民法院关于执行〈中华人民共和国仲裁法〉若干问题的处理意见》的通知（沪高法（2001）49号），颁布时间：2001年1月3日，实施时间：2001年2月1日]。

As to the usefulness of the postman role performed by the arbitration institutions forwarding the applications for interim measures, opinions of the respondents to the China Arbitration Survey varied. Over the half of the respondents expressed the opinion that it is not needed, 31% of the respondents held the opposite view, and the remaining part had no particular opinion on that issue.⁴⁵²

Interestingly, Cao discusses the potential reasonableness of an extended role of the arbitration institution in the process of applying for an interim measure. Cao elaborates on the question whether the institution should possibly scrutinize the application. According to Cao, a part of the Chinese judiciary finds the present postman solution under the CAL senseless.⁴⁵³ Cao supports it with a CIETAC case concerning a Sino-foreign joint venture company. In that case, a foreign company (respondent) applied to CIETAC for evidence preservation – financial books of the JV. The measure was successfully ordered by the Intermediate People's Court of Nantong. Subsequently, the court discovered that the respondent already applied for the preservation of the same evidence in another case – a local lawsuit against the JV, in which the respondent claimed its right to be informed as a shareholder. The local court had already ordered all the documents to be preserved. Du Kailin, a judge from the Intermediate People's Court of Nantong who ordered the evidence preservation, subsequently published an article in which he discussed the problems of evidence preservation in aid of arbitration in China.

Judge Du suggested that the elimination of repeated measures upon the same documents could be avoided if either the court or the arbitration institution would be required to decide on the fate of an interim measure after hearing both parties' arguments. In addition, in judge Du's eyes, the arbitration institution would be in a better position to hear the arguments of the parties and, thus, before performing its role of a postman, the institution should first examine the application's relevance and admissibility. Next, the institution should express its opinion on the appropriateness of an interim measure for the court's reference. Cao suggests that the opinion of judge Du possibly represents a major opinion among the state court judges in China.⁴⁵⁴

According to the findings of the China Arbitration Survey, almost a quarter of its respondents supported the scrutiny of the application for an interim measure by the arbitration institution before it forwards it to the court.⁴⁵⁵ Although scrutinizing the application is not recommended by the author of this thesis,

⁴⁵² See Chapter 9 on the China Arbitration Survey p. 198, as well as Appendix 1 p. 292.

⁴⁵³ Cao, 107.

⁴⁵⁴ *Ibid.*, 107-108.

⁴⁵⁵ See Chapter 9 on the China Arbitration Survey p. 198, as well as Appendix 1 p. 293.

yet, one important issue needs to be noted. Namely, the voices in China support a firm solution in either direction – the abolishment of the postman role played by the institution, or the scrutiny of the application. The regulation in the present shape seems to be of no use neither to the users of arbitration nor to the court judges deciding the matter.

Another related issue refers to the fact that the arbitration institution in forwarding the application is not bound by any time limits. Although this does not seem to be very problematic in practice, because smooth proceedings should be in the best interest of the institution's reputation, yet, the lack of time limits can constitute a potential threat to an urgent matter – as the request for an interim measure typically is. It has been reported that it can take up to a week or even more for the arbitration institution to forward the application to the court.⁴⁵⁶

All in all, Tao calls the current Chinese solution “redundant” and emphasizes that the urgency of requests for interim measures, paired with the people's courts' lack of knowledge of merits of the case, can additionally result in increased costs of the proceeding.⁴⁵⁷

C. Remaining observations

The current regulation in the area of interim measures in aid of arbitration in China is believed to be a copy of traditional mechanisms designed for the civil court proceeding.⁴⁵⁸ One of the reasons cited as to why China believes that the court is in a better position to deal with interim measures than the tribunal is trust, preference, and attaching more importance to institutions rather than to individuals (here – the arbitrators) by Chinese people.⁴⁵⁹ The same logic can then apply to the situations, where the arbitration institution acts as a middleman between an applicant and a court deciding the issue. This should be also understood as the preference of the court to receive applications from the institution (the arbitration institution), and not from the individual (the individual applicant).

As the principle of party autonomy allows the parties to make their individual choices for many aspects of the arbitration proceeding, if the parties find that the arbitral tribunal is not in a good position to order interim measures, the parties can exclude such option by an agreement. Also, if the free choice

⁴⁵⁶ Fung and Wang, 199.

⁴⁵⁷ Tao, "Salient Issues in Arbitration in China," 819-820. See also Chi, "Is It Time for Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law," 155.

⁴⁵⁸ Cao, 104.

⁴⁵⁹ See Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 23-24.; Cao, 105.

between the tribunal and the court is available, the parties can turn to whomever they find to be in a better position to grant the measure. Nonetheless, as the findings of the China Arbitration Survey suggest, the stakeholders of international commercial arbitration in China prefer to have the tribunal ready to assist with interim measures in the arbitration proceeding.⁴⁶⁰

5.2.4. Recommendations

A. Providing the arbitral tribunal with the power to order interim measures

The arbitral tribunal should be given the power to effectively order interim measures in the arbitration proceeding in China, including preservative measures. This is supported by a great majority of the respondents to the China Arbitration Survey.⁴⁶¹ Further, the concurrent power to order interim measures should be given to both the tribunal and the court, and the choice of to whom to apply in a particular case should be given to the parties. Therefore, the approach of both Hong and Singapore, where once the arbitration proceeding is started, the tribunal is the preferred forum for ordering interim measures is not recommended for China. Instead, the parties should be given a free choice at any stage of the arbitration proceeding.

In support of giving the parties the free choice of fora, one other important issue is the fact that if China decides to grant the relevant power to the tribunal, it would mean the shift of power. Yang Ing Loong predicts some possible reluctance of the Chinese judges to embrace the concept that interim measures granted by the tribunal could be of equal force as the ones issued by the court, which can have an impact on the enforcement of tribunal-granted measures.⁴⁶² Therefore, it is even more important to offer the parties a free choice in order to increase the chances of securing the right to interim measures.

A number of scholars and practitioners have emphasized the competence and readiness of the arbitrators in China to decide on interim measures.⁴⁶³ Similarly, two-thirds of the respondents to the

⁴⁶⁰ See Chapter 9 on the China Arbitration Survey p. 199, as well as Appendix 1 p. 296.

⁴⁶¹ *Ibid.*

⁴⁶² Yang Ing Loong, "Provisional Measures," in *50 Years of the New York Convention: ICCA International Arbitration Conference*, ed. Albert Jan van den Berg (Kluwer Law International, 2009), 612.

⁴⁶³ See Tao, "Salient Issues in Arbitration in China," 820.; also Xiuwen Zhao and Lisa Kloppenberg, "Reforming Chinese Arbitration Law and Practices in the Global Economy," *University of Dayton Law Review* 31 (2005-2006).; Cao, 107.; Zhitao Shen, "Discussion on the Improvement of the Emergency Arbitrator System in China According to International Experience [Original Title: 从国际经验看我国紧急仲裁员制度的完善]," *Arbitration Reserach [仲裁研究]* 38 (2015): 83-85.

China Arbitration Survey were of the opinion that the tribunal is in the best position to order these measures in China. Further, 22% of the respondents pointed to the state court, and a few of the respondents chose the arbitration institution. Furthermore, as noted, the respondents, who have already acted as arbitrators in the China-seated cases, in a majority of instances reported feeling competent to order interim measures in such cases. Notably, however, the findings of the survey also present that some of the respondents with the relevant experience expressed not to feel competent to take such actions.⁴⁶⁴ This can suggest that when vesting the additional power on the tribunal in China, some level of preparation and training would be desirable.

Furthermore, equipping the tribunal with the relevant power would enhance the overall position of the Chinese arbitration institutions in a competitive international market.⁴⁶⁵ From the perspective of a foreign party, if it is to initiate an arbitration proceeding in China, and if there is a need to secure its rights via an interim measure, as of today, the first action needs to be taken before the Chinese court, and basically no alternative is available. Therefore, having the tribunal equipped with a wider range of powers would help to create a more favorable arbitration environment with more choices offered to the parties. In this respect, also the actions of an emergency arbitrator should be recognized and supported in China.

B. Establishing the enforcement regime for tribunal-ordered interim measures

Just acknowledging the power of the arbitral tribunal to order interim measures is not sufficient. It is vital that tribunal-ordered measures can be supported by the court, if needed.⁴⁶⁶ Therefore, in order to eliminate the uncertainties pertaining to the enforcement, the change, if adopted in China, should be reflected in future regulation, and a legal regime for the court assistance in enforcing such measures should be provided.

This is the approach taken in the 2006 version of the UNCITRAL Model Law in Art. 17H and 17I dealing

Also, when deciding on granting the relevant powers to the tribunal, a number of other UNCITRAL Model Law solutions can be considered by China. This includes: the conditions for ordering interim measures; possibilities of modifying, suspending and terminating the measure; requirement of security and disclosure of circumstances that can affect the measure; as well as costs and damages.

⁴⁶⁴ See Chapter 9 on the China Arbitration Survey p. 198-199, as well as Appendix 1 p. 290 & 296.

⁴⁶⁵ Xing. (last accessed: 20 November 2018).

⁴⁶⁶ See Chi, "Is It Time for Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law," 155.; Ge Liu, "UNCITRAL Model Law V. Chinese Law and Practice - a Discussion on Interim Measures of Protection," in *New Horizons in International Commercial Arbitration and Beyond*, ed. Albert Jan van den Berg, ICCA Congress Series (Kluwer Law International, 2005), 282-283.

with the recognition and enforcement of interim measures ordered by the arbitral tribunal. As to the grounds on which the court can refuse to enforce tribunal-ordered measures, those grounds should be clearly specified and limited to those grounds based on which the enforcement of an arbitral award can be refused. A clear position as to the grounds for the refusal of enforcement would help to reduce the potential reluctance of the court to support the arbitral tribunal in this regard. The court dealing with the enforcement should not review the substance of an interim measure.

In addition, it would be also useful to address the regime for the enforcement of interim measures ordered by the emergency arbitrator. It is the position of this thesis that the measures ordered by the emergency arbitrator should also be enforced in the same way the measure ordered by the regular arbitral tribunal are enforceable.⁴⁶⁷

C. Eliminating the postman role played by the arbitration institution in the process of applying for an interim measure after the arbitration proceeding commenced

One other postulate refers to the elimination of the postman role played by the arbitration institution in the process of applying for an interim measure once the arbitration proceeding is commenced. The parties should be allowed to apply to the court directly. It is recommended primarily for the sake of efficiency of the proceeding and to eliminate the risk of delay on the side of the arbitration institution transmitting the application.⁴⁶⁸

However, if the total elimination of the arbitration institution's role in this regard is not possible, some other actions should be taken. Namely, as of today, there are no time limits for forwarding the application to the court by the arbitration institution. Therefore, determining the time within which the institution needs to act, most realistically by adding the phrase "as soon as possible", would help to reduce the risk of a potential careless behavior on the side of the institution,⁴⁶⁹ but a set limit would be better. As to the implementation of this particular suggestion, the CAL does not need to be revised, and the arbitration institutions can insert such wording into their arbitration rules.

⁴⁶⁷ See also Yuen, McDonald, and Dong, 177.

⁴⁶⁸ See Fung and Wang, 201.; Chi, "Are We "Paper-Tigers": The Limited Procedural Power of Arbitrators under Chinese Law," 279.; Thorp, 612-613.

⁴⁶⁹ Thorp, 613.

D. Remaining observations

As a final point, for any course of actions taken by China in the area of distribution of power to order interim measures in aid of arbitration, the author of this thesis seeks to dispel some possible concerns that allowing the tribunal to decide on interim measures can render the whole proceeding uncontrollable. First, the arbitral tribunal does not have the authority to order an interim measure directed against third parties (non-parties to arbitration). Only the state court is in the position to order a measures directed against or affecting a non-party. Second, the arbitral tribunal is not equipped with coercive powers and, thus, cannot force the party to do or to refrain from doing something. If the coercive enforcement is needed, this can be only done with the assistance of the court. Moreover, under some circumstances, the court can refuse to enforce a tribunal-ordered interim measure. Third, the tribunal's authority to order interim measures does not need to be exclusive. On the contrary, it is the position of this thesis that it should be co-shared with the court. Finally, if the parties' doubts pertain to the competence of the tribunal, this power can be excluded by the parties' agreement.

CHAPTER 6: FORMING AN ARBITRAL TRIBUNAL

6.1. General remarks

The proper forming and work of an arbitral tribunal, from beginning to end, are essential for running the arbitration proceeding smoothly, and ensuring that the interests of any parties are not harmed by, for example, a partial, non-independent, or unqualified arbitrator. Forming an arbitral tribunal in the context of this thesis includes the appointment, challenge, removal, and replacement of arbitrators.⁴⁷⁰ This Chapter discussed the division of power between the arbitral tribunal, the state court, and the arbitration institution at the stage of forming an arbitral tribunal. In addition, this Chapter serves to present another type of the state involvement in the pre-award stage of arbitration in China. Namely, the state-controlled functioning of the arbitration institutions, which are the key decision-makers in the process of forming a tribunal.

This Chapter concentrates primarily on institutional arbitration, due to the limited permission for *ad hoc* arbitration in China, and therefore, considerations pertaining to *ad hoc* proceedings are of lesser focus.⁴⁷¹ It does not cover a number of related, but not core, issues, such as qualifications and the standards of impartiality and independence of arbitrators, as well as mechanisms in more complex multi-party arbitration proceedings.⁴⁷²

In line with the principle of party autonomy, the parties are largely free to arrange their mechanisms for various instances of forming a tribunal according to their wishes. In practice, the choice of a specific set of arbitration rules in a particular case usually equals to choosing the relevant mechanisms prescribed by these rules. As such, in institutional arbitration, these institutional machineries will

⁴⁷⁰ In order to avoid confusions, the term of “forming” of an arbitral tribunal used in the context of this thesis refers to all the aspects of the forming from beginning to end, including the arbitrators’ appointment, challenge, removal, and replacement. Different terminology has been used in literature to refer to these aspects collectively. By way of example, Redfern & Hunter use the term “Establishment [...] of an Arbitral Tribunal” (see Redfern and Hunter, 229.); Born titles a relevant chapter of his treatise as “Selection, Challenge and Replacement of Arbitrators in International Arbitration” (see Born, 1636.); Gaillard and Savage refer to “Constitution of the Arbitral Tribunal” in the same context (see Gaillard and Savage, 451.).

⁴⁷¹ See Chapter 2 p. 35-36. At the same time, however, if the scope of permission for *ad hoc* arbitration is to further expand in the future, China will need to anticipate the default solutions for *ad hoc* cases. As presented below in this Chapter, as of today, under the CAL, the solutions for *ad hoc* proceedings are not sufficiently provided.

⁴⁷² See, generally, on these issues, as well as on other aspects pertaining to forming a tribunal in Born, 1636-1961.; Redfern and Hunter, 229-285.; Gaillard and Savage, 451-556.

normally supersede the default mechanisms provided by the applicable arbitration law of the seat of arbitration, except for mandatory provisions under this law.

By way of example, the provisions relating to the appointment of arbitrators can be individually crafted by the parties. The parties can designate the number of arbitrators, language qualifications, or mode of appointment. Yet, in case there are no specific arrangements made by the parties, the institutional rules will typically provide default solutions. Normally, the arbitration institution itself will act as a default authority making the relevant decisions, if needed. Similarly, in case of the challenge to an arbitrator, because of doubts as to the arbitrator's impartiality or independence, the institution will typically decide the challenge. Yet, often with a possible appeal to the court in case of an unsuccessful attempt to remove an arbitrator.

Consequently, in institutional arbitration, the state court plays a limited role in the area of forming an arbitral tribunal. Resolving these issues "internally" by the arbitration institution has a number of advantages, including the efficiency, the level of familiarity with matters that are to be decided and the pool of arbitrators by the institution. On the contrary, the court's role can be more important in case of *ad hoc* arbitration, where there is no arbitration institution administering the proceeding and acting as an authority in the situations like those pertaining to the forming an arbitral tribunal. In *ad hoc* scenarios, national arbitration laws provide for default solutions, whereby the state court (or other authority) can become involved in the proceeding.

The structure of this Chapter differs slightly from the two preceding Chapters. First, due to the important role of the arbitration institution, a significant amount of attention is dedicated to the arbitration institutions and their rules. The Chapter starts with a comparison of transnational and Chinese standards for the distribution of power and the mechanisms available for forming an arbitral tribunal. After the comparison, a critical assessment of the Chinese law and practice is provided. Further, in a part dedicated to China-related observations, the limited independence of the arbitration institutions, acting as decision-makers in the given context, is discussed to present another instance of the state's involvement in arbitration in China.

6.2. Allocation of power in the area of forming an arbitral tribunal

6.2.1. Transnational standards

A. Appointment of arbitrators

There are a number of ways how arbitrators can be appointed. Among the most common solutions are: agreement by the parties, appointment by the arbitration institution, appointment of a presiding

arbitrator by co-arbitrators selected earlier by the parties, appointment through a list system, appointment by a professional institution, and appointment by the court. In line with the principle of party autonomy, the priority in determining the way of appointment is given to the parties. Yet, in case the parties are unable to reach an agreement, default mechanisms are usually provided under applicable arbitration rules or under the law of the seat of arbitration. These default mechanisms are offered in order to avoid delays and let the arbitration proceeding commence and continue.

a. UNCITRAL Model Law

Two provisions of the UNCITRAL Model Law deal with the appointment of arbitrators. According to Art. 10 of the UNCITRAL Model Law, the parties are free to decide on the number of arbitrators, but in case of no determination of the number, there will be three arbitrators. The Working Group of the UNCITRAL Model Law considered various solutions, and, in particular, the choice between one and three arbitrators as a default solution. The latter option was eventually decided upon, since while acknowledging that having a sole arbitrator is more time- and cost-efficient, it was believed that a three-member tribunal can better guarantee the understanding of all the parties involved in a dispute. In addition, it was found to be the most common choice in the practice of international commercial arbitration. It was also noted that if the parties wished the efficiency connected with a sole arbitrator – they can agree to have one arbitrator.⁴⁷³

The following Art. 11, in addition to the prohibition of discriminating based on nationalities, provides for the mechanics of the appointment. In line with the principle of party autonomy, it prescribes that the parties are free to agree on this procedure.⁴⁷⁴ Further, a default mechanism in case no specific arrangement has been made by the parties is offered. This means that in case of a three-member panel, each of the parties appoints one arbitrator, and these two party-appointed arbitrators appoint the third arbitrator. Additionally, when any of the parties fails to appoint an arbitrator within 30 days from the receipt of a request do so, or when two party-appointed arbitrators fail to appoint the third one within 30 days from their appointment, then upon the party request, the appointment will be made by the court or “other authority” as specified in Art. 6 of the UNCITRAL Model Law.⁴⁷⁵ For the scenario

⁴⁷³ Holtzmann and Neuhaus, 348-349.

⁴⁷⁴ This freedom, however, is not limitless. See Art. 12 and Art. 24 of the UNCITRAL Model Law; See also *ibid.*, 359-361.; United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, 59.

⁴⁷⁵ See Chapter 3 p. 54-55.

of a sole arbitrator, in case the parties are unable to reach an agreement, again the authority as stipulated by Art. 6 will come into play.

Also, this authority will be involved as a default solution if, despite an appointment procedure agreed by the parties, either of the parties, two party-appointed arbitrators, or a third party (such as an institution) fails to act under the agreed procedure. In making the appointment decisions, the Art. 6 authority should take into account a number of factors. They include the qualifications of an arbitrator as required by the parties, the impartiality and independence of a prospective arbitrator, and also the factor of nationality for the appointment of a sole or a presiding arbitrator. The appointment decisions are not appealable. Overall, the main goal of these solutions is to limit the unnecessary delays and proceed swiftly with the appointment.⁴⁷⁶

b. Hong Kong and Singapore

Hong Kong and Singapore largely follow the solutions of the UNCITRAL Model Law, as described above. However, regarding the default solution for the number of arbitrators in case the parties do not specify it, both Hong Kong and Singapore take a different approach. Section 23(3) of the HK Arbitration Ordinance stipulates that if the parties have not provided for the number, the HKIAC – which, as discussed both in Chapter 3 and below,⁴⁷⁷ has a special statutory role in the area of forming an arbitral tribunal in Hong Kong – will determine the number choosing between one or three arbitrators. In Singapore, however, according to Section 9 of the SIAA, the default solution is one arbitrator. The arguments of the time and cost efficiency, as well as lesser pressure to compromise in deliberations have been pointed as the rationales behind the Singaporean solution.⁴⁷⁸

As to the application of Art. 11 of the UNCITRAL Model Law addressing the appointment mechanics, some modifications have been made as well. The HK Arbitration Ordinance, while adopting the content of Art. 11, explores additional possible scenarios of the appointment. Section 24(2) deals with an uncommon, yet technically possible scenario of arbitration with an even number of arbitrators. It specifies that if the parties have not provided for any other appointment mechanism, each of the parties appoints the same number of arbitrators. If there is an agreed procedure, but it is not followed, the HKIAC will make the necessary appointments. What is more, Sections 30 and 31 provide for an additional solution for a situation with an even number. Namely, unless otherwise agreed by the

⁴⁷⁶ For the legislative history of Art. 10 and 11, see Holtzmann and Neuhaus, 348-387.; see also Binder, 162-176.

⁴⁷⁷ See Chapter 3 p. 55. and *infra* 135-136.

⁴⁷⁸ See Chew, 66.; Mark Mangan, Lucy Reed, and John Choong, *A Guide to the Siac Arbitration Rules* (Oxford University Press, 2014), 89.

parties, arbitrators may appoint an umpire, whose primary role is to assist the tribunal in making decisions where a majority cannot be reached.⁴⁷⁹ Further, Section 23(3) of the HK Arbitration Ordinance addresses a scenario where there is an uneven number, but more than three arbitrators are to be appointed. In that case, if there is no other procedure agreed by the parties, each of them appoints the same number, and the HKIAC appoints a remaining arbitrator. The HKIAC will step in if the specific agreement made by the parties is not followed.⁴⁸⁰

As to Singapore, Art. 9A of the SIAA modifies the default solution available under Art. 11(3) of the UNCITRAL Model Law for a three-member panel. It stipulates that after each of the parties appoints one arbitrator, the third arbitrator is to be appointed by the two parties together. This solution was adopted with a motive of giving primacy to the party autonomy.⁴⁸¹ Only if a compromise cannot be reached by the parties within 30 days from receiving the first request by any of the parties to do so, the SIAC – a statutory default authority in Singapore – will step in and make a decision.⁴⁸²

As noted, the HKIAC and the SIAC, the leading arbitration institutions in Hong Kong and Singapore respectively, play a special role in the appointment process.

Based on Sections 13(2) and 24 of the HK Arbitration Ordinance, the HKIAC is the statutory appointing authority in Hong Kong. In deciding about the appointment, the HKIAC will follow the *Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules 609C* of 2014, which were drafted with the approval of the Chief Justice of Hong Kong in order to facilitate appointments.⁴⁸³ Concerning Singapore, as prescribed by Section 8(2) of the SIAA, the Chairman of the Court of Arbitration of the SIAC acts as the statutory appointing authority in international arbitration proceedings. Section 8(3) of the SIAA adds that in case the Chief Justice finds it fit, he or she can appoint another person to perform this function.

⁴⁷⁹ See more on the institution of an umpire in Ma and Brock, 230.; Kwok Kit Cheung and Christy Yu, "Hong Kong - the Appointment of an Umpire in Arbitrations," *Conventus Law: Legal News & Analysis* (30 December 2016), <http://www.conventuslaw.com/report/hong-kong-the-appointment-of-an-umpire-in/>. (last accessed: 20 November 2018).

⁴⁸⁰ See, generally, for the appointment issues in Hong Kong Ma and Brock, 403-407.; Cheng and Moser, 107-109.

⁴⁸¹ Chew, 67.

⁴⁸² See, generally, for the appointment issues in Singapore Joseph and Foxton, 149-169.; Chew, 66-68.

⁴⁸³ See also the HKIAC Rules as Appointing Authority available at the official website of the HKIAC: <http://www.hkiac.org/arbitration/rules-practice-notes/rules-appointing-authority> (last accessed: 20 November 2018).

c. Arbitration rules

As mentioned, unless otherwise agreed by the parties, the selection of a set of institutional rules normally equals the choice of the appointment mechanisms under these rules. In institutional arbitration, matters pertaining to the appointment are typically handled “internally” by the institution (which can be represented by their chairmen/presidents or in any other way). Such “internal” approach is preferred over the involvement of the court, because the decision-making by the institution in this context is believed to be more expeditious, and the appointment matters are dealt with by persons with substantial amount of experience in the area, which also increases the reliability and predictability of the decisions.⁴⁸⁴

Initially, the parties can agree on a number of arbitrators. As to the default number, the HKIAC will decide whether one or three arbitrators will be appointed, taking into consideration the circumstances of a particular case.⁴⁸⁵ Under the SIAC Rules, a sole arbitrator is the default solution, unless the SIAC Registrar decides differently bearing in mind the size of a case, its complexity, and other relevant circumstances of a dispute. However, it is pointed that the Registrar will exercise this power only upon the application of a party, and the Registrar should not exercise this power if the parties already agreed to a sole arbitrator.⁴⁸⁶

Further, arbitration rules typically provide that in case of a three-member tribunal, each of the parties appoints one arbitrator, but the practice as to the appointment of a presiding arbitrator varies. Under the HKIAC Rules, the arbitrators appointed by the parties will choose the presiding arbitrator, and if they fail to do that, “the HKIAC” will make the appointment. Under the rules of the SIAC, in the absence of the agreement to the contrary, “the President” of the SIAC will appoint the presiding arbitrator. The HKIAC and the SIAC President are also the default authorities for the appointment of a sole arbitrator.⁴⁸⁷

“The HKIAC” in this context should be understood as “the Council of HKIAC or any other body or person designated by it to perform the functions referred to herein, or, where applicable, to the Secretary-

⁴⁸⁴ Born, 1914-1915.

⁴⁸⁵ Art. 6(1) of the 2018 HKIAC Rules.

⁴⁸⁶ Art. 9(1) of the 2016 SIAC Rules. See Mangan, Reed, and Choong, 90-91. pointing also to the exception of expedited arbitration proceedings.

⁴⁸⁷ See, generally, Art. 7-8 of the 2018 HKIAC Rules, and Art. 9-11 of the 2016 SIAC Rules.

General of HKIAC and other staff members of the Secretariat of HKIAC”.⁴⁸⁸ For appointment matters, the HKIAC established a special “Appointments Committee”, which is mandated to, among others, appoint arbitrators and determine a number of arbitrators in particular cases. At the time of writing, there were seven arbitration practitioners of different nationalities forming the Appointments Committee of the HKIAC.⁴⁸⁹ According to Art. 1(3) of the 2016 SIAC Rules, “the President” is defined as “the President of the Court and includes any Vice-President and the Registrar”. The “registrar” means “the Registrar of the Court and includes any Deputy Registrar”. The SIAC has one President of the Court and two Vice-Presidents, and all of them are international arbitration practitioners coming from various jurisdictions. There is also one registrar and one deputy registrar in the SIAC.⁴⁹⁰

The rules of both institutions prescribe also the time limits within which the appointment decisions need to be made. Under the HKIAC Rules, if the parties agree to have a sole arbitrator *before* the arbitration commences, they have 30 days to jointly appoint the arbitrator counting from the date when a notice of arbitration was received by a respondent. However, if the parties decide to have a sole arbitrator *after* the dispute commences, the time period is reduced to 15 days from that agreement. Further, in case the parties do not provide for any number, and the HKIAC decides on appointing a sole arbitrator, the parties have 15 days to make a joint nomination from when they received that decisions of the HKIAC.

For a three-member panel, if the parties agree to this number *before* the arbitration commences, they should nominate their arbitrators in a notice of arbitration and a request to the notice, respectively. If this number is agreed *after* the arbitration commences, the time is reduced to 15 days: from the date of that agreement – for a claimant, and from the date of receiving the claimant’s nomination – for a respondent. If the parties fail to agree on a number and so, it is fixed by the HKIAC, a claimant has 15 days from the receipt of such notice from the HKIAC, and a respondent has 15 days from the receipt of the claimant’s appointment decision. Subsequently, the party-appointed arbitrators have 30 days from the confirmation of the second arbitrator to appoint the third – presiding arbitrator. The HKIAC makes the appointments if the procedures described above are not followed.

⁴⁸⁸ Art. 2(4) of the 2018 HKIAC Rules.

⁴⁸⁹ See the official website of the HKIAC: <http://www.hkiac.org/about-us/council-members-and-committees/appointments-committee> (last accessed: 20 November 2018).

⁴⁹⁰ See the official website of the SIAC: <http://www.siac.org.sg/2014-11-03-13-33-43/about-us/court-of-arbitration> and <http://siac.org.sg/2014-11-03-13-33-43/about-us/ceo-and-secretariat> (last accessed: 20 November 2018).

According to the SIAC Rules, the joint appointment of a sole arbitrator should be made within 21 days from the date of commencement of arbitration.⁴⁹¹ For a three-member tribunal, a claimant nominates one arbitrator when filing a notice for arbitration, and a respondent has 14 days from the receipt of this notice to do the same. If these time limits are not met, the SIAC Presiding will make the relevant decisions. Also, the SIAC Registrar may fix other time limits for the appointment.⁴⁹²

B. Challenge, removal, and replacement of arbitrators

Arbitrators, irrespective of how they are appointed, should hear cases impartially and independently. If there are doubts as to the arbitrator's impartiality or independence, any of the parties has the right to challenge such an arbitrator. In addition, the arbitrator can be also challenged if he or she lacks the qualifications agreed by the parties. This can happen, for example, when the parties agreed that their arbitrators should be fluent both in English and Chinese, but this is not what the situation actually is.⁴⁹³

There might be also some situations, when it becomes impossible for the arbitrator to continue his or her mission as an arbitrator. This can happen, for example, because of the arbitrator's serious sickness or criminal conviction. There might be also situations, when the arbitrator fails to exercise his or her role as an arbitrator for other reasons, such as simply not dedicating enough time and attention to a case. It can finally happen that the parties decide to remove the arbitrator for other reasons, or the arbitrator decides to withdraw him or herself.

a. UNCITRAL Model Law

According to Art. 13 of the UNCITRAL Model Law, the parties are free to agree on a challenge procedure. In the absence of the special procedure, unless a challenged arbitrator him or herself withdraws from office, or the other party agrees to the challenge, the arbitral tribunal will address the challenge. A party bringing the challenge has 15 days after becoming aware of the constitution of the tribunal, or after becoming aware of any circumstance giving rise to justifiable doubts as to the arbitrator's

⁴⁹¹ According to Art. 3(3)(4) of the 2016 SIAC Rules, the date of receipt of a notice of arbitration by the Registrar is deemed the date of commencement. A claimant while sending the notice to the Registrar, simultaneously needs to send it to a respondent as well.

⁴⁹² See Art. 3(1)(h), Art. 10(2) and Art. 11(2) of the 2016 SIAC Rules.

⁴⁹³ See more on the grounds for challenge and other related issues in Holtzmann and Neuhaus, 388-391.; United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, 64-67.

impartiality or independence, to send a written challenge application to the tribunal. Further, if the challenge was not successful, the challenging party has the right to appeal this decision to the court.

In the process of drafting of Art. 13, the court review mechanism available under Art. 13(3) was the most controversial part. A variety of alternatives permitting court intervention was discussed. On the one hand, it was argued that immediate control by the court should be permitted, and the arbitration proceeding should be suspended while the court is dealing with an appeal. This would help to avoid unnecessary controversies occurring when a challenged arbitrator proceeds with the case, as well as reduce the risk of the award being subsequently set aside. On the other hand, it was argued that the court's review should be postponed to the post-award stage in order to limit the risk of using challenges as tactical delays.⁴⁹⁴

Eventually, a stance compromising these two positions was adopted, and as such, a party dissatisfied with an unsuccessful challenge has an option of immediate recourse to the court, however, a number of solutions has been implemented in order to reduce the incentive to abuse the mechanism of challenge for strategical reasons. Namely, (1) a challenging party has only 30 days for its recourse to the court; (2) the tribunal can proceed during the time the court makes its decision; and (3) a subsequent court's decision is not appealable. Importantly, Art. 13(3) of the UNCITRAL Model Law has a mandatory character and cannot be contracted out by the parties. The effect of a late challenge is not addressed specifically by Art. 13. However, because of the time limit prescribed in it, it should be, generally, understood that the party having the awareness of the grounds for a challenge, but failing to raise the challenge in a timely manner, should not be able to rely on them subsequently in the proceeding or after the award is rendered.⁴⁹⁵

Also, it is important to note that in virtually all jurisdictions, the court has the possibility to ultimately review the irregularities on the side of the composition of a tribunal after the award is rendered. This can happen, for example, where one of the parties was not aware of the grounds for a challenge until after the award is rendered. Such matter can be raised in the course of a setting-aside procedure before the court of the seat of arbitration, or at the stage of enforcement before the court in which the enforcement is sought.⁴⁹⁶

⁴⁹⁴ Holtzmann and Neuhaus, 407.

⁴⁹⁵ See, generally, *ibid.*, 407-410.; Binder, 192-198.; United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, 68-69.

⁴⁹⁶ See Art. 34(2)(a)(4) and 36(1)(a)(4) of the UNCITRAL Model Law; for Hong Kong, see Sections 81, 86, and 89 of the HK Arbitration Ordinance; for Singapore, see Art. 34(2)(a)(4) and 36(1)(a)(4) of the UNCITRAL Model Law

Beyond the challenges based on the doubts as to the arbitrator's impartiality or independence, Art. 14 of the UNCITRAL Model Law addresses another situation. It stipulates that if an arbitrator becomes *de jure* or *de facto* unable to perform his or her functions, or for any other reasons fails to act without undue delay, this arbitrator's mandate terminates if he or she withdraws from office, or if the parties agree on the termination of the mandate. However, if a controversy remains as to the grounds of the impossibility or failure to act, any of the parties can request the court (or other authority as specified in Art. 6 of the UNCITRAL Model Law) to decide on the mandate's termination. As to the extent of the review, the guide to the UNCITRAL Model Law suggests that what should be taken into account is what is expected from an arbitrator based on the arbitration agreement and at a specific procedural stage. Generally, "[a]rticle 14 [...] is intended to catch the egregious cases and not to place a judge with a stopwatch over the shoulder of every arbitrator".⁴⁹⁷ Such review decision of the court or other authority is not appealable.

Finally, it is worth noting that if an arbitrator is removed, there can exist a need for the substitution of a removed arbitrator.⁴⁹⁸ According to Art. 15 of the UNCITRAL Model Law, the appointment of a substitute arbitrator should be conducted according to the rules governing the original appointment of the arbitrator to be replaced.⁴⁹⁹

b. Hong Kong and Singapore

The challenge mechanics prescribed by Art. 13 of the UNCITRAL Model Law are incorporated by the laws of Hong Kong and Singapore. For Hong Kong – the Court of First Instance of the High Court, and for Singapore – the High Court is designated to hear the appeals to unsuccessful challenges, as prescribed under Art. 13(3).⁵⁰⁰ Additionally, the HK Arbitration Ordinance provides in Section 26(2) that the Court of First Instance may decide not to enforce the arbitral award that was made by a challenged arbitrator during the time when court review of the challenge is pending. Also, Section 26(5) provides

read together with Section 3(1) of the SIAA; for China, see Art. 58(1)(3) and 63 of the CAL read together with Art. 237(3) of the CCPL.

⁴⁹⁷ Holtzmann and Neuhaus, 440.

⁴⁹⁸ Another possibility is that the tribunal proceeds in a reduced form (so called "truncated tribunal"). The decisions can still be made by a majority. See more on truncated tribunals in Born, 1955-1961.

⁴⁹⁹ See more on Art. 15 in Holtzmann and Neuhaus, 464-466.; Binder, 206-211.; also United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, 73-74. for the related case law.

⁵⁰⁰ See Section 26 of the HK Arbitration Ordinance; and Art. 13(3) and of the 1985 UNCITRAL Model Law read together with Sections 3 and 8(1) of the SIAA.

that if this court decides to support the challenge, it may set aside the award. No alteration of the Art. 13 content was made in Singapore.⁵⁰¹

Both Hong Kong and Singapore also follow the solution of Art. 14 of the UNCITRAL Model Law on failure or impossibility to act by an arbitrator, and no modifications were introduced to the content of this provision.⁵⁰² The Court of First Instance of the High Court in Hong Kong, and the High Court in Singapore are designated to address appeals as provided under Art. 14 of the UNCITRAL Model Law.⁵⁰³ Similarly, Art. 15 of the UNCITRAL Model Law on the appointment of a substitute arbitrator was adopted both in Hong Kong and Singapore without alterations.⁵⁰⁴

c. Arbitration rules

As to the approach of arbitration rules toward the challenge, again, unless a non-challenging party agrees to the challenge or a challenged arbitrator withdraws, the issue is typically resolved internally by the arbitration institution. Accordingly, “the HKIAC” and “the Court” of the SIAC have the authority to decide the challenges under their respective rules.⁵⁰⁵ In this case, for the HKIAC, a “Proceedings Committee” has been mandated to decide the challenges. This Proceedings Committee consists of ten arbitration practitioners of various nationalities.⁵⁰⁶ In addition, members of the HKIAC’s Proceedings Committee are different than those of the HKIAC’s Appointments Committee appointing arbitrators, which helps to secure more objectivism in deciding the challenges.

“The Court” in case of the SIAC should be understood as the “Court of Arbitration of SIAC and includes a Committee of the Court”. Further, a “Committee of the Court” means a committee consisting of not less than two members of the Court appointed by SIAC’s President (which may include the President).⁵⁰⁷ Currently, the Court of Arbitration of the SIAC consists of twenty-two arbitration scholars

⁵⁰¹ On the challenge mechanism in Hong Kong, see Ma and Brock, 324-326.; and in Singapore, see Joseph and Foxton, 169-174.

⁵⁰² See Section 27 of the HK Arbitration Ordinance, and Art. 14 of the UNCITRAL Model Law read together with Section 3(1) of the SIAA.

⁵⁰³ See Section 13(4) and 2(1) of the HK Arbitration Ordinance, and Section 8(1) of the SIAA.

⁵⁰⁴ See Section 28 of the HK Arbitration, and Art. 15 of the UNCITRAL Model Law read together with Section 3(1) of the SIAA. See also, generally, on the issue of removing an arbitrator in Hong Kong in Ma and Brock, 341.; and in Singapore in Joseph and Foxton, 174-176.

⁵⁰⁵ See Art. 11 of the 2018 HKIAC Rules, and Art. 14-16 of the 2016 SIAC Rules.

⁵⁰⁶ See the official website of the HKIAC: <http://www.hkiac.org/about-us/council-members-and-committees/proceedings-committee> (last accessed: 20 November 2018).

⁵⁰⁷ Art. 1(3) of the 2016 SIAC Rules.

and practitioners from around the world.⁵⁰⁸ In practice, challenges are decided by three-member committees of the SIAC Court, which are selected by the SIAC President or Vice President.⁵⁰⁹

As to some procedural details, the time limits to raise the challenge are 15 days under the HKIAC Rules, and 14 days under the SIAC Rules, after the confirmation of an arbitrator is notified to a challenging party, or from when the challenging party learns about the circumstances giving rise to justifiable doubts as to the arbitrator's independence and impartiality. Further, pending the determination of the challenge, the tribunal (including the challenged arbitrator) may proceed with a case.

In addition, the SIAC introduced a number of other solutions. Notably, under Art. 15(3), there is a special challenge fee that needs to be paid first in order to trigger the challenge procedure. If the fee is not paid, the challenge is considered to be withdrawn. The fee provision is believed to discourage frivolous challenge applications aimed at delaying the proceeding.⁵¹⁰ Further, Art. 15(4) stipulates that the Registrar may order suspension of the arbitration proceeding until the challenge is resolved. Also, Art. 16(1) provides for the time limit of seven days from the receipt of the challenge notice given to a non-challenging party and the challenged arbitrator to decide whether this non-challenging party agrees to the challenge, or the challenged arbitrator withdraws him or herself. After this time elapses, the SIAC Court decides the matter.

Similar mechanisms were adopted to deal with the situation when it becomes impossible for an arbitrator to continue his or her tasks as an arbitrator.⁵¹¹ Additionally, under Art. 17(3) of the 2016 SIAC Rules, the SIAC's President may, at his or her own initiative and in his or her own discretion, remove an arbitrator (1) who refuses or fails to act in accordance with the arbitration rules or within the time limits prescribed by the rules; (2) fails to act with due diligence and/or in a manner ensuring a fair, expeditious, economical, and final resolution of a dispute; or (3) if an arbitrator is *de jure* or *de facto* prevented from performing his or her functions as an arbitrator. In making his or her decision, the SIAC President should consult the parties and members of the arbitral tribunal, including the arbitrator to be removed. However, the last commentary to the SIAC Rules from 2014 reported that no arbitrator had been removed through this procedure as of the time of its writing.⁵¹²

⁵⁰⁸ See the official website of the SIAC: <http://siac.org.sg/2014-11-03-13-33-43/about-us/court-of-arbitration> (last accessed: 20 November 2018).

⁵⁰⁹ Mangan, Reed, and Choong, 113.

⁵¹⁰ Lai. (last accessed: 20 November 2018).

⁵¹¹ See Art. 11(6)-11(10) of the 2018 HKIAC Rules, and Art. 16-17 of the 2016 SIAC Rules.

⁵¹² Mangan, Reed, and Choong, 117.

As to the appointment of a substitute arbitrator, according to the HKIAC Rules and the SIAC Rules, it is conducted according to the rules governing the original appointment of an arbitrator to be replaced.⁵¹³ In addition, under the HKIAC Rules (Art. 12(2)), on the application of a party, the HKIAC can determine that in some exceptional circumstances, the other party should be deprived of its right to appoint a substitute arbitrator. In such a case, the HKIAC will make the appointment itself, or will authorize the tribunal in a reduced number to continue with issuing a decision or an award. It is suggested by commentators that this power is used by the HKIAC sparingly and under the following conditions: (1) there is a request of a party; (2) the HKIAC is of the opinion that there exist special circumstances justifying the denial of a party's right to appoint; and (3) the parties are given the opportunity to comment.⁵¹⁴

Concerning the continuation of the arbitration proceeding and its re-starting in case of the replacement, under the 2018 HKIAC Rules, arbitration should resume where an arbitrator was removed, unless the tribunal decides differently.⁵¹⁵ The 2016 SIAC Rules provide for a similar solution, but they stipulate additionally, that in case a presiding arbitrator in a three-member panel or a sole arbitrator is replaced, hearings need to be restarted.⁵¹⁶

6.2.2. Chinese standards

A. Appointment of arbitrators

The Chinese practice in forming an arbitral tribunal is marked by a strong position of the arbitration institution – represented by its chairman. This can be observed in the provisions of the CAL and in the arbitration rules.

a. CAL

Article 30 of the CAL stipulates that the arbitral tribunal can consist of one or three arbitrators, and that in case of a three-member panel, there should be a presiding arbitrator. No default solution has been provided under the CAL for the situation where the parties do not determine the number of arbitrators. Further, according to Art. 31 of the CAL, in a three-member panel, each of the parties selects one arbitrator or entrusts its choice to the chairman of the arbitration institution. The third

⁵¹³ Art. 12(1) of the 2018 HKIAC Rules, Art. 17(1) of the 2016 SIAC Rules.

⁵¹⁴ Michael Moser and Chiann Bao, *A Guide to the HKIAC Arbitration Rules* (Oxford University Press, 2017), 125.

⁵¹⁵ Art. 12(3) of the 2018 HKIAC Rules.

⁵¹⁶ Art. 18 of the 2016 SIAC Rules.

arbitrator is jointly selected by the parties or this decision can be in advance entrusted to the chairman. If an agreement as to the third arbitrator cannot be reached by the parties – the chairman will determine the issue.

In case of a sole arbitrator, the parties make a joint nomination or they can entrust the selection to the chairman of the institution. Similarly, as in case of a presiding arbitrator in a three-member panel, if the parties are unable to reach an agreement – the chairman will be the one deciding the issue. It is worth noting that the CAL itself does not provide for the time frame within which the appointment decisions should be made, either by the parties or the chairman. Article 32 of the CAL provides, however, that if the parties fail to decide on the appointment, or fail to obey the relevant time limits prescribed by arbitration rules, the chairman will make the decision.

In addition, in the context of appointment, it is worth mentioning that China maintains a system of closed panels of arbitrators. Although Chinese law does not explicitly say that only the candidates from the arbitration institutions' lists can act as arbitrators, Art. 13 of the CAL is believed to be the basis for it; it requires that the arbitration institution prepares a lists of arbitrators.⁵¹⁷ In practice, each of the institutions maintains such a list of arbitrators. Some institutions maintain separate lists for domestic and foreign-related cases, whereas some others have one unified list for both. As to why China prefers closed panels, the immaturity of the arbitration system in China, limited capabilities of arbitration users to make reasonable decisions as to appointments, as well as concerns as to obeying the high professional ethics by the arbitrators in China have been cited.⁵¹⁸

b. Arbitration rules

Under the arbitration rules of both CIETAC and the BAC, unless the parties agree otherwise, three arbitrators are to be appointed.⁵¹⁹ For CIETAC, in case of a three-member tribunal, each party has 15 days from the receipt of a notice of arbitration to nominate an arbitrator, or entrust this decision to the chairman. In case this time limit is not met – a decision is made by the chairman. Further, the parties have 15 days from the receipt of a notice of arbitration by a respondent to jointly nominate the third arbitrator, who will act as a presiding arbitrator, or, again, they can decide to let the chairman

⁵¹⁷ See Yuen, McDonald, and Dong, 186-187.; Fan, *Arbitration in China, A Legal and Cultural Analysis*, 65-66.

Art. 13 of the CAL: "[...] An arbitration commission shall prepare the list of arbitrators according to different specialties."

⁵¹⁸ Weixia Gu, "The China-Style Closed Panel System in Arbitral Tribunal Formation - Analysis of Chinese Adaptation to Globalization," *Journal of International Arbitration* 25, no. 1 (2008), 131-132.

⁵¹⁹ Art. 25(2) of the 2015 CIETAC Rules, and Art. 19(1) of the 2015 BAC Rules.

make this decision. The failure to timely make the appointment leads to the chairman's decisions in this regard.

In addition, as to the third arbitrator, in a CIETAC proceeding, the parties may prepare a recommendation list containing one to five candidates. Next, an arbitrator nominated by both parties should be the third (presiding) arbitrator. However, if the parties nominate more than one common arbitrator – the chairman will make a decision taking into consideration all the circumstances of a case. The chairman will also appoint the third arbitrator in case there was no common recommendation made by the parties.⁵²⁰ For the purpose of selecting a sole arbitrator, CIETAC provides for a separate provision with rules similar to those pertaining to the selection of a presiding arbitrator in a three-member panel.⁵²¹ Also, CIETAC introduced in Art. 30 a set of criteria to be taken into account by the CIETAC chairman when deciding on the appointment. These criteria include: the law applicable to a dispute, place of arbitration, language of arbitration, nationalities of the parties, and any other factor(s) that the chairman considers relevant.

The BAC, generally, implements similar solutions as those prescribed in the CIETAC Rules. As to differences, concerning the list of candidates, under the BAC Rules, such list should contain one to three candidates. In addition, the BAC offers the parties a possibility to use a recommendation list prepared by the BAC itself, where five to seven candidates are listed, and the parties can each select between one and four candidates. Also, the BAC stipulates that if there are no common candidates on the lists, an arbitrator appointed by the chairman should not be any of the persons recommended by the parties.⁵²²

Regarding the practical use of the lists of candidates for arbitrators, Sun and Willems opine that it is rather limited, and that the appointments of both sole and presiding arbitrators in China are predominantly made by the chairmen of the arbitration institutions.⁵²³ The findings of the China Arbitration Survey confirm this. According to the respondents of the China Arbitration Survey, in a great majority of cases, the ultimate appointment of a sole/presiding arbitrator was made by the chairmen of the institution.⁵²⁴

⁵²⁰ See Art. 27 of the 2015 CIETAC Rules.

⁵²¹ See Art. 28 of the 2015 CIETAC Rules.

⁵²² See Art. 19 of the 2015 BAC Rules.

⁵²³ Sun and Willems, 228.

⁵²⁴ See Chapter 9 on the China Arbitration Survey p. 199, as well as Appendix 1 p. 286.

Concerning the lists of potential candidates for arbitrators, it is noteworthy that the leading arbitration institutions in China permit under their rules the appointment of arbitrators outside of the lists – yet, subject to confirmation by the chairman.⁵²⁵ Nonetheless, off-panel appointments seem not to be widely used in practice. By way of example, a majority of the respondents to the China Arbitration Survey has never come across the situation where the appointment was outside the panel list.⁵²⁶ On the other hand, it should be also noted that the leading institutions maintain quite rich lists of candidates, including Chinese and foreign arbitrators, which offers a fairly wide choice to the parties. Under the most recent panel of arbitrators, 71.8 % of the CIETAC arbitrators come from mainland China, and the remaining from Hong Kong, Macau, Taiwan, and foreign countries representing in total 65 countries and regions of the world.⁵²⁷ The BAC panel of arbitrators effective as of 2017 has in total 506 arbitrators from 21 different countries and regions, including 22 arbitrators from Hong Kong and Taiwan and 105 foreign arbitrators.⁵²⁸

Finally, as to what should be specifically understood as a “chairman” of the arbitration institution for the purpose of appointments (and also, as discussed below in this Chapter – on a number of other occasions), Art. 2(1) of the CIETAC Rules stipulates that “[t]he Chairman of CIETAC shall perform the functions and duties vested in him/her by these Rules while a Vice Chairman may perform the Chairman’s functions and duties with the Chairman’s authorization.” Furthermore, according to Art. 5 of the Articles of Association of the CIETAC, “CIETAC is composed of one chairman, one executive vice-chairman, a number of vice-chairmen and a number of commission members, who are experts and distinguished persons in relevant fields.” Concerning the BAC, Art. 1(3) of the 2015 BAC Rules stipulates that the chairman of the BAC or, with the authorization of the chairman – one of the BAC’s vice-chairmen, or the secretary-general of the BAC perform the functions and duties vested in the chairman by the arbitration rules. The BAC has one chairman, four vice-chairman, and one secretary general.⁵²⁹

⁵²⁵ See Art. 26(2) of the 2015 CIETAC Rules, and Art. 64 of the 2015 BAC Rules targeting specifically international arbitration cases. Also, see the criticism toward the lacking criteria/guidance for the decision of the chairman on whether or not he or she should approve an off-panel arbitrator in Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 149.

⁵²⁶ See Chapter 9 on the China Arbitration Survey p. 199, as well as Appendix 1 p. 285.

⁵²⁷ See the CIETAC Panel of Arbitrators effective from 1 May 2017 to 30 April 2020 at the CIETAC official website: <http://cietac.org/index.php?m=Article&a=show&id=14241&l=en> (last accessed: 20 November 2018).

⁵²⁸ See the official website of the BAC: http://www.bjac.org.cn/english/page/gybh/introduce_index.html (last accessed: 20 November 2018).

⁵²⁹ See the official website of the BAC: <http://www.bjac.org.cn/english/page/gybh/organize.html> (last accessed: 20 November 2018).

B. Challenge, removal, and replacement of arbitrators

a. CAL

Regarding the issue of a challenge to an arbitrator, Art. 36 of the CAL provides that the chairman of the arbitration institution decides the challenge upon a party's application if reasons that cast doubts as to the arbitrator's independence/impartiality (as prescribed more precisely in Art. 34 of the CAL) exist.⁵³⁰ Furthermore, if the chairman of the institution serves as an arbitrator, the challenge should be decided collectively by the arbitration institution. As to the timing for raising the challenge, Art. 35 stipulates that a party has to raise it before the first hearing of the tribunal, or if the reasons for the challenge become known to the party only after the first hearing – the challenge should be brought up before the end of the last hearing.

It should be noted that no court recourse is possible immediately after a decision to keep a challenged arbitrator is made by the chairman (such recourse is permitted under the UNCITRAL Model Law).⁵³¹ However, as mentioned, the courts in China, like the courts in other jurisdictions, can review the irregularities pertaining to the tribunal composition after the award is rendered in a setting aside procedure or when dealing with the recognition and enforcement of it.⁵³²

Finally, Art. 37 the CAL stipulates that if an arbitrator is withdrawn in the course of the challenge, or becomes unable to perform his or her duties, a replacement arbitrator needs to be appointed. In addition, in such instances, the tribunal, upon the party's application or on its own discretion, can decide whether the arbitration proceeding should re-start.

b. Arbitration rules

Under the institutional rules of CIETAC and the BAC, the chairman of the arbitration institution is designated to decide the challenge – if the other party does not agree to the challenge, or an arbitrator does not withdraw him or herself.

⁵³⁰ Under Art. 34 of the CAL, the reasons for the withdrawal of an arbitrator are the following: "1. The arbitrator is a party involved in a case or a blood relation or relative of the parties concerned or their attorneys.; 2. The arbitrator has vital personal interests in the case.; 3. The arbitrator has other relations with parties or their attorneys involved in that case that might affect the fair ruling of the cases; 4. The arbitrator meets the parties concerned or their attorneys in private or has accepted gifts or attended banquets hosted by parties concerned or their attorneys."

⁵³¹ See Yuen, McDonald, and Dong, 201.

⁵³² See Art. 58(1)(3) and 63 of the CAL read together with Art. 237(3) of the CCPL.

To be more specific, Art. 32(1) of the 2015 CIETAC Rules stipulates that upon receiving a declaration of impartiality/independence of an arbitrator, or a written disclosure of the facts that can give rise to doubts about the arbitrator's impartiality and independence, a party has ten days to raise the challenge on the grounds that were disclosed.⁵³³ It is further provided that if any of the parties fails to raise the challenge timely, it cannot subsequently challenge the arbitrator based on the reasons disclosed. Moreover, according to Art. 32(3) of the 2015 CIETAC Rules, a party having justifiable doubts as to the arbitrator's impartiality or independence can raise the challenge within 15 days from receiving the notice of the tribunal formation. However, if the party becomes aware of the reasons giving such justifiable doubts only later, it has 15 days from when it became aware of such circumstances, but in any case – not later than the closing of the last oral hearing. As mentioned, if the challenge is made, the other party may agree to it, or a challenged arbitrator can withdraw, which will not lead to sustaining the grounds for the challenge. Otherwise, the chairman makes a decision.

Articles 21 and 22 of the 2015 BAC Rules considerably follow the solutions under the CIETAC Rules. Concerning the issue of timing, Art. 22 stipulates that a challenge to the arbitrator's impartiality or independence should be, generally, made before the first oral hearing. However, if the challenge is made based on the circumstances that become known after the first hearing, it should be made not later than before the last hearing. Yet, in case there is no (further) hearing or it is a documents-only arbitration, a party has ten days from when it has become aware of the circumstances that give rise to a challenge to it. Also, Art. 22(6) stresses that a decision of the chairman on the challenge is final. Lastly, Art. 22(7) deals with the situation of appointing a counsel after the constitution of the tribunal. It prescribes that if that appointment of a counsel results in potential grounds for the challenge of any of arbitrators, a party appointing that counsel is deemed to have waived its right to challenge. However, the right to challenge by the other party is not affected.

Further, Art. 33 of the 2015 CIETAC Rules provides that if an arbitrator becomes *de iure or de facto* unable to perform his or her duties as an arbitrator, or fails to act in accordance with the requirements of the CIETAC Rules (this includes observing the time limits prescribed therein), the CIETAC chairman has the power to remove such an arbitrator. The chairman's decision in this regard is final.

As to the substitution of an arbitrator who was removed, it follows the rules of the original appointment. The arbitral tribunal decides whether, and if so, to what extent, the arbitration proceeding should be repeated. Moreover, Art. 34 of the 2015 CIETAC Rules provides for an option of appointing an extra arbitrator, if after the conclusion of the last hearing, an arbitrator in a three-

⁵³³ See Art. 31 of the 2015 CIETAC Rules on the disclosure. Also note that the arbitration rules refer to the general standards of impartiality/independence, instead to the grounds listed in Art. 34 of the CAL.

member panel is unable to deliberate and render the award. This matter is decided by the CIETAC Chairman upon the request of two other arbitrators. However, after consultation with the parties, the CIETAC chairman can permit the tribunal to continue the deliberations and issue the award – despite the reduced number of arbitrators.

Under Art. 23(4) of the 2015 BAC Rules, in case of a successful removal of an arbitrator appointed by a party, this appointing party has five days from the receipt of the notice of removal to nominate a substitute arbitrator. In other instances, the chairman will decide upon a substitute appointment. Again, the tribunal, either upon the party's application or on its own initiative, has the right to decide whether the arbitration proceeding should be repeated. Article 45 of the 2015 BAC Rules largely mirrors Art. 34 of the 2015 CIETAC Rules as to the continuation of the proceeding by a majority of arbitrators.

6.2.3. Criticism of the Chinese law and practice

The first part of these critical remarks regarding the Chinese law and practice in the area forming an arbitral tribunal pertains to the distribution of power and mechanisms available in that area. The second part relates to the issue of the limited independence of the Chinese arbitration institutions acting as decision-makers.

A. Problems with the distribution of power and available mechanisms when forming an arbitral tribunal

It is important to stress again that the CAL is primarily intended for institutional arbitration. As explained more fully in Chapter 2, *ad hoc* arbitration has not been acceptable in China until recently, when some subtle changes have been made in order to permit *ad hoc* arbitration in a limited way.⁵³⁴ The CAL provisions pertaining to various aspects of forming an arbitral tribunal are relatively modest, and co-exist with arbitration rules that are more specific in this regard. Although this thesis deals primarily with institutional arbitration, this specific part touches upon an *ad hoc* scenario, and points to some issues that can emerge in accordance with the CAL's application to *ad hoc* arbitration. In case China continues its support for *ad hoc* arbitration, it should provide a better legal framework for such proceedings. Nonetheless, even for institutional proceedings, the modesty of the CAL provisions can cause some problems.

⁵³⁴ See Chapter 2 p. 35-36.

To illustrate, the CAL does not explicitly provide for the possibility for the parties to arrange procedures for forming an arbitral tribunal, which limits party autonomy. It also does not provide for: (1) a default number of arbitrators if no choice is made by the parties; (2) time limits for taking specific decisions; and (3) default mechanisms in case no particular arbitration institution is involved. All these issues and some solutions on how these shortcomings can be remedied are elaborated on in the section on recommendations below in this Chapter.⁵³⁵

Some other deficiencies existing specifically at the stage of the appointment have been identified as well. In this context, Gu uses an illustrative description of “controlled rules of appointment”.⁵³⁶ By way of example, in reference to the CIETAC practice, some shortcomings include: the appointment of own staff as arbitrators, appointment of government officials, not providing for the rule of nationality exclusion for a sole or presiding arbitrator in cases where the parties come from different countries, as well as the preference of a Chinese arbitrator acting as a presiding arbitrator if the appointment is made by the CIETAC chairman.⁵³⁷

The closed-panel system is also criticized. Fan suggests that the intention behind the closed-panel system was to guarantee a higher quality of arbitration.⁵³⁸ However, this can be also seen as an additional layer of control. This is because the arbitration institution decides who can be on the lists and who cannot, whose nomination should be extended and whose not *etc.* Cohen reported a case in which a nomination was not extended, arguably due to critical comments made toward the practice of the particular institution.⁵³⁹ Further, as noted, some of the leading arbitration institutions in China allow in their rules for off-panel appointments, subject to the confirmation by the chairman. However, with the above-quoted exception of CIETAC, in case of off-panel appointments, criteria for a decision of the chairman are, generally, not available. This, in turn, can potentially increase the risk of the chairman’s discretionary decisions.

The practice in China is that the arbitration institutions “hire and fire” arbitrators. “Hire” – in the sense that they first approve candidates for their panel lists, and then in case of a default or entrusted appointment, the chairman ultimately deals with the appointment. “Fire” – in the sense of deciding the challenges to arbitrators by the chairman, or by not extending a position on a panel list. In light of that, it seems to be understandable that the arbitrators in China may want to be on the panel lists, and

⁵³⁵ See p. 154-157 of this Chapter.

⁵³⁶ Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 124.

⁵³⁷ Fan, *Arbitration in China, A Legal and Cultural Analysis*, 67-68.

⁵³⁸ *Ibid.*, 66.

⁵³⁹ Cohen, 562.

also appointed to hear cases. It seems that in order to have the two happen, it is in the arbitrator's interest to act in line with the institution's expectations. That, however, can potentially reflect on the arbitrator's independence.⁵⁴⁰

B. Limited independence of the Chinese arbitration institutions

Another problematic issue pertains to the independence of decision-makers. As argued above in the section on transnational standards, in general, a strong role of the chairman of the arbitration institution (or the institution represented in other way) in institutional arbitration is not uncommon. Such internal solutions can help secure more professionalism and efficiency and, thus, are frequently utilized by various institutions. However, where the institution is in charge of decisions that are important to the arbitration proceeding, because they can have an impact on its outcome, it is essential to consider the independence of decision-makers.⁵⁴¹

This independence is, to a significant extent, affected in China by the over-involvement of the government in the functioning of the Chinese arbitration institutions, especially in their financial and personnel-related matters.

Although Art. 8 and Art. 14 of the CAL provide for the full independence and lack of interference by the government in arbitration and work of the arbitration institutions,⁵⁴² in fact, it is probably more realistic to say that the declared independence has a "fragile" character.⁵⁴³ The governmental influence over the arbitration institution is exercised through: (a) the involvement of the government in deciding who holds the key positions in the institution, and (b) the involvement of the government in various aspects of the institution's financing. By way of example, a problem of the limited independence of the arbitration institution can potentially materialize when a decision acceptable to

⁵⁴⁰ See Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 138.; See also Chapter 4 p. 90-91 discussing this problem in the context of deciding jurisdictional objections.

⁵⁴¹ As discussed in Chapter 4, p. 78-79, the arbitration institutions in China are also involved in making the decisions on jurisdictional objections. As such, the institutions' independence is also relevant for that issue.

⁵⁴² Art. 8 of the CAL: "Arbitration shall be conducted independently according to law, free from interference of administrative organs, social groups or individuals." and Art. 14 of the CAL: "An arbitration commission shall be independent of any administrative organ, without any subordinate relationship with administrative organs. Neither would there be any subordinate relations thereof."

⁵⁴³ The term was originally used in the context of the Chinese arbitration institutions by Clarisse von Wunschheim, see Von Wunschheim, *Enforcement of Commercial Arbitral Awards in China*, 39.

the local government's interest is favored. This can be a possible scenario where, for instance, state assets or state-owned enterprises are involved in arbitration.⁵⁴⁴

a. Involvement of the government in deciding who holds the key positions in the arbitration institutions

One problem is the involvement of officials from industrial and commercial branches of local governments, which is a common scenario for many arbitration institutions in China, with a few exceptions, such as CIETAC and the BAC.⁵⁴⁵ Yang Runshi, the former director of the general office of the SPC in China criticizes the intrusion of the government into the functioning of the Chinese arbitration institutions. He observes that governmental officials frequently hold various offices within the institution, and that they are not willing to let arbitration develop independently. Yang mentions also that officials of a senior rank often act as chairmen of the institutions. In addition, Yang stresses that in particularly contentious or controversial cases that can have an influence on the public, the arbitration institution or the tribunal needs to report to officials of the relevant governmental authorities – before the award is rendered.⁵⁴⁶

Furthermore, even if local officials do not occupy key positions in the arbitration institution themselves, the governmental units are typically involved in appointing the institution's chairman and other personnel who act in the capacity of chairman. Also, although the "governmental shadow" can be less present in the leading arbitration institutions in China, even these leading institutions are still influenced by the government participating in the appointment of their key staff.

By way of example, the CIETAC's key personnel, including the CIETAC chairman, is engaged by the China Council for the Promotion of International Trade ("CCPIT").⁵⁴⁷ The CCPIT is a governmental agency

⁵⁴⁴ Yuen, McDonald, and Dong, 236.

⁵⁴⁵ See *ibid.*, 235-236.; Kun Fan, "Underlying Influences on the Effectiveness of Arbitration in China," *Asian Dispute Review* 2012, no. 3 (2012), 78.; Sun and Willems, 8.; Tao, *Arbitration Law and Practice in China*, 7.

⁵⁴⁶ Runshi Yang, "Free Our Thinking and Push through the Reform of the Arbitration Regime and Its Mechanisms [Original Title: 解放思想 推进仲裁体制和机制改革]," *Beijing Arbitration Commission Official Website* (15 October 2008), <http://www.bjac.org.cn/news/view?id=1516>. (last accessed: 20 November 2018). See also Sun and Willems, 8-9.

⁵⁴⁷ Art. 5 of the Articles of Association of CIETAC: "CIETAC is composed of one Chairman, one Executive Vice Chairman, a number of Vice Chairmen and a number of Commission Members, who are experts and distinguished persons in relevant fields engaged by the China Council for the Promotion of International Trade (China Chamber of International Commerce). They shall serve a term of three years, subject to adjustment when necessary." The original language of Art. 5 is: 贸仲委由主任一人、常务副主任一人、副主任若干人及委员若干人组成。上述组成人员由中国国际贸易促进委员会（中国国际商会）聘请有关方面的专家和知名人士担任，每届任期三年。在必要时，任期可做适当调整, where "聘请" (pìn qǐng) means "employ", "engage", "hire", "appoint".

dealing with issues of trade and investment promotion.⁵⁴⁸ It undertakes the related work and accepts the government's guidance, and – importantly – its funding comes from the government.⁵⁴⁹ CIETAC is actually a related agency of the CCPIT.⁵⁵⁰ Therefore, a decision as to the CIETAC chairman (and also the vice-chairmen performing the functions of the CIETAC chairman when so authorized) is, in practice, influenced by the government.

As to the appointment of the key staff of the BAC, a BAC Committee (a governing organ of the BAC, which includes the chairman, vice-chairmen and a few other members) is involved in the nomination of candidates to a BAC Committee for a succeeding term. The chairman of the BAC Committee will have a meeting with relevant departments and the chamber of commerce for the purpose of nominations. Upon the nomination, the appointment itself is made by the Municipal People's Government.⁵⁵¹

b. Involvement of the government in various aspects of financing of the Chinese arbitration institutions

As to the aspect of financing of the Chinese arbitration institutions, some problems that reflect on the institutions' independence exist as well. As noted above, there is a number of arbitration institutions in China, which need to rely on the governmental support for their financing. In addition, although, there are a few institutions claiming to establish themselves as fully independent financially, in principle, they still need to report their expenses and take part in the subsequent allocation of resources under the rules of the Ministry of Finance. Further, this subsequent allocation of resources does not necessarily reflect the income that a particular institution was able to make.⁵⁵²

The financial scheme introduced by the Ministry of Finance can lead to doubts as to the institutions' independence, since the institutions may prefer to obey the instructions of the government in order to secure their financing for the future. As such, as expressed by Yu, the past Secretary-General of

⁵⁴⁸ See the official website of the CCPIT:
http://en.ccpit.org/info/info_40288117521acbb80153a75e0133021e.html (last accessed: 20 November 2018).

⁵⁴⁹ Art. 4 and 16 of the CCPIT Constitution.

⁵⁵⁰ See the official website of the CCPIT:
http://en.ccpit.org/info/info_8a8080a94fd37680014fd3c885fc0006.html (last accessed: 20 November 2018).

⁵⁵¹ Art. 16 of the BAC's Articles of Association.

⁵⁵² See Chapter 2 p. 40-41. See also the Notice of the Ministry of Finance, the National Development and Reform Commission, the Ministry of Supervision and the National Audit Office on Strengthening the Two-Channel Management of the Receipts and Disbursements of the Administrative Charges and Other Revenues of Central Departments and Entities (Circular 29) from 9 May 2003. [财政部、国家发展和改革委员会、监察部、审计署关于加强中央部门和单位行政事业性收费等收入“收支两条线”管理的通知, 财综[2003] 29号, 2003年5月9日].

CIETAC, the Ministry scheme seems not to be welcomed by the Chinese institutions that are able to do financially well by themselves.⁵⁵³ This is mainly because these institutions cannot decide freely on their expenditures, and instead – they have to accept the government’s control.⁵⁵⁴

As also mentioned above, theoretically, there is an option of an alternative model of financing, such as the one explored by the BAC. The BAC is not a part of the Ministry scheme. Instead, it obtained a status of an “institution managed as an enterprise” and pays the business tax based on its revenues.⁵⁵⁵ However, this alternative model of financing requires the approval of the authorities. Furthermore, the price of the financial independence is quite high, because of relatively high tax rates applicable.

C. Other related problems

China’s approach to the financing of arbitration institutions is likely related to the extensive number of the institutions existing in China. Presently, there are over 230 arbitration institutions in China.⁵⁵⁶ This number is excessive and does not meet the real needs of arbitration users. Quite possibly, for the reason that the unprofitable institutions need financial support, the Ministry of Finance introduced the system obliging almost all the institutions to report their revenues and submit them for the purpose of the subsequent allocation of resources.

The problem with excessive arbitration institutions in China has been raised by numerous commentators.⁵⁵⁷ However, due to a socio-political system of China, it is rather unlikely that unsuccessful institutions would simply be shut down, and numerous people working for them would lose their positions. According to Lin “[m]any local governments treat arbitration institutions merely as additional Institutional Units and another channel for increasing staffing and its arrangements”.⁵⁵⁸ Furthermore, the excessive number and the reliance on the government by some institutions has led to another type of irregularity – namely, a practice of a compulsory referral to arbitration. That means

⁵⁵³ Moser and Yu, 557.

⁵⁵⁴ Yuen, McDonald, and Dong, 235.

⁵⁵⁵ See Chapter 2 p. 47.

⁵⁵⁶ See Sun and Willems, 4-7.

⁵⁵⁷ See, for example, Song, Zhao, and Li, 175-176.; Shengchang Wang, "The Globalization of Economy and China's International Arbitration," *Asian Dispute Review* 2003, no. 187-188 (2003), 187.; Lin. (last accessed: 20 November 2018)

⁵⁵⁸ Lin. (last accessed: 20 November 2018).

a practice by which local governments use their power to compel (or strongly “advise”) the local companies to refer their disputes to particular arbitration institutions.⁵⁵⁹

In summary, according to Sun and Willems, the interdependence of the arbitration institutions and the government in China in the area of financing “continue[s] to present a practical hurdle to their independence”.⁵⁶⁰

6.2.4. Recommendations

This part offers recommendations on how to: (A) improve the distribution of power and mechanisms available in the area of forming an arbitral tribunal, and (B) improve the functioning of the Chinese arbitration institutions, and, in particular, increase their level of independence.

A. Improving the distribution of power and mechanisms in the area of forming an arbitral tribunal

Generally, arbitration law should support the parties’ freedom to arrange their own procedures in the area of forming an arbitral tribunal. Further, a workable default framework should be provided under the CAL, with the aim of accommodating also *ad hoc* proceedings.

a. Appointment of arbitrators

The CAL should provide for a default number of arbitrators – in case the parties have not specified it. The default number should be three. As noted above in the context of transnational standards, a panel of three arbitrators can potentially better understand the positions of all the parties involved in dispute. Also, as observed by Mangan, Reed, and Choong, the parties are statistically more likely to agree on a presiding arbitrator in a three-member panel than on a sole arbitrator.⁵⁶¹ However, if a sole tribunal is favored by the parties, for example, because of the cost efficiency, the parties should be free to choose a sole arbitrator.

Further, it is recommended that for the selection of the third arbitrator in a three-member panel, the solution of the UNCITRAL Model Law is followed, whereby the third arbitrator is appointed by the two party-appointed arbitrators. As noted above, the Singaporean solution (whereby the third arbitrator is

⁵⁵⁹ Wang, “CIETAC’s Perspective on Arbitration and Conciliation Concerning China,” in *New Horizons in International Commercial Arbitration and Beyond ICCA Congress Series* 36-37.

⁵⁶⁰ Sun and Willems, 9.

⁵⁶¹ Mangan, Reed, and Choong, 89.

jointly appointed by the parties, and only if that it is not possible – the SIAC makes the appointment) is claimed to give more way to party autonomy. However, the default solution under the UNCITRAL Model Law (and also that of Hong Kong) also respects the autonomy of parties: the third arbitrator is selected by the arbitrators appointed by the parties, and, thus, indirectly by the parties as well. In practice, once a dispute occurs, it may be difficult for the parties to make a compromise on any issue, including the third arbitrator. As such, it seems more likely that a compromise will be reached by party-appointed arbitrators. Therefore, the latter solution is recommended to China.

Another issue that can come into play, in particular if *ad hoc* arbitration is more widely permitted in China, is who should be a “statutory appointing authority”. In answering this question, it should be noted that in contrast to Hong Kong and Singapore, China has a few leading arbitration institutions⁵⁶² and, therefore, it would be more difficult to choose one of them to be such an authority. However, if one of them is to be selected, due to its experience, expansive lists of arbitrators (including foreign arbitrators), and the presence of sub-commissions offices in different regions, this could potentially be CIETAC. Nonetheless, it should be noted, that as argued in this Chapter, CIETAC itself is not free of problems in the area of appointment.

Moreover, the appointment decision rendered by a default appointing authority should not be appealable, mainly for the sake of efficiency of the proceeding. In addition, specific and relatively short time limits should be added for the appointment decisions by the parties. This is already provided by the arbitration rules, yet, should be also implemented into the arbitration law.

Concerning other problems existing in the area of the appointment in China – beyond issues pertaining to the distribution of power and mechanisms discussed above, there is a number of actions that can be taken to remedy the shortcomings. First, governmental officials and staff of the arbitration institutions should not be appointed as arbitrators. By way of example, the BAC decided that its chairperson and the BAC’s staff cannot concurrently serve as arbitrators, and the BAC’s vice-chairpersons and committee members can only act as arbitrators, if they are jointly appointed by the parties.⁵⁶³ This solution could serve as an inspiration for other Chinese institutions. Second, in case of disputes involving foreign elements, a sole or a presiding arbitrator should be of a different nationality than that of the parties – unless the parties agree otherwise.⁵⁶⁴ Third, providing a set of criteria for

⁵⁶² See Chapter 2. p. 39.

⁵⁶³ Chen, "Striving for Independence, Competence, and Fairness: A Case Study of Beijing Arbitration Commission," 342-343.

⁵⁶⁴ Yet, in China, the problem is more complex, because, as mentioned above, CIETAC offers relatively low payment to arbitrators, which can be discouraging for foreign arbitrators. See more Fan, *Arbitration in China, a Legal and Cultural Analysis*, 68-69.; Tao, *Arbitration Law and Practice in China*, 134.

situations, where the chairman makes the appointment would help to reduce the risk of the chairman's discretionary power. Here, the CIETAC's solution under Art. 30 of the 2015 CIETAC Rules could serve as a reference. Finally, eliminating the assumption of compulsory panels of arbitrators in China would be another positive change.

On this last point specifically, it is true that many of the leading arbitration institutions in the world have their own lists of arbitrators. This is also the case for the HKIAC and the SIAC. However, these lists serve as a reference/recommendation. For example, the SIAC in its FAQ section available on the SIAC's official website makes it clear that despite the existence of the SIAC's panel list, the parties are free to nominate arbitrators of their own choice.⁵⁶⁵ Broadening the access to various arbitrators is important in light of the changing dynamics of business transactions that China does with the rest of the world. By way of example, having in mind the Belt and Road Initiative,⁵⁶⁶ it is noteworthy that as to arbitrators from countries like Myanmar, Pakistan, or Bangladesh participating in this initiative, the choice is extremely limited, even when looking at the extensive panel of arbitrators of CIETAC.

b. Challenge, removal, and replacement of arbitrators

The approach to the time limits to raise the challenge should be modified in China. As mentioned, under the CAL, a party, generally, needs to raise the challenge *before the first hearing of the tribunal*. However, if the reasons for a challenge become known only after the first hearing, the challenge can be brought up *before the end of the last hearing*. This can potentially lead to abuses. One could imagine a situation where a party realizes that there exists a reason for a challenge after the first hearing, but it waits to see how arbitration proceeds. In case it proceeds in a way not favorable to that party, it raises the challenge at the later stage. This can result in a waste of time and money, in particular, if the challenge is successful. It seems to be more practical that a party is given a specific amount of time for raising the challenge, counted from when the party has become aware of circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence. In case of the UNCITRAL Model Law, these are 15 days, and if a party does not raise the challenge timely, it should be deemed waived on those grounds. The recommendation of introducing a more specific time framework pertains to both the CAL, as well as the Chinese institutional rules.

Concerning future *ad hoc* proceedings, the UNCITRAL Model Law mechanisms are recommended. Beyond specific time limits for raising a challenge; other aspects include putting the arbitral tribunal in

⁵⁶⁵ See the official website of the SIAC: <http://www.siac.org.sg/faqs#faq40> (last accessed: 20 November 2018). Yet, the appointment is subject to the approval by the SIAC President.

⁵⁶⁶ See Chapter 1 p. 2.

charge of deciding the matter, and providing an option of recourse to the court in case of an unsuccessful challenge. On the point of recourse to the court, in case China decides to implement this mechanism, a number of safeguards employed by the UNCITRAL Model Law should be used as well. This includes (1) a short period of time for appealing a challenge decision; (2) a possibility for the continuation of the arbitration proceeding during court review; and (3) the lack of appeal for the subsequent court decision.

B. Need for restructuring of the arbitration institutions in China and enhancing their independence

The administrative influence over the arbitration institutions in China should be limited. This would also allow to provide the institutions with more independence in their decision-making. Yang suggests that in order to ensure the proper development of arbitration in China, strengthening its non-governmental nature and safeguarding the independence of the arbitration institutions should be seen as the top priority for future reforms of the whole arbitration system.⁵⁶⁷ According to some commentators, the most significant governmental support for arbitration would be non-interference.⁵⁶⁸ In terms of “divorcing” the Chinese arbitration institutions from the government, the main postulates pertain to providing the institutions with more independence in terms of choosing their personnel and financing. Another issue is the excessive number of arbitration institutions in China.

a. Personnel

The elimination of the practice of governmental officials holding the key positions in the arbitration institutions is important. This would help reduce the risk of perceived or real influences and, thus, provide more neutrality in arbitration proceedings in China. Equally importantly, the management of the arbitration institutions by experienced legal professionals would help guarantee a higher level of professionalism in running the institutions, as well as in making decisions, also in the area of forming an arbitral tribunal. Thus, the government’s involvement in arranging the key personnel of the institutions should be eliminated, or at least, limited, and a more professional approach should be taken instead.

⁵⁶⁷ Yang. (last accessed: 20 November 2018). See also Fan, "Underlying Influences on the Effectiveness of Arbitration in China," 78.

⁵⁶⁸ See Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 106 note 102; Lin. (last accessed: 20 November 2018).

b. Financing

Arbitration institutions should be detached from the government's involvement in terms of their financing. Cutting both the extra financing and assigned cases would likely result in a reduced number of institutions in China. It would then, likely enhance the effectiveness of the institutions seeking to survive in the market.

Alternatively, the institutions should be given a free choice between being a part of the Ministry redistribution scheme or managing their finances by themselves. Further, in case this choice is offered, overly burdening taxes should not be imposed on the institutions that decide to take tend to their own financing. In this respect, Wang proposes that for tax purposes, the arbitration institutions should be regarded as non-profit organizations and, therefore, enjoy tax exemptions.⁵⁶⁹ The self-management of the profitable institutions would allow them to use any surplus of funds in the most effective way. For instance, the institutions could increase the rates paid to arbitrators, and by doing that, attract more of prominent arbitrators available to hear cases. This would be of practical relevance for the above mentioned postulate of applying the nationality exclusion rule to a sole or presiding arbitrator in cases where the parties from different states are involved.

c. Addressing the excessive number of arbitration institutions in China

Future reforms in China should also embrace the problem of the excessive number of the arbitration institutions in China. This is because this extensive number and artificial support for some institutions has contributed to irregularities, such as imposing on the parties the choice of arbitration administered by a particular institution, which contradicts the basic principle of arbitration – party autonomy. Some extent of “marketization” of the arbitration institutions in China would likely allow to see which institutions are, indeed, needed.

d. Possible references

i. BAC

The BAC, in a number of aspects, is a fairly unique arbitration institution in China. It is funded in an alternative way, and, to some extent, it operates differently than most of the Chinese arbitration institutions. Therefore, the BAC's reliance on the government has also decreased when comparing it with other institutions in China.⁵⁷⁰ In practice, the BAC has managed to build itself as a successful

⁵⁶⁹ Sun and Willems, 9. See also the official website of the BAC: <http://www.bjac.org.cn/news/view?id=1517> (last accessed: 20 November 2018).

⁵⁷⁰ See, generally, Chen, "Striving for Independence, Competence, and Fairness: A Case Study of Beijing Arbitration Commission.", 313 *et seq.*

arbitration center, and, in turn, its international recognition and caseload have been steadily growing.⁵⁷¹ With that in mind, the BAC model could serve as a point of reference for the future attempts to restructure the arbitration institutions in China. The details of the functioning of the BAC, regarding both its personnel and financing, are discussed broader in Chapter 2.⁵⁷²

ii. International institutions: the example of the HKIAC

Looking at some other possible points of reference, one could also turn to international arbitration institutions established beyond China. The HKIAC is a good example, primarily because of access to information on the functioning of this institution. Some other solutions are occasionally mentioned below as well.

1. Personnel

The HKIAC is governed by its Council, which is comprised of a number of individuals of various nationalities, and is headed by a chairperson and a number of vice-chairpersons. Daily operations of the HKIAC are conducted by its secretary-general and secretarial staff. The HKIAC has a number of committees, which work under the guidance of the Council. This includes the executive committee – a principal body directing the HKIAC’s activities, the above mentioned appointment committee and procedure committee, as well as the third standing committee – the finance and administration committee, which deals with overseeing of finances, accounts, tax, human resources, general administration, and corporate governance.⁵⁷³ Members of all of these bodies are practitioners representing a variety of nationalities.⁵⁷⁴

As to the HKIAC Council, it is composed by between three and 25 members. Every year, one-third of the Council members who have been in office longest since their last election are required to retire at the annual general meeting. By default, if a retiring Council member offers him or herself for re-election, he or she is deemed have been re-elected, except if the HKIAC expressly resolves not to fill

⁵⁷¹ In 2017, the BAC accepted 77 international commercial arbitration cases, which makes an increase of 21 cases comparing to 2016. See the official website of the BAC: <http://www.bjac.org.cn/english/news/view?id=3167> (last accessed: 20 November 2018).

⁵⁷² Chapter 2 p. 47-48.

⁵⁷³ Cheng and Moser, 23. See also the official website of the HKIAC: <http://www.hkiac.org/about-us/council-members-and-committees> (last accessed: 20 November 2018).

⁵⁷⁴ See the official website pages of the HKIAC: <http://www.hkiac.org/about-us/council-members-and-committees/hkiac-council>; <http://www.hkiac.org/about-us/council-members-and-committees/executive-committee>; <http://www.hkiac.org/about-us/council-members-and-committees/finance-and-administration-committee>; <http://www.hkiac.org/about-us/council-members-and-committees/proceedings-committee>; and <http://www.hkiac.org/about-us/council-members-and-committees/appointments-committee> (last accessed: 20 November 2018).

the vacated position, or if a resolution for the re-election of a Council member is put to the meeting and lost. As a general rule, only retiring Council members are eligible for election, unless another candidate is recommended by the Council or a vacancy exists. To be eligible for election, a candidate must be first proposed by a member of the HKIAC and notify in writing about his or her willingness to be elected.⁵⁷⁵

The HKIAC executive committee directs the activities of the HKIAC in accordance with policies approved by the HKIAC Council. It comprises of a maximum of six members: the HKIAC's chairperson, two vice-chairpersons, and the heads of the three standing committees. All members of the executive committee must be members of the HKIAC Council and their term on the committee is three years.⁵⁷⁶

With respect to the three standing committees, all their members are appointed by the HKIAC Council. Further, the chairperson and secretary-general of the HKIAC are *ex officio* members, the majority of members shall be the HKIAC Council members, and their term of office is two years, with the exception that the chairperson of each committee serves a three-year term, which the HKIAC Council may extend to a four-and-a-half-year term.⁵⁷⁷ It should be noted that in June 2017, the HKIAC Council reconstituted its procedure committee and appointment committee with a view to achieving diverse representation on both committees, taking into account the following considerations: nationality, gender, common law and civil law qualifications, representation from law firms, barristers' chambers and in-house counsels, diverse subject-matter and jurisdictional expertise, recognised international and local profiles, as well as balancing seniority with developing younger, local talent.⁵⁷⁸

Regarding internationalization and diversification, also the SIAC's Court of Arbitration stressed the need to implement these into structures.⁵⁷⁹ By way of further example, the Court of the London Court of International Arbitration ("LCIA"), which deals with, among others, the appointment of arbitrators and challenges, is made of up two thirty three members. Maximum six of the LCIA Court members can

⁵⁷⁵ See Art. 37, 46, 47, 49, 50 of the of the HKIAC Articles of Association. Note, however, that by ordinary resolution, the HKIAC may increase or decrease the number of the Council members (Art. 51). The information concerning the details of the HKIAC's structures was obtained from Sarah Grimmer, the Secretary-General of the HKIAC on 18 January 2018 (email correspondence on file with the author of this thesis).

⁵⁷⁶ Art. 2, 5, 6, 9, 10 of the HKIAC Executive Committee Regulations (31 May 2014). Note also the changes as of 2017.

⁵⁷⁷ Art. 2-6 of the HKIAC Standing Committee Constitution (2017), Art. 3 of the HKIAC Procedure Committee Regulations (2014), and Art. 4 of the HKIAC Appointment Committee Regulations (2014).

⁵⁷⁸ This information was obtained from Sarah Grimmer, the Secretary-General of the HKIAC on 18 January 2018 (email correspondence on file with the author of this thesis).

⁵⁷⁹ See the official website of the SIAC: <http://www.siac.org.sg/2014-11-03-13-33-43/about-us/court-of-arbitration> (last accessed: 20 November 2018).

be of the UK nationality. As claimed by the LCIA, the diversification of the LCIA Court is a pursuit to “maintain a balance of leading practitioners in commercial arbitration, from the major trading areas of the world”.⁵⁸⁰

It is perhaps unrealistic that such an extensive degree of internationalization will happen in the case of the Chinese arbitration institutions, at least as of today. However, an increased diversification and professionalism of personnel is important for any type of institution. Therefore, this is also desirable in China, in particular, in the case of institutions that seek to become more international.

2. Finances

Regarding finances, in reality, it is rare for arbitration institutions to be entirely independent – both organically and financially. A full independence would mean no connection to another organization or government, and no funding from a government. Gerbay points out that the American Arbitration Association (“AAA”) is a rare example of a fully independent institution. The AAA has the form of a New York not-for-profit corporation and it is not linked to a chamber of commerce or any other state entity. The AAA does not receive any funding from the government, and it regularly publishes its annual reports including financial information.⁵⁸¹ In practice, however, many arbitration institutions are connected to chambers of commerce. This often happens, because the chambers’ business communities are frequently the driving force behind creating particular institutions.⁵⁸²

As to the control of financing by the government, taking the HKIAC as an example, it can be observed that although at the beginning the HKIAC was financially supported by the Hong Kong government, it gradually freed itself from the need to be financially assisted, and now it declares to be “financially self-sufficient and completely free and independent from any type of influence or control”.⁵⁸³ Annual reports including financial statements, which are regularly published by the HKIAC, seem to support its financial self-standing and self-governance.⁵⁸⁴ Indeed, a crucial point is how independently

⁵⁸⁰ See the official website of the LCIA: <http://www.lcia.org/LCIA/organisation.aspx> (last accessed: 20 November 2018).

⁵⁸¹ See Gerbay, *The Functions of Arbitral Institutions*, 21. See also the annual report of the American Arbitration Association for 2016, including its financial information at: https://www.adr.org/sites/default/files/document_repository/AAA_AnnualReport_2017.pdf (last accessed: 20 November 2018).

⁵⁸² Gerbay, *The Functions of Arbitral Institutions*, 20-21.

⁵⁸³ See the official website of the HKIAC: <http://hkiac.org/about-us> (last accessed: 20 November 2018), also Ma and Brock, 157.; Cheng and Moser, 23.

⁵⁸⁴ See, for example, the 2015 and 2016 HKIAC Annual Reports for 2014 and 2015, respectively, available at the official website of the HKIAC: http://www.hkiac.org/sites/default/files/annual_report/2015_Annual_Report_Final.pdf and

particular institutions function *after* they were *initially* helped, and thereafter reached financial independence. This is because, with the notable exception of the AAA, it would be perhaps unrealistic to argue that, generally, governments have nothing to do with arbitration institutions. Quite conversely, as argued in Chapter 3, states normally have an interest in supporting the arbitration infrastructure.⁵⁸⁵ As such, it happens that states become involved especially at the initial stage of the functioning of the arbitration institutions. Nonetheless, once the arbitration institution is effectively helped to start its operations, the involvement of the government should be minimized: this includes China.

http://www.hkiac.org/sites/default/files/annual_report/annual%20report%202016%20%28low%20resolution%29%20v2.pdf (last accessed: 20 November 2018).

⁵⁸⁵ See Chapter 3 p. 52-53.

CHAPTER 7: EVIDENCE TAKING

7.1. General remarks

Evidence is a crucial element of an arbitration proceeding. The parties need evidence to support their contentions. Also, it is important that the tribunal deciding the case has access to accurate evidence for the purpose of reaching a fair decision. Regarding the specific aspects of evidence taking, such as what kind of evidence can be presented before the tribunal and in what way it should be presented, as discussed more extensively below, the practice can vary in particular jurisdictions. However, it should be also noted that some efforts have been taken to bridge the various approaches to evidence taking in international arbitration proceedings.

By way of example, the International Bar Association (“IBA”) Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) seek to serve this purpose. As per the preamble of the IBA Rules, the intention is to bridge the differences between the parties coming from different legal cultures, and to offer a set of rules that can be adopted to support the arbitration proceeding.⁵⁸⁶ The IBA Rules regulate a variety of issues related to evidence taking, including: document production, evidence by a fact witness or a party-appointed or a tribunal-appointed expert witness, and issues of admissibility and assessments of evidence. Importantly, the IBA Rules have the nature of “soft law”. Thus, they apply, in principle, when the parties adopt them.

In general, a party is expected to furnish own evidence to support its case. There might be, however, some instances, when the party may need help in obtaining crucial evidence. This can happen, for example, when the key evidence is not in the possession of the party who seeks to rely on it, but quite contrarily – is in the possession of the opposing party, whose interest is that such particular piece of evidence does not see the light of the day. If the party is unsuccessful in soliciting the evidence from the opposite party, it can seek the help of the tribunal by requesting a relevant order. Yet, the tribunal is not equipped with coercive powers, and, thus, cannot directly compel a person in possession of evidence to produce it.

⁵⁸⁶ See the preamble of the International Bar Association (“IBA”) Rules on the Taking of Evidence in International Arbitration adopted by a resolution of the IBA Council 29 May 2010.

On the other hand, as in case of interim measures, the tribunal has an arsenal of weapons to punish the behavior of a non-complying party. This includes, in particular, drawing an adverse inference from the non-complying behavior and reflecting it in the award. Nonetheless, at the end of the day, the tribunal cannot coerce the uncooperative party to do or to refrain from doing something. If the coercive enforcement is needed, this can only happen through the involvement of the state court.

State court assistance can be of particular importance if evidence is to be obtained from a third party – a non-party to arbitration. This is because, as mentioned, arbitration is consensual and has a very limited reach to non-parties. The need for the state court help in obtaining evidence in this context was well characterized in *Jardine Lloyd Thompson Canada Inc. v. SJO Catlin* in 2006, where it was stated that: “[t]he parties to the arbitration can craft an arbitration agreement to suit their own purposes but they cannot, without more, exercise powers over third persons. The Legislature has seen fit, however, to empower tribunals to request the court's assistance in taking evidence.”⁵⁸⁷ Against such a background, it is important that arbitration can rely on the assistance of state courts in the process of evidence taking.

It needs to be emphasized here that there are differences between “taking of evidence” and “preservation of evidence”, although these two are often correlated. “Preservation of evidence” is an interim measure and it can be granted under specific circumstances, usually when – without this measure – the evidence would be destroyed or difficult to obtain in the future. “Taking of evidence”, on the other hand, involves a procedural order relating to particular evidence needed for the hearing for the purpose of moving the arbitration proceeding forward.⁵⁸⁸ Finally, as discussed more extensively below, in the context of obtaining the court’s assistance for the purposes of evidence taking, the tribunal’s approval may be needed, which is not required in case of the application for an interim measure.

This Chapter deals with the distribution of power in the area of evidence taking. In doing that, while addressing the relevant powers of the arbitral tribunal in this regard, the discussion concentrates specifically on the question of the state court’s assistance to arbitration. This Chapter starts with a description of transnational standards in the area. Subsequently, it moves to the analysis of the situation in China, where some shortcomings are navigated, and also some recommendations on how these deficiencies can be improved are offered. Some more complex topics, especially the question of

⁵⁸⁷ *Jardine Lloyd Thompson Canada Inc. v. SJO Catlin* [2006] ABCA 18, para 25. The judge in this case was referring to Art. 27 of the UNCITRAL Model Law.

⁵⁸⁸ See Moses, 112.; Joseph and Foxton, 285.

whether the state court should assist a foreign tribunal in obtaining evidence, are beyond the discussion of this thesis.⁵⁸⁹

7.2. Allocation of power in the area of evidence taking

7.2.1. Transnational standards

Before moving to the analysis of relevant solutions available under the UNCITRAL Model Law, and that of Hong Kong and Singapore, the introductory remarks refer to the differences between civil and common law evidence taking, and their impact on the practice of international arbitration.⁵⁹⁰

The practice of evidence taking can vary in particular jurisdictions. It is important to mention that, in general, there are considerable differences between civil and common law court proceedings as to how evidence should be collected and presented, and this will have some impact on the practice of international arbitration. By way of example, approaches toward document production vary in the two systems.⁵⁹¹ Document production takes place when a party requests a relevant document to be produced by the opposing party. In civil law jurisdictions, the parties, generally, collect evidence by themselves and such requests for the production of documents are rather rare. In common law jurisdictions, however, the tradition of document production has developed over the years, and, thus, the courts are more permissive toward such requests.

Importantly, although significant differences regarding matters such as document production exist between civil and common law jurisdictions, the national rules for court proceedings are, generally, not applicable to international arbitration (unless the parties specifically agree to their application). A few reasons have been quoted by Lew, Mistelis, and Kröll to support this approach. First, there is no

⁵⁸⁹ On that issue, see, for example, Born, 2419-2421.

⁵⁹⁰ It should be noted that the UNCITRAL Model Law has been adopted by various states with civil law tradition (such as Germany and Poland), as well as by those with common law tradition (such as Hong Kong and Singapore). See the status of the states adopting the UNCITRAL Model Law on International commercial Arbitration at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last accessed: 20 November 2018).

⁵⁹¹ See, generally, on the differences between common and civil law evidence taking and their implications for international arbitration: Siegfried Elsing and John Townsend, "Bridging the Common Law Civil Law Divide in Arbitration," *Arbitration International* 18, no. 1 (2002), 59 *et seq.*; Lew, Mistelis, and Kröll, 555-556.; Born, 2204-2207.; Waincymer, 746-748.; Gaillard and Savage, 689-690.; Hans Smit, "Roles of the Arbitral Tribunal in Civil Law and Common Law Systems with Respect to Presentation of Evidence," in *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, ed. Albert Jan van den Berg, ICCA Congress Series (Kluwer Law International, 1996), 161 *et seq.*; Rolff Trittmann and Boris Kasolowsky, "Taking Evidence in Arbitration Proceeding: Between Common Law and Civil Law Traditions - the Development of a European Hybrid Standard of Arbitration Proceedings," *University of South Wales Journal* 31, no. 1 (2008), 330 *et seq.*

obvious reason why the national court proceeding rules should apply in international arbitration proceedings. Second, international arbitration with its flexibility offers the parties and the tribunal a chance to develop the rules most suitable for a particular proceeding. Third, this approach has the advantage of bridging cultural differences among the parties.⁵⁹²

Moreover, although the differences between the common law and civil law evidence taking are significant in the context of litigation, they are less significant in international commercial arbitration. As argued by scholars, a trend of a convergence of various backgrounds and practices in international arbitration has developed over the years.⁵⁹³ It is also pointed by Elsing and Townsend that international arbitration emerged as a response to the needs of parties coming from different jurisdictions, and that the convergence of practices allows a variety of possible solutions available both in common and civil law systems.⁵⁹⁴ Accordingly, instead of directly referring to domestic court rules, a set of rules selected by the parties (including arbitration rules, as well as additional sources, such as the above mentioned IBA Rules on the Taking of Evidence in International Arbitration) can constitute a more adaptable legal framework for evidentiary matters in international arbitration.

It is also important to note that the provisions of arbitration laws and arbitration rules typically do not provide for detailed instructions as to evidence taking, and, thus, a considerable level of discretion is often vested in the hands of arbitrators. Therefore, factors such as legal background, training, and experience of arbitrators deciding a particular case (and also to some extent of counsels putting forward particular requests) can play an important role in conducting the evidentiary hearing. Consequently, the fact of the existence of different approaches toward evidence taking should not be completely disregarded.

Although the parties have the burden to prove their case, arbitration laws in leading jurisdictions provide for some possibility of the assistance by the tribunal and the court in gathering evidence. In

⁵⁹² Lew, Mistelis, and Kröll, 559-560.

⁵⁹³ See, for example, Born, 2207-2210.; Waincymer, 755-62.; Gaillard and Savage, 690-691. Elsing and Townsend, 59 *et seq.*; Smit, in *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration.*; Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration (3rd Ed.)* (Kluwer Law International, 2015), 569-570.; Jan Paulsson, "Overview of Methods of Presenting Evidence in Different Legal Systems," in *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, ed. Albert Jan van den Berg, ICCA Congress Series (Kluwer Law International, 1996), 112 *et seq.*

See also Tom Ginsburg, "The Culture of Arbitration," *Vanderbilt Journal of Transnational Law* 36 (2003), 1335 *et seq.*; and Gabrielle Kaufmann-Kohler, "Globalization of Arbitral Procedure," *Vanderbilt Journal of Transnational Law* 36 (2003), 1313 *et seq.* for the general discussion on the convergence of practices in international commercial arbitration.

⁵⁹⁴ Elsing and Townsend, 1.

this respect, the tribunal can be equipped with relevant powers, and, further, court assistance can be available, where appropriate. This refers to both obtaining the evidence from a party, as well as from a non-party. Two typical instances refer to document production and securing the attendance of a witness at the evidentiary hearing.

Following the definition offered by Marghitola, “document production” should be understood as a “procedural device to obtain documents”.⁵⁹⁵ A “document” should be interpreted broadly, and should include: writings, communications, pictures, drawing, programs, or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual, or any other means.⁵⁹⁶ Typically, one of the parties will request a document to be produced by the opposing party. Furthermore, the tribunal can also order document production on its own initiative, without a party’s request, but this seems to happen very rarely in practice.⁵⁹⁷

It is worth mentioning that document production is a widely debated topic in international arbitration, and it is not free from criticism. Document production has been criticized primarily for being complex, overly expansive, time-consuming, and expensive.⁵⁹⁸ According to Lionnet, common shortcomings of the extensive document production contradict the aim of international arbitration proceedings, which is to be speedy and efficient.⁵⁹⁹ This is connected with the fact that sometimes the parties request extensive document production, which is actually not aimed at fact-finding, but rather at delaying the proceeding, or finding other pieces of information that could help them to support their case. This practice is commonly referred to as a “fishing expedition”.⁶⁰⁰

⁵⁹⁵ Reto Marghitola, *Document Production in International Arbitration* (Kluwer Law International, 2015), 6. A few terms, such as “discovery” and “disclosure” are often used interchangeably with “document production” in practice. Yet, they have slightly different meanings. See: *ibid.*, 8-10. For the purpose of this thesis “document production” and “discovery of documents” have the same meaning.

⁵⁹⁶ See the definition of “document” provided by the IBA Rules on the Taking of Evidence in International Arbitration in the “Definitions” section.

⁵⁹⁷ See Marghitola, 6.

⁵⁹⁸ See, for example, Klaus Lionnet, “Once Again: Is Discovery of Documents Appropriate in International Arbitration?,” in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen and Robert Briner (ICC Publishing, 2005), 491 *et seq.*; Kyriaki Karadelis, “Getting a Grip on Discovery,” *GAR* (31 January 2014).; also Jarred Pinkston, “The Arbitrator and the Arbitration Procedure - the Case for a Continental European Arbitral Institution to Limit Document Production,” in *Austrian Yearbook on International Arbitration 2011*, ed. Nikolaus Pitkowitz, Alexandre Petsche *et al.* (Manz’sche Verlags- und Universitätsbuchhandlung; Manz’sche Verlags- und Universitätsbuchhandlung, 2011), 87 *et seq.*

⁵⁹⁹ Lionnet, in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, 498-499.

⁶⁰⁰ See Born, 2360-2361.; Marghitola, 61-64.

In order to respond to the criticism raised toward document production, numerous actions have been taken. By way of example, the above mentioned IBA Rules on the Taking of Evidence in International Arbitration provide for special rules, which need to be satisfied if document production is to be ordered. In addition to the requirement to specifically identify the documents that are to be produced, the IBA Rules require that a party requesting document production proves that a demanded document is relevant to the case and material to its outcome. Furthermore, a party that is asked to produce a document can object to it based on a number of grounds, such as the failure to satisfy the above listed requirements or that document production would cause unreasonable burden.⁶⁰¹

Interestingly, following the voiced dissatisfaction with the recent evidence taking practices in international arbitration, a new soft law instrument was created, referred to as the “Prague Rules”. While acclaiming the contribution of the IBA Rules, the drafters of the Prague Rules⁶⁰² note that the IBA Rules are still closer to common law practice. The drafters further note this affects the efficiency of the international arbitration proceeding, and, in particular, its cost, referring especially to document production, but also to the use of fact and expert witnesses.

The drafters of the Prague Rules seek to offer a more inquisitorial model of procedure with more active arbitrators. Concerning document production specifically, the Prague Rules provide for a limited scope of document production and a more active role of the tribunal. Article 4 of the Prague Rules provides that the tribunal should, generally, avoid extensive document production. Further, a party requesting document production should point to a specific document or documents that is/are to be produced; and these documents need to be: (1) relevant and material to the outcome of a case; (2) not in the public domain; and (3) in the possession of the other party. Also, the tribunal itself can request the production of document from a party, and it should impose time restrictions within which the document should be produced. The Prague Rules are to be officially launched at the end of 2018. Yet, a number of discussions on their practicability have already taken place.⁶⁰³

⁶⁰¹ See Art. 3 and Art. 9(2) of the IBA Rules on the Taking of Evidence in International Arbitration.

⁶⁰² Rules on Conduct of the Taking of Evidence in International Arbitration (“Prague Rules”), Draft of 11 April 2018. The Working Group is of predominantly civil law background (and predominantly Russian as per the nationality). See the Working Group members at the official website of the Prague Rules: http://praguerules.com/working_group/ (last accessed: 20 November 2018).

⁶⁰³ See more at the official website of the Prague Rules at <http://praguerules.com>; Duarte Henriques, “The Prague Rules: Competitor, Alternative or Addition to the Iba Rules on The taking of Evidence in International Arbitration?,” *ASA Bulletin* 36, no. 2 (2018), 351 *et seq.*; Michal Kocur, “Why Civil Law Lawyers Do Not Need the Prague Rules,” (20 June 2018), https://www.linkedin.com/pulse/why-civil-law-lawyers-do-need-prague-rules-michal-kocur/?lipi=urn%3Ali%3Apage%3Ad_flagship3_profile_view_base%3BoHKTlpvCR1OpedNBc4Lshg%3D%3D. (last accessed: 20 November 2018).

Nonetheless, even under the Prague Rules, some document production is allowed. Thus, what seems to be problematic is not the device of document production as such, but rather the extent of document production that should be permitted. On that point, the degree of document production known in common law systems, and especially in the American reality, should not (and usually does not) take place in international arbitration.⁶⁰⁴ Also, the tribunal has the possibility to reflect the unreasonable costs incurred for extensive document production in the final award, where the proceeding costs are normally allocated. Last but not least, a capable and decisively acting tribunal, not concerned with potential accusations of due process paranoia,⁶⁰⁵ is the key factor to the reasonable use of document production.

Concerning the role of the state court in evidence taking, a particularly important instance is where document is to be produced by a non-party. This could be the case when, for example, a sub-contractor in a dispute between an owner and a contractor possesses some relevant evidence. The use of drawing an adverse inference from the non-complying behavior can be of limited use in such cases. Hence, court assistance can be of particular relevance.

It may also happen that the attendance of a non-party witness at the evidentiary hearing is needed. Generally, each of the parties chooses how to present its cases and which witnesses to offer in order to help to tell its side of the story. However, the witness who is of interest in a case may not necessarily be available to appear in front of the tribunal. By way of example, one of the parties may be interested in having a witness appearing at the hearing, but it has no control over this witness. One could imagine a scenario where a crucial witness (irrespective whether a written statement has been already given by this witness or not) – a manager of a company in dispute, does not intend to attend the hearing, despite a request of one of the parties, because the witness was urged by its boss – the other party, not to get involved. It can also happen that an important witness is beyond the sphere of control of any of the parties, but it would be useful to have this witness to fill the gaps in evidentiary material. In such situations, a party may seek the tribunal's help in securing the witness' attendance. Finally, in some instances, the tribunal can seek to secure the attendance of a witness on its own initiative. Yet, the tribunal will do it only in very exceptional circumstances.⁶⁰⁶

⁶⁰⁴ See Marghitola, 61, also note 162.

⁶⁰⁵ On the issue of "due process paranoia", see Chapter 3 p. 64.

⁶⁰⁶ See Judith Levine, "Can Arbitrators Choose Who to Call as Witnesses? (and What Can Be Done If They Don't Show Up?)," in *Legitimacy: Myths, Realities, Challenges*, ed. Albert Jan van den Berg, ICCA Congress Series (Kluwer Law International, 2015), 315-317.

The tribunal does not have the tools to compel the witness to attend the hearing and provide evidence. It can try to informally “invite” the witness. It can also ask the party who has a degree of control over the witness to use its best efforts to try to bring this witness before the tribunal. This is enshrined, for example, in the IBA Rules.⁶⁰⁷ In some instances, the tribunal can also draw an adverse inference from the witness’ non-appearance, if, for example, a written witness statement was offered by the party, but then the witness is unavailable for cross-examination. Yet, in any case, the tribunal cannot force the witness to come to the hearing. Ultimately, only the state court can compel the witness attendance, provided that there is a relevant framework for court assistance in such situations.

A. UNCITRAL Model Law

As to the powers of the tribunal in the process of evidence taking, its power to order document production typically is not regulated by a specially dedicated arbitration law provision. Taking the UNCITRAL Model Law as an example, the tribunal’s power can be, however, inferred from Art. 19(1), according to which, the parties’ procedural autonomy should be followed by the tribunal. Hence, if the parties agreed to a specific set of rules, which allow document production, the choice of the parties should be respected. Furthermore, Art. 19(2) prescribes that in the absence of a specific agreement made by the parties, the tribunal may conduct arbitration in a way it considers appropriate.⁶⁰⁸ As such, it is suggested by scholars, that this provision can be interpreted as a basis for document production under the UNCITRAL Model Law.⁶⁰⁹ It is also stressed that the inherent fact-finding mandate of the tribunal should be given due attention in this regard.⁶¹⁰

Concerning the tribunal’s power to order the witness attendance, the UNCITRAL Model Law is silent on that issue. Following the logic above, it can be argued that this power can be established based on a similar interpretation of the provisions quoted above in the context of document production, yet subject to an important qualification – that non-parties cannot ultimately be affected by the tribunal’s decisions, if not adequately supported by the court.

With reference to the legal framework for court support in enforcing the tribunal’s orders, Art. 27 of the UNCITRAL Model Law stipulates that the arbitral tribunal, or a party with the tribunal’s approval, may request the assistance in evidence taking from a competent court. At the stage of drafting of Art.

⁶⁰⁷ Art. 4(10) of the IBA Rules on Taking of Evidence in International Commercial Arbitration.

⁶⁰⁸ See more on the legislative history of Art. 19 of the UNCITRAL Model Law in Holtzmann and Neuhaus, 564-568.

⁶⁰⁹ See Born, 2325-2326.; Waincymer, 854.

⁶¹⁰ See Born, 2331-2334.

27, it was stressed that the court's assistance in enforcing the procedural decisions of the tribunal can "contribute to the proper and efficient functioning of international commercial arbitration".⁶¹¹

In the course of the discussion on the content of Art. 27, it was pointed that requesting the court's assistance can be abused by the parties seeking to delay the arbitration proceeding. In response, it was ultimately decided that either a party or the tribunal can turn to the court seeking its assistance. However, if it is the party, it first needs to obtain the tribunal's approval. This solution allows the tribunal to scrutinize unsuitable requests, such as "fishing expedition" attempts, and it allows arbitrators to be in a better control over the proceeding. Further, in the spirit of the simplicity of the UNCITRAL Model Law and integrating Art. 27 with already existing court procedures, Art. 27 was gradually simplified, and it was eventually decided that the court will execute the request for assistance according to its own rules on evidence taking.⁶¹²

B. Hong Kong and Singapore

It is initially important to stress that both Hong Kong and Singapore are common law jurisdictions.⁶¹³ Further, the arbitration laws of Hong Kong and Singapore considerably follow the concepts of the UNCITRAL Model Law in the area discussed.⁶¹⁴

In Hong Kong, the concepts of Art. 19 of the UNCITRAL Model Law dealing with the determination of rules of procedure are reflected by Section 47 of the HK Arbitration Ordinance.⁶¹⁵ Concerning the more specific powers given to the tribunal under the HK Arbitration Ordinance, Section 56 provides that unless otherwise agreed by the parties, the tribunal has the power to, *inter alia*, order a discovery of documents and direct the attendance of a witness before the tribunal. However, it should be noted that the tribunal can only "direct" a witness to attend the hearing; it cannot compel a non-party witness without obtaining the court leave.⁶¹⁶ In addition, the person concerned is not required to

⁶¹¹ Holtzmann and Neuhaus, 739.

⁶¹² See more on the legislative history of Art. 27 of the UNCITRAL Model Law in *ibid.*, 734-738.; also, generally, about Art. 27 in Binder, 326-332.

⁶¹³ See more on the evidence taking in the court proceedings in Hong Kong in Michael Wilkinson et al., *A Guide to Civil Procedure in Hong Kong (5th Ed.)* (LexisNexis, 2017), 769-804 & 363-457.; and in Singapore in Siyuan Chen and Eunice Chu Hui Han, *Civil Procedure in Singapore (2nd Ed.)* (Wolters Kluwer, 2016), 377-391.

⁶¹⁴ See, generally, Sections 47, 53, 55-56, 61 of the HK Arbitration Ordinance, and Sections 12 and 13 of the SIAA.

⁶¹⁵ See, generally, Cheng and Moser, 139-141.; Ma and Brock, 509-510.

⁶¹⁶ See Levine, in *Legitimacy: Myths, Realities, Challenges*, 348.; Peter Megens, Paul Starr, and Peter Chow, "Compulsion of Evidence in International Commercial Arbitration: An Asia-Pacific Perspective," *Asian International Arbitration Journal* 2, no. 1 (2006): 47-48.

produce in the arbitration proceeding any document or other evidence that he or she would not be required to produce in the proceeding before the court. This relates especially to the issue of privilege, which means that the person concerned has the right to refuse to produce evidence.⁶¹⁷

As discussed in Chapter 5, *supra*, Section 61 of the HK Arbitration Ordinance provides that orders and directions of the tribunal are enforceable in the same manner as the court's orders, if the court leave is obtained. In addition, Section 53(3) stipulates that in case of the party's failure to comply with the tribunal's order or direction, the tribunal can make a peremptory order prescribing the time for compliance, and in case of non-compliance, without affecting Section 61, the tribunal may decide that a party is not entitled to rely on any allegations or material that was the subject matter of a particular peremptory order. Besides, the tribunal can render an award based on materials available, draw an adverse inference from the non-complying behavior, as well as reflect it in the proceeding costs allocation.

Further, the court assistance in evidence taking is regulated under Section 55 of the HK Arbitration Ordinance. In addition to the wording of Art. 27 of the UNCITRAL Model Law incorporated by this Section, it provides explicitly that the Court of First Instance of the High Court may order a person to attend the arbitration proceeding for the purpose of giving evidence, or produce documents or other evidence. Moreover, the Court can exercise its powers irrespective of whether similar powers can be exercised by the tribunal under Section 56 in relation to the same dispute. Nonetheless, the role of the court in arbitration in Hong Kong is, generally, supportive in character and should be used sparingly.⁶¹⁸

Regarding the situation in Singapore, Art. 19 and Art. 27 of the UNCITRAL Model Law are adopted there *verbatim*. In addition, Section 12 of the SIAA grants a range of powers to the arbitral tribunal, which includes ordering the discovery of documents from a party. Yet, there is no specific provision under the SIAA that mentions the tribunal's power to order a witness to appear at the hearing.⁶¹⁹

Further, as noted in Chapter 5, Section 12(6) of the SIAA provides that all orders and directions given by the tribunal are enforceable in the same way as those given by the court, yet the court leave must

⁶¹⁷ See Cheng and Moser, 129.

⁶¹⁸ See Chapter 5 p. 106-108.

⁶¹⁹ Section 12(1) of the SIAA stipulates that the relevant directions can be made in reference with a party. Regarding witnesses, Section 12(2) of the SIAA mentions only that the tribunal, subject to the parties' agreement to the contrary, has the power to administer oaths or take affirmations of the parties and witnesses. The power of the tribunal to order the witness attendance can be also deduced from the IBA Rules (see Art. 8(1) of the IBA Rules: "Each witness [...] shall [...] appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal."; see also Art. 4(9)(10) of the same rules). It is suggested that the IBA Rules have been increasingly followed by the tribunals in international arbitration in Singapore (see Joseph and Foxton, 269.)

be obtained.⁶²⁰ In addition, as per Art. 27 of the UNCITRAL Model Law, the High Court is given the power to offer its assistance to evidence taking in arbitration. Section 13 of the SIAA provides specifically that the High Court can order a subpoena ordering the attendance of a witness before the tribunal or document production. This can come into play, in particular, where a non-party is to give evidence. Such orders are not issued commonly in practice. Rather, an order will be only made if the evidence is necessary for a fair disposal of arbitrated issues and no equivalent evidence can be obtained from the parties.⁶²¹ Moreover, like in case of Hong Kong, under Section 13(4) of the SIAA, a person concerned does not have to produce evidence if it would not be obliged to do so in a court proceeding.

As to the requirement of obtaining the tribunal's approval by the party turning to the court for assistance (as required by Art. 27 of the UNCITRAL Model Law), the courts of Hong Kong and Singapore have dealt with this issue. In one Hong Kong case, a court stressed that the tribunal's approval is necessary, but it may also be implied, or inferred from the circumstance of a case. Yet, the court found also that for the situation wherein a party seeks a subpoena to bring a witness to the proceeding, the express written approval of the tribunal needs to be obtained.⁶²² Further, in one Singapore case, a party applied for the issuance of subpoena in order to compel a witness attendance, despite the fact that this request was previously rejected by the tribunal. The court rejected the application, stressed that a request for court assistance is not a sort of an appeal from the tribunal's decision in this regard, remarking that the behavior of the applicant was an abuse of process.⁶²³

It is worth noting that issues such as document production, seeking to bring a witnesses to attend the hearing, and having the courts backing up such actions are not only common law practices. Some civil law jurisdictions have also anticipated the need for such mechanisms for the sake of efficiency of the arbitration proceeding. By way of example, Art. 182 of the Swiss Private International Law resembles Art. 19 of the UNCITRAL Model Law and, thus, gives the arbitral tribunal the right to fashion the conduct of the proceeding in the absence of the parties' agreement. Article 182(3) anticipates also a possibility of an adversarial proceeding, and it allows it, with the qualification that equal treatment and the right to be heard have to be secured. Furthermore, Art. 184 mirrors Art. 27 of the UNCITRAL Model Law, and provides that "[i]f the assistance of state judiciary authorities is necessary for the

⁶²⁰ See Chapter 5 p. 114.

⁶²¹ Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated (2nd Ed.)* (Informa Law from Routledge, 2016), 77-78.

⁶²² *Vibroflotation A.G. v. Express Builders Co. Ltd.*, High Court, Court of First Instance in Hong Kong, 15 August 1994, [1994] HKCFI 205.

⁶²³ *ALC v. ALF* [2010] SGHC 231, 11 August 2010, High Court of Singapore.

taking of evidence, the Arbitral Tribunal or a party with the consent of the Arbitral Tribunal, may request the assistance of the state judge at the seat of the Arbitral Tribunal; the judge shall apply his own law."⁶²⁴

7.2.2. Chinese standards

To begin with, China should be classified as a country with civil law tradition.⁶²⁵ Further, Art. 43 of the CAL stipulates that the parties provide evidence to support their claims, and where the tribunal deems it necessary, it can collect evidence on its own initiative. In general, the evidentiary hearing in China arbitration largely relies on documents submitted by the parties in support of their own claims.⁶²⁶ Accordingly, requests for production of documents adverse to one's case do not happen often in China.⁶²⁷ Further, oral evidence plays a limited role.⁶²⁸ However, it should be noted that this can be different if arbitrators with more extensive exposure to document production or presenting witnesses hear a case.

Concerning document production, it has been gradually evolving in China. The concept of document production is not specifically reflected in the provisions of the CAL. However, some sources for document productions can be found, for example, in the CIETAC Rules. Article 35(1) of the 2015 CIETAC Rules prescribes that unless the parties agree otherwise, the tribunal has the right to examine a case in the way it deems appropriate, provided that it acts fairly, impartially, and gives the parties a reasonable opportunity to present their case. Further, Art. 41(2) specifies that the tribunal can request the parties to produce evidence within a specified time period. Finally, Art. 43(1) provides that the tribunal can collect evidence it considers necessary. The BAC arbitration rules contain comparable provisions.⁶²⁹

⁶²⁴ See more in Elliott Geisinger and Nathalie Voser, *International Arbitration in Switzerland: A Handbook for Practitioners (2nd Ed.)* (Kluwer Law International, 2013), 74-83, 91-97.; and Manuel Arroyo, *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International, 2013), 133-134, 138-140, 500-505, 513-514, and also 141-155 for the discussion on further judicial assistance under Art. 185 of the Swiss PIL. See also Born, 2330-2331.

⁶²⁵ See, for example, Fung and Wang, 61.

⁶²⁶ Yuen, McDonald, and Dong, 279.

⁶²⁷ See Jingzhou Tao, "Document Production in Chinese International Arbitration Proceedings," in *International Arbitration 2006: Back*

to Basics?, ICCA Congress Series (Kluwer Law International, 2007), 613.; Yuen, McDonald, and Dong, 279-280.

⁶²⁸ Yuen, McDonald, and Dong, 279 & 284.

⁶²⁹ See Art. 24, 32, and 33 of the 2015 BAC Rules.

In addition, CIETAC recently introduced an optional set of rules called the CIETAC Guidelines on Evidence,⁶³⁰ which address specifically the issue of document production. An overall goal of the CIETAC Guidelines on Evidence is to “assist the parties, their counsels and arbitral tribunals in dealing with issues of evidence more efficiently in arbitration proceedings.”⁶³¹ Article 7 of the CIETAC Guidelines on Evidence allows the parties to request the tribunal to order production of documents from the other party. Furthermore, Art. 11 allows the tribunal itself to request the parties to produce any evidence that it considers necessary.

Accordingly, the adoption of the CIETAC Guidelines on Evidence can provide the parties the possibility of document production in arbitration in China. Alternatively, the adoption of the IBA Rules on the Taking of Evidence in International Arbitration can help the parties reach the same result. However, even if the tribunal has the power to order document production, there is no legal framework for court assistance in this regard. Thus, a tool of an adverse inference is, in practice, the limit of the effectiveness of an order to produce documents in arbitration in China.

Concerning the power of the tribunal to order witness attendance, again, the CAL is silent on that issue. Arbitration rules seem not to offer much in this regard, beyond that which is discussed above concerning document production. In any case, again, no regime for court assistance in such instances exists. Therefore, in practice, a party seeking to rely on evidence from a particular witness will only be able to engage its own resources to convince the witness to appear at the hearing.⁶³²

Summarizing, there is no state court assistance regime for evidence collection in arbitration proceedings under Chinese law.⁶³³ This is true regardless whether the request for assistance comes directly from the party or if it has been already validated by the tribunal.

⁶³⁰ China International Economic and Trade Arbitration Commission (“CIETAC”) Guidelines on Evidence effective from 1 Mar 2015 [中国国际经济贸易仲裁委员会 证据指引，从 2015 年 3 月 1 日起施行].

⁶³¹ See the preamble of the CIETAC Guidelines on Evidence.

⁶³² Sun and Willems, 258-259.

⁶³³ See Qifan Cui, "Assistance of State Courts in Evidence Taking in International Commercial Arbitration - Deficiencies and Building of the Chinese System [Original Title: 论国际商事仲裁中取证的法院协助—兼论我国相关制度的缺失与构建]," *International Commercial Law Review* [国际商法论丛] 11 (2013): 184-186.; Chi, "Is It Time for Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law," 155.

7.2.3. Criticism of the Chinese law and practice

A. No assistance by the state court to arbitration in evidence taking

Concerning the division of power in the area of evidence taking, one needs to take into account the civil law tradition of China. However, according to Tao, as to document production specifically, the arbitration community in China agrees that a certain level should be permitted. Further, Tao points that when deciding on document production, the tribunal should balance an efficient approach to evidence taking with the real need for document production in establishing the truth.⁶³⁴ As to the power to bring a witness to the proceeding, it needs to be noted that, generally, the tribunal is not given such power, because it typically relates to non-parties, and court assistance in such instances is essential. Also in China, the tribunal cannot compel the witness attendance. However, a Chinese court will not offer its assistance in this matter.

The lack of court assistance in obtaining evidence in arbitration proceedings in China has been criticized by numerous authors, and has been seen as a serious defect of the Chinese system negatively affecting the efficiency of the arbitration proceeding.⁶³⁵ The lack of court support can translate into limited powers of the tribunal to effectively conduct the investigation. As noted, the issue can be especially problematic when particular evidence is needed from a non-party, since the range of actions that can be taken in such instances by the tribunal is very limited.

In practice, because of these limitations, it happens that a party seeking to obtain evidence in China chooses to turn to the court with the application for evidence preservation (an interim measure). However, as discussed above, when applying for evidence preservation, the party needs to establish that this evidence can be destroyed or difficult to obtain in the future.⁶³⁶ As argued by Sun and Willems, because the court normally scrutinizes the party's application for an interim measure in order to ensure

⁶³⁴ Tao, "Document Production in Chinese International Arbitration Proceedings," in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, 603.

⁶³⁵ See, for example, Sun and Willems, 258-259.; Chi, "Is It Time for Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law," 155.; Tao, "Document Production in Chinese International Arbitration Proceedings," in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, 621.

⁶³⁶ See Art. 46 of the CAL. See also Chapter 5, p. 115.

that it is not used as a way of investigating the opposing or a third party, such an attempt of trying to obtain evidence can be eventually unsuccessful in practice.⁶³⁷

Finally, it is important to stress that the hands of arbitrators in China are tied more than the hands of arbitrators in other jurisdictions. It is so, because arbitrators in China cannot rely on the help of the court, neither regarding evidence taking, nor regarding support for an order for an interim measure.⁶³⁸

7.2.4. Recommendations

A. The state court should provide assistance to arbitration in evidence taking

In order for the tribunal to act effectively, it needs to have a number of tools, and, if needed, also support of the state court. The need for court assistance in evidence taking refers to both documentary evidence as well as other types of evidence. Such assistance is essential, in particular, in situations where evidence from a non-party is needed. Documents are typically the core element of the evidentiary hearing. However, a witness can assist in filling the gaps in the process of evidence taking and help to establish the truth.

A number of authors have argued the necessity of changing the law in China in order to provide for the court assistance in the area of evidence taking in arbitration.⁶³⁹ Also, one half of the respondents to the China Arbitration Survey expressed the view that court assistance would help increase the overall efficiency of the arbitration proceeding in China. Over one-third of the respondents expressed the view that it would not, and the remaining part of the respondents had no particular view on that issue.⁶⁴⁰ It should be noted that answers to this particular survey question may reflect the background of the respondents, who at least in part, probably have not been exposed much to the evidentiary practices of document production, *etc.*⁶⁴¹

⁶³⁷ Sun and Willems, 261-262.

⁶³⁸ See Chapter 5 p. 120.

⁶³⁹ See, for example, Tao, "Document Production in Chinese International Arbitration Proceedings," in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, 621.; Sun and Willems, 262-267.; Chaowu Song, "Chinese Arbitration System: Malpractices and Overcoming Difficulties [Original Title: 我国仲裁制度：弊端及其克服]," *Journal of China University of Political Science and Law (Tribune of Political Science and Law)* [政法论坛：中国政法大学学报] 20, no. 6 (2002), 96.

⁶⁴⁰ See Chapter 9 on the China Arbitration Survey p. 199, as well as Appendix 1 p. 300.

⁶⁴¹ See the profile of the China Arbitration Survey respondents in Chapter 9 p. 194-195 and Appendix 1 p. 260-264.

Tao, when discussing specifically the issue of document production and the need of support offered by the court to arbitration, pointed out that:

“[t]he development of arbitration practice in China also depends on the attitude of the state courts and their approach towards arbitration, especially with regard to procedural issues. In order to increase the efficiency and the competitiveness of arbitration in China, it is essential that state courts are involved in this process and start supporting arbitration commissions and tribunals more actively, especially with respect to uncooperative parties.”⁶⁴²

Sun and Willems see the need of having the courts assistance in evidence taking as a necessity to “bridge the gap between the arbitral tribunal’s authority to conduct investigation on its own and its apparent lack of power to do so”.⁶⁴³ Moreover, anticipating some degree of court assistance is also relevant for internationalization of arbitration in China, where parties and arbitrators with different legal backgrounds may have different expectations toward the arbitration proceeding. Also, merely providing for the possibility of court assistance in evidence taking can help not only to discipline the parties, but also to encourage the cooperation of non-parties, if needed.

Sun and Willems offer a number of suggestions for establishing the court assistance system in evidence taking in China. One of their recommendations is respecting the parties’ agreement in each particular case. Further, Sun and Willems suggest that the requests for court assistance should be subjected to the approval of the tribunal, as it is provided under the UNCITRAL Model Law. Such “filtering” of requests by the tribunal can help to reduce undesirable actions, like “fishing expeditions”. Having the tribunal available to validate which requests for court assistance are justified and which are not would not only help to eliminate the risks of, for example, misuse of document production, but would also help the tribunal to have a better level of control over the proceeding. As provided under Art. 27 of the UNCITRAL Model Law, the court should execute the requests according to its own rules on evidence taking. It allows to streamline the procedural solutions, and also avoid potential conflicts with national laws regarding the court’s powers in this regard.⁶⁴⁴

On a final note, there are a number of other issues, which are relevant in the course of discussion on establishing the court assistance system in evidence taking in China. The issue of privileges, which allow to refuse to give evidence under specific circumstances, is one of such important aspects. In general,

⁶⁴² Tao, "Document Production in Chinese International Arbitration Proceedings," in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, 621.

⁶⁴³ Sun and Willems, 262.

⁶⁴⁴ *Ibid.*

the privilege system in China has not been yet well developed, and due attention should be given to it in the future.⁶⁴⁵ However, it is beyond the focus of this thesis.⁶⁴⁶

⁶⁴⁵ See, for example, Tao, "Document Production in Chinese International Arbitration Proceedings," in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, 614.

⁶⁴⁶ See, generally, on the issue of privileges in Born, 2375-2387.

CHAPTER 8: FOREIGN ARBITRATION INSTITUTIONS AND SCOPE OF THEIR POWERS

8.1. General remarks

Party autonomy in international arbitration is envisaged broadly. The parties can choose, among others, arbitrators, institutional or *ad hoc* arbitration, an arbitration seat, an arbitration institution, and also arbitration rules. However, not all of these choices can be freely made in China.

This Chapter discusses another aspects of the state's involvement in international arbitration, which is characteristic for China, and is not observed in the leading arbitration jurisdictions. This refers to imposing limitations on the choices that the parties can make in international arbitration proceedings taking place in China. Some of these limitations were discussed already above, such as a limited choice of seat of arbitration and a limited access to *ad hoc* arbitration in China.⁶⁴⁷ This Chapter focuses specifically on one additional issue, namely, the choice of the parties to have arbitration administered by a foreign institution, but seated in China. In doing that, it analyzes the limited scope of actions that foreign arbitration institutions in China are permitted. First, transnational standards are discussed, then the situation in China. Next, the Chapter focuses on selected shortcomings of the Chinese system and possible ways to address them.

8.2. Status and powers of foreign arbitration institutions

The status and permitted range of powers of foreign arbitration institutions in other states are important aspects of international commercial arbitration. They have to do with issues, such as party autonomy, neutrality, and flexibility of the proceeding. Doe states allow for the activities of overseas arbitration institutions within their borders? If so – why and to what extent? What is the level of the state's control and assistance to the arbitration proceeding in cases administered by overseas institutions? Is a foreign institution treated like a domestic one, for example, if there is a need for court assistance with the enforcement of an interim measure? Answers to these questions set China apart from other jurisdictions.

As of today, neither the status of foreign arbitration institutions in China, nor the scope of activities they can undertake is clear. These issues have become especially pressing in face of recent

⁶⁴⁷ See Chapter 2 p. 35-38.

developments in China, which includes the SPC's official endorsement of the validity of an arbitration agreement providing for a foreign institution-administered arbitration seated in China, as well as the first opening of representative offices by foreign institutions in the Shanghai FTZ, details of which are discussed below.

8.2.1. Transnational standards

Generally speaking, numerous jurisdictions, including UNCITRAL Model Law jurisdictions, such as Hong Kong and Singapore, allow for the full range of activities to be offered by foreign arbitration institutions in arbitration proceedings seated within their territories. Also, the local courts in these jurisdictions supervise the arbitration proceedings and offer their assistance to arbitration, when needed.

A. UNCITRAL Model Law

Generally, for an arbitration agreement to be valid, in addition to the common requirement of a written form, there are very few other conditions that need to be satisfied. Under the New York Convention, a valid arbitration agreement requires: (1) a consent of parties to submit to arbitration (2) existing or future disputes pertaining to a defined legal relationship (3) which can be solvable by means of arbitration.⁶⁴⁸ This concept is contained in Art. 7(1) of the UNCITRAL Model Law, which provides that: “[a]rbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

The essential elements of a valid arbitration agreement are listed exhaustively in Art. 7(1). The guide to the UNCITRAL Model Law, commenting on this provision, states that Art. 7 is “one of the most important parts of UNCITRAL's attempt to unify national arbitration statutes. It is here that States should resist most strongly any temptation to impose more onerous or peculiarly local requirements.”⁶⁴⁹

⁶⁴⁸ Art. II(1) of the New York Convention. Art. V(1)(a) states also that the enforcement of an award can be refused if an arbitration agreement was entered by a party not having the capacity to do that, the agreement was invalid under the applicable law, a dispute matter was not arbitrable; or the enforcement of an award would be contrary to the public policy of the enforcing state.

⁶⁴⁹ Holtzmann and Neuhaus, 258. There exist also additional factors not listed in Art. 7, but pertaining to the issue of a valid arbitration agreement. These are listed in Art. 34 on the setting aside of an award, and in Art. 36 on the grounds for refusing the award's enforcement. They include the aspects of the capacity of the parties entering into the arbitration agreement, validity under the law to which the parties subjected the agreement, arbitrability of disputes, and compliance with the public policy.

Article 7 was modified in 2006 in order to better accommodate various forms in which the agreement can be concluded, but the definition of an arbitration agreement remained the same.⁶⁵⁰ Accordingly, no further requirements are imposed on the parties in reaching a valid arbitration agreement. As such, the UNCITRAL Model Law jurisdictions permit both *ad hoc* and foreign administered arbitration within their territories.

A related issue is the classification of an arbitration proceeding administered by an overseas institution. The concept of the seat of arbitration is of particular importance here. The seat of arbitration is a legal theory, and it means that “arbitration is governed by the law of the place in which it is held”.⁶⁵¹ The choice of the seat of arbitration produces a number of consequences for the arbitration proceeding. They include the powers of the tribunal (such as whether it can decide about its competence to resolve a dispute or effectively order interim measures); the level of supervision and assistance over arbitration (such as whether the court will support arbitration in evidence taking and exercise supervision over the award); and also the application of default mechanisms in case relevant choices have not been made by the parties (like in case of forming an arbitral tribunal).

As provided under Art. 1(2) of the UNCITRAL Model Law, the seat of arbitration determines the applicability of the UNCITRAL Model Law. Further, the concept of the seat is also relevant for the post-award fate of arbitration. In that context, it is generally accepted that the arbitral award bears the nationality of the seat of arbitration. This is relevant for the enforcement regime, including the application of the New York Convention. This concept is enshrined in Art. 31(3) of the UNCITRAL Model Law.⁶⁵² Moreover, the court of the seat of arbitration is the one that has the power to set aside an award. This is reflected in Art. 34(2) of the UNCITRAL Model Law.

As such, in the cases administered by foreign arbitration institutions, but seated in the UNCITRAL Model Law jurisdictions, the arbitral award rendered in such proceedings is seen as rendered in the seat for the purposes of nationality and enforcement regime. Also, the court of the seat will have the

⁶⁵⁰ The UNCITRAL Model Law (version of 2006) offers a choice between two options of Art. 7.

Option I deals with the issue of a form of an arbitration agreement, and it provides in greater detail what means that that an arbitration agreement needs to be made “in writing”.

Option II does not deal with the question of a form at all.

Countries adopting the UNCITRAL Model Law can choose between these two options. See more in Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006, p. 28.

⁶⁵¹ Redfern and Hunter, 171. See also, generally, about the concept of the seat of arbitration and the ramifications of the choice of the seat in *ibid.*, 165-175 & 181.; Born, 1536-1583.; Lew, Mistelis, and Kröll, 172-173.

⁶⁵² See more on the legislative history of Art. 31(3) in Holtzmann and Neuhaus, 838-839.

power to set aside such an award. In addition, this court will be available to offer its support to the arbitration proceeding, for example, in instances where the coercive enforcement would be requested for an interim measures ordered by the tribunal. Therefore, in the sense of permitting the actions of foreign arbitration institutions, as well as overseeing them and providing assistance, the cases administered by foreign institutions are treated equally with the cases administered by domestic institutions.

B. Hong Kong and Singapore

Both Hong Kong and Singapore support the approach of the UNCITRAL Model Law to a valid arbitration agreement. In Hong Kong, Art. 7 is incorporated by virtue of Section 19 of the HK Arbitration Ordinance, and in Singapore – through Section 2A(1) of the SIAA. Consequently, the laws of Hong Kong and Singapore do not impose any additional requirements on the parties in respect to a valid arbitration agreement.⁶⁵³

Further, the nationality of an arbitral award and the post-award regime in Hong Kong and Singapore also follow the UNCITRAL Model Law concepts.⁶⁵⁴ Judges both in Hong Kong and Singapore confirmed in their decisions that the seat of arbitration is a crucial element in determining the award's nationality and the post-award regime.⁶⁵⁵ As a consequence and by way of example, the ICC has successfully administered cases seated both in Hong Kong and in Singapore.⁶⁵⁶

8.2.2. Chinese standards

In China, under Art. 16 of the CAL, there is a requirement that an arbitration institution needs to be named in an arbitration agreement. As such, *ad hoc* proceedings, in principle, are not allowed in China.⁶⁵⁷ Furthermore, foreign arbitration institutions – with their rather unclear legal status in China, are limited in providing services in cases seated in China. Importantly, the lack of clarity over the status

⁶⁵³ See, generally, on the validity of an arbitration agreement in Hong Kong in Ma and Brock, 208-214.; and in Singapore in Joseph and Foxtan, 39-45.

⁶⁵⁴ For Hong Kong, see Sections 67(1) and 81(1) of the HK Arbitration Ordinance; and for Singapore, see Art. 31(3), 34(2) of the UNCITRAL Model Law read together with Art. 3(1) of the SIAA. Also, see generally, about the concept of the seat of arbitration in Hong Kong in Ma and Brock, 140-141.; and in Singapore in Chew, 36-37 & 89-93.; Joseph and Foxtan, 372-376.

⁶⁵⁵ For Hong Kong, see *Shenzhen Nan Da Industrial and Trade United Co Ltd v. FM International Ltd* [1992] 1 HKC 328 (2 March 1992); for Singapore, see *PT Garuda Indonesia v Birgen Ai r* [2002] SGCA 12, Court of Appeal, Civil Appeal No 600099 of 2001.

⁶⁵⁶ See the compilation of the ICC statistics in Born, 2064-2067.

⁶⁵⁷ See Chapter 2 p. 35-36.

and scope of services that can be provided by foreign institutions in China pertains only to “foreign-related” cases, because the SPC confirmed that the administration of domestic disputes by foreign institutions is not possible in China.⁶⁵⁸

As to “foreign-related” disputes specifically, the status of foreign institutions in China remains uncertain. Chinese arbitration-related regulations neither explicitly permit nor prohibit the conduct of arbitration in China by foreign institutions.⁶⁵⁹ However, that which is certain under the CAL is that an arbitration institution needs special registration and approval.⁶⁶⁰

Traditionally, the discussion in China centered on the above mentioned Art. 16 of the CAL, and the positions of the Chinese courts as to the validity of an arbitration agreement selecting a foreign institution for a China-seated arbitration case varied.⁶⁶¹ However, and notably, the validity of such an arbitration agreement was endorsed by the SPC in the *Longlide* case in 2013.⁶⁶² The *Longlide* case concerned a dispute administered by the ICC and seated in Shanghai, China. The SPC declared this agreement to be valid. Yet, this should not be seen as a total breakthrough allowing the foreign institutions to provide a full range of services in China.

⁶⁵⁸ Yuen, McDonald, and Dong, 87-88. In the *Jiangsu Aerospace Wanyuan Wind Power Co. Ltd. vs. LM Wind Power (Tianjin) Co. Ltd.* case, the SPC held that there is no legal basis permitting the parties to choose a foreign institution or *ad hoc* arbitration in a case, which does not contain a “foreign-related” element.

⁶⁵⁹ See Tao, “Challenges and Trends of Arbitration in China” in *New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series*, 84-85.; Yuen, McDonald, and Dong, 88-91.; Weixia Gu, “The Developing Nature of Arbitration in Mainland China and Its Correlation with the Market: Institutional, Ad Hoc, and Foreign Institutions Seated in Mainland China,” *Contemporary Asia Arbitration Journal* 10, no. 2 (2017), 266-267.

⁶⁶⁰ Art. 10 of the CAL provides that: “An arbitration commission may be set up in the domicile of the people's governments of municipalities directly under the Central Government (hereinafter referred to as “municipalities”), provinces and autonomous regions or in other places according to needs. It shall not be set up according to administrative levels.

An arbitration commission shall be set up by the relevant departments and chambers of commerce under the coordination of the people's governments of the cities prescribed in the preceding paragraph.

The establishment of an arbitration commission shall be registered with the judicial administrative departments of provinces, autonomous regions and municipalities.”

Art. 11 to 14 of the CAL provide for further requirements concerning the arbitration commission. For more of the arguments why Chinese law, and especially the provisions of the CAL, compellingly lead to the conclusion that a foreign institution cannot administer cases in China, see Yuen, McDonald, and Dong, 88-91.

⁶⁶¹ *Ibid.*, 88.

⁶⁶² See the Reply of the Supreme People’s Court regarding the Dispute on the Validity of an Arbitration Agreement between Anhui Longlide Packing and Printing Co., Ltd. and BP Agnati S.R.L; issued on 25 March 2013, effective from 25 March 2013; [《最高人民法院关于申请人安徽省龙利得包装印刷有限公司与被申请人 BP Agnati S.R.L.申请确认仲裁协议效力案的复函; [2013]民四他字第 13 号; 颁布时间: 自 2013 年 3 月 25 日, 实施时间: 2013 年 3 月 25 日].

This is because the SPC, on the one hand, declared the *Longlide* arbitration agreement to be valid, but on the other hand, it failed to address a number of other relevant issues, including the nationality of arbitral awards resulting from such proceedings and the enforcement regime for them. Should such awards be seen as Chinese domestic awards, non-domestic, foreign awards, or perhaps any other type of awards, which would then result in different enforcement regimes? As such, should these awards be enforced as domestic awards, under the New York Convention, or in another way? These questions are of particular relevance, because, as presented below, concerning the cases where the Chinese courts found the discussed type of arbitration agreements to be valid, the courts and commentators' positions as to the nationality of the arbitral award and enforcement regime have varied.

Generally, as discussed in Chapter 2, arbitration in China can be divided into “domestic” (seated in China), “foreign-related” (seated in China, but involving at least one of foreign elements as prescribed by law), and “foreign” arbitration (seated outside of China). This division produces a number of consequences analyzed in Chapter 2.⁶⁶³ Similarly, in China, the arbitral award can be enforced as a Chinese award (which includes domestic and foreign-related enforcement regimes; both with the CAL and CCPL applicable, but with some differing elements, including the extent of review)⁶⁶⁴ or as a foreign award (with the New York Convention applicable).⁶⁶⁵ An answer to the question which regime should apply in the given context has not been fully clarified. It should be observed that the fact that an award is rendered in a proceeding administered by a foreign arbitration institution is not recorded as a foreign element under the Chinese law. As a consequence, the application of a foreign-related regime is not automatic in such instances.⁶⁶⁶

Different propositions have been explored as to the enforcement regime. One of the solutions was to refer to the seat of the *arbitration institution* (but not the seat of *arbitration* – as it is in the transnational context). This is because, traditionally, for the question of the nationality of an arbitral award, China has followed the concept of the location of the arbitration institution, which is reflected in Art. 58 of the CAL, as well as Art. 274 and Art. 283 of the CCPL.⁶⁶⁷

⁶⁶³ See Chapter 2 p. 36-38.

⁶⁶⁴ The grounds for refusing the enforcement of domestic and foreign-related awards differ in China, with some elements of substantive review in the domestic regime, which are absent in the foreign related regime.

⁶⁶⁵ See, generally, about the enforcement of arbitral awards in China in Von Wunschheim., *Enforcement of Commercial Arbitral Awards in China*, 1 *et seq.*; Yuen, McDonald, and Dong, 365-405.; Tao, *Arbitration Law and Practice in China*, 169-242.

⁶⁶⁶ See Chapter 2 p. 36-38 for what constitutes such elements.

⁶⁶⁷ Art. 58 of the CAL, as well as Art. 274 and Art. 283 of the CCPL refer to the location of an arbitration institution as determining the post-award regime. See more on the concept of the seat of arbitration in China

Such interpretation leads, however, to the conclusion that the seat of arbitration in a case administered by the France-registered ICC, but seated in China – should then be France. Indeed, a court concluded that way in *Duferco v. Ningbo Arts & Crafts Import & Export*, in which it found that the award rendered in an ICC-administered case seated in Beijing was a non-domestic⁶⁶⁸ (French) award, and decided to enforce it under the New York Convention, because of the involvement of a foreign arbitration institution.⁶⁶⁹ Another option suggested was treating such awards as foreign awards and enforcing them under the New York Convention.⁶⁷⁰ Finally, another proposition is that such awards should be seen as domestic ones, unless there is a factor that should lead to the application of a foreign-related regime.⁶⁷¹

One other uncertainty pertains to the question of which court should have the power to set aside an award in such cases. Again, following the wording of Art. 58 of the CAL, it seems that in China, it should be “the intermediate people's court at the place where the *arbitration institution* resides”. However, should this mean that, consequently, this should be a French court for an award rendered under the ICC’s auspices in China? If this is, indeed, a desired position, then it contradicts the above mentioned common view that the court of the seat of arbitration has the power to set aside an award rendered in its territories. Furthermore, it is rather unlikely that China would prefer to have a foreign court exercising supervision over a case seated in China – as it is now suggested by the wording of Art. 58 of the CAL.

Finally, given that the definition of an arbitration institution under the CAL (in particular Art. 11 and 12) seems to be limited to domestic institutions, some other questions remain without clear answers. Bearing in mind the focus of this thesis, two specific issues are of particular interest. One of them is whether a foreign arbitration institution should enjoy the statutory power to address jurisdictional objections, as provided under Art. 20 of the CAL.⁶⁷² The other refers to the question whether the Chinese court would offer its support to an arbitration proceeding administered by a foreign institution,

in Kun Fan, "Prospects of Foreign Arbitration Institutions Administering Arbitration in China," *Journal of International Arbitration* 28 (2011): 350-352.

⁶⁶⁸ See Art. I(1) of the New York Convention.

⁶⁶⁹ *Duferco v. Ningbo Arts & Crafts Import & Export*, 22 April 2009, [2008] 甬仲监字第 4 号 (Ningbo IPC). Note that the award in this case was enforced by the Ningbo Intermediate People’s Court, and therefore, did not need to be reported higher within the PRS mechanism. (on the PRS mechanism, see Chapter 4 p. 79-80)

⁶⁷⁰ Yuen, McDonald, and Dong, 97. See a more detailed analysis of this issue in the same source p. 90-98.

⁶⁷¹ See *ibid.*

⁶⁷² See Chapter 4 p. 78-79.

in case the assistance would be requested, for example, for the purpose of obtaining an interim measure. It is suggested that the Chinese court would be reluctant to do that.⁶⁷³

8.2.4. Criticism of the Chinese law and practice

A. Unclear status and range of powers of foreign arbitration institutions in China

Over the years, the SPC has taken a number of measures to soften the rigid requirements of the CAL by providing numerous guidelines, such as a liberal explanation of the incorrectly recorded name of an arbitration institution.⁶⁷⁴ However, there are still some issues lacking clarity and they should be addressed in order to avoid uncertainties. One issue that has not been sufficiently addressed, either by the provisions of the CAL or by the SPC, pertains to the possibility and ramifications of the arbitration case seated in China, but administered by a foreign arbitration institution.

In addition to the *Longlide* case, the question of the status and powers of foreign arbitration service providers in China has become even more relevant in light of recent foreign new-comers to the Chinese arbitration stage. In November of 2015, the HKIAC opened its office in the China (Shanghai) Pilot Free Trade Zone (“FTZ”). This pioneering move was then followed by the opening of similar offices by the SIAC and the ICC at the beginning of 2016. This has considerably changed the landscape of arbitration in China, since prior to 2015, there was no formal presence of offshore arbitration institutions in mainland China whatsoever.

Importantly, all of the new foreign offices were announced as “representative offices” and were established in the Shanghai FTZ.⁶⁷⁵ As mentioned, the Shanghai FTZ has a character of a testing laboratory for innovations, including legal innovations, which once tested positive in a limited area of the zone, can be then implemented in the entire country.⁶⁷⁶ A legal basis for the establishment of the representative offices of the HKIAC, the SIAC, and the ICC is the *Circular on Issuing the Plan for Further Promoting the Reform and Opening-up of the China Shanghai Pilot Free Trade Zone by the State*

⁶⁷³ Yuen, McDonald, and Dong, 95.

⁶⁷⁴ For example, Art. 3 of the SPC 2006 Interpretation states that where the name of an arbitration institution stipulated in an arbitration agreement is inaccurate, but the specific institution can be determined, it shall be ascertained that this arbitration institution has been selected.

⁶⁷⁵ See the news on the official websites of the HKIAC: <http://www.hkiac.org/zh-hant/node/1697>; of the SIAC: <http://www.siac.org.sg/69-siac-news/467-opening-of-siac-office-in-shanghai>; and of the ICC: <http://www.iccwbo.org/News/Articles/2016/New-Shanghai-office-lays-groundwork-for-ICC-Asia-developments/> (last accessed: 20 November 2018).

⁶⁷⁶ See Chapter 2 p. 38-39.

Council,⁶⁷⁷ and the introduction of the international, renowned dispute resolution institutions to the Shanghai FTZ is a part of the plan for further development of the Shanghai FTZ.

According to the Chinese law, a representative office cannot conduct profit-based business activities, and the main goal of establishing the representative office is for marketing purposes.⁶⁷⁸ In light of that, the scope of activities announced by the HKIAC, the SIAC, and the ICC includes: encouraging best international arbitration practices via cooperation with local authorities and arbitration institutions, providing professional training to Chinese practitioners, and supporting the hearings in China.⁶⁷⁹ It seems that, at least as of now, the Shanghai FTZ arbitration offices will not provide the full case management services in China, and that the administration of cases will be handled by their main offices.⁶⁸⁰ However, although all of the institutions declare to be representative offices with a limited scope of activities in China at the moment, it is assumed that the ultimate goal of this expansion is to provide a full range of services, and also, to receive the assistance of the Chinese courts.

As indicated above, a couple of issues remain problematic as of today. The SPC decided to officially endorse the validity of the arbitration agreements in *Longlide*, yet, a number of uncertainties continue to exist. Regarding the awards rendered in cases like *Longlide*, these are: the nationality of an award, the enforcement regime, and the position on the jurisdiction to set aside such an award. Another uncertainty refers to the extent of support offered by the Chinese court in such arbitration proceedings, for instance, for the sake of effective interim measures.

8.2.5. Recommendations

A. Permitting the full range of actions and powers of foreign arbitration institutions in China

The status of foreign arbitration institutions operating in China and the scope of power in related arbitration proceedings should be addressed in order provide for more transparency and certainty to

⁶⁷⁷ The Circular on Issuing the Plan for Further Promoting the Reform and Opening-up of the China Shanghai Pilot Free Trade Zone by the State Council from 8 April 2015; [国务院关于印发进一步深化中国（上海）自由贸易试验区改革开放方案的通知（2015年4月8日）].

⁶⁷⁸ See Art. 13 and Art. 14 of the Regulations on Administration of Registration of Resident Offices of Foreign Enterprises; Decree of the State Council of the People's Republic of China No. 584, issued on 10 November 2010, effective from 1 March 2011. [《外国企业常驻代表机构登记管理条例》中华人民共和国国务院令（第584号）颁布时间: 2010年11月10日, 实施时间: 2011年3月1日].

⁶⁷⁹ See *supra* note 675.

⁶⁸⁰ The HKIAC addresses this issue explicitly. See the official website of the HKIAC: <http://www.hkiac.org/zh-hant/node/1697> (last accessed: 20 November 2018).

arbitration users. Allowing the full operation of foreign arbitration institutions would be beneficial to the Chinese system. The competition between local and foreign institutions would enhance further development of the local institutions, which would likely need to innovate in order to meet the expectations of arbitration users.

It should be also noted that, generally, the market opening can help the states to become more competitive arbitration seats, with an increased number of options available to the parties, which in turn, can help to attract more arbitration cases. This would be an especially attractive option in case of disputes, which although involving a foreign element, under the Chinese system are classified as “domestic” ones, and hence, cannot be arbitrated outside of China.⁶⁸¹

Among other possible advantages of the further market opening for foreign institutions would be creating more work opportunities for China arbitration specialists, as well as a potential flow of cash connected with an increased number of foreign parties coming to arbitrate in China.⁶⁸² Such move would possibly result in a reduction of the caseload of the local Chinese arbitration institutions, unless they also work to become more competitive. This could help further develop the local institutions in order to meet the expectations of business.

It is recommended that China follows the common reasoning applied in international commercial arbitration regarding the issue of nationality and the post-award regime for arbitral awards rendered in the cases administered by foreign institutions, but seated in China. That would mean that the award bears the nationality of the place where arbitration has its seat. The award should be treated as a Chinese award. As such, the Chinese courts should have the jurisdiction to set aside the award, and for the purpose of enforcement, the award should be seen as a Chinese award, either domestic or if there exists a foreign element – as a foreign-related award.⁶⁸³

The clarification of the concept of the seat of arbitration in China would provide more of predictability in the area of the award’s nationality and post-award regime. In the past, this issue has not been problematic, since only the Chinese institutions were allowed to administer cases in China. However, the provisions of the CAL and the CCPL do not embrace the changes of the last years, including the fate of arbitration in cases like *Longlide*. What is more, the clarifications would be also relevant for the

⁶⁸¹ See Chapter 2 p. 36-38.

⁶⁸² See Tao, "Challenges and Trends of Arbitration in China " in *New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series*, 86-87.; Thorp, 610.

⁶⁸³ See Chapter 10 p. 212-213 for the comments on the division of arbitration in China into domestic, foreign-related and foreign, and proposition for the future approach toward this division.

cases administered by the Chinese institutions, but seated outside of mainland China, like those administered by the Hong Kong office of CIETAC.

Furthermore, if arbitration is administered by a foreign institution and is seated in China, the Chinese court should offer its assistance to such a proceeding. It is needed for the overall efficiency of the proceeding, especially bearing in mind that, as of today, only the court can effectively order preservative measures in aid of arbitration in China.⁶⁸⁴ Also, since it is argued that the position of foreign institutions should be equated to that of domestic institutions, the foreign institutions should be able to address jurisdictional objections under Art. 20 of the CAL.⁶⁸⁵

⁶⁸⁴ See Chapter 5 p. 115-120.

⁶⁸⁵ Yet, as argued in Chapter 4, it is advised against keeping the current distribution of power to address jurisdictional objections in China. See Chapter 4 p. 90-92.

PART III.

Part III of this thesis consists of two Chapters. Chapter 9 describes the empirical research prepared for this thesis. It explains the aims, methods, and results of the China Arbitration Survey, which was conducted among various stakeholders of international commercial arbitration in China. Subsequently, Chapter 10 provides the general conclusions for the whole thesis. It summarizes the existing shortcomings of the Chinese system in the areas discussed, as well as offers a number of recommendations as to how the Chinese system can be improved. In addition, Chapter 10 explores possible options that can be considered, in particular by the parties, in face of the existing deficiencies of the Chinese arbitration system.

CHAPTER 9: CHINA ARBITRATION SURVEY

9.1. Introduction to the China Arbitration Survey

The China Arbitration Survey (“Survey”) was prepared to develop information on both practical experience and expectations of various participants of arbitration proceedings involving a foreign element, but seated in China. The Survey was primarily designed and conducted in order to explore the topic of this doctoral research. Therefore, its main focus lies in the state’s participation and the division of power shared among the arbitral tribunal, the arbitration institution, and the state court in the pre-award stage of arbitration in China.

The focus on the pre-award stage is to explore new territory. There is solid and recent empirical data on the post-award stage (meaning the setting aside of an award, as well as recognition and enforcement of it) in China, partly available also in English,⁶⁸⁶ and yet, somewhat more limited research pertaining to the pre-award phase. Notably, however, a part of this survey research relating to the use

⁶⁸⁶ See, for example, Peerenboom, 249 *et seq.*; Liu and Shen, 1 *et seq.*; Ku, Alford, and Bei. (last accessed: 20 November 2018); Chinese Court Decision Summaries on Arbitration edited by the WunschARB, which is a collection of the English summaries of Chinese court decisions related to arbitration, including: annulment and enforcement of arbitral awards, and validity of arbitration agreements, available at: <http://www.kluwerarbitration.com/chinese-court-decision-summaries>; see also data provided by the SPC: Supreme People’s Court, “Resolving the Problems in Enforcement and Enhancing Public Faith in Enforcement – the Analysis of Judicial Enforcement Cases for 2014 [Original Title: 破解执行难题 提升执行公信——2014年全国法院办理执行案件情况分析],” (2015), <http://www.chinacourt.org/article/detail/2015/05/id/1637270.shtml>. (last accessed: 20 November 2018).

of the Prior Reporting System (“PRS”) mechanism⁶⁸⁷ extends also to the post-award stage, and takes into consideration all types of situations, when the PRS proceeding can take place.

The Survey reached out to respondents from mainland China, Hong Kong/Taiwan/Macau, and other regions of the world, of various age, with various types of involvement in the arbitration proceeding, as well as with various amount of experience. The full version of the Survey’s questions and results can be found in Appendix I to this thesis.

9.2. Key findings⁶⁸⁸

- In general, the Chinese arbitration environment is perceived as rather friendly by over two-thirds of the respondents. Among those who found it to be rather unfriendly (in total 19% of the respondents), a majority was from Hong Kong/Taiwan/Macau or countries other than China.
- The arbitral tribunal was found to be the best forum for addressing jurisdictional objections, as well as deciding on interim measures in arbitration cases seated in China.
- The respondents pointed to the existing shortcomings of the Chinese arbitration system, such as the limited efficiency of the PRS proceedings (with the main deficiency being the overall lack of transparency of this system), and the limitations in the area of interim measures in arbitration (with the main shortcoming being the limited power of the tribunal to decide on these measures).
- Appointments of arbitrators outside of the panel lists are rare in China. According to the respondents, in a great majority of cases, the ultimate appointment of a sole arbitrator/a presiding arbitrator was made by the chairman of the arbitration institution.

⁶⁸⁷ See Chapter 4 p. 79-80.

⁶⁸⁸ A more detailed analysis of the survey findings can be found on p. 195-199 of this Chapter. See also Appendix 1 on p. 260 *et seq.*

9.3. Methodology

9.3.1. Preparation and distribution of the survey

The Survey was created in the form of an online questionnaire designed with the help of the Monkey Survey program (www.surveymonkey.net). A database of potential respondents was built based on public data available online, private materials of the author of this thesis, and suggestions coming from the Chinese arbitration community. The Survey was distributed mainly through personalized emails. In addition, the use of social media, especially LinkedIn and WeChat and its professional discussion groups, was explored. The Survey was conducted from 6 January to 8 March 2017.

Two separate language versions (English and Chinese) of the same content were prepared in order to accommodate the respondents due to the length of the Survey questions. There were concerns that one bilingual questionnaire could be discouraging to respondents. Subsequently, for the purpose of analysis, the answers to the Survey questions from both language versions were merged. Importantly, except for a few selected questions, especially those pertaining to the respondents' profile, the respondents were not obliged to answer all of the questions.

9.3.2. Requests directed to the respondents before answering the survey

For the accurateness of the research, before answering the Survey, the respondents were asked to:

- Base their answers to the Survey questions on their personal experience with arbitration proceedings (in any capacity) seated in mainland China. Only question no. 4 reflected on the practice beyond mainland China;

Q4: In how many arbitration cases, seated overseas and/or administered by an overseas arbitration institution, have you participated during the last five years? Note: This should include all cases seated in Hong Kong, Taiwan and Macao (whether ad hoc or conducted by an arbitration institution elsewhere).

- Limit their answers to the experience of the last five years, including on-going cases;
- Limit their answers to arbitration proceedings involving a foreign element. These have included proceedings involving Sino-foreign joint venture companies (JV) and wholly foreign-owned enterprises (WFOE) acting as parties, despite the fact, that under the Chinese law, such cases could be qualified as domestic ones.

9.3.3. Number and profile of the respondents

The Survey intended to reach out to a diversified audience with the Survey-relevant experience. Accordingly, representatives of various nationalities, age, types of involvement in arbitration, as well as with various amount of experience were invited to participate in the Survey. The Survey was fully completed by 64 respondents. Eventually, 58 responses were taken into account for conducting the subsequent analysis, due to the fact that six respondents lacked the relevant experience with the cases involving foreign elements and seated in mainland China.

- **Nationality:** 60% of the respondents were from mainland China, 14% from Hong Kong/Taiwan/Macau, and 26% from other regions of the world.
- **Age:** 33% of the respondents were in age between 31 and 40 years old, 29% in age of 41 to 50 years old, also 29% in age of over 50 years old. The remaining part of the respondents were below 30 years old.
- **Primary involvement in the arbitration-related proceedings in mainland China during the last five years:** Half of the respondents' primary involvement in the arbitration-related proceedings in mainland China was in the capacity of counsels. For 31%, it was in the capacity of arbitrators, for 9% in the capacity of staff of the arbitration institution. The remaining 7% of the respondents chose the option "Other" and described their involvement as: 1) arbitrator and attorney at law, 2) arbitrator, counsel, in-house counsel, and interested party, 3) tribunal secretary, and 4) arbitrator and arbitration counsel.
- **Experience:** As to the experience of the respondents, two questions were asked. One of the questions related to the respondents' exposure to arbitration cases seated overseas and/or administered by overseas arbitration institutions over the last five years. In this question, the respondents were asked to also include all the cases seated in Hong Kong/Taiwan/Macau (whether *ad hoc* or administered by an arbitration institution elsewhere). 22% of the respondents had no such experience within the last five years, 14% had experience with 1-3 cases, 31% with 4-10 cases, 22% with 11-20 cases, and 10% with above 20 such cases. Over two-thirds of mainland Chinese and a vast majority of other respondents had some experience with arbitrating outside of mainland China.

The respondents were also asked about their experience with arbitration cases involving a foreign element, but seated in mainland China during the last five years. In answering this question, the respondents were asked to also include their experience with the arbitration proceedings including Sino-foreign JVs and WFOEs acting as the parties, despite the fact that under the Chinese law some of these cases could be characterized as domestic ones. Over two-third of the respondents had experience with minimum four of such cases over the last five years, 24% of the respondents with 4-10 cases, 10% with 11-20 cases, and 33% with above 20 cases. The remaining one-third of the respondents had experience with one to three of such cases.

- **The mainland China arbitration institutions before which the respondents participated over the last five years:** CIETAC, the BAC, the Shenzhen Court of International Arbitration (“SCIA” aka. “SCIETAC”), and the Shanghai International Arbitration Centre (“SHIAC” aka. “SIETAC”) were the main Chinese arbitration institutions before which the respondents participated.

9.4. The study

A reference to “respondents” in the following part pertains to those respondents who answered a particular question. For the purpose of being reader-friendly, the analysis below presents, in principle, the full percentage numbers.

9.4.1. Perception of arbitration in China

A majority of the respondents described the arbitration environment in China as “rather friendly”. Yet, on the other hand, almost 1/5 found it to be “rather unfriendly”. A number of the respondents considered it to be “very friendly”, or had no particular opinion on that issue. None of the respondents chose the option “very unfriendly”. Among those, who found the Chinese arbitration environment to be “rather unfriendly” were mainly the respondents from outside of mainland China. This was the case for over one-third of the foreign, Hong Kong/Taiwan/Macau respondents, and for approx. 9% of the mainland Chinese respondents. Among all of the dissatisfied respondents, a majority had substantial experience with arbitrating both in and beyond mainland China.

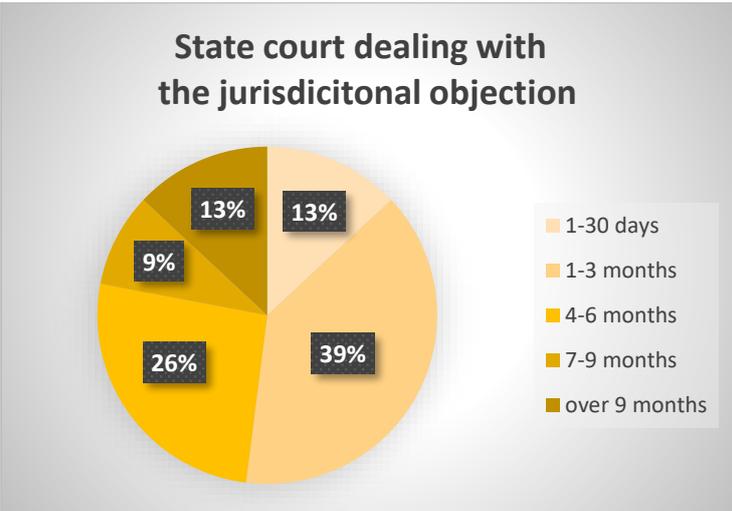
As to why the arbitration environment in China was not perceived as friendly, among the most commonly quoted reasons were: the over-involvement of the arbitration institution in the arbitration proceeding and the limited powers of the arbitral tribunal. The other reasons mentioned by the respondents were: the limited party autonomy, the over-involvement of the state court in the

arbitration proceeding, the lack of professionalism, the arbitration law not conforming to the Model Law standards, the worries about the state/party involvement into the proceeding, the limitations imposed on foreign arbitration institutions operating in mainland China, as well as experiencing the influence of „*guanxi*“⁶⁸⁹ by the parties.

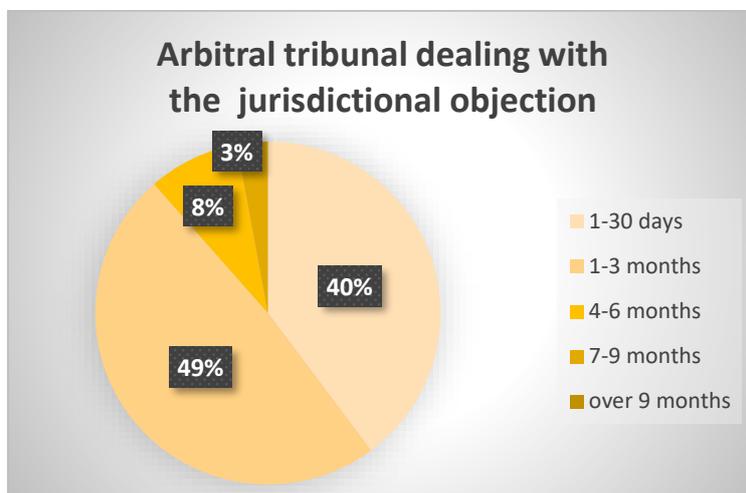
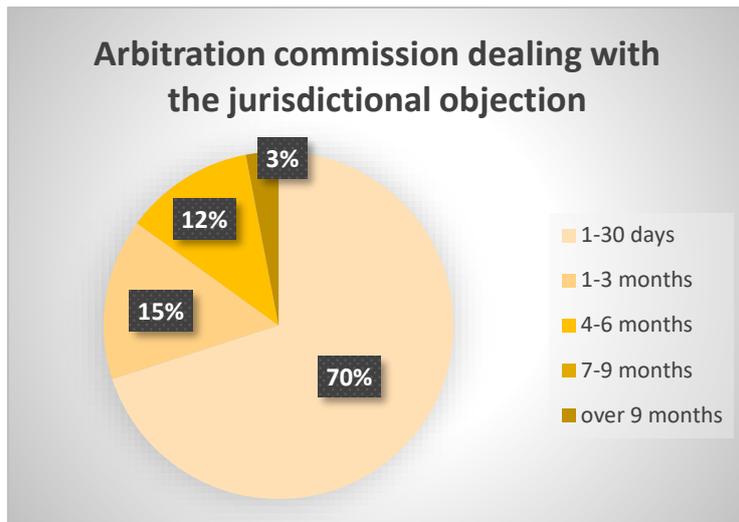
9.4.2. Objections to jurisdiction

In the set of questions pertaining to jurisdictional objections, the respondents were asked to consider all types of jurisdictional objections in the pre-award stage of arbitration, including the objections to the validity of an arbitration agreement and the objections to the scope of claims to be arbitrated. However, the respondents were asked not to consider the challenges to arbitrators in this section.

As to the time needed for dealing with jurisdictional objections, the respondents reported that the arbitration institution takes the least amount of time, the arbitral tribunal slightly more, but still considerably less than the court. The graphs below illustrate the answers to the questions about the time needed to address the objection.



⁶⁸⁹ „*Guanxi*“ describes the Chinese concept of a social network of relationships and influences.



A vast majority of the respondents (almost three-fourths) chose the arbitral tribunal to be in the best position to decide jurisdictional objections in the arbitration proceeding conducted in mainland China. This was followed by 14% of the respondents pointing out to the arbitration institution, and 10% to the state court. The remaining part of the respondents had no view on that issue.

Prior Reporting System (事先报告制度, *shì xiān bào gào zhì dù*, “PRS”)

Regarding the functioning of the PRS, the respondents reported that in a majority of cases, the PRS proceeding reached the level of the SPC. In case the PRS proceeding finished at the higher people's court level, the respondents pointed to the fact that in a majority of such cases, the time was over four months. In case the PRS proceeding finished at the SPC level, most of the respondents reported that in a vast majority of such cases – the time exceeded six months.

Further, a great majority of the respondents did not have a chance to participate in the PRS proceedings, as a party or a party counsel. A number of the respondents had such a chance, but only

in a minority of cases. Also, one respondent (reporting to witness four to ten PRS cases) reported to be able to participate in a majority of cases. According to the view commonly expressed by the respondents, the parties should be allowed to participate in the PRS proceedings.

All but one of the respondents who have had personal experience with the PRS proceedings pointed to some deficiencies of the PRS mechanism. Among the reasons given, the overall lack of transparency of the system was quoted the most commonly. This was followed by the lack of clear deadlines for the state courts to make their decisions and the lack of possibility for the parties to participate in the PRS proceedings.

9.4.3. Interim measures in aid of arbitration

In answering the questions pertaining to interim measures in aid of arbitration, the respondents were asked to consider only protective measures (保全措施 *bǎo quán cuò shī*) – namely property and evidence preservation and, thus, not to consider any other interim measures (其他的临时措施 *qí tā de lín shí cuò shī*).

In general, according to the respondents, interim measures in aid of arbitration are not used frequently in mainland China proceedings. A large majority of the respondents have never experienced such a measure being granted by the tribunal. Yet, there were also a few respondents, who experienced such a scenario. As to the institution of an emergency arbitrator, three out of 58 respondents reported to witness an interim measure granted by the emergency arbitrator in mainland China.

The respondents who have acted as arbitrators in the proceedings seated in mainland China, in a majority of cases expressed feeling competent to grant interim measures in the cases seated in mainland China. Still, however, a few of the respondents with the relevant experience expressed not feeling competent to take such actions. In addition, a large majority of the respondents expressed the view that the overall situation of a case can improve if the tribunal can effectively decide on interim measures in the proceedings seated in mainland China.

As to the “postman” role of the arbitration institution forwarding the party’s application for an interim measures to the court, the opinions vary. Over half of the respondents found it to be unnecessary. Further, 31% of the respondents held the opposite view, and the remaining part had no particular opinion on that issue. Furthermore, two-thirds of the respondents expressed the view that the arbitration institution should not scrutinize the application before it forwards it to the court. Next, 24% of the respondents held the opposite view, and the rest had no particular opinion on that issue.

As to requests for security in case of the application for an interim measures, the situation varies in China. According to the respondents, it is not always requested, but if requested, it is typically over 50% up to 100% of the claim.

Finally, two-thirds of the respondents were of the opinion that the arbitral tribunal is in the best position to order interim measures in the arbitration proceeding in China. Further, 22% of the respondents pointed to the state court, and a few respondents chose the arbitration institution. Over two-thirds of the respondents expressed their dissatisfaction with the current regulation in the area of interim measures in aid of arbitration under the Chinese system, with over half of the respondents claiming they were dissatisfied, and 14% being very dissatisfied. Further, 10% of the respondents were satisfied with the present circumstances, and 22% had no opinion. As to the reasons for dissatisfaction, almost two-thirds of the respondents pointed to the limited powers of the arbitral tribunal in this regard. This was followed by 15% of the respondents pointing to the limited types of interim measures available in China, and 10% of the respondents pointing to the lack of possibility to apply for an interim measures directly before the court once the arbitration proceeding is commenced.

9.4.4. Forming an arbitral tribunal

A majority of the respondents had never come across the situation, where the appointment of an arbitrator was made outside the panel list provided by the arbitration institution. In addition, in a great majority of cases, the ultimate appointment of a sole arbitrator/presiding arbitrator was made by the chairman of the arbitration institution.

9.4.5. Evidence taking

Over the half of the respondents had never experienced the situation, where the arbitral tribunal would order evidence on its own initiative. The respondents who have experienced such a scenario reported that it does not happen often. Half of the respondents expressed the view that the state court assistance in obtaining evidence would help to increase the efficiency of the arbitration proceedings in mainland China. Over one-third of the respondents was of the contrary opinion, and the remaining part held no particular view on that issue.

CHAPTER 10: CONCLUSIONS AND RECOMMENDATIONS

This Chapter provides a set of conclusions concerning the issue of the state's involvement in the pre-award stage of international commercial arbitration in China. It summarizes problematic issues, as well as offers a number of recommendations as to how the existing shortcomings can be addressed. As such, *what* should be improved is discussed, and *how* the improvement postulates can be realized on different levels. The final part of this Chapter offers closing remarks for the whole thesis.

10.1. Too much supervision and not enough assistance by the state in the pre-award stage of international commercial arbitration in China

The state involvement in the pre-award stage of international commercial arbitration in China is too extensive in terms of supervision over arbitration, and too limited in terms of assistance to it. Moreover, the channels through which the involvement of the state takes place are not fully proper.

On the one hand, the role of the state in arbitration in China is over-expanded. This is because of: (1) the extended role of the state court, which is given the priority to decide jurisdictional objections in arbitration, as well as the exclusive power to effectively order preservative measures in aid of arbitration; (2) the administrative character of arbitration institutions in China that make decisions relevant to arbitration and its outcome; and (3) the state limiting the choices available to the parties, which includes, in particular, the choice of an arbitration institution for a China-seated case. On the other hand, the state is under-involved. This refers to the limited state court assistance in the areas of tribunal-ordered interim measures and evidence taking in arbitration.

These shortcomings affect the efficiency and neutrality of the arbitration proceeding in China. Therefore, there exist the needs: (1) to rebalance the division of power among the arbitral tribunal, the state courts, and the arbitration institution in the pre-award stage of international commercial arbitration; (2) to reorganize the arbitration institutions in China and allow for more of their independence; and (3) to permit and support the full range of actions of foreign arbitration institutions in arbitration cases seated in China.

10.1.1. Need to rebalance the distribution of power shared among the arbitral tribunal, the state court, and the arbitration institution in the pre-award stage of arbitration in China

The role of the state court in the pre-award stage of arbitration in China lacks the proper balance. On the one hand, the court is over-involved in some areas of the proceeding, while, on the other hand, there are areas, where the court is under-involved. As to the role of the arbitration institution, it is too expansive and goes beyond the typical involvement of an arbitration institution in the arbitration proceeding. Accordingly, such over-involvements of the court and the arbitration institution happen at the expense of the arbitral tribunal – the ultimate adjudicators in arbitration, and it results in the reduced power of the tribunal to act effectively.

A. Imbalanced involvement of the state court

As to the role that the court plays in the pre-award stage of international commercial arbitration proceedings, when comparing it to transnational standards, on a number of occasions China deviates from these standards. As just noted above, there are instances, where the Chinese court becomes over-involved in the proceeding, and there are other instances, where although the involvement of the court is expected, it is practically non-existent. This means the extensive level of supervision of the court in some areas, and its limited assistance when it is needed. Also, the Chinese courts are given some exclusive powers, which are normally co-shared with the arbitral tribunal. This refers to deciding jurisdictional objections and ordering interim preservative measures in aid of arbitration. This imbalance, overall, leads to the reduction of powers of the tribunal and the limited efficiency of its adjudicating.

As to the expanded level of supervision over arbitration, the Chinese courts are given the priority in addressing jurisdictional objections. Deciding jurisdictional objections is a crucial issue, because it is an “entry gate” for arbitration. At this stage, it is decided whether arbitration will take place or not. It is commonly accepted that arbitrators, being chosen by the parties to decide their disputes, should also address the question of their own competence to hear the case. In virtually all systems, also the court plays a role in assessing whether arbitration should take place or not. Nonetheless, in these jurisdictions, there is usually a compromise as to the fact that the tribunal is given the opportunity to decide this issue first, and the court can subsequently review the tribunal’s decisions, if requested. This approach is enshrined in the principle of competence-competence. In China, however, under the CAL, arbitrators do not have the power to decide on their jurisdiction, and the court is given priority to rule on it instead. What is more, during the time the court is resolving a jurisdictional question, the

arbitration proceeding should be suspended. This, however, can lead to delays at the very initial stage of the arbitration proceeding.⁶⁹⁰

Moreover, the Chinese courts are the only forum to which the parties can effectively turn in the process of obtaining preservative measures in aid of arbitration. Preservation of property and evidence can be instrumental for the arbitration proceeding. These measures help to protect the property for the subsequent execution of an arbitral award and also can help to preserve evidence that can be important to the proceeding. The power to order interim measures in aid of arbitration, including preservative measures, is typically co-shared by the arbitral tribunals and the state court. In China, however, as of now, only the court can fully effectively order preservative measures for the reason that there is no regime for court assistance in enforcing tribunal-ordered measures.⁶⁹¹ This not only reduces the choices available to the parties, but also can affect the effectiveness of adjudicating by the tribunal.

There exists also an imbalance in the area of the court's participation in arbitration in the opposite direction – namely, where the Chinese court is under-involved. That means, more specifically, that the Chinese courts will neither offer their assistance in enforcing preservative measures granted by the tribunal, nor assist with evidence taking.⁶⁹² Arbitration is not equipped with coercive powers and therefore, if a coercive action is required, the assistance of the court can be essential. The support of the court can be especially relevant for any actions relating to non-parties. This is because arbitration has a limited reach to non-parties. As such, the tribunal cannot effectively order a non-party to do or to prevent it from doing something.

Tang Houzhi, a prominent arbitration specialist from China, in 1985, in the course of a discussion on the role of state courts in arbitration in the context of Art. 5 of the UNCITRAL Model Law, stated that “court intervention could be understood to mean assistance, which should be provided as fully as possible, or control, which should be kept to a reasonable minimum”.⁶⁹³ Yet, this postulate has not been fully realized in China and the existing imbalances affect the neutrality and efficiency of the arbitration proceeding.

⁶⁹⁰ See Chapter 4 p. 78-95.

⁶⁹¹ See Chapter 5 p. 115-120.

⁶⁹² See Chapter 5 p. 120 and Chapter 7 p. 176-177.

⁶⁹³ Holtzmann and Neuhaus, 236. Tang Houzhi represented China in the discussions on the shape of the UNCITRAL Model Law.

B. Over-involvement of the arbitration institution

The role of the Chinese arbitration institutions in the arbitration proceeding has a quite unique character. Notably, the typical role of an administrator of the proceeding is considerably exceeded in China. This over-involvement of the arbitration institution has been emphasized by various commentators.⁶⁹⁴ Gu portrays the situation in an illustrative way by characterizing it as “too long leg” of the arbitration institutions.⁶⁹⁵

In his study, Gerbay, who conducted a comparison of tasks of various leading arbitration institutions in the world, noted that, in general, the scope of activities varies significantly from institution to institution.⁶⁹⁶ However, Gerbay also navigated a salient feature of Chinese arbitration institutions,⁶⁹⁷ which is unique for the Chinese institutions only – namely, the possibility to render a final decision on jurisdiction.⁶⁹⁸ Although, as analyzed by Gerbay, in practice, all arbitration institutions deal to some extent with the question of jurisdiction, nonetheless, it is typically done on a *prima facie* basis at the stage of accepting a case, when no arbitral tribunal has been yet constituted. Next, the decision of the institution in this regards is subjected to a subsequent review by the tribunal. However, this is not the case in China, where the power to address jurisdictional challenges is co-shared between the court and the arbitration institution under the CAL.

When assessing the level of intervention in the arbitration proceeding by different arbitration institutions, Gerbay evaluated also a possibility of particular types of involvement by the institutions to influence the outcome of a case. Accordingly, in one of his continuums comparing the involvement of different institutions around the world, Chinese institutions (represented by CIETAC and the Chinese Maritime Arbitration Commission – “CMAC”⁶⁹⁹) were the institutions with the most pronounced intervention at the pre-appointment stage.⁷⁰⁰ The continuum prepared by Gerbay is presented below.

⁶⁹⁴ See, for example, Yuen, McDonald, and Dong, 225.; Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 196-97.; Song, Zhao, and Li, 187-88.

⁶⁹⁵ Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 196.

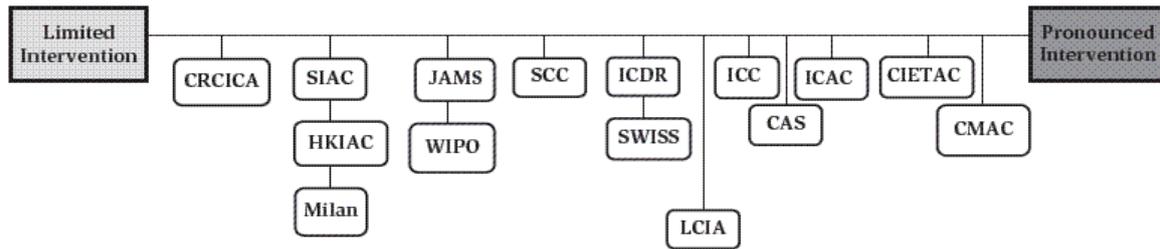
⁶⁹⁶ Gerbay, *The Functions of Arbitral Institutions*, 55 & 58-59.

⁶⁹⁷ Gerbay in his analysis refers primarily to CIETAC, though some occasional references are made also to the CMAC, the BAC and the SHIAC.

⁶⁹⁸ Gerbay, *The Functions of Arbitral Institutions*, 68-69.

⁶⁹⁹ The CMAC focuses on resolving maritime disputes.

⁷⁰⁰ Gerbay, *The Functions of Arbitral Institutions*, 108 & 109-112.



Source: Figure 3.1. Continuum of Institutional Powers (Post-Appointment Phase), Gerbay R., *The Functions of Arbitral Institutions*, p. 112.

Another atypical involvement of the Chinese institutions refers to participation of the arbitration institution in the process of obtaining interim measures in aid of arbitration. This means that the institution serves as a postman forwarding an application for an interim measure made by a party to the state court.⁷⁰¹

Nevertheless, it is important to note that in contrast to many other arbitration institutions in the world, these particularities of the Chinese institutions are not always their deliberate choice. Rather, it is likely the issue of undesirable constraints imposed on the institutions by the provisions of the Chinese law. The leading Chinese arbitration institutions seem to be aware of the limitations. In response to them, on numerous occasions they have taken steps to innovate and bring the practice of arbitration in China closer to internationally accepted standards. So far, this was the case, for example, when some of the leading institutions introduced a mechanism of delegation of the power to address jurisdictional objections to the arbitral tribunal,⁷⁰² or when they empowered the tribunal to order any types of interim measures in aid of arbitration.⁷⁰³ However, in any case, the developments introduced by the institutions often cannot be fully utilized in practice, because of limitations of Chinese law. By way of example, because of the lack of legal framework for the enforcement of tribunal-ordered interim measures, this power given to the tribunal by the institutional rules is of limited use.

⁷⁰¹ See Chapter 5 p. 119-120.

⁷⁰² See Chapter 4 p. 81-84.

⁷⁰³ See Chapter 5 s. 117-118.

C. Limited powers of the arbitral tribunal

As noted, the role of the court and the arbitration institution in the pre-award stage of arbitration in China is in a few instances expanded, when comparing it to transnational standards. Importantly, this expansion happens at the expense of the arbitral tribunal, and its power is accordingly reduced. Particularly, under the CAL, the tribunal cannot address the challenges to the validity of an arbitration agreement, and cannot effectively order preservative measures in aid of arbitration. These two functions are important to the efficiency of the arbitration proceeding. An arbitrator is an adjudicator in an arbitration case, just like a judge in a court case. Therefore, it is desirable that the tribunal is equipped with a range of tools that will allow it to conduct the proceedings according to what the parties agreed to and in a maximally productive way.

Meanwhile, however, in China, the powers of the tribunal are curbed. Both the court and the arbitration institution took over some of the tribunal's usual powers. This can result in problems, such as delays, inconsistent decisions, or even the questioned neutrality of the proceeding. It also poses a general concern as to whether the Chinese allocation of power fully reflects the parties' agreement to have their disputes resolved by means of arbitration. Therefore, it is argued that the tribunal in China should be given more powers, and this refers especially to the possibility to address objections to its jurisdiction, as well as the power to order preservative measures in aid of arbitration.

In eliminating possible doubts that the too powerful tribunal can render the arbitration proceeding uncontrollable, it is important to stress that this risk is limited. In virtually all jurisdictions, including the UNCITRAL Model Law jurisdictions, the court retains the ultimate control over the discussed matters. As such, for the issue of jurisdictional objections, the courts have the possibility to tackle any irregularities (1) either in a concurrent manner – at the beginning of arbitration after the tribunal renders its decision on jurisdiction and one of the parties disagrees with the tribunal's decision, or (2) in the post-award phase – in a setting aside procedure or at the stage of enforcement of an award. Concerning the issue of interim measures, in case the coercive enforcement is needed, the court needs to be engaged in anyway, because the tribunal is not equipped with coercive powers.

For the purpose of a more neutral and efficient proceeding and in order to be in line with the parties' agreement to *arbitrate*, the arbitral tribunal in China should be given the relevant powers. Notably, almost three-fourths of the respondents to the China Arbitration Survey expressed the view that the

arbitral tribunal is in the best position to decide jurisdictional objections in arbitration.⁷⁰⁴ Further, almost a half of the respondents pointed to the limited powers of arbitrators in the area of interim measures as the main reason for the dissatisfaction with the current system of interim measures in aid of arbitration in China, and two-thirds of the respondents expressed the view that the tribunal is in the best position to order interim measures in arbitration.⁷⁰⁵

D. Limited autonomy of the parties

It is important to stress that the parties are at the very center of any arbitration. As repeatedly emphasized in this thesis, arbitration is a consensual method of resolving disputes, and, thus, where there is no agreement of the parties to arbitrate – there is no arbitration at all. The principle of party autonomy lies at the heart of arbitration, and, therefore, the parties are given a substantial level of freedom to design their proceeding in a way they find most suitable in a particular case. However, party autonomy is curbed in China.

In general, when the parties choose to arbitrate, it is logical to assume that they intend to resolve their disputes by means of arbitration. However, in China, although the parties chose to arbitrate, they may have to direct their first arguments to a Chinese court. First, it will happen when one of the parties raises a jurisdictional challenge before the court and the issue has not been yet decided by the arbitration institution. Second, in case a party finds that there is a need for property or evidence preservation, the only forum it can effectively turn to is the Chinese court. This is especially relevant in the context of international commercial arbitration, where foreign parties may choose to arbitrate in order to (1) avoid the involvement of local courts, and/or (2) proceed in accordance with the rules and procedures of international commercial arbitration that the parties are likely more familiar with.

Other choices of the parties arbitrating in China are limited when comparing them to commonly accepted international standards. First, in case of arbitration involving foreign interest, but classified as a domestic one, the choice is, in principle, limited to the Chinese arbitration institutions, as well as China as a seat. In addition, the parties can only choose to apply the Chinese law as a substantive law. Hence, by way of example, a Sino-German JV automotive company in dispute with a Chinese distributor, as a general rule, must arbitrate in China, before a Chinese arbitration institution, applying Chinese law. There are only few exceptions to the rule.⁷⁰⁶

⁷⁰⁴ See Chapter 9 on the China Arbitration Survey p. 197, as well as Appendix 1 p. 274.

⁷⁰⁵ See Chapter 9 on the China Arbitration Survey p. 199, as well as Appendix 1 p. 296-298.

⁷⁰⁶ See Chapter 2 p. 36-38.

Second, the parties' choice is also restricted because of the Chinese closed-panel system of arbitrators who are available to resolve disputes. Although, as discussed above, some leading arbitration institutions permitted the off-panel appointments in their rules, it still is not a universal solution for all the institutions.⁷⁰⁷

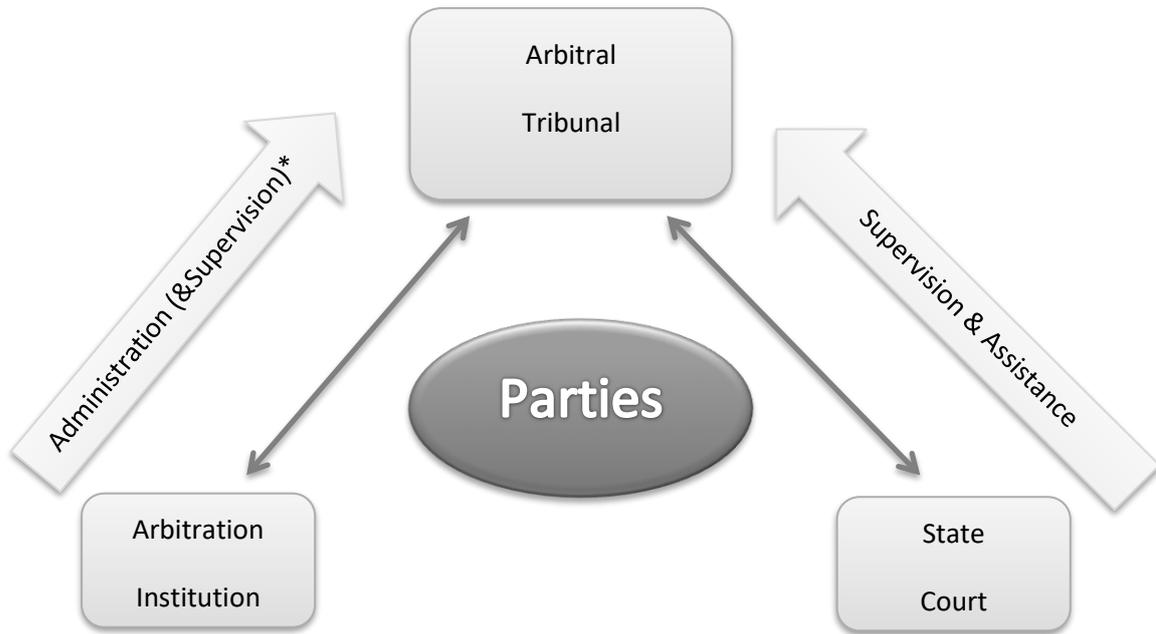
Third, as just mentioned, regarding the issue of measures of evidence and property preservation, the choice of the parties as to the forum that they can effectively turn to with their requests is also limited. Yet, there might be scenarios in which a party in a particular case may prefer to turn to the tribunal with a request for a measure, and not to the state court. The reasons can be analogues to why the parties prefer to arbitrate in the first place. It could be so, because, for example, the parties prefers to resolve their dispute in a private, confidential, and neutral way. In China, however, if a party intends to effectively preserve property or evidence, it needs to turn to the court with its request, and no alternative choice is available.

The graphics below present a comparison of the distribution of power among the arbitral tribunal, the state court, and the arbitration institution, as well as the interdependencies among the three of them. The first graphic presents what is claimed to be commonly accepted standards in international commercial arbitration. The second one portrays the situation in China. There are a few noticeable differences between the two graphics.

The differences primarily refer to the scope of powers of particular stakeholders in arbitration proceedings. In the graphics below, these are represented by different sizes of particular stakeholders. The first difference refers to the arbitral tribunal, and it represents the reduced powers of the tribunal in China, as well as its reduced control over the arbitration proceeding – when comparing to transnational standards. The second difference reflects the expanded roles of the arbitration institution and the state court in China. It is also stressed that in China, the court's supervision is too extensive, while there is not enough assistance to arbitration offered by the court. Also, it is marked that the arbitration institution in China, in addition to administering and supervising the arbitration proceeding, is also given the power to decide jurisdictional objections under the CAL (in the graphic it is marked as "EP" – "extra power"). The third difference reflects the connection between the arbitration institution and the court in China, whereby the institution communicates with the court for the purpose of interim measures. Finally, the reduced autonomy of the parties in China is also reflected.

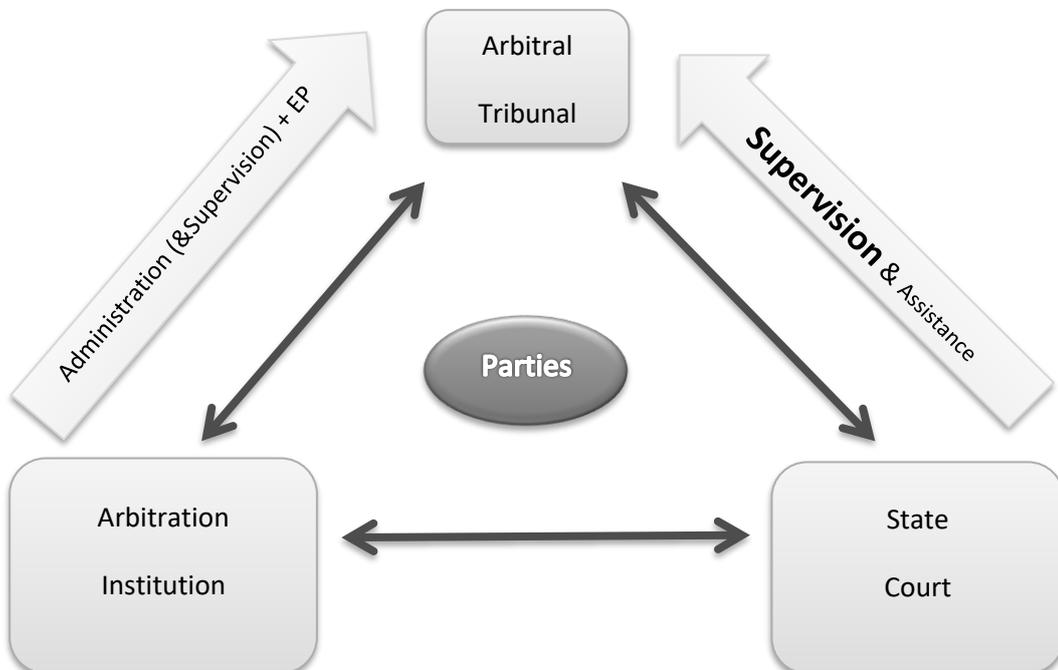
⁷⁰⁷ See Chapter 6 p. 145.

Graphic 1: Transnational standards



*Level of "supervision" can differ in various arbitration institutions.

Graphic 2: Chinese standards



*Level of "supervision" can differ in various arbitration institutions.

10.1.2. Need to reorganize the Chinese arbitration institutions

There is too much administrative interference in the functioning of the arbitration institutions in China. The interference refers especially to the financing of the institutions, as well as to the appointment of the staff exercising key positions. This affects the proper functioning of the institutions, and also can put in question the institutions' independence. This includes their decisions that can have an impact on the outcome of cases, such as the decisions on jurisdictional challenges or appointment of arbitrators.

This problem is illustrated by the example of forming arbitral tribunals in China, where the chairman of the arbitration institution is vested with important powers, such as appointing and removing arbitrators. As discussed in Chapter 6, the independence of such a powerful chairman (and other personnel acting on the chairman's behalf) in making the relevant decisions can be questionable in China. The main problem lies in the government-controlled financing of the institutions in China, as well as in the government's involvement in arranging their key personnel.⁷⁰⁸ Accordingly, as aptly articulated by Chen, for the leading arbitration institutions that are aware of these shortcomings, the reality is "striving for independence, competence, and fairness".⁷⁰⁹

10.1.2. Need to clarify the status and permit the full range of actions of foreign arbitration institutions in China

As argued in Chapter 8, as of now, the status and range of powers available to foreign arbitration institutions in China are unclear.⁷¹⁰ This, as a consequence, limits the predictable choices available to the parties arbitrating in China.

10.2. Overview of recommendations

Recommendations as to how the relevant deficiencies of the Chinese arbitration system can be improved are provided on three levels. The first groups of recommendations refers to the revision of relevant laws, and especially – a comprehensive revision of the CAL. The second group takes into account the fact that a comprehensive amendment of the CAL may take some time, and hence, a

⁷⁰⁸ See Chapter 6 p. 150-154.

⁷⁰⁹ This term was used originally by Chen in his article: Chen, "Striving for Independence, Competence, and Fairness: A Case Study of Beijing Arbitration Commission." (refer to the title).

⁷¹⁰ See Chapter 8 p. 183-188.

number of alternative solutions that can be implemented are explored. This includes, in particular, actions that can be taken by the SPC and the arbitration institutions, but also the role that the Shanghai FTZ can play in this regard. Finally, the third group revolves around actions that can be taken by the parties in order to secure their rights and interests when resolving their disputes in China and/or with China. It especially focuses on how the parties can deal with the current situation in case the postulated changes do not materialize. This last part considers the actions that can be taken in relation to arbitration proceedings in China, but also alternatives to arbitrating in China.

Accordingly, the analysis below recapitulates *what* aspects of the state's involvement in the pre-award stage of international commercial arbitration in China deserve modifications, and the three-level analysis on *how* changes can be introduced follows.

10.3. Proposed direction of changes for the state's involvement in the pre-award stage of international commercial arbitration in China

10.3.1. Rebalancing the powers shared among the arbitral tribunal, the state court, and the arbitration institution

The system of international commercial arbitration in China in its pre-award stage requires some rebalancing of power shared among the arbitral tribunal, the state court, and the arbitration institution.

To begin with, some powers should be given to the arbitral tribunal. In the context of this thesis, this relates to (1) fully recognizing the principle of competence-competence in China, so that the arbitral tribunal will have the power to address all jurisdictional objections, and (2) empowering the tribunal to effectively order preservative measures in aid of arbitration. These actions would help secure more neutrality of the arbitration proceeding, enhance its efficiency, and would also increase the choices available to the parties. While increasing the powers of the tribunal in these two aspects, the level of undesirable intervention by the state would be reduced. At the same time, however, the court will retain a desirable level of control over the proceeding.

As to the supportive role of the court, this should be further enhanced in China. Accordingly, it is recommended that the courts in China should be provided with a relevant legal framework to assist arbitration by enforcing the orders granted by the tribunal, if such assistance is needed. This refers especially to the orders granted by the tribunal in the area of interim measures and evidence taking.

As to the role of the arbitration institution, its role in addressing jurisdictional objections, as currently prescribed under the CAL, should be eliminated; this function should be transferred to the arbitral tribunal. Similarly, the role of a postman that the arbitration institution in China plays when forwarding

the application for an interim measure to the court should be eliminated. In this way, the parties would be able to directly apply for an interim measure to the court – both before and after the arbitration proceeding starts.

10.3.2. Reducing the administrative control over the Chinese arbitration institutions

It is recommended that the Chinese arbitration institutions should be given more freedom to operate. As argued above, the administrative influence over the arbitration institutions in China can be observed especially in two aspects: in financing the institutions and in equipping them with personnel.⁷¹¹ As to the financial control and support of the government, it is anticipated that not necessarily all of over 230 arbitration institutions in China would be satisfied with the elimination of state funding. Even the prospect of using own money in a way a particular institution wishes is not very attractive, if it is unable to make any significant profit. The complexity of the topic of the excessive number of arbitration institutions in China to some extent echoes the complexity of the Chinese socio-economic system. Therefore, letting the unprofitable and uncompetitive arbitration institutions to naturally “disappear” from the market may not be a very realistic scenario for China, at least as of today.

However, especially those arbitrations institutions that are able to do financially well should be given the opportunity to decide their finances and other aspects of their activities. This would likely create more incentive for the institutions to innovate in order to meet the needs of arbitration users. This could also allow the institutions to use their finances according to their needs. By way of example, this would enable the institutions to pay the staff and arbitrators suitably in order to attract the high quality staff and arbitrators.

As to the changes in the area of personnel of the Chinese arbitration institutions, the involvement of the government should be reduced. This would help enhance the overall independence of the institutions and, importantly, decisions made by them in the context of the arbitration proceeding. In general, as to the personnel, the emphasis should be put on professionalism and experience, so that the institutions can function more competently and efficiently, and can smoothly adapt to dynamic changes, which are common in international commercial arbitration.

As a final thought, more freedom given to the arbitration institutions would allow the leading Chinese arbitration centers to better compete with their foreign counterparts. This issue can be of particular

⁷¹¹ See Chapter 6 p. 150-154.

relevance if foreign institutions are given the permission to fully administer arbitration cases in China, which, as discussed above, is not an unrealistic scenario bearing in mind the recent developments in this area.⁷¹²

10.3.3. Allowing the full operation of foreign arbitration institutions in China

It is recommended that China should permit a full range of services to be provided by foreign arbitration institutions in China-seated cases. It would not only help to further internationalize China's arbitration environment and offer a wider range of choices to the parties, but also it would likely enhance the entire arbitration system in light of the cooperation and competition between domestic and offshore institutions.⁷¹³

10.3.4. Maintaining two separate systems for domestic and foreign-related/international arbitration

In anticipating the future reforms of the Chinese arbitration system, one important issue needs to be approached at an early stage of the discussions. Namely, this is whether China should have two separate sets of rules for domestic and foreign-related/international arbitration (like, for example, Singapore) or whether it should have a unitary system for both types of arbitration (like, for example, Hong Kong). In case China feels the need to treat domestic arbitration in a more "protective" way, it is reasonable to have two separate systems.⁷¹⁴ Indeed, it seems to be a more realistic proposal for China, bearing in mind the above demonstrated general approach to retain a significant amount of control over arbitration. The CAL in its current shape governs both domestic and foreign-related/international arbitration, but there is also a special section containing provisions applicable to the latter regime only. This technical solution could be further utilized.

10.3.5. Adjusting the definition of a "foreign-related" / "international" arbitration

In case China decides to keep following the path of two separate systems for domestic and foreign-related cases, it is postulated that the application of the "foreign-related" regime should extend. It should extend to some transactions and disputes, which as of today, despite involving foreign elements,

⁷¹² See Chapter 8 p. 187-188.

⁷¹³ See Chapter 8 p. 188-190.

⁷¹⁴ See Fung and Wang, 79.; João Ribeiro and Stephanie Teh, "The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law," *Journal of International Arbitration* 34, no. 3 (2017), 487.

are still classified as domestic ones, and, hence, fall into the category of domestic arbitration with all its limitations.⁷¹⁵ It especially refers to the transactions and disputes in which foreign-invested enterprises (“FIE”) – WFOEs and Sino-foreign JVs – are involved.

As of today, as argued in Chapter 2, there exists a possibility for the courts in China to make use of the category of “other circumstances that can be determined as foreign-related civil relations” under the SPC’s interpretation from 2012. Moreover, the courts recently started to explore the use of such “other circumstances” in the context of FIEs. Furthermore, the SPC’s FTZ Opinion took a similar approach, though it applies only to the limited areas of the FTZs.⁷¹⁶ It is argued that allowing transactions and disputes involving FIEs to generally enjoy the benefits of the foreign-related regime is desirable. It would result in one unified view applied across the country, and, hence, the fate of a particular case would not need to depend on an interpretation made by a court in an individual case.

10.3.6. Providing for more transparency of the entire system: tackling the ambiguities

There are numerous instances, where the Chinese arbitration system lacks the desirable level of transparency. In order to provide for more predictability in the system, the existing ambiguities should be eliminated. Among the ambiguities navigated in this thesis are, in particular, the lack of clear time limits within the PRS system, and the status of foreign arbitration institutions in China.⁷¹⁷ Rectifying these ambiguities would not only help to reduce the risk of abuses by the parties, the arbitral tribunal, and the court, but would also help to standardize the practice across the country.

10.3.7. Systemic changes

Finally, more systemic changes are, generally, needed in order to address the shortcomings of the Chinese arbitration system in the long run. As to Chinese courts, it is claimed that the SPC, as well as the courts in major Chinese business cities, like Beijing, Shanghai, or Shenzhen, have generally demonstrated their arbitration-friendly approach over the last years. However, other courts may not necessarily follow. The reasons can include the problem of local protectionism, corruption, as well as the lack of familiarity with arbitration-related issues. Therefore, further reforms of the courts in China are a condition for the healthy development of arbitration. Likewise, offering more education in the area of arbitration to judges would help to improve the situation. Meanwhile, the elimination of the

⁷¹⁵ See Chapter 2 p. 36-38.

⁷¹⁶ See Chapter 2 p. 37-38.

⁷¹⁷ See Chapter 4 p. 85-88 and Chapter 8 p. 187-188.

above discussed ambiguities in law, as well as continuous guidance provided to courts, especially by the SPC, would help to unify the practice of the courts in the whole country.

10.4. Ways of improving the existing shortcomings of the Chinese arbitration system

When approaching the questions of how to eliminate the discussed shortcomings in order to make China more arbitration-friendly, multiple answers can be navigated. Some are as broad as the advancement of the entire legal system of China.⁷¹⁸ Nevertheless, some more specific efforts can be gradually taken on three levels: (1) the comprehensive revision of the CAL; (2) possible actions before the comprehensive revision of the CAL takes place; and (3) options available to the parties.

10.4.1. Comprehensive revision of the CAL

As discussed in Chapter 2, the CAL was a product of efforts to combine the needs of private businesses (including foreign businesses), on the one hand, and the centrally planned state-run economy of China, on the other hand.⁷¹⁹ After 24 years after the enactment of the CAL, users of arbitration in China are not fully satisfied with the system, and the criticism toward the CAL has come both from China and abroad.⁷²⁰ A part of the problems relates to the outdated character of the CAL, which is a pillar of the Chinese arbitration system, but has gradually become unable to meet the needs of arbitration users. In fact, in 1994, there were different conditions for enacting the CAL, and contractual characteristics of arbitration were not given enough attention at that time. It resulted in arbitration being contained in the law “in form but not in spirit”.⁷²¹ One other important problem of the CAL is the fact that it recognizes some of the key principles of international commercial arbitration, such as party autonomy and flexibility of arbitration, but in a limited way. That means that some choices, such as which forum to turn to with a request for preservative measures in aid of arbitration, are limited in China.

⁷¹⁸ See Tao, "Salient Issues in Arbitration in China," 830.

⁷¹⁹ See Chapter 2 p. 27-28.

⁷²⁰ See, for example, Manjiao Chi, "Is Chinese Arbitration Act Truly Arbitration-Friendly: Determining the Validity of Arbitration Agreement under Chinese Law," *Asian International Arbitration Journal* 4, no. 1 (2008), 104 *et seq.*; Shengchang Wang, "China Arbitration Law v UNCITRAL Model Law," *International Arbitration Law Review* 9, no. 1 (2006), 1 *et seq.*; Jingzhou Tao and Clarisse Von Wunschheim, "Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institution," *Arbitration International* 23 (2007), 309 *et seq.*; Song, Zhao, and Li., 169 *et seq.*; Chi, "Are We “Paper-Tigers”: The Limited Procedural Power of Arbitrators under Chinese Law.", 259 *et seq.*; Zhao and Kloppenberg, 421 *et seq.*; Kong Yuan, "Revision of China's 1994 Arbitration Act—Some Suggestions from a Judicialization Perspective," *Journal of International Arbitration* 22, no. 4 (2005), 323 *et seq.*; Zhanjun Ma, "Modification of 1994 Arbitration Law of China [Original Title: 1994 年中国《仲裁法》修改及论证]," *Arbitration Study [仲裁研究]* 8 (June 2006), 60 *et seq.*

⁷²¹ Song, Zhao, and Li, 174.

Furthermore, some provisions of the CAL are too rigid, whereas some other are too vague, and the limited guidance as to how the obscurities should be understood is available. As such, the CAL on a few occasions, like when providing the criteria as to who can be an arbitrator, is rather inflexible.⁷²² Some other provisions, on the other hand, are very vague, which can lead to unnecessary ambiguities. By way of example, Art. 20 of the CAL assigning the power to decide jurisdictional challenges does not specify who should precisely do that if the arbitration institution is to deal with this matter.

The numerous shortcomings of the CAL have resulted in a myriad of additional sources of law produced, especially by the SPC, in order to tackle the problematic matters.⁷²³ Still, however, there are a number of issues, which have not been resolved as of today. This is the case, for example, for the status of foreign arbitration service providers in China. This has become even more relevant in light of the HKIAC, the SIAC, and the ICC opening their offices in the Shanghai FTZ. Furthermore, because of the need to produce numerous additional documents in order to address unclear issues and guide various stakeholders of arbitration in China, the whole system has become very complex and difficult to navigate, especially for foreigners. Therefore, a further organization and unification of the system would be beneficial to all stakeholders of arbitration in China.

A comprehensive review of the CAL has been recommended for a long time.⁷²⁴ The revision was, in fact, expected already a couple of times in the past. Nevertheless, no complete change has taken place, and it is needed. The review of the CAL was even on the agenda of the legislative plans of the Standing Committee of the NPC in 2005. Likewise, the Legislation Bureau of the State Council made its arrangement for the amendment in 2006.⁷²⁵ Yet, these plans have not been realized – likely due to other priorities of the Chinese legislator. As Chen enthusiastically titled his article shortly after the new arbitration law was adopted in 1994, the CAL was, indeed, a great leap forward for the Chinese arbitration system.⁷²⁶ However, 24 years later, it is time for another “great leap forward”. Notably, however, the chances for this seem to be high, since the Standing Committee of the National People’s Congress in its five-year legislative plan issued on 7 September 2018 listed the CAL as the law to be

⁷²² See Art. 13 of the CAL.

⁷²³ See Wang, "China Arbitration Law v UNCITRAL Model Law," 6.

⁷²⁴ See, for example, Song, Zhao, and Li, 178.; Tao, "Salient Issues in Arbitration in China," 830.; Thorp, 608.

⁷²⁵ See Chi, "Is Chinese Arbitration Act Truly Arbitration-Friendly: Determining the Validity of Arbitration Agreement under Chinese Law," 105.

⁷²⁶ Min Chen, "The Arbitration Act of the People's Republic of China - a Great Leap Forward," *Journal of International Arbitration* 12, no. 4 (1995). (refer to the title)

studied and revised.⁷²⁷ The State Council was designated to deal with the matter.

There are a number of questions relating to how the CAL should be revised. Some authors suggest that the UNCITRAL Model Law should be adopted in China.⁷²⁸ In the course of drafting of the CAL, China referred to the UNCITRAL Model Law and reflected some of its underlying principles, such as the party autonomy, severability of arbitration agreements, and finality of arbitral awards. However, the UNCITRAL Model Law eventually was not adopted in China. Apparently, the division of power and level of supervision prescribed by the UNCITRAL Model Law was not acceptable to the Chinese government at that time.⁷²⁹ The proposition of this thesis is, however, that 24 years after the enactment of the CAL, the system of international commercial arbitration in China, including all its stakeholders – arbitrators, judges, arbitration institutions, counsels, and the community, has made remarkable progress and deserves to benefit from other solutions available under the UNCITRAL Model Law.

The UNCITRAL Model Law adoption would not render the arbitration proceeding uncontrollable. Quite conversely, there are various mechanisms provided in order to secure a sufficient, but not excessive level of supervision over arbitration. Furthermore, there are numerous benefits of modeling own arbitration law on the format proposed by UNCITRAL. In addition to guaranteeing the party autonomy, as well as neutral and efficient arbitration proceedings, another benefits is the recognition and promotion of the UNCITRAL Model Law jurisdictions abroad, and, thus, providing a more competitive edge to the jurisdictions that decide to adopt the Model Law. Users of international commercial arbitration are, generally, rather familiar with the solutions of the UNCITRAL Model Law. Hence, the adoption of the UNCITRAL Model Law would likely boost the level of confidence toward arbitration in China, especially in the eyes of foreign participants to the system. However, one needs to notice that the revision of law itself is not sufficient, and the cooperation of state courts acting in line with the new law is needed as well.

⁷²⁷ Wei. (last accessed: 20 November 2018). See the full list of laws to be revised at the official website of the NPC: http://www.npc.gov.cn/npc/xinwen/2018-09/10/content_2061041.htm (last accessed: 20 November 2018).

⁷²⁸ See, for example, Wang, "China Arbitration Law v UNCITRAL Model Law," 6-7.; Ribeiro and Teh.; Chi, "Is It Time for Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law.;" Jingzhou Tao, "Amendments to the Arbitration Law Should No Longer Be Avoided (Fourth Session of the Arbitration Round Table) [《仲裁法》修订不应再“虚晃一枪” (第四届仲裁圆桌发言稿)]," *Arbitration Roundtable [仲裁圆桌]* (1 November 2018), https://mp.weixin.qq.com/s?__biz=MzU5MzU2MzMzMw==&mid=2247483760&idx=1&sn=076f8af52b2b01149c90d7e7d9f9ba33&chksm=fe0fdadac97853ccd243166de1e87d7e2d528fdbef682a46081b73e09a24f5871b86340dbd53&mpshare=1&scene=1&srcid=1106syBs8C7exai4vvdZqE1P#rd. (last accessed: 20 November 2018).

⁷²⁹ Yuen, McDonald, and Dong, 35.

Yet, in case China does not decide to follow the UNCITRAL Model Law format, it should enshrine its basic principles of the distribution of power among the arbitral tribunal, the state court, and the arbitration intuition in its future version of arbitration law. In doing that, it is especially important that arbitrators are given the relevant powers. It is also vital that the undesirable supervision of the court over arbitration is reduced, and that the court's assistance to arbitration is enhanced. Besides, the role of the arbitration institution should be diminished, and, in particular, it should not be involved in addressing jurisdictional objections.

10.4.2. Possible actions before the comprehensive revision of the CAL takes place

Despite the fact that revision of the CAL has been (again) anticipated by the China's legislative body – the NPC, some time is still likely needed for the project to be completed. This is because the revision of CAL was not classified as the top legislative priority. In general, legislative projects in China are grouped in three classes (I to III), in descending priority. The revision of the CAL was placed in the second category “Class II Projects: Draft laws for which work should be rushed and which will be submitted for deliberation when the conditions become mature”,⁷³⁰ at the bottom of the list. A number of other laws awaiting more urgent legislative action were placed in the first group “Class I Projects: Draft laws for which the conditions are relatively mature and which are planned to be submitted for deliberation during the term”.⁷³¹ Among them are the Judges Law, the Separate Parts of the Civil Code, and numerous pieces of law pertaining to the environmental protection and taxation. In addition, as mentioned, the revision of the CAL was already in the agenda in the past, and it did not take place, as originally planned. Some other projects have continuously been on the NPC's lists for years, such as the Telecommunications Law, which has been listed in all but one of the five-year legislative plans already since 1993.⁷³²

As such, some alternative routes for further improvement of the Chinese arbitration system should be explored meanwhile. It includes the further activation of the SPC, the arbitration institutions (both Chinese and foreign), and the Shanghai FTZ in tackling the existing shortcomings. In addition, a role of the China Arbitration Association in this context can be explored as well.

⁷³⁰ Changhao Wei, "Analysis of 13th NPCSC Legislative Plan Pt. 1: Relisted, Dropped & New Projects," *NPC Observer* (16 September 2018), <https://npcobserver.com/2018/09/16/analysis-of-13th-npcsc-legislative-plan-pt-1-relisted-dropped-new-projects/>. (last accessed: 20 November 2018).

⁷³¹ *Ibid.* (last accessed: 20 November 2018). The prioritized Class I projects are expected to be completed within the 13th term of the NPC's term, which is in March 2023. Class III Projects are the projects without complete legislative conditions, for which research and discussions should continue.

⁷³² *Ibid.* (last accessed: 20 November 2018).

A. Further lead by the SPC

a. Interpretive documents issued by the SPC

As demonstrated, the SPC has a wide range of tools available to shape the practice of Chinese arbitration, and so far, it has used these tools quite regularly to develop the system. What would be desirable is preparation of one comprehensive written resource collecting and explaining problematic issues. The SPC did it already, for example, in 2006.⁷³³ Importantly, the SPC does not have such a strict agenda as the NPC does. Therefore, the SPC could continue to work on creating a more arbitration-friendly environment in China until a comprehensive revision of the CAL takes place. The issues that should be targeted by the SPC, *inter alia*, are:

1. The definition of a “foreign-related” dispute;
2. The status of foreign arbitration institutions in China;
3. The issue of suspension of the arbitration proceeding while the court is dealing with a jurisdictional objection;
4. The shortcomings related to the Prior Reporting System, especially the lack of clear time limits for the court to make its decision;
5. The endorsement of the practice of delegating the power to address jurisdictional objections from the arbitration institution to the arbitral tribunal;
6. The access to interim measures after the arbitration proceeding commences and the role of a postman played by the arbitration institution in the course of application for an interim measure.

b. Other actions by the SPC

In addition, there are some other actions, which have been taken by the SPC in the past, and should be continuously taken by it. By way of example, the SPC provides various trainings, seminars, and other educational opportunities related to arbitration for judges of lower level courts. Some of the landmark actions taken by the SPC in this regard include the SPC’s cooperation with the Tsinghua-Temple International Business Law LLM program and a program in International Arbitration and Dispute Settlement co-organized with the Tsinghua Law School.⁷³⁴ Both types of cooperation aim at, among

⁷³³ See Chapter 2 p. 31.

⁷³⁴ See more at the official website of the Master of Law Program in International Arbitration and Dispute Settlement (IADS): <http://www.law.tsinghua.edu.cn/publish/lawen/8090/index.html>; and the official websites

others, further education of judges dealing with arbitration-related matters. There are also frequent symposia organized or participated by the SPC, through which the SPC educates, learns itself, and shares the views on recent developments in arbitration in China.

B. Role of the Chinese arbitration institutions

Arbitration institutions in China should be reorganized, so that they are freed from administrative influences. Yet, undeniably, this would be a very complex and long-term undertaking. There are, however, some actions that the arbitration institutions can take and, in fact, have already taken on numerous occasions in order to improve the shortcomings of the Chinese arbitration system. In light of a passive approach of the Chinese legislator, the leading institutions, aware of the deficiencies of the system, have tried to innovate and introduce some solutions aimed at building a more arbitration-friendly environment in China. This includes delegating the power to address jurisdictional challenges to the arbitral tribunal⁷³⁵ and empowering the arbitrators to order preservative measures in aid of arbitration – as provided by the institutional rules.⁷³⁶

However, ambitious actions taken by the institutions are often restricted by the provisions of the CAL and therefore, the steps taken by them have been cautious.⁷³⁷ Also, the limitations of the Chinese system can impact the efficiency of innovations made by the institutions. This is the situation, for example, for giving the arbitral tribunal the power to order a variety of interim measures in arbitration – since there is no legal framework for the court's support in such cases. Therefore, as of today, the situation is that the leading arbitration institutions have scratched the surface of some practices common in international arbitration, but the users of arbitration in China cannot fully benefit from the introduced changes. Nevertheless, this important role of the leading arbitration institutions as the forerunners of changes to the arbitration system in China is noted, and, thus, their further moves in a pro-arbitration direction are expected in the future.

Furthermore, the leading arbitration institutions have played an important role in increasing the level of knowledge of various stakeholders of arbitration in China. By way of example, numerous seminars, workshops, and symposia are frequently organized by the leading institutions, and not rarely are co-

of the Temple-Tsinghua Master of Laws Program: <https://www.law.temple.edu/admissions/graduate-llm/llm-china/> and <https://sites.temple.edu/lawchinallmc/> (last accessed: 20 November 2018).

⁷³⁵ See Chapter 4 p. 81-84.

⁷³⁶ See Chapter 5 p. 117-118.

⁷³⁷ Yuen, McDonald, and Dong, 56.

organized with foreign leading institutions, such as the ICC, the SIAC, or the HKIAC.⁷³⁸ Another notable example refers to regular educational sessions for the institutions' staff and arbitrators, like those organized, for example, by the BAC.⁷³⁹

C. Role of foreign arbitration institutions

As discussed in Chapter 8, the presence of foreign arbitration institutions in China, although in a limited capacity, was recently permitted.⁷⁴⁰ This, indeed, should be seen as a pioneering move, since before the HKIAC opened its office in the Shanghai FTZ in 2015, there was no formal presence of a foreign arbitration institution in China. The foreign new-comers to the Chinese market declared their readiness to cooperate with the local community in order to further improve the Chinese system. This is a positive development, and further cooperation is expected in the future. In the longer run, the fuller operation of foreign institutions in China would result in competition among domestic and foreign institutions, prompting the local institutions to innovate in order to satisfy the expectations of arbitration users.

D. Role of the Shanghai FTZ

Another example of gradually developing the law in China is through the use of the FTZs, where legal innovations can be first tested within the limited areas of particular zones, and subsequently – if successful – can be implemented across the country.

It is recommended that the role of the Shanghai FTZ be further utilized in testing various arbitration-related innovations, and, subsequently, introducing the successful ones across the country. The Shanghai FTZ has already been used for such purposes. By way of example, the SPC's Opinion from 2016 targeting the Shanghai FTZ not only extended the arbitration options available to parties in some categories of disputes involving foreign elements, but also in a restricted way provided room for *ad hoc* arbitration in China.⁷⁴¹ These innovations, along with the opening of offices by foreign institutions in the Shanghai FTZ, may well test positively within a limited area of the Shanghai FTZ. If so, they could

⁷³⁸ See, for example, some events reported on the official website of CIETAC: <http://www.cietac.org/index.php?m=Article&a=show&id=14574&l=en> (last accessed: 20 November 2018); and the official website of the BAC: <http://www.bjac.org.cn/english/news/view?id=2669> (last accessed: 20 November 2018).

⁷³⁹ See Chen, "Striving for Independence, Competence, and Fairness: A Case Study of Beijing Arbitration Commission," 333-334.

⁷⁴⁰ See Chapter 8 p. 181-188.

⁷⁴¹ See Chapter 2 p. 36.

be subsequently implemented across the country, so that the benefits of modernization can have a wider reach.

Additionally, the Shanghai FTZ has been already used for testing particular legal solutions related to cross-border transactions. This happened, for example, on the occasion of the “catalogue for the guidance of foreign investment” that classifies the industries for various investment opportunities by foreign investors. Traditionally, China has provided four categories of sectors regarding investment options for foreign parties: a prohibited, a restricted, an encouraged, and a permitted category. This resulted in corresponding levels of access to particular sectors. Subsequently, China decided to shift to a “negative list” approach, and provided for a reduced and integrated list of sectors, in which the foreign capital is banned/limited and subjected to special administration, or otherwise – encouraged. This was to streamline the process of investment, reduce restrictions, and further open-up to foreign investors. Originally, this idea was applied and tested only within the Shanghai FTZ, but later it was extended to other FTZs, and, finally, the solution was applied across the country.⁷⁴²

E. Role of the Chinese Arbitration Association

As argued in Chapter 2, there are various positions as to whether the Chinese Arbitration Association (“CAA”) should be established, and if so – how, in what form, and for what reasons.⁷⁴³ If it is to be created, the most desirable position is to limit the governmental ties to the CAA. An industry-wide regulatory body (as prescribed by the CAL) is not needed now, or even appropriate, for arbitration in China.⁷⁴⁴ As one possible option, a model similar to the Chartered Institute of Arbitrators (CIArb) in London could be explored.⁷⁴⁵ Imitating the CIArb model, the CAA could be a self-regulating and self-financing organization, where fees are collected from its members. Such a CAA could deal with, among others, organizing trainings and seminars for both Chinese and foreigners to become accredited

⁷⁴² See Lan Lan, "'Negative List' Heads for Wider Adoption," *China Daily* (22 November 2014), http://www.chinadaily.com.cn/business/2014-11/22/content_18958825.htm.; and the official website of the State Council of the PRC: http://english.gov.cn/state_council/ministries/2016/04/09/content_281475323760671.htm See more on the catalogue of industries for foreign investments at the official website of the PRC's Investment Promotion Agency of Ministry of Commerce: http://www.fdi.gov.cn/1800000121_39_4851_0_7.html (last accessed: 20 November 2018).

⁷⁴³ See Tao, *Arbitration Law and Practice in China*, 42-44. See, generally, Chapter 2 p. 51.

⁷⁴⁴ Yuen, McDonald, and Dong, 225.

⁷⁴⁵ See the official website of the Chartered Institute of Arbitration: <http://www.ciarb.org/about>. The CIArb deals with numerous issues, such as promotion of the access to alternative dispute resolutions, education, training and professional qualifications, advancing and promoting research as well as new professional policy and practices concerning dispute resolution. It acts as a hub for practitioners, policy makers, academics and business, and supports the development of ADR. See more: <http://www.ciarb.org/about/what-we-do> (last accessed: 20 November 2018).

arbitrators, as well as with preparing the ethical and disciplinary codes for the conduct of arbitrators.⁷⁴⁶ The CAA could also serve as a research center for the purpose of further modernization of the Chinese arbitration environment.⁷⁴⁷

In any case, if the CAA is to be formed, it should rather be a platform for study and dialogue on important issues, as well as a promoter of best arbitration practices – and should not constitute an additional layer of supervision over arbitration in China, and especially over arbitration institutions. This is important in order to avoid any further dependence of arbitration on governmental units in China. In particular, the performance of the key task assigned to the CAA under the provisions of the CAL – namely, the formulation of arbitration rules is an undesirable scenario. This is because, in the course of over 20 years since the enactment of the CAL, the arbitration institutions in China have developed and modernized their own rules with an eye to being competitive and meeting expectations of arbitration users. Therefore, the unification of arbitration rules does not seem to offer any real benefits for further development of arbitration in China.⁷⁴⁸ Finally, it seems that there is no urgent need to create the CAA, and there are other channels, through which changes to the system can be introduced. Thus, attention should be allocated primarily to other solutions that have been already tested in practice.

10.4.3. Options available to the parties

In face of the shortcomings of the Chinese arbitration system, and in face of the likely scenario that the desired changes may not happen in the closest future, how parties can navigate these shortcomings should be anticipated. Since this thesis revolves around international commercial arbitration, the analysis is from the perspective of foreign parties conducting business with Chinese counterparts. There are a number of strategies that can be considered by the parties to remedy the deficiencies of the Chinese system. The first part of the discussion below refers specifically to arbitration. The second part seeks to evaluate other dispute resolution mechanisms that can be used by the parties.

A. Arbitration

Arbitration, in general, can offer the parties a number of advantages in resolving cross-border disputes. Among the most important advantages of arbitration are the enhanced possibility of enforcement of

⁷⁴⁶ Gu, *Arbitration in China: Regulation of Arbitration Agreements and Practical Issues*, 202-203.

⁷⁴⁷ Tao, *Arbitration Law and Practice in China*, 42-43.

⁷⁴⁸ See Song, Zhao, and Li, 188.; Yuen, McDonald, and Dong, 228.

arbitral awards, flexibility, and neutrality of arbitration.⁷⁴⁹ The following part of the discussion focuses first – on arbitration in China, and then – on arbitration outside of China in the context of Sino-foreign disputes.

a. Arbitration in China

Arbitrating in China, in general, and despite the above discussed shortcomings, can be a sensible solution. Importantly, when discussing various possible methods for resolution of Sino-foreign disputes, it needs to be emphasized that for some types of disputes, the choice to resolve disputes outside of China (in the course of arbitration or litigation) can be limited. This will be the case if a dispute – despite the involvement of a foreign factor – is classified as a domestic one under the Chinese law.⁷⁵⁰ In such instances, the parties have normally no choice, but to resolve their disputes in China. Furthermore, another relevant issue that needs to be taken into consideration relates to bargaining powers of the parties. It can be that a Chinese party with a stronger bargaining position may require the other party to agree to resolve disputes in China. Unsurprisingly, Chinese parties, generally, prefer to resolve disputes in their own country.⁷⁵¹

As to the choice of arbitrating inside or outside of China, arbitrating in China can offer a number of advantages, which can be difficult to secure when arbitrating outside of it. By way of example, if a foreign party seeks to obtain a measure to preserve a property located in China for the sake of the future enforcement of an award, the Chinese courts will most likely only provide their assistance if the arbitration proceedings are conducted in China, and not outside of it. In addition, arbitrating in China can actually be faster and cheaper than arbitrating abroad.⁷⁵²

There might be, however, also some disadvantages of arbitrating in China. As argued, the existing shortcomings refer especially to the rather extensive level of supervision of arbitration exercised by the state in various forms (including the requirement of using a Chinese arbitration institution), but

⁷⁴⁹ See Chapter 1 p. 1-2.

⁷⁵⁰ See Chapter 2 p. 36-38.

⁷⁵¹ See, for example, Moser, *Managing Business Disputes in Today's China: Duelling with Dragons*, 89-90.; Dan Harris, "Arbitration in China. Get Used to It," *China Law Blog* (22 September 2011), https://www.chinalawblog.com/2011/09/arbitration_in_china.html. (last accessed: 20 November 2018).

⁷⁵² Clarisse Von Wunschheim, "Dr. Clarisse Von Wunschheim on Arbitrating Your China Disputes, Part Ii. Inside or Outside China?," *China Law Blog* (4 February 2012), https://www.chinalawblog.com/2012/02/dr_clarisse_von_wunschheim_on_arbitrating_your_china_disputes_part_ii_inside_or_outside_china.html. (last accessed: 20 November 2018).

also to the limited assistance offered by the state. These shortcomings can result in affecting not only the efficiency of proceedings, but also their neutrality.

Nonetheless, arbitrating in China can be a reasonable strategy for resolution of Sino-foreign disputes, especially in light of the alternatives available – with their own disadvantages, which are assessed below. Against such a background, the parties can take a number of actions in order to mitigate the deficiencies of the Chinese arbitration system, especially at the stage of drafting of an arbitration agreement.

It is crucially important to craft well the content of an arbitration agreement. This is because, once a dispute occurs, it is more difficult to reach any agreement, especially if one of the parties has an interest in not coming into an agreement. And this could be so for the reason that an existing agreement gives one party a privileged position in the dispute, for example, for appointment of arbitrators, because in case of arbitrating in China, chances are rather high that a presiding arbitrator in a three-member panel will be a Chinese citizen.⁷⁵³ Therefore, a careful approach to drafting of an arbitration agreement is vital. Naturally, it may be difficult to anticipate future disputes and optimal arbitration arrangements at the stage of negotiation of a contract. Nonetheless, a number of issues are worth considering already at that initial stage of negotiation. They are discussed immediately below.

One general issue pertains to the selection of an arbitration institution. Subsequently, more detailed recommendations regarding the specificities of drafting of an arbitration agreement with the aim of securing more proper balance of power in arbitration are offered. These recommendations seek to respond to some problematic issues identified in the Chapters 4, 5, 6, and 7. As such, they deal with helping to secure the enforcement of an arbitration agreement and power to address jurisdictional objections, improving the efficiency of interim measures in aid of arbitration, as well as taking care of selected aspects of forming an arbitral tribunal and evidence taking.

i. Choosing an arbitration institution

One critical issue in any institutional arbitration is the choice of an arbitration institution. As argued in Chapter 8, as of now, choosing a foreign arbitration institution for the cases seated in China can result in a number of uncertainties, since neither the question of the post-award regime, nor court assistance in such proceedings is clear.⁷⁵⁴ Similarly, *ad hoc* arbitration, generally, is not recommendable for the

⁷⁵³ See Chapter 6 p. 149; also Moser, *Managing Business Disputes in Today's China: Duelling with Dragons*, 76.

⁷⁵⁴ See Chapter 8 p. 183-188.

reason of uncertainty around it.⁷⁵⁵ Therefore, for the cases seated in China, the parties should consider choosing a Chinese arbitration institutions. Among the institutions often recommended in that context are CIETAC and the BAC.⁷⁵⁶

Selecting one of the leading arbitration institutions in China will help to secure a proceeding governed by a set of modern arbitration rules. This can be relevant for a number of aspects discussed above. By way of example, as to deciding jurisdictional objections, arbitration rules of some of the leading institutions (including CIETAC and the BAC) provide that despite the general lack of recognition of the principle of competence-competence under the CAL (and the resulting lack of power of the tribunal to decide the objections), such power can be delegated to the tribunal by the arbitration institution.⁷⁵⁷ Further, choosing the rules of the leading institutions can help to secure not only a wider pool of arbitrators, but also an option of off-panel appointments.⁷⁵⁸

ii. Enforcement of an arbitration agreement and power to address jurisdictional objections

One of the key issues in helping to safeguard an arbitration agreement in China, like elsewhere, is making sure that the agreement is valid and enforceable. The process of drafting of the agreement deserves particular attention, because a well drafted agreement will help to limit the challenges to its validity, and consequently, occasions for possible involvement of the Chinese court or the arbitration institution addressing the challenge. In addition, it is important not to leave the room for interpretation of the agreement. Interpreting can be problematic not only because of possible unexpected conclusions of those who interpret, but also because of the time spent on it and potential delays. As argued in Chapter 4, delays in China are possible, because in case the court is seized with a question of the validity of an arbitration agreement, it normally orders the arbitration institution to suspend the proceeding for the time of its decision making.⁷⁵⁹

⁷⁵⁵ See Chapter 2 p. 35-36.

⁷⁵⁶ See, for example, Kun Fan and Clarisse Von Wunschheim, "Arbitrating in China: The Rules of the Game - Practical Recommendations Concerning Arbitration in China," *ASA Bulletin* 28, no. 1 (2008), 43.; Cohen, 567.; Dan Harris, "How to Write a China (CIETAC/BAC) Arbitration Clause," *China Law Blog* (7 November 2011), https://www.chinalawblog.com/2011/11/how_to_write_a_china_cietac_arbitration_clause.html.; (last accessed: 20 November 2018).

⁷⁵⁷ See Chapter 4 p. 81-84.

⁷⁵⁸ See Chapter 6 p. 145.

⁷⁵⁹ See Chapter 4 p. 85.

In order to avoid the uncertainties pertaining to an arbitration agreement, it can be sensible to refer to the standard arbitration agreements provided by the leading arbitration institutions on their official websites and in their institutional rules.

iii. Interim measures in aid of arbitration

As to the access to preservation of property and evidence, it is claimed that the parties cannot do much in order to improve the situation here through drafting of their arbitration agreement in some specific ways. The arbitral tribunal is not equipped with the relevant powers under the CAL, and there is no legal framework for court assistance in this respect.

However, again, a useful move that can be made is (1) choosing one of the leading arbitration institutions and its rules, which, despite the lacking framework under the CAL, give the tribunal the power to order relevant measures; and (2) selecting (an) arbitrator(s) exposed to the practice of international commercial arbitration. This can potentially help to secure granting of a relevant measure by arbitrators. Yet, importantly, in any case, there will be a limited arsenal of the consequences in case of the non-compliance by a party against which the measure is directed. It is unlikely that the Chinese courts will assist in enforcing such measures.⁷⁶⁰ Nonetheless, it needs to be stressed that the parties arbitrating in China still have the access to interim measures obtained from the state court.

iv. Forming an arbitral tribunal

Choosing an arbitration institution that provides for an extensive roster of arbitrators (including foreign arbitrators) as well as the option of off-panel appointments is one possible action that can be taken by the parties in order to secure more choices in selecting arbitrators. Additionally, one other thing that can be done at the stage of drafting of an arbitration agreement is providing for the nationality exclusion rule for a sole or a presiding arbitrator. That means that a sole or a presiding arbitrator should not be of the nationality of the parties involved. Such a clause can help to prevent the situation, where a sole arbitrator is a Chinese citizen, or a panel of arbitrators is dominated by the Chinese arbitrators – in case this would be a concern of any of the parties.

v. Evidence taking

Depending on their needs, the parties can anticipate in their arbitration agreements some aspects of evidence taking. As such, the parties can, for example, exclude document production or contrarily, provide for such an option. If the latter is desired, or for any other reasons related to evidence taking, the parties can adopt some soft law documents, such as the IBA Rules on the Taking of Evidence in

⁷⁶⁰ See Chapter 5 p. 120.

International Arbitration or the CIETAC Guidelines on Evidence. As just mentioned above, the selection of an arbitrator with a relevant background can also help in satisfying the parties' expectations as to evidentiary matters. Nevertheless, it needs to be stressed that if assistance of the Chinese courts is needed for the coercive enforcement of relevant measures in the process of evidence taking, it will likely be unavailable, and not much can be done by the parties in this regard.⁷⁶¹

b. Arbitrating outside of China

Another possible option that can be considered by the parties in the context of Sino-foreign disputes, and in face of the above discussed shortcomings of arbitration in China, is arbitrating outside of it. However, as discussed, some issues that need to be taken into consideration at a preliminary stage include whether this option is available to the parties at all, and also what the parties' bargaining positions are. If arbitration outside of China is possible and agreeable, Hong Kong and Singapore and their respective leading arbitration institutions – the HKIAC and the SIAC are often referred to in case an alternative to arbitrating in China is requested.⁷⁶²

Beyond that, other options can be taken into account as well. As for arbitration institutions, this includes the International Chamber of Commerce (ICC) International Court of Arbitration or the Chinese European Arbitration Centre that seeks specifically to be a dispute resolution bridge between Chinese and European parties. In selecting an arbitration seat, parties, depending on their origin and expectations toward the procedure, can also consider issues such as the approach to evidence taking or contract interpretation mechanisms in a given jurisdiction. If, for example, parties in dispute come respectively from China and Poland, a European civil law jurisdiction, for example Germany, may be an option worth considering given the legal culture proximity between China and Germany. There are numerous civil law jurisdictions in Europe that adopt the UNCITRAL Model Law as their arbitration law, including Germany and Poland.

Arbitrating outside of China can offer a number of advantages to foreign parties. One of the main advantages is the increased neutrality of the proceeding, including the neutrality of the courts involved through the selection of a particular seat of arbitration for issues such as setting aside of an arbitral award. Another possible advantage is a greater range of choices available to the parties. This pertains to, for example, a choice of arbitrators or a possibility to choose between institutional and *ad hoc* arbitration. Regarding *ad hoc* arbitration, although, in principle, it is not allowed in China, the Chinese

⁷⁶¹ See Chapter 7 p. 176-177.

⁷⁶² See Chapter 1 p. 13-19.

courts are obliged to recognize *ad hoc* arbitral awards on the basis of the New York Convention, or the special arrangements concluded with Hong Kong, Taiwan, and Macau.

Furthermore, arbitrating outside of China, especially in the jurisdictions with modern arbitration laws, can help to secure more empowered arbitral tribunals. In the context of this thesis, this means that arbitrators in cases seated in jurisdictions with arbitration-friendly legal frameworks will typically have the power to rule on their own jurisdiction, will be able to effectively grant a wide range of interim measures in aid of arbitration, and also will have a chance to be assisted by the courts in the process of evidence taking.

However, it needs to be noted that in a few particular instances, arbitrating outside of China can have some limitations, which can be perceived as disadvantages of arbitrating outside of China in case of Sino-foreign disputes. One of such limitations pertains to the lack of assistance of the Chinese courts to foreign arbitration proceedings. To illustrate, a Chinese court will highly unlikely assist the foreign tribunal with the preservation of property or evidence.⁷⁶³ Although, the assistance of the Chinese courts to the China-based arbitral tribunals would be limited, yet, obtaining such interim measures is more likely when arbitration takes place in China, because of the possibility to turn directly to the state court with the application. Also, it is argued that arbitrating outside of China can be sometimes slower and more expensive when comparing it to arbitrating in China.⁷⁶⁴

When assessing which particular solution would be more optimal for resolution of Sino-foreign disputes – arbitration inside or outside of China, the question of enforcement of arbitral awards should not raise substantial concerns. Arbitrating in China does not give an obvious advantage from the perspective of enforcement. This is because of a number of mechanisms aimed at protection of foreign awards. This refers especially to the application of the New York Convention and the Prior Reporting System.⁷⁶⁵

⁷⁶³ See Tao, "Arbitration Law of the PRC," in *Concise International Arbitration (2nd Ed.)*, 940.

⁷⁶⁴ See Von Wunschheim, "Dr. Clarisse Von Wunschheim on Arbitrating Your China Disputes, Part II. Inside or Outside China?." (last accessed: 20 November 2018).

⁷⁶⁵ See Chapter 2 p. 30-31 and Chapter 4 p. 80. See also Clarisse Von Wunschheim, "Dr. Clarisse Von Wunschheim on Arbitrating Your China Disputes, Part III. Is Enforcement Overemphasized?," *China Law Blog* (5 February 2012), https://www.chinalawblog.com/2012/02/dr_clarisse_von_wunschheim_on_arbitrating_your_china_disputes_part_iii_is_enforcement_overemphasized.html. (last accessed: 20 November 2018).

B. Litigation

Another possibility is reaching out to solutions alternative to arbitration, and in particular to litigation. Theoretically, there are two possible options. One is to litigate in China and another – outside of it. Two of these options are discussed below one by one.

a. Litigation in China

Generally, arbitration has been for long recommended as a method for addressing Sino-foreign disputes, primarily in order to avoid the Chinese courts. This is because the Chinese courts have been perceived as affected by a number of various problems, such as their lack of independence, bias toward foreign parties, corruption, and limited professionalism.⁷⁶⁶ Nonetheless, a few issues deserve to be noted in this context. First, it is argued that despite the persistence of some problems affecting the Chinese courts, the courts in China have made substantial progress over the last years, and as such, they have progressively come into play as a way of resolving Sino-foreign disputes.⁷⁶⁷ The courts in China's major coastal cities are more independent, more professional, and more capable to deal with the Sino-foreign disputes than the courts in the other parts of the country.⁷⁶⁸ Therefore, if a court in one of the major business centers, like Beijing, Shanghai, or Shenzhen has jurisdiction over the case, it may be a feasible solution for resolving cross-border disputes. This can be arranged via an agreement on the jurisdiction of a particular court concluded by the parties.

Litigating in China can offer the parties a number of advantages. Generally, judges are equipped with more powers than arbitrators. This can be relevant if a quick coercive actions is needed, for example, freezing of assets for the future enforcement of a court judgement. Also, the enforcement of Chinese court judgments plausibly should not be problematic in China.

However, on the other hand, litigating before the Chinese courts can have a number of disadvantages. In addition to some possible risks, including the court's limited independence and professionalism, if litigation is chosen as a method to resolve disputes, a number of advantages of arbitration are lost.

⁷⁶⁶ See Gu, "Judicial Review over Arbitration in China: Assessing the Extent of the Latest Pro-Arbitration Move by the Supreme People's Court in the People's Republic of China," 257-264.; Weixia Gu, "The Judiciary in Economic and Political Transformation: Quo Vadis Chinese Courts?," *Chinese Journal of Comparative Law* 1, no. 2 (2013), 313-315.; Peerenboom and Xin. (last accessed: 20 November 2018); Fan, *Arbitration in China, a Legal and Cultural Analysis*, 113.

⁷⁶⁷ See Cohen, 565.; see also White Paper of the SPC dedicated to the issue of further judicial reform of the Chinese courts available at: http://english.court.gov.cn/2016-03/03/content_23724636.htm (last accessed: 20 November 2018).

⁷⁶⁸ See Fan, *Arbitration in China, a Legal and Cultural Analysis*, 113.; Moser, *Managing Business Disputes in Today's China: Duelling with Dragons*, 161 & 299.

This includes the confidentiality and flexibility of the proceeding, as well as the finality of its outcome. Litigating in China will also equal to the use of local court procedures and proceedings conducted in Chinese. Furthermore, there is a requirement of representation by a Chinese lawyer in any type of actions before the Chinese court, which is not required in case of arbitration proceedings in China.

b. Litigation outside of China

Another option that can be taken into account by the parties is litigating outside of China. The first question to be asked, however, is – similarly like in case of arbitrating outside of China – whether this is possible at all.⁷⁶⁹ Also, another question pertains to the willingness of a Chinese party to litigate disputes before a foreign court. Such readiness can be in practice limited, especially if this is to be a court of the other party.⁷⁷⁰ Therefore, if the court outside of China is considered, this should be rather a court of a third state, neutral to both of the parties. This solution, if accepted, can potentially offer the parties more neutrality and professionalism.

However, one of the major limitations of litigation in the context of cross-border disputes is the issue of enforcement of state court judgements in other countries. Typically, the enforcement of any decisions, regardless whether these are court judgements or arbitral awards, is sought in a place, where assets of a losing party are located. Since the assets of a Chinese party are commonly located in China, hence, also the enforcement will likely be requested in China. However, comparing to international commercial arbitration and the New York Convention, there is no comparable multinational convention of that scale dealing with the enforcement of foreign court judgements.

The *Convention of 30 June 2005 on Choice of Court Agreements*, commonly referred to as the Hague Choice of Court Convention, is an example of efforts to streamline the enforcement of cross-border judgements. However, its effectiveness is limited. The Hague Choice of Court Convention stipulates that the parties from the signatory states of this convention can enter into choice-of-court agreements in the area of civil and commercial transactions, and as such, the courts in the contracting states not designated by the parties should not assume the jurisdiction. Furthermore, a judgement resulting out of a relevant proceeding should be recognized and enforced in all other states where the convention is applicable, unless there are limited circumstances to refuse the enforcement – as provided by this convention. So far, the European Union member states, Mexico, and Singapore are the parties to this convention, and a few other states, including China and the United States, signed the convention, but

⁷⁶⁹ See *per analogy* Chapter 2 p. 36-38 discussing inability to arbitrate some disputes outside of China.

⁷⁷⁰ See Moser, *Managing Business Disputes in Today's China: Duelling with Dragons*, 9.

have not ratified it yet.⁷⁷¹ Therefore, although the Hague Choice of Court Convention to some extent improves the enforcement of state court judgments, one needs to notice its limitations, since it only applies to choice-of-court judgments, and a number of its signatories is limited.

Otherwise, the enforcement of a state court judgments will normally depend on whether the states concerned (meaning the state, where a court judgement was rendered, and the state that is asked to enforce it) have a relevant legal basis for the enforcement of each other's judgements. What typically is such a basis is a bilateral treaty on the judicial assistance concluded by the states. Yet, a number of such agreements entered into by China is limited. By way of example, China concluded such agreements with Poland, Russia, and Turkey, but has not concluded them with other states, like the United States or Germany.⁷⁷² Another type of a possible basis for the enforcement in the absence of a bilateral or a multilateral treaty is the principle of reciprocity. This means that despite the lack of a relevant legal agreement, the courts located in different states recognize and enforce each other's judgements.⁷⁷³

An example of the efforts undertaken in order to improve the situation of mutual enforcement of court judgements – despite the lack of an agreement for a mutual judicial assistance in such instances, pertains to Germany and China. In 2006, the Higher Court in Berlin recognized a Chinese court decision on setting aside an arbitral award rendered in China.⁷⁷⁴ The Berlin court applied the principle of reciprocity⁷⁷⁵ (or as termed by Song – “the principle of anticipated reciprocity”⁷⁷⁶), while noting at the same time that there was no evidence that Chinese courts would also enforce the German court judgements on the same basis. The Berlin court referred to the Chinese principle of reciprocity, and opined that it cannot be expected that a Chinese court will recognize a German court's judgement – before a German court would first recognize a Chinese court judgment. Thus, it decided to be the first one to induce the application of the principle of reciprocity in the Sino-German context. In doing that, the German court emphasized the practicality of this solution. This direction was subsequently

⁷⁷¹ See the status of signatories of the Hague Choice of Court Convention at the official website of the Hague Conference on the Private International Law at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (last accessed: 20 November 2018).

⁷⁷² See the official website of the SPC listing the relevant agreements: http://english.court.gov.cn/2015-06/04/content_21334593.htm (last accessed: 20 November 2018).

⁷⁷³ For China, see Art. 281 and 282 of the CCPL.

⁷⁷⁴ The Higher Regional Court of Berlin, decision of 18 May 2006, 20 SCH 13/04.

⁷⁷⁵ The concept of reciprocity is reflected in Section 328 of the German Code of Civil Procedure, promulgated on 5 December 2005, and last amended by Article 1 of the Act dated 10 October 2013.

⁷⁷⁶ Jiangli Song, "Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments," *Zeitschrift für Chinesisches Recht* 4 (2017): 283-284.

endorsed by another German court in 2007, which also decided to enforce a Chinese court judgement relying on the principle of reciprocity.⁷⁷⁷

A few years later, in 2013, a Chinese court decided to enforce a German court judgment.⁷⁷⁸ In that case, a German citizen applied to the Intermediate People's Court of Wuhan requesting the enforcement of a judgment concerning an insolvency case, which was rendered by the German Montabaur District Court in 2009. The Wuhan court referred to the approach of the Berlin court from 2006, and decided to enforce the German court judgment based on the principle of reciprocity.⁷⁷⁹

Another case in this context pertains to the enforcement of a US court judgement in China, also based on the principle of reciprocity. In 2017, the Chinese court in Wuhan decided to enforce a US court judgement rendered by the Los Angeles Superior Court of California in *Liu Li v Tao Li and Tong Wu* – again, despite the lack of a relevant agreement concluded by China and the US for the purpose of mutual recognition and enforcement of each other's judgements. The Wuhan court found, however, that the reciprocity in recognizing and enforcing the court judgments was established between China and the US, because the US District Court of the Central District of California decided earlier to recognize and enforce a Chinese court judgement rendered by the Higher People's Court of Hubei in the other case – namely, in *Hubei Gezhouba Sanlian Industrial Co., Ltd et. al. v Robinson Helicopter Co.*⁷⁸⁰ Similarly, the Chinese Nanjing Intermediate People's Court in 2016 decided to enforce a Singaporean court judgement also relying on the principle of reciprocity.⁷⁸¹

The above described efforts of the courts should be seen as a progressive development for the mutual recognition and enforcement of foreign court judgements in the Sino-foreign context. It potentially

⁷⁷⁷ The Higher Regional Court of Düsseldorf, decision of 22 March 2007, W 117/06. See Peter Yuen and John Choong, "Enforcement of Domestic and Foreign Court Judgements in PRC" in *Doing Business in China*, ed. Michael Moser and Fu Yu (Juris, 2014), 8.23.

⁷⁷⁸ The decision of the Intermediate People's Court of Wuhan (2012) [鄂武汉中民商外初字第 0016 号].

⁷⁷⁹ See Song, "Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments," 282-283.; also Wenliang Zhang, "Sino-Foreign Recognition and Enforcement of Judgments: A Promising "Follow-Suit" Model?," *Chinese Journal of International Law* 16 (2017), 537-538.

⁷⁸⁰ See Song, "Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments," 283.; also Dan Harris, "China Enforces United States Judgment: This Changes Pretty Much Nothing," *China Law Blog* (5 September 2017), <https://www.chinalawblog.com/2017/09/china-enforces-united-states-judgment-this-changes-pretty-much-nothing.html>. (last accessed: 20 November 2018).

⁷⁸¹ See Song, "Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments," 283.; Subsequently, Singapore and China reached an agreement on the recognition and enforcement of money judgements in commercial cases. See Meng Yu and Guodong Gu, "Supreme Courts of China and Singapore Sign Agreement on Recognition and Enforcement of Money Judgements in Commercial Cases," *China Justice Observer* (11 September 2018), <https://www.chinajusticeobserver.com/insights/supreme-courts-of-china-and-singapore-sign-agreement-on-recognition-and-enforcement-of-money-judgments-in-commercial-cases.html> (last accessed: 20 November 2018).

increases the options available to the parties. However, one also needs to see their limitations. First of all, these developments refer to the recognition and enforcement of the court judgements between China and particular states that have sought to explore the application of the reciprocity principle. Furthermore, even for that states, the system of the effective enforcement has not been yet clearly established. This is because the courts are, generally, not bound by the recent decisions, and as such, each court can make its individual verdict on the enforcement. Song notes also the fact that only a small number of judgements have been so far enforced based on the principle of reciprocity, and that “sovereignty, economic security and other factors have continuously resulted in a complicated set of rules for consideration regarding recognition and enforcement”.⁷⁸² Notably, however, a special interpretation pertaining to the enforcement of foreign court judgments is in the agenda of the SPC. Among the matters that are intended to be dealt with by the SPC are the clarification of the concept of reciprocity and addressing the grounds for refusing the enforcement.⁷⁸³

Summarizing the option of the court proceedings in the context of Sino-foreign disputes, as to litigating in China, it can be a sensible option – especially if the courts in China’s major business destinations would be the ones deciding the cases. As to litigating outside of China, as of today, despite the recent developments, one needs to take into consideration possible uncertainties pertaining to the enforcement of judgments.

As a final point in the context of using the courts for resolution of Sino-foreign disputes, another recent development refers to international commercial courts – such as the Singapore International Commercial Court (“SICC”) launched in 2015, which was designed to “deal with transnational commercial disputes”.⁷⁸⁴ The SICC offers to the parties, *inter alia*, a panel of international judges and the opportunity to be represented by a foreign counsel. Nonetheless, some issues, such as the enforcement of judgments can, again, be problematic.

Also China has lately decided to establish its own international commercial courts to adjudicate international cases. At the end of June 2018, the SPC announced the launch of two such courts – one in Shenzhen, and one in Xian. Some information has been already published on the official website of the newly created China International Commercial Court (“CICC”).⁷⁸⁵ The website informs that the

⁷⁸² Song, "Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments," 285.

⁷⁸³ See *ibid.*, 285-287.; Susan Finder, "SPC Reveals New Belt & Road-Related Initiatives," *Supreme People's Court Monitor* (7 October 2017), <https://supremepeoplescourtmonitor.com/2017/10/07/spc-reveals-new-belt-road-related-initiatives/>. (last accessed: 20 November 2018).

⁷⁸⁴ See the official website of the Singapore International Commercial Court: <https://www.sicc.gov.sg/About.aspx?id=22> (last accessed: 20 November 2018).

⁷⁸⁵ See the official website of the CICC: <http://cicc.court.gov.cn> (last accessed: 20 November 2018).

objective of the CICC is to “try international commercial cases fairly and timely in accordance with the law, protect the lawful rights and interests of the Chinese and foreign parties equally, create a stable, fair, transparent, and convenient rule of law international business environment”.⁷⁸⁶

The initial regulations on the CICC inform that this court is to deal with international commercial cases, as well as with the cases involving applications for preservation measures in arbitration, setting aside, and enforcement of international commercial arbitration awards. Further, judges of the CICC are to be appointed by the SPC from the senior judges with the experienced in trial work, acquainted with international commerce and investment, as well as with the work proficiency in Chinese and English. So far, among the judges listed on the official website of the CICC, there are eight Chinese judges. Cases are to be heard by a panel of three or more judges. Moreover, the International Commercial Expert Committee was set up, and selected international commercial mediation institutions and international commercial arbitration institutions will support the work of the CICC, so that the parties will be able to choose from a variety of dispute resolution mechanisms.⁷⁸⁷ Currently, the SPC is at the stage of drafting more detailed procedures for the functioning of the CICC. Since it is a recent development, no single case has been tried by the CICC at the time of writing of this thesis. Nonetheless, the CICC and its further development will be worth of watching in the future.

C. Mediation and other options

One other method that can be considered by the parties is mediation – either with or without an involvement of a particular mediation institution.⁷⁸⁸ As to the advantages of mediation, it can be a faster, cheaper, and more flexible method, which additionally can help to increase the chances of

⁷⁸⁶ See the official website of the CICC: <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (last accessed: 20 November 2018).

⁷⁸⁷ See the Judicial Interpretation of the SPC Fa Shi [2018] No. 11, Provisions of the SPC on Several Issues Regarding the Establishment of the International Commercial Court (adopted on 25 June 2018, effective from 1 July 2018); [最高人民法院关于设立国际商事法庭若干问题的规定, 法释(2018)11号, 颁布时间: 2018年6月25日, 实施时间: 2018年7月1日].

See also more in Susan Finder, "Comments on China's International Commercial Courts," *Supreme People's Court Monitor* (9 July 2018), <https://supremepeoplescourtmonitor.com/2018/07/09/comments-on-chinas-international-commercial-courts/>; Wei Sun, "International Commercial Court in China: Innovations, Misunderstandings and Clarifications," *Kluwer Arbitration Blog* (4 July 2018), <http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications/>. (last accessed: 20 November 2018).

⁷⁸⁸ See, for example, the CCPIT Mediation Centre, an institution assisting the parties in resolution of disputes through mediation in China (see the official website: <http://adr.ccpit.org/EN/Index/index.html> and http://en.ccpit.org/info/info_40288117521acbb801530bb36b5a0136.html); also the Singapore International Mediation Centre (see the official website: <http://simc.com.sg/>) (last accessed: 20 November 2018). See more on mediation of Sino-foreign disputes in Moser, *Managing Business Disputes in Today's China: Duelling with Dragons*, 37-42.

preserving a good relationship between the parties in the future. Yet, mediation also has its shortcomings. First of all, the parties need to be willing to mediate and seek to resolve their problem. A mediator neither decides the dispute nor forces the parties to reach any agreement. Conversely, a role of a mediator is to help the parties to work out a solution acceptable to all of them. Furthermore, an outcome of mediation is typically in a form of a settlement agreement (a contract), and as such, the enforcement of it can be problematic in case one of the parties does not obey the conditions prescribed in it. In case of the breach of a settlement agreement, the other party will normally need to initiate a court proceeding.

Interestingly, on 26 June 2018, at the 51st session of the UNCITRAL, the final drafts of the Convention on the Enforcement of Mediation Settlements and of a related model law were approved. The main goal of this convention is to provide an instrument for the enforcement of international commercial settlement agreements resulting from mediation. It is supposed to perform a role comparable to that of the New York Convention has played in international commercial arbitration. As of now, the project requires adoption by the United Nations General Assembly, and later, on the acceptance of particular jurisdictions that would wish to be bound by this convention.⁷⁸⁹

In summary, the parties have some alternatives in resolving Sino-foreign disputes, and arbitration in China, with its limitations, is not the only option. Other possible solutions discussed above display a number of own advantages and disadvantages. Naturally, a choice of the most optimal method for a particular transaction and possible disputes will depend on a variety of factors, such as the enforcement prospects, need to apply for preservation measures, cost of a proceeding *etc.* Therefore, each case needs to be assessed individually. However, regardless of the particularities of each case, one key issue that needs to be anticipated is the execution of an outcome of any proceeding.

It is argued that arbitration in China, despite its shortcomings, can offer a number of advantages to the parties, especially in face of the alternatives available and their own deficiencies. In addition, arbitration in China is a solution that should be rather effortlessly agreeable to Chinese parties. Also, as discussed, some of the shortcomings of arbitration in China can be partly remedied through a careful drafting of an arbitration agreement.

⁷⁸⁹ See the official website of UNCITRAL for detailed information:
<http://www.uncitral.org/uncitral/commission/sessions/51st.html> (last accessed: 20 November 2018).

10.4. Closing remarks

The general level of the state involvement in the pre-award stage state of international commercial arbitration in China has negatively impacted the Chinese arbitration system. Because of the existing shortcomings in this regard, especially the efficiency and neutrality of international commercial arbitration in China are at risk.

China's business interaction with the rest of the world has grown enormously over the last years, and cross-border business transactions inevitably incorporate a risk of disputes. In order to address such risks, efficient dispute resolution mechanisms are needed. International commercial arbitration has proven to be the preferred choice in such instances for a number of reasons, including the simplified enforcement rules, flexibility, and neutrality of the proceeding.

A lot has been done in order to improve the Chinese arbitration environment since the enactment of CAL in 1994. Especially the role of the SPC and the leading arbitration institutions should be noted in this regard. However, a number of shortcomings still affect the system, and make China a jurisdiction that is lagging behind the leading jurisdictions. It refers both to the efficiency of the arbitration proceeding, but also to the perception of China as a place to arbitrate. The differences between the Chinese and internationally accepted standards work to China's disadvantage.

As argued above, one of the major problems refers to the too extensive involvement of the state in arbitration in China reflected in: (1) the imbalance of powers shared among the arbitral tribunal, the state court, and the arbitration institution in the pre-award stage of arbitration; (2) the limited independence of the Chinese arbitration institutions; and (3) the unclear status of the foreign arbitration institutions in China. Therefore, further changes are needed, and they should refer, in particular, to: (1) rebalancing the division of power shared among the tribunal, the court, and the arbitration institution in the pre-award stage of arbitration in the direction of *more support* given to arbitration and *less supervision* over it; (2) freeing of the Chinese arbitration institutions from the administrative interference; and (3) permitting the full range of actions by the foreign arbitration institutions in China.

A continuous modernization of the Chinese arbitration system and bringing it closer to internationally recognized standards would be beneficial to China in many respects. Most importantly, it would increase the efficiency of arbitration proceedings, and would boost the country's image as a place to resolve disputes through arbitration and a reliable partner to do business with. It would also expose the Chinese parties to the rules that the rest of the world plays, and as such, prepare them to better

resolve their disputes with foreign parties elsewhere. In searching for further improvements in the suggested directions, the UNCITRAL Model Law, as well as the experience of the Hong Kong and Singapore, can serve as an inspiration.

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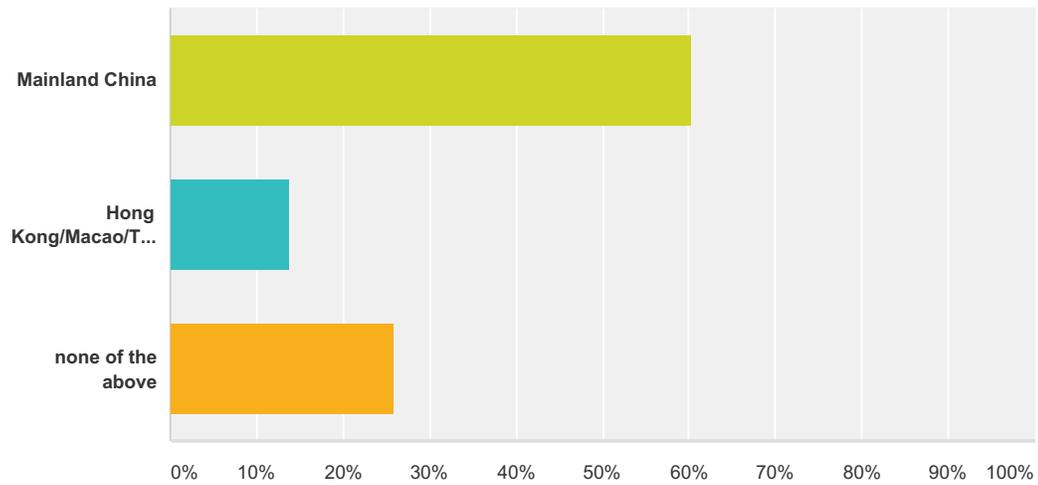
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Appendix 1

The China Arbitration Survey Findings

Q1 You are from:

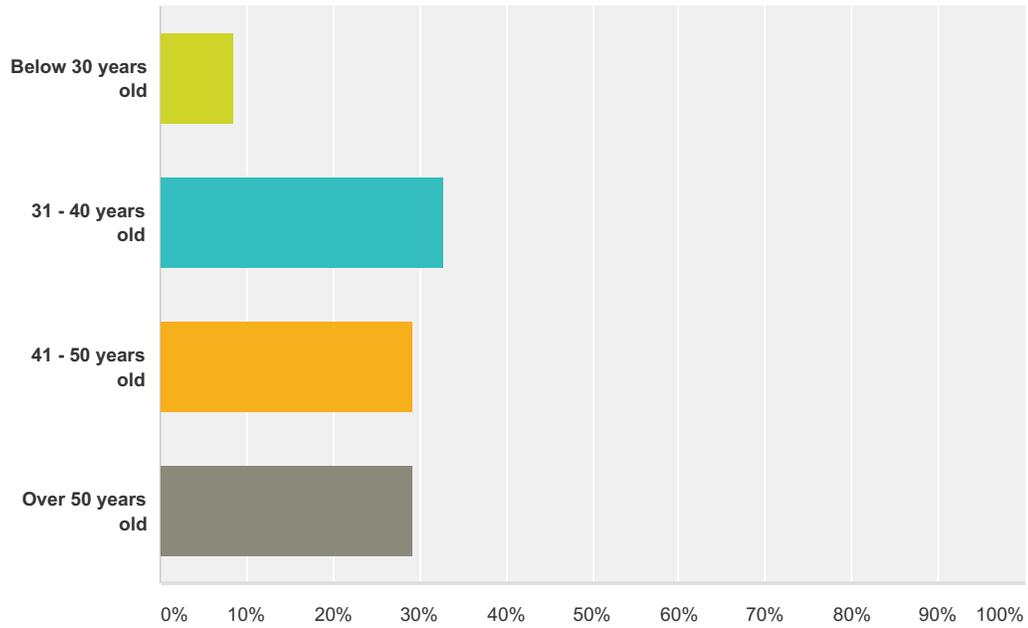
Answered: 58 Skipped: 0



Answer Choices	Responses	Count
Mainland China	60.34%	35
Hong Kong/Macao/Taiwan	13.79%	8
none of the above	25.86%	15
Total		58

Q2 What is your age?

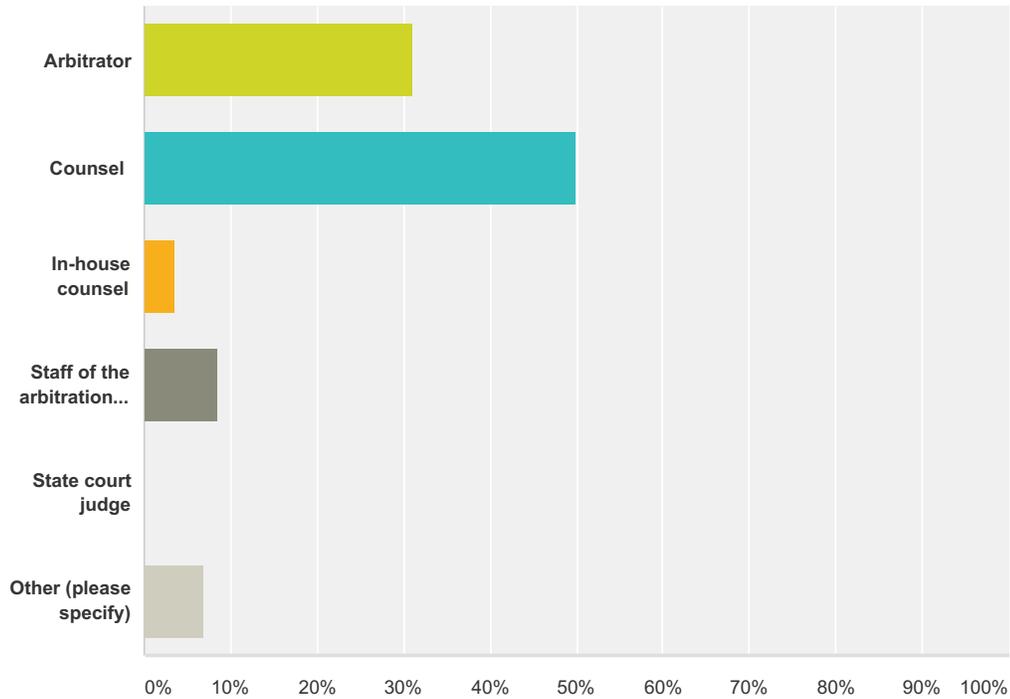
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Answer Choices	Responses
Below 30 years old	8.62% 5
31 - 40 years old	32.76% 19
41 - 50 years old	29.31% 17
Over 50 years old	29.31% 17
Total	58

Q3 What has been your primary involvement in arbitration-related proceedings in Mainland China during the last five years?

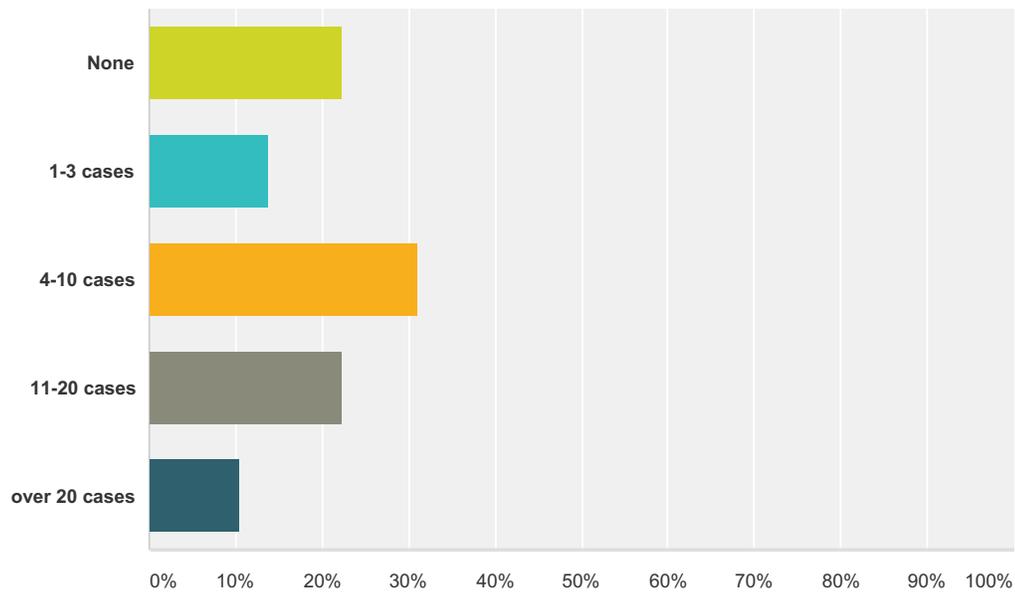
Answered: 58 Skipped: 0



Answer Choices	Responses	Count
Arbitrator	31.03%	18
Counsel	50.00%	29
In-house counsel	3.45%	2
Staff of the arbitration commission	8.62%	5
State court judge	0.00%	0
Other (please specify)	6.90%	4
Total		58

Q4 In how many arbitration cases, seated overseas and/or administered by an overseas arbitration institution, have you participated during the last five years?Note: This should include all cases seated in Hong Kong, Taiwan and Macao (whether ad hoc or conducted by an arbitration institution elsewhere).

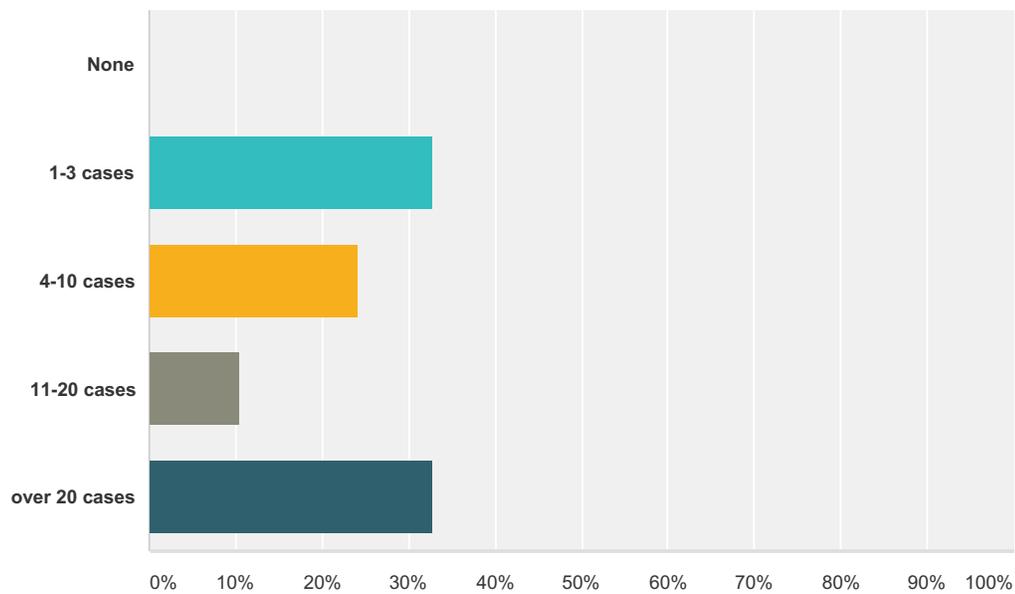
Answered: 58 Skipped: 0



Answer Choices	Responses	
None	22.41%	13
1-3 cases	13.79%	8
4-10 cases	31.03%	18
11-20 cases	22.41%	13
over 20 cases	10.34%	6
Total		58

Q5 In how many arbitration cases involving foreign element(s), and seated in Mainland China, have you participated during the last five years? Note: Please reflect also your experience in arbitration proceedings including Sino-foreign JVs and WFOEs acting as parties in arbitration proceedings, despite the fact that under Chinese law these cases could be characterized as domestic ones.

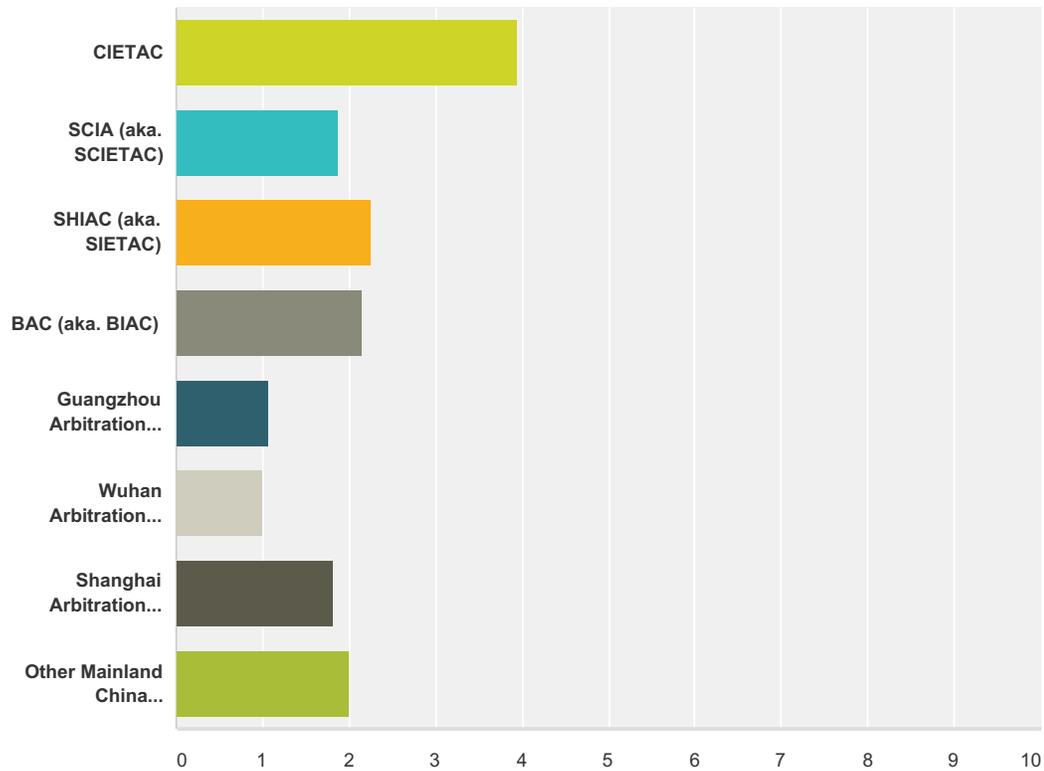
Answered: 58 Skipped: 0



Answer Choices	Responses
None	0.00% 0
1-3 cases	32.76% 19
4-10 cases	24.14% 14
11-20 cases	10.34% 6
over 20 cases	32.76% 19
Total	58

Q6 Which are the Mainland China arbitration commissions before which you have participated during the last five years?

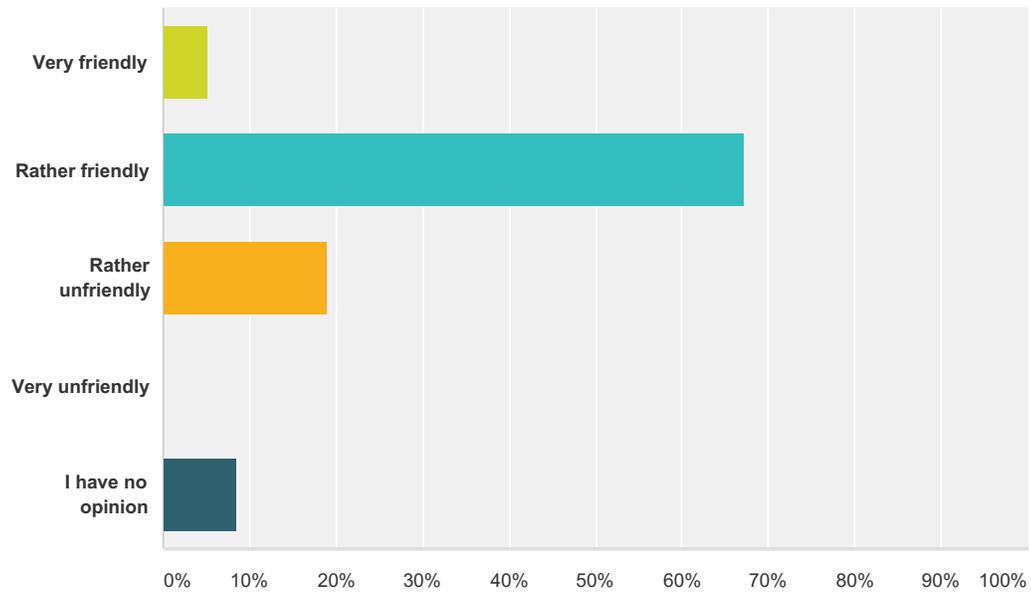
Answered: 58 Skipped: 0



	None of the cases	1-20% of the cases	21-40% of the cases	41-60% of the cases	61-80% of the cases	81-100% of the cases	Total	Weighted Average
CIETAC	5.77% 3	15.38% 8	9.62% 5	17.31% 9	15.38% 8	36.54% 19	52	3.94
SCIA (aka. SCIETAC)	47.83% 11	34.78% 8	0.00% 0	17.39% 4	0.00% 0	0.00% 0	23	1.87
SHIAC (aka. SIETAC)	30.00% 6	40.00% 8	15.00% 3	5.00% 1	0.00% 0	10.00% 2	20	2.25
BAC (aka. BIAC)	33.33% 9	33.33% 9	18.52% 5	14.81% 4	0.00% 0	0.00% 0	27	2.15
Guangzhou Arbitration Commission	93.33% 14	6.67% 1	0.00% 0	0.00% 0	0.00% 0	0.00% 0	15	1.07
Wuhan Arbitration Commission	100.00% 14	0.00% 0	0.00% 0	0.00% 0	0.00% 0	0.00% 0	14	1.00
Shanghai Arbitration Commission	52.94% 9	29.41% 5	5.88% 1	5.88% 1	0.00% 0	5.88% 1	17	1.82
Other Mainland China commissions	50.00% 11	27.27% 6	9.09% 2	0.00% 0	0.00% 0	13.64% 3	22	2.00

Q7 How would you describe the arbitration environment in China?

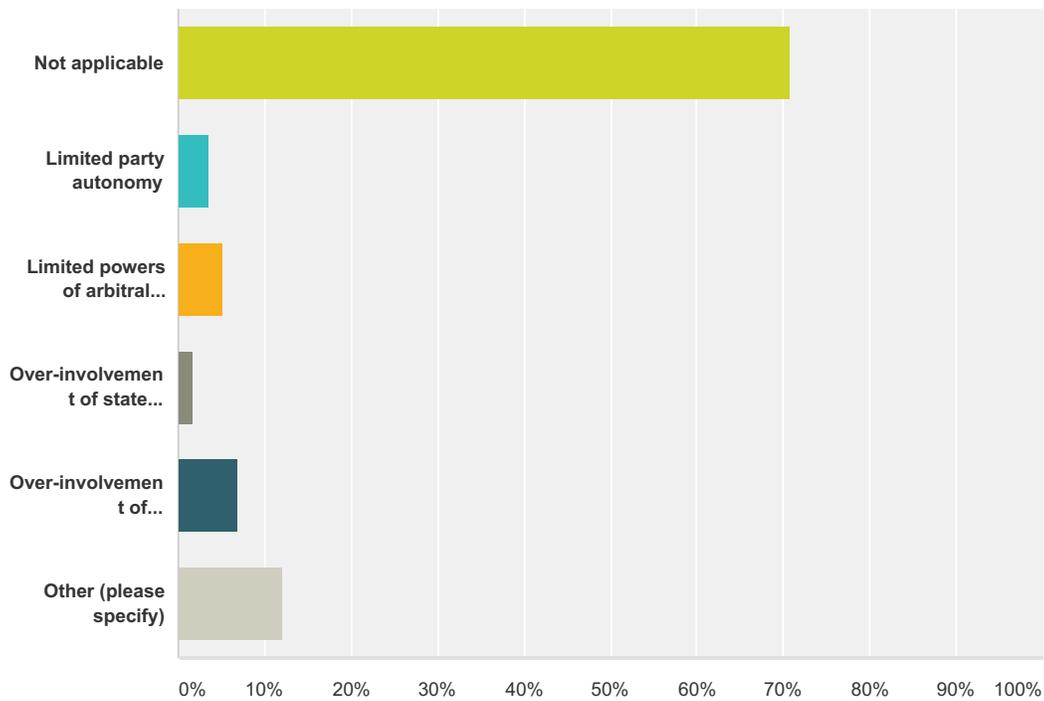
Answered: 58 Skipped: 0



Answer Choices	Responses
Very friendly	5.17% 3
Rather friendly	67.24% 39
Rather unfriendly	18.97% 11
Very unfriendly	0.00% 0
I have no opinion	8.62% 5
Total	58

Q8 In case in the question above you chose the answer “Rather unfriendly” or “Very unfriendly”, what do you believe to be the main reason China is not arbitration-friendly? Note: Please choose “Not applicable” if you answered “Very friendly”, “Rather friendly” or “I have no opinion” in the preceding question.

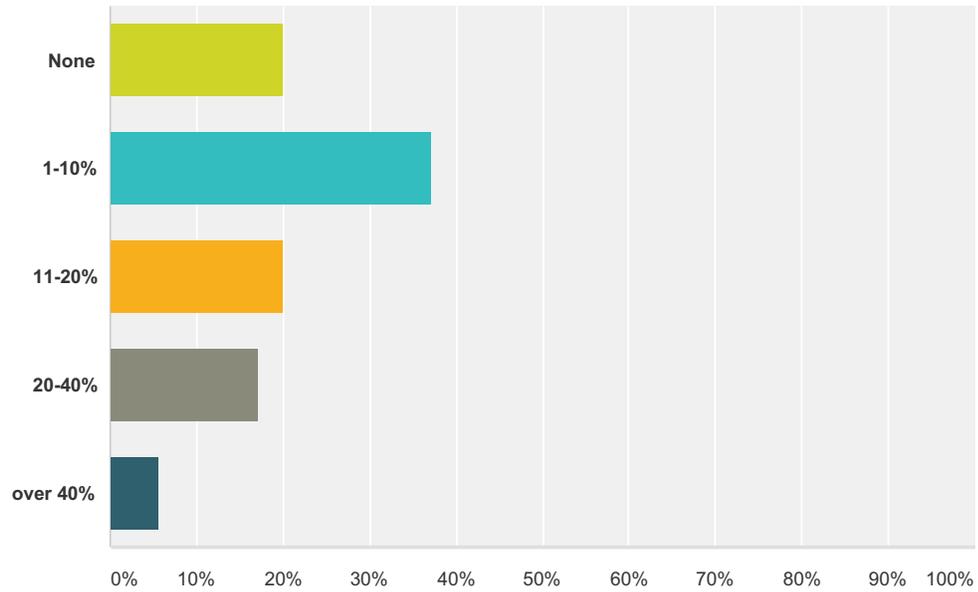
Answered: 58 Skipped: 0



Answer Choices	Responses
Not applicable	70.69% 41
Limited party autonomy	3.45% 2
Limited powers of arbitral tribunal	5.17% 3
Over-involvement of state courts in arbitration proceeding	1.72% 1
Over-involvement of arbitration commissions in arbitration proceeding	6.90% 4
Other (please specify)	12.07% 7
Total	58

Q9 In what percentage of cases was there an objection to jurisdiction, based on your personal experience in Mainland China during the last five years?

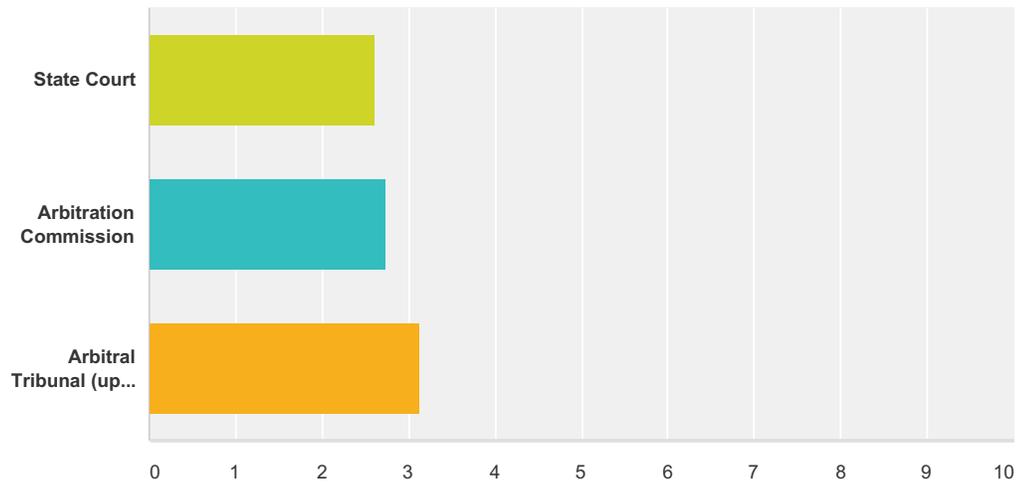
Answered: 35 Skipped: 23



Answer Choices	Responses
None	20.00% 7
1-10%	37.14% 13
11-20%	20.00% 7
20-40%	17.14% 6
over 40%	5.71% 2
Total	35

Q10 In case of the objection(s) to jurisdiction, who was deciding the issue?

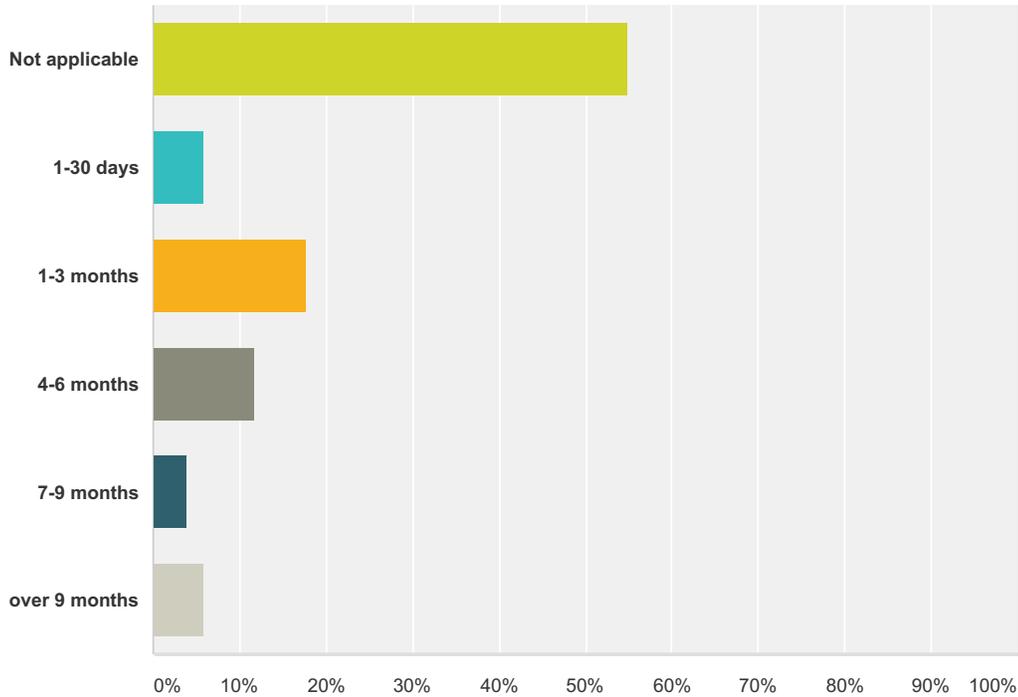
Answered: 51 Skipped: 7



	None of the cases	1-20% of the cases	21-40% of the cases	41-60% of the cases	61-80% of the cases	81-100% of the cases	Total	Weighted Average
State Court	34.29% 12	22.86% 8	17.14% 6	8.57% 3	8.57% 3	8.57% 3	35	2.60
Arbitration Commission	25.64% 10	28.21% 11	17.95% 7	12.82% 5	5.13% 2	10.26% 4	39	2.74
Arbitral Tribunal (upon delegation of competence by arbitration commission)	18.42% 7	28.95% 11	13.16% 5	15.79% 6	7.89% 3	15.79% 6	38	3.13

Q11 In cases where the state court was deciding the objection(s) to jurisdiction, how long did it take on average to render a decision? Note: Please choose "Not applicable" if you have never experienced the situation where the state court was deciding the objection to jurisdiction.

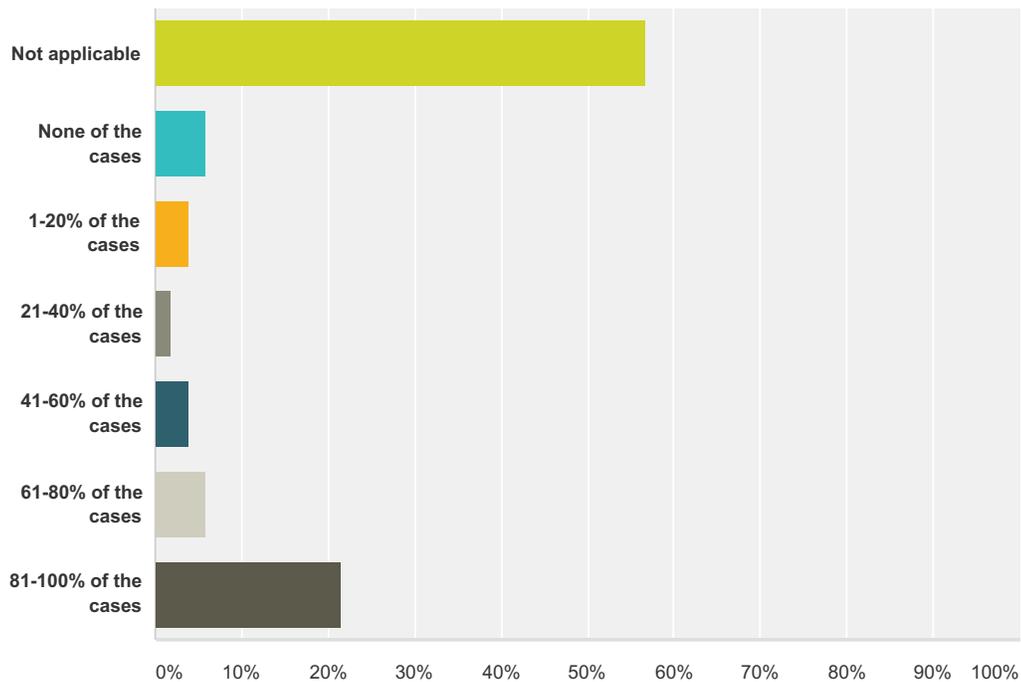
Answered: 51 Skipped: 7



Answer Choices	Responses
Not applicable	54.90% 28
1-30 days	5.88% 3
1-3 months	17.65% 9
4-6 months	11.76% 6
7-9 months	3.92% 2
over 9 months	5.88% 3
Total	51

**Q12 In cases where the state court was deciding the objection(s) to jurisdiction, in what percentage of cases was the arbitration proceeding suspended for the time of decision making by the state court?
Note: Please choose "Not applicable" if you have never experienced the situation where the state court was deciding the objection to jurisdiction.**

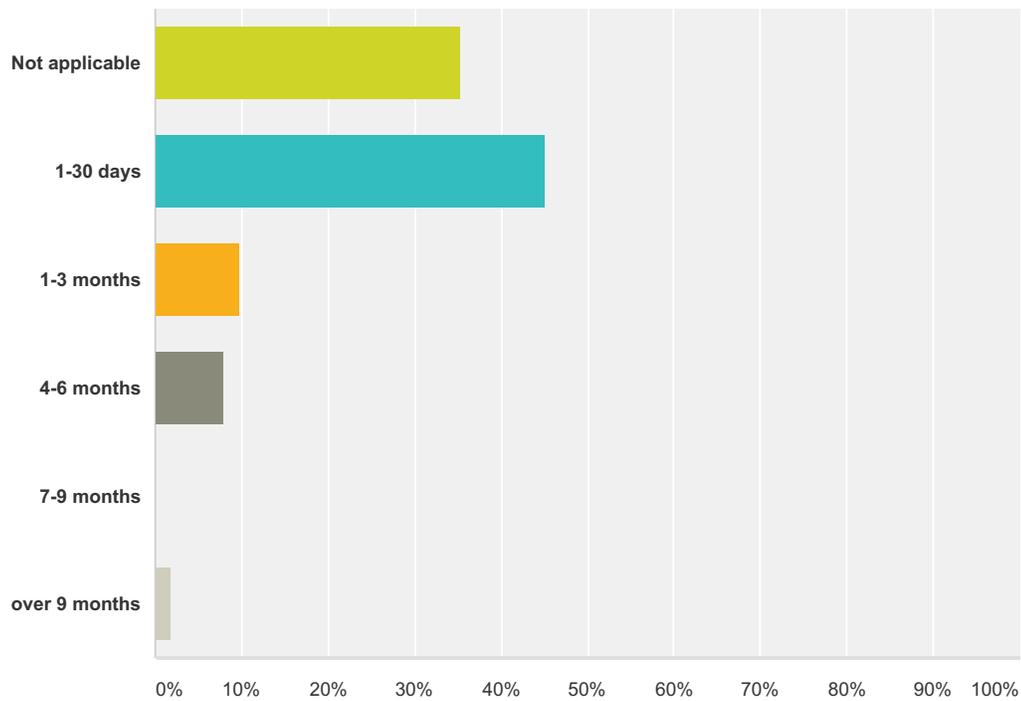
Answered: 51 Skipped: 7



Answer Choices	Responses
Not applicable	56.86% 29
None of the cases	5.88% 3
1-20% of the cases	3.92% 2
21-40% of the cases	1.96% 1
41-60% of the cases	3.92% 2
61-80% of the cases	5.88% 3
81-100% of the cases	21.57% 11
Total	51

Q13 In cases where the arbitration commission was deciding the objection(s) to jurisdiction, how long did it take on average to render a decision? Note: Please choose "Not applicable" if you have never experienced the situation where the arbitration commission was deciding the objection to jurisdiction.

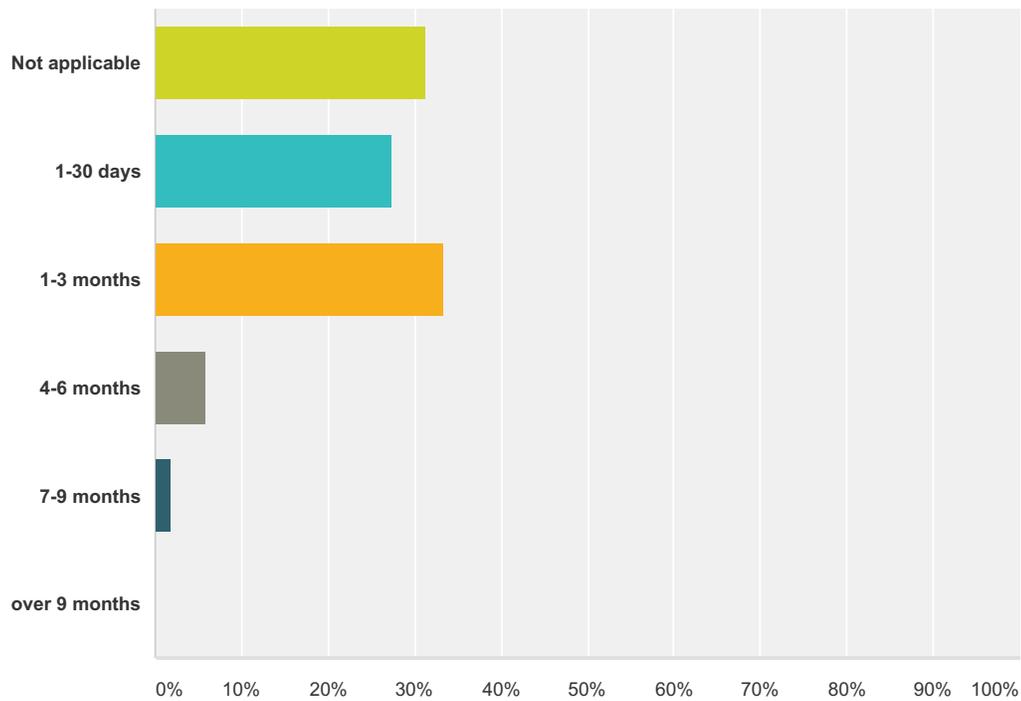
Answered: 51 Skipped: 7



Answer Choices	Responses
Not applicable	35.29% 18
1-30 days	45.10% 23
1-3 months	9.80% 5
4-6 months	7.84% 4
7-9 months	0.00% 0
over 9 months	1.96% 1
Total	51

Q14 In cases where the arbitration tribunal was deciding the objection(s) to jurisdiction, how long did it take on average to render a decision? Note: Please choose "Not applicable" if you have never experienced the situation where the arbitral tribunal was deciding the objection to jurisdiction.

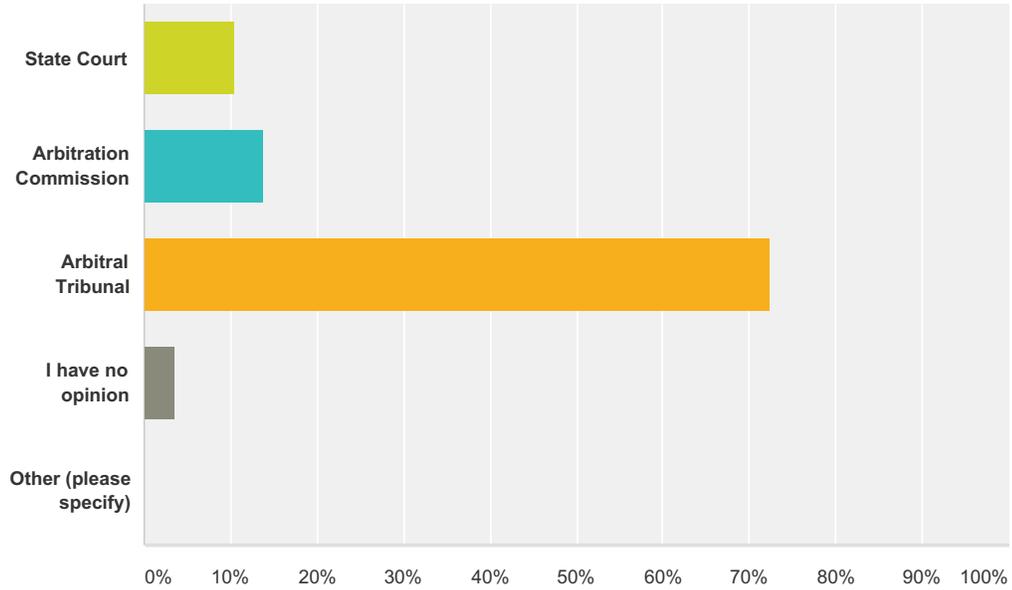
Answered: 51 Skipped: 7



Answer Choices	Responses
Not applicable	31.37% 16
1-30 days	27.45% 14
1-3 months	33.33% 17
4-6 months	5.88% 3
7-9 months	1.96% 1
over 9 months	0.00% 0
Total	51

Q15 If you could choose, whom do you believe to be in the best position to decide objections to jurisdiction in arbitration proceedings conducted in Mainland China?

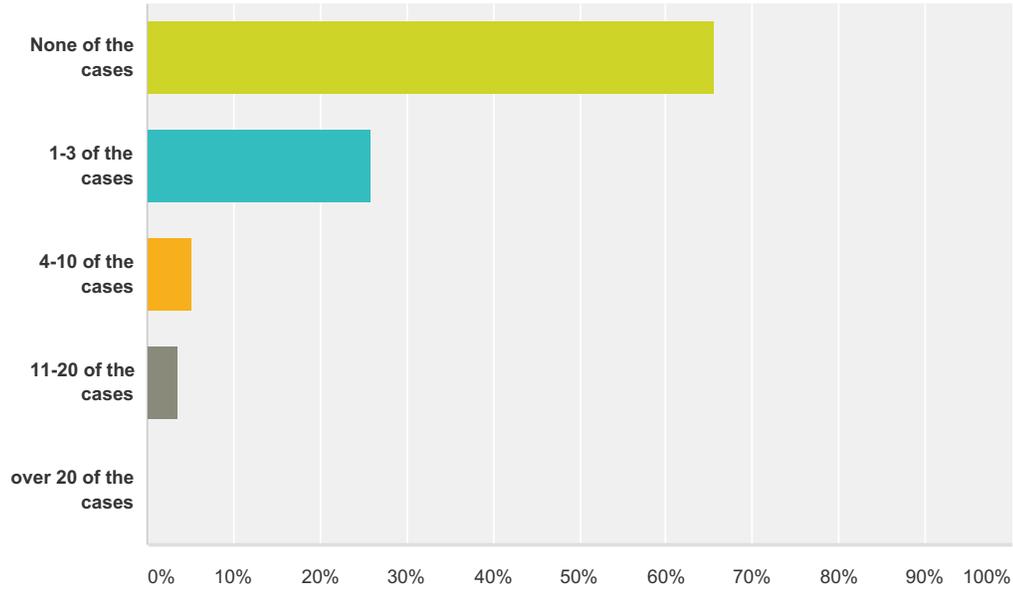
Answered: 58 Skipped: 0



Answer Choices	Responses
State Court	10.34% 6
Arbitration Commission	13.79% 8
Arbitral Tribunal	72.41% 42
I have no opinion	3.45% 2
Other (please specify)	0.00% 0
Total	58

Q16 How many cases went through the Prior Reporting System (PRS) at any stage of the proceeding, based on your personal experience in Mainland China during the last five years?

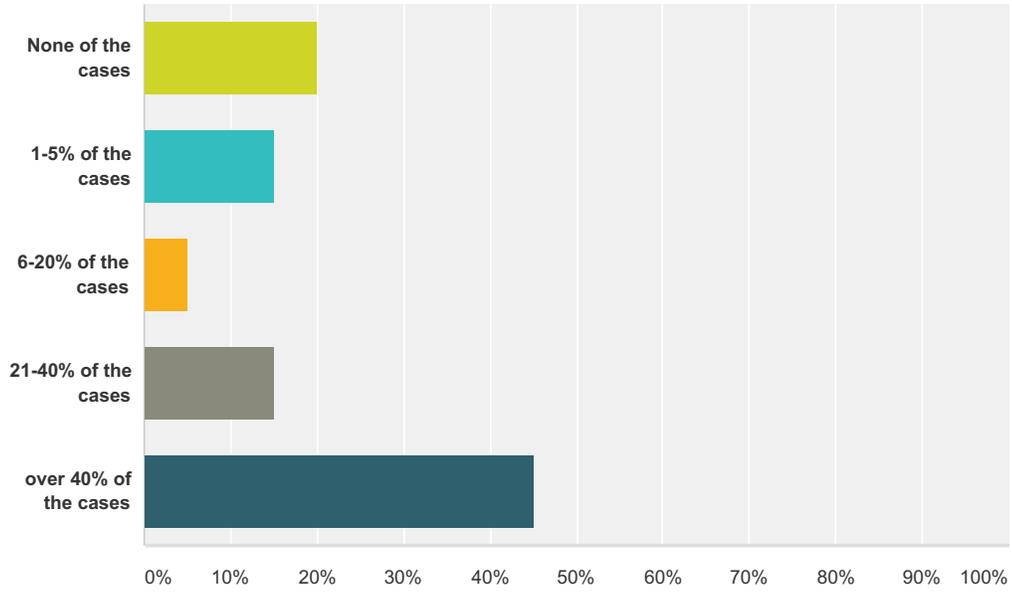
Answered: 58 Skipped: 0



Answer Choices	Responses	
None of the cases	65.52%	38
1-3 of the cases	25.86%	15
4-10 of the cases	5.17%	3
11-20 of the cases	3.45%	2
over 20 of the cases	0.00%	0
Total		58

Q17 What percentage of these PRS cases involved the issue of validity of the arbitration agreement?

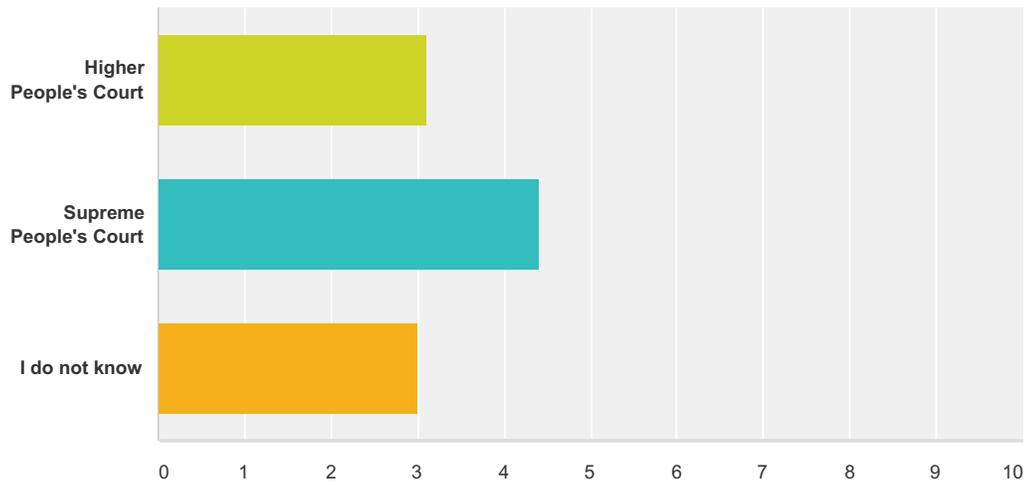
Answered: 20 Skipped: 38



Answer Choices	Responses
None of the cases	20.00% 4
1-5% of the cases	15.00% 3
6-20% of the cases	5.00% 1
21-40% of the cases	15.00% 3
over 40% of the cases	45.00% 9
Total	20

Q18 What was the final level reached within the PRS system proceeding(s)?

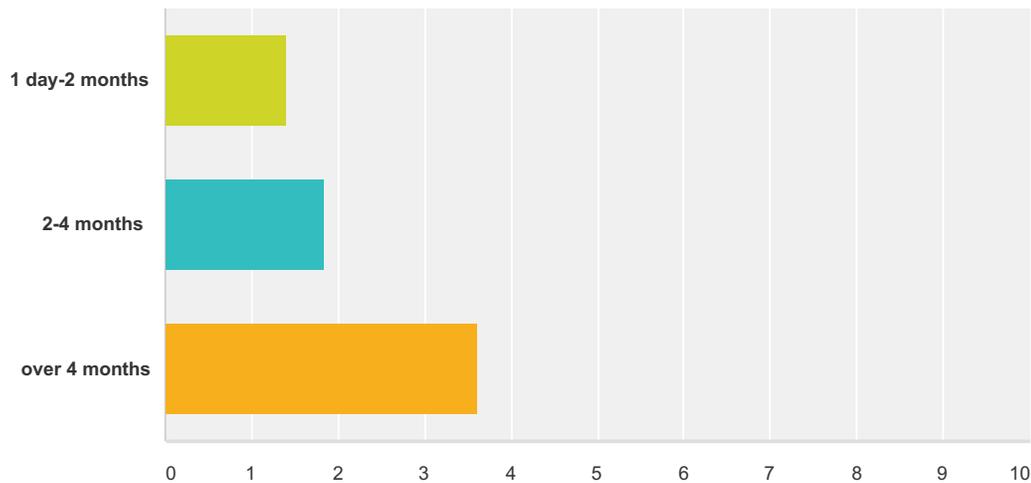
Answered: 20 Skipped: 38



	None of the cases	1-20% of the cases	21-40% of the cases	41-60% of the cases	61-80% of the cases	81-100% of the cases	Total	Weighted Average
Higher People's Court	22.22% 2	33.33% 3	11.11% 1	0.00% 0	11.11% 1	22.22% 2	9	3.11
Supreme People's Court	5.88% 1	17.65% 3	5.88% 1	17.65% 3	5.88% 1	47.06% 8	17	4.41
I do not know	60.00% 3	0.00% 0	0.00% 0	0.00% 0	0.00% 0	40.00% 2	5	3.00

Q19 How long did it take on average to complete the proceeding(s) within the PRS system in case the PRS proceeding(s) finished at the Higher People's Court level:Note: Please leave this question unanswered and move to the next one in case you have never experienced the situation where the PRS proceeding(s) finished at the Higher People's Court level.

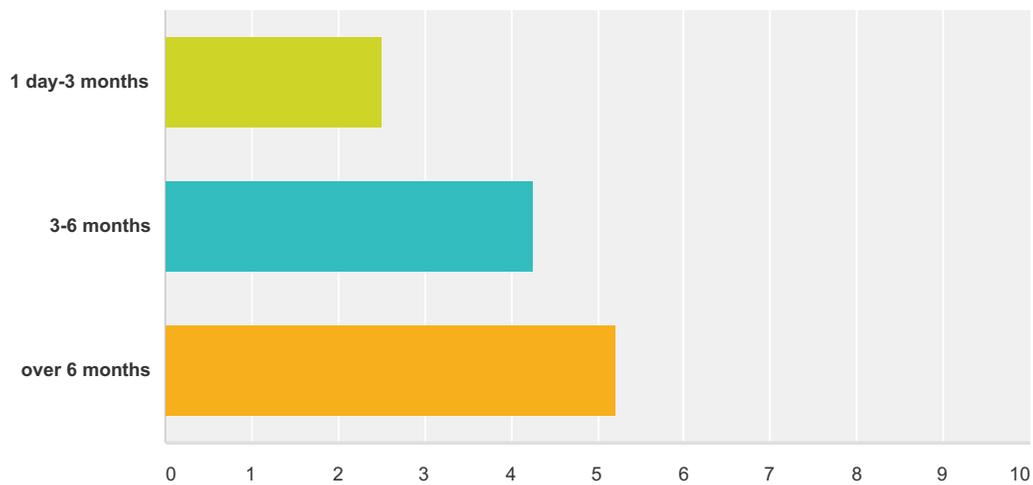
Answered: 13 Skipped: 45



	None of the cases	1-20% of the cases	21-40% of the cases	41-60% of the cases	61-80% of the cases	81-100% of the cases	Total	Weighted Average
1 day-2 months	80.00% 4	0.00% 0	20.00% 1	0.00% 0	0.00% 0	0.00% 0	5	1.40
2-4 months	50.00% 3	16.67% 1	33.33% 2	0.00% 0	0.00% 0	0.00% 0	6	1.83
over 4 months	30.77% 4	15.38% 2	0.00% 0	7.69% 1	7.69% 1	38.46% 5	13	3.62

Q20 How long did it take on average to complete the proceeding(s) within the PRS system in case the PRS proceeding(s) finished at the Supreme People's Court level:Note: Please leave this question unanswered and move to the next one in case you have never experienced the situation where the PRS proceeding(s) finished at the Supreme People's Court level.

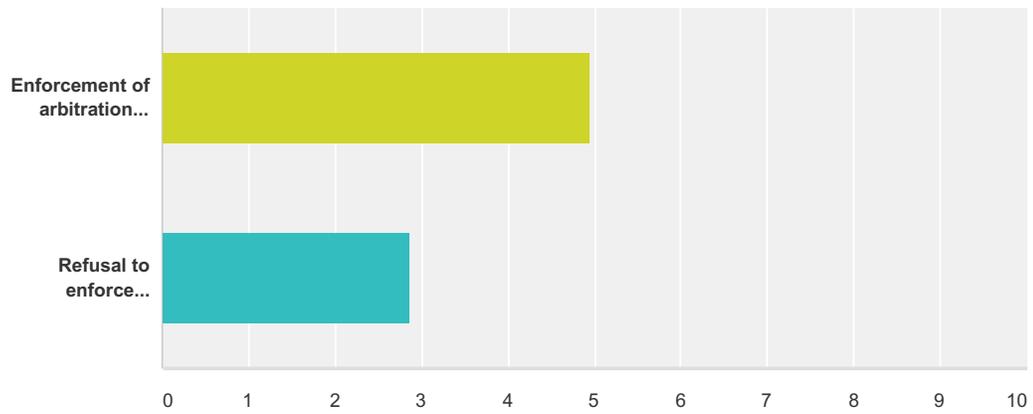
Answered: 20 Skipped: 38



	None of the cases	1-20% of the cases	21-40% of the cases	41-60% of the cases	61-80% of the cases	81-100% of the cases	Total	Weighted Average
1 day-3 months	50.00% 1	0.00% 0	0.00% 0	50.00% 1	0.00% 0	0.00% 0	2	2.50
3-6 months	0.00% 0	0.00% 0	50.00% 2	0.00% 0	25.00% 1	25.00% 1	4	4.25
over 6 months	5.56% 1	0.00% 0	5.56% 1	11.11% 2	11.11% 2	66.67% 12	18	5.22

Q21 What was the result of the PRS system proceeding(s)?

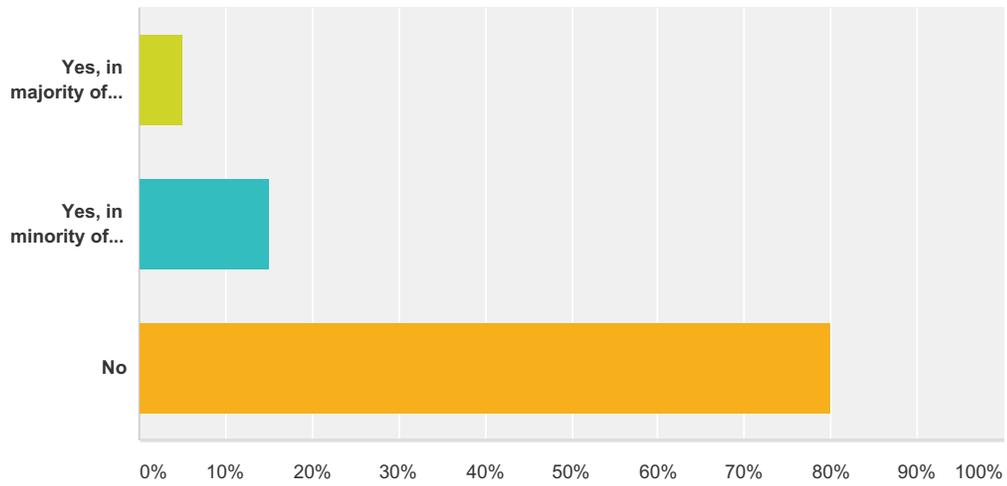
Answered: 20 Skipped: 38



	None of the cases	1-20% of the cases	21-40% of the cases	41-60% of the cases	61-80% of the cases	81-100% of the cases	Total	Weighted Average
Enforcement of arbitration agreement/arbitral award	5.56% 1	0.00% 0	0.00% 0	27.78% 5	22.22% 4	44.44% 8	18	4.94
Refusal to enforce arbitration agreement/arbitral award	23.08% 3	30.77% 4	15.38% 2	15.38% 2	0.00% 0	15.38% 2	13	2.85

Q22 Were you able to participate in the PRS system proceeding(s) as a party or a party counsel?

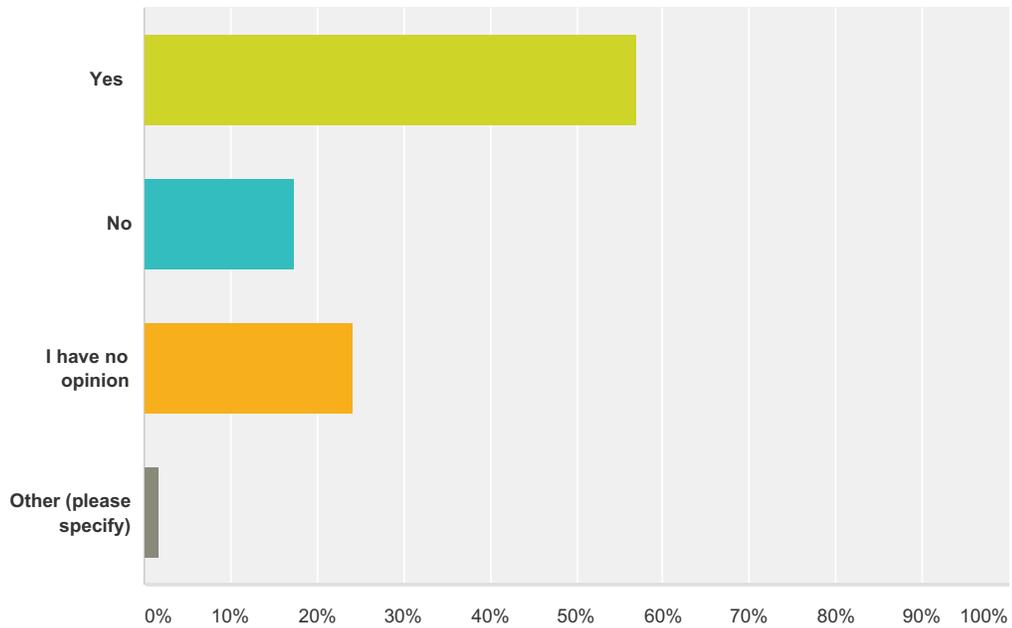
Answered: 20 Skipped: 38



Answer Choices	Responses
Yes, in majority of cases	5.00% 1
Yes, in minority of cases	15.00% 3
No	80.00% 16
Total	20

Q23 Do you believe the parties to arbitration should be allowed to participate in the PRS system proceedings?

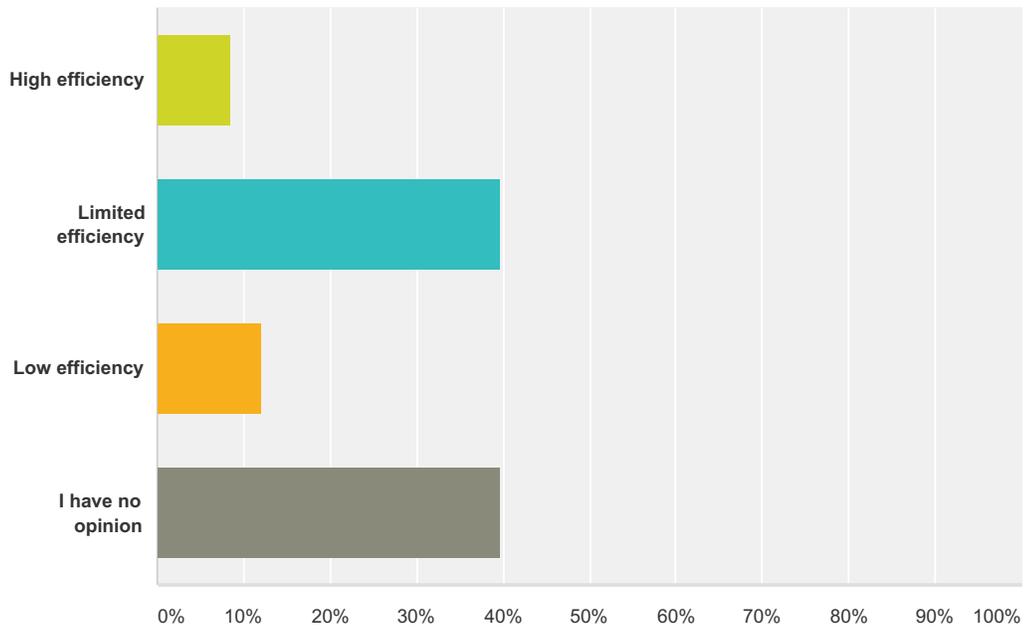
Answered: 58 Skipped: 0



Answer Choices	Responses
Yes	56.90% 33
No	17.24% 10
I have no opinion	24.14% 14
Other (please specify)	1.72% 1
Total	58

Q24 How do you assess the efficiency of the PRS system?

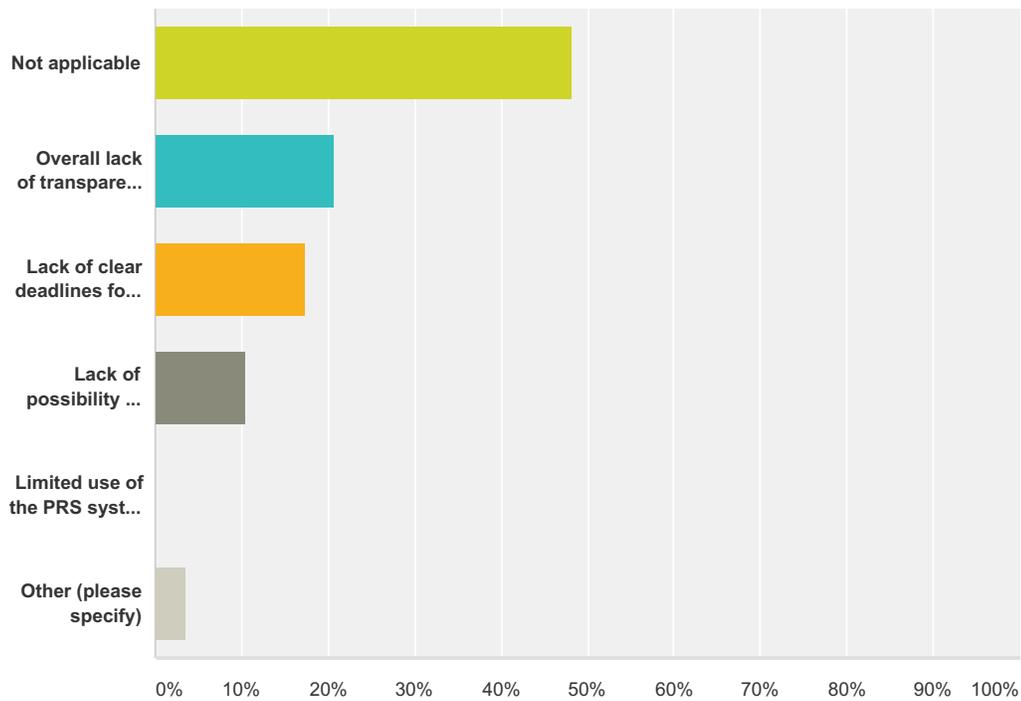
Answered: 58 Skipped: 0



Answer Choices	Responses
High efficiency	8.62% 5
Limited efficiency	39.66% 23
Low efficiency	12.07% 7
I have no opinion	39.66% 23
Total	58

Q25 In case in the question above you chose the answer “Limited efficiency” or “Low efficiency”, what do you believe to be the main reason affecting the efficiency of the PRS system? Note: Please choose the first option "Not applicable" if you answered "High efficiency" or "I have no opinion" in the preceding question.

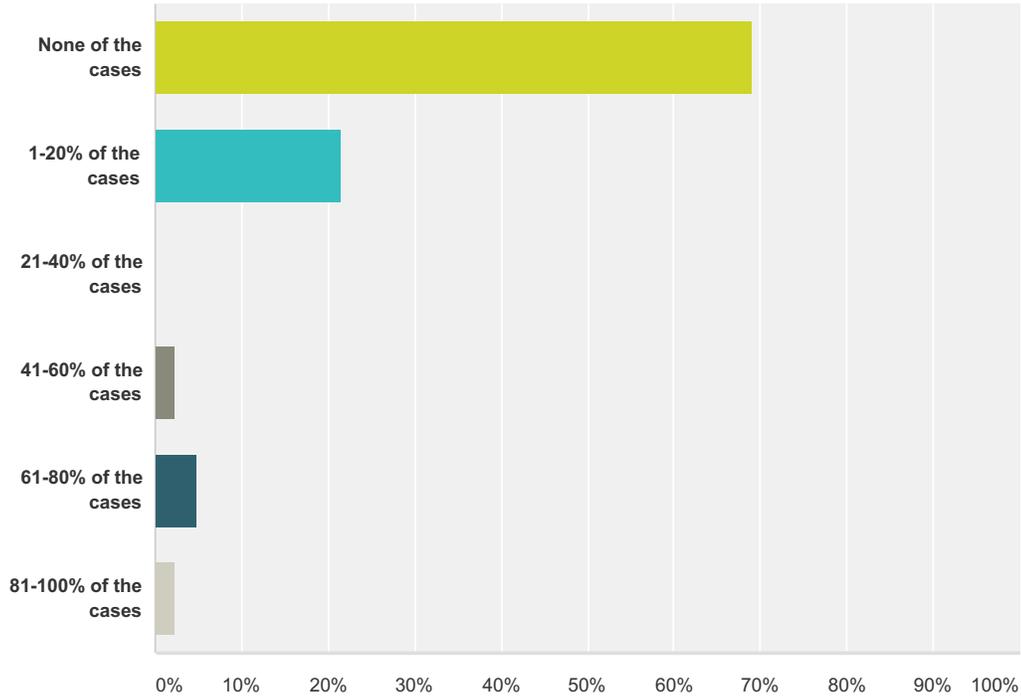
Answered: 58 Skipped: 0



Answer Choices	Responses
Not applicable	48.28% 28
Overall lack of transparency of the system	20.69% 12
Lack of clear deadlines for the state courts to make decisions	17.24% 10
Lack of possibility for the parties to participate in the PRS system proceeding	10.34% 6
Limited use of the PRS system for foreign and foreign-related cases	0.00% 0
Other (please specify)	3.45% 2
Total	58

Q26 In what percentage of cases was the appointment of the arbitrator made outside of the panel list, based on your personal experience in Mainland China during the last five years?

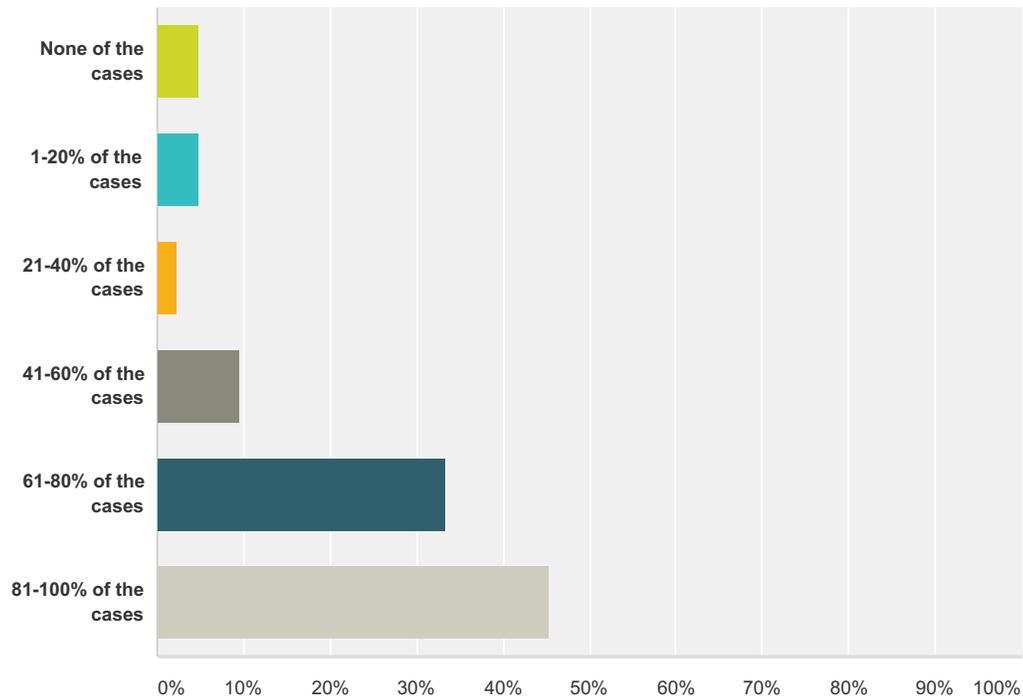
Answered: 42 Skipped: 16



Answer Choices	Responses
None of the cases	69.05% 29
1-20% of the cases	21.43% 9
21-40% of the cases	0.00% 0
41-60% of the cases	2.38% 1
61-80% of the cases	4.76% 2
81-100% of the cases	2.38% 1
Total	42

Q27 In what percentage of cases was the ultimate appointment of the sole arbitrator/presiding arbitrator made by the chairman of the arbitration commission, based on your personal experience in Mainland China during the last five years?

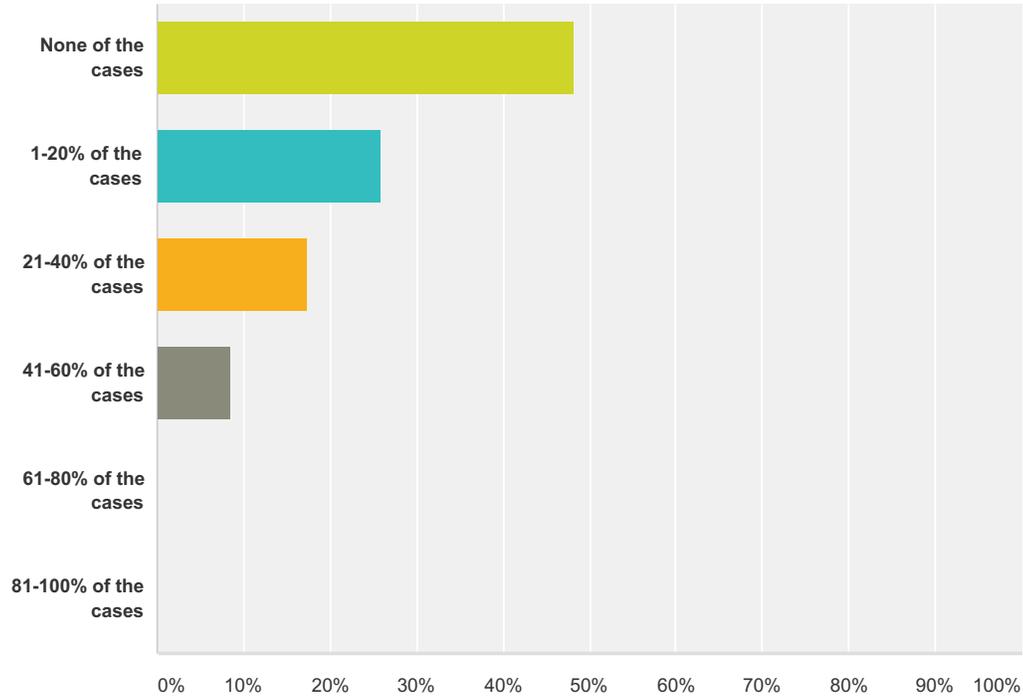
Answered: 42 Skipped: 16



Answer Choices	Responses
None of the cases	4.76% 2
1-20% of the cases	4.76% 2
21-40% of the cases	2.38% 1
41-60% of the cases	9.52% 4
61-80% of the cases	33.33% 14
81-100% of the cases	45.24% 19
Total	42

Q28 In what percentage of the arbitration cases was IM granted in aid of arbitration, based on your personal experience in Mainland China during the last five years?

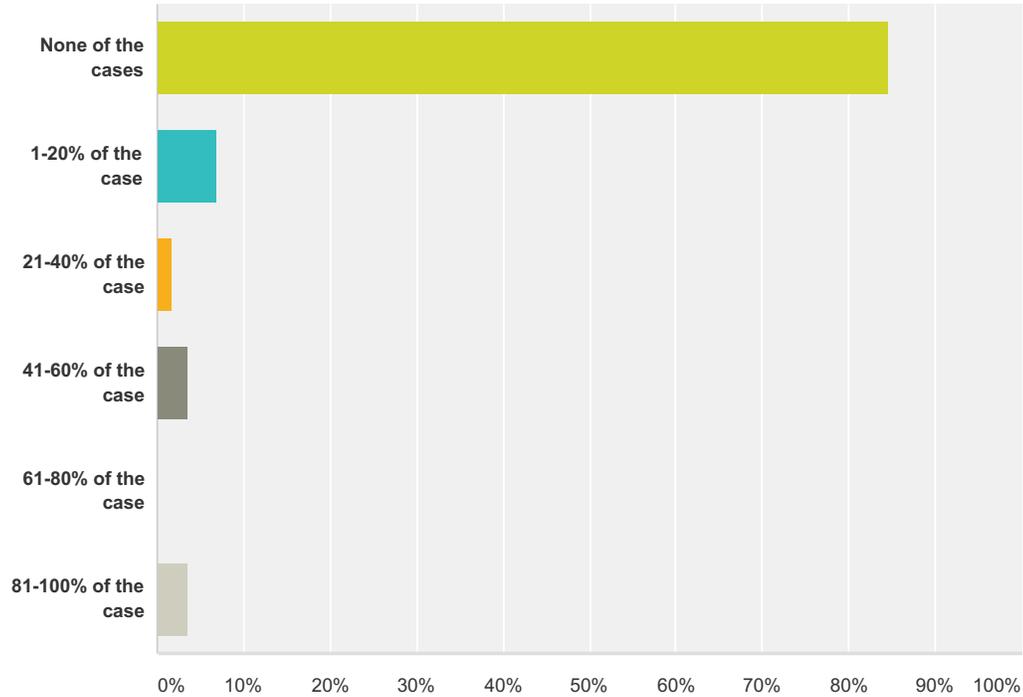
Answered: 58 Skipped: 0



Answer Choices	Responses	Count
None of the cases	48.28%	28
1-20% of the cases	25.86%	15
21-40% of the cases	17.24%	10
41-60% of the cases	8.62%	5
61-80% of the cases	0.00%	0
81-100% of the cases	0.00%	0
Total		58

Q29 What percentage of the IM in aid of arbitration was granted by an arbitrator, based on your personal experience in Mainland China during the last five years?

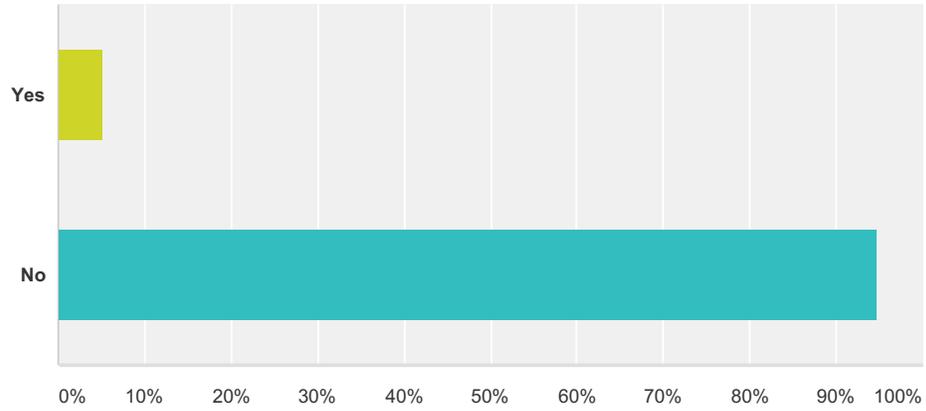
Answered: 58 Skipped: 0



Answer Choices	Responses
None of the cases	84.48% 49
1-20% of the case	6.90% 4
21-40% of the case	1.72% 1
41-60% of the case	3.45% 2
61-80% of the case	0.00% 0
81-100% of the case	3.45% 2
Total	58

Q30 Have you experienced IM being granted by an emergency arbitrator in Mainland China arbitration during the last five years?

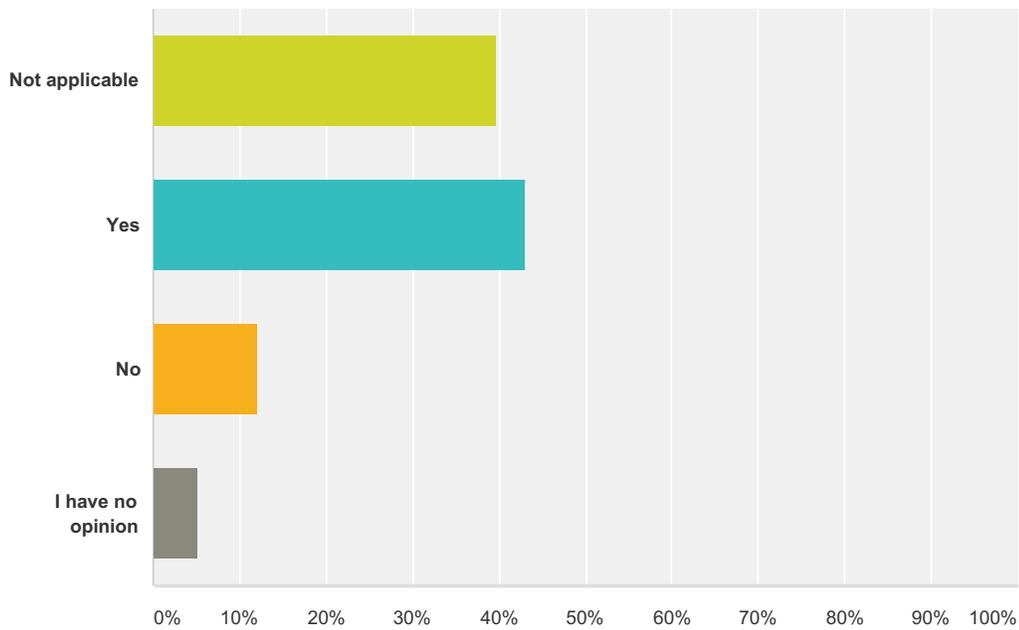
Answered: 58 Skipped: 0



Answer Choices	Responses	
Yes	5.17%	3
No	94.83%	55
Total		58

Q31 If you act as an arbitrator in cases seated in Mainland China, do you feel competent to decide on the issues of IM (including: granting, suspension and termination of IM)? Note: Please choose “Not applicable” if you have never acted as an arbitrator in arbitration seated in Mainland China.

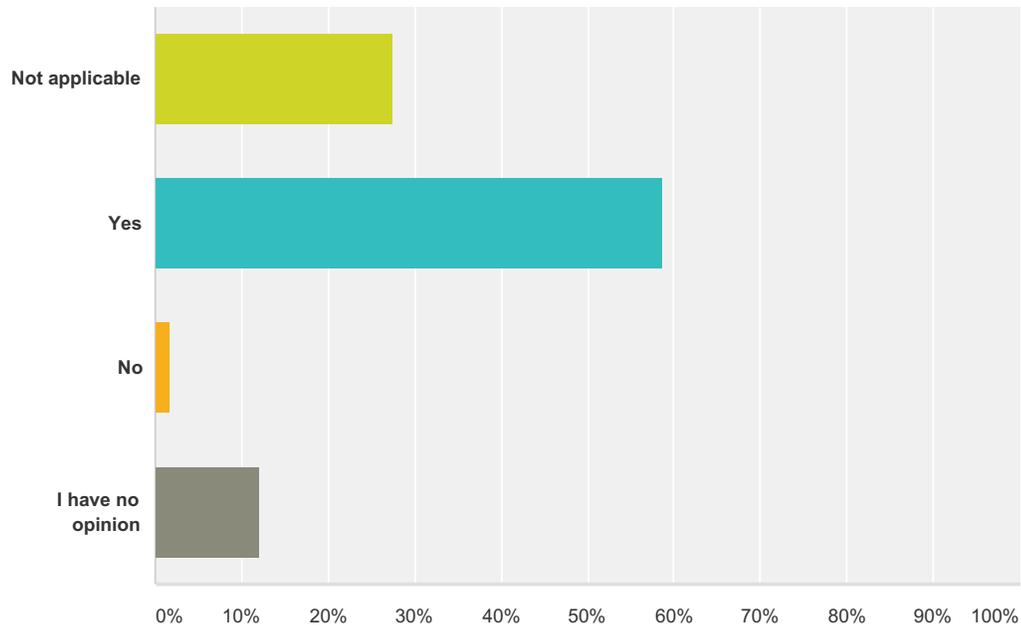
Answered: 58 Skipped: 0



Answer Choices	Responses	
Not applicable	39.66%	23
Yes	43.10%	25
No	12.07%	7
I have no opinion	5.17%	3
Total		58

Q32 Do you believe the overall situation of the case can improve if you can effectively decide on IM as an arbitrator in cases seated in Mainland China? Note: Please choose “Not applicable” if you have never acted as an arbitrator in arbitration seated in Mainland China.

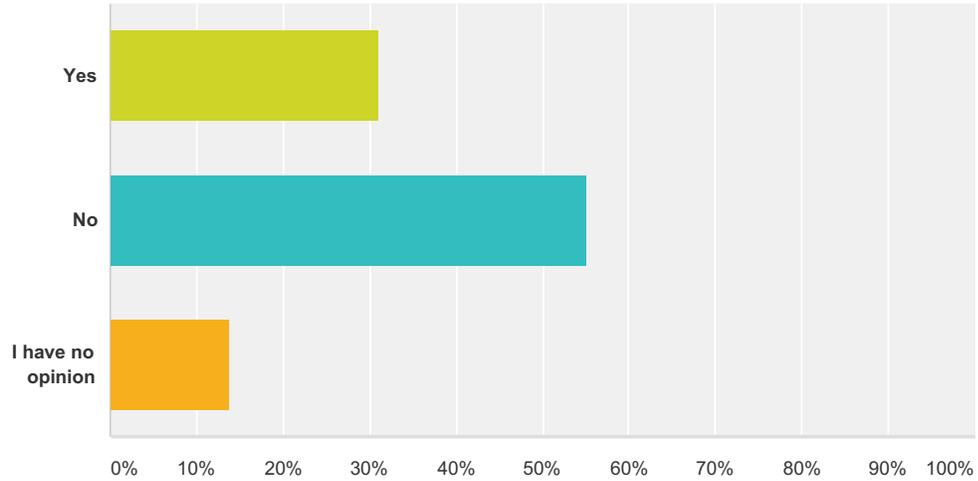
Answered: 58 Skipped: 0



Answer Choices	Responses	
Not applicable	27.59%	16
Yes	58.62%	34
No	1.72%	1
I have no opinion	12.07%	7
Total		58

Q33 Do you believe the postman role of the arbitration commission, forwarding the application for IM to the state court having jurisdiction over the matter, is needed in Mainland China arbitration?

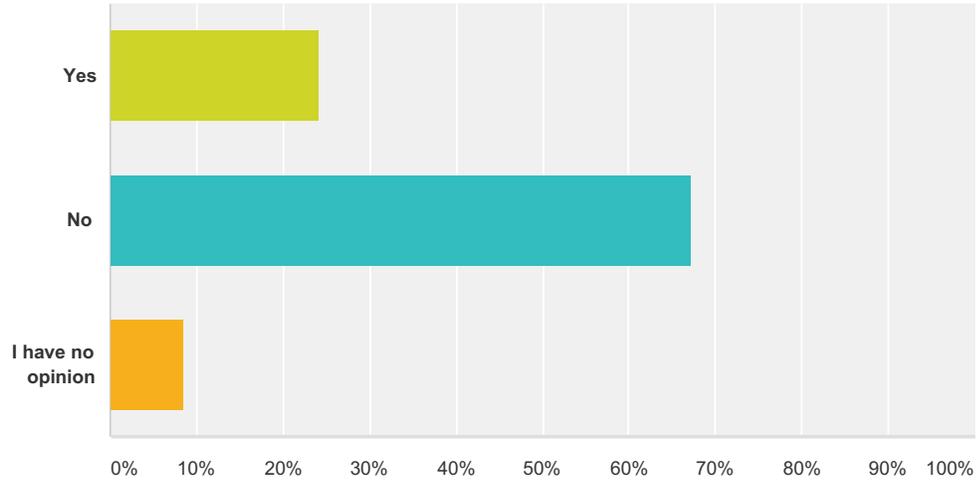
Answered: 58 Skipped: 0



Answer Choices	Responses
Yes	31.03% 18
No	55.17% 32
I have no opinion	13.79% 8
Total	58

Q34 Do you believe the arbitration commissions in Mainland China arbitration should scrutinize the application for IM before it forwards it to the state court having jurisdiction over the matter?

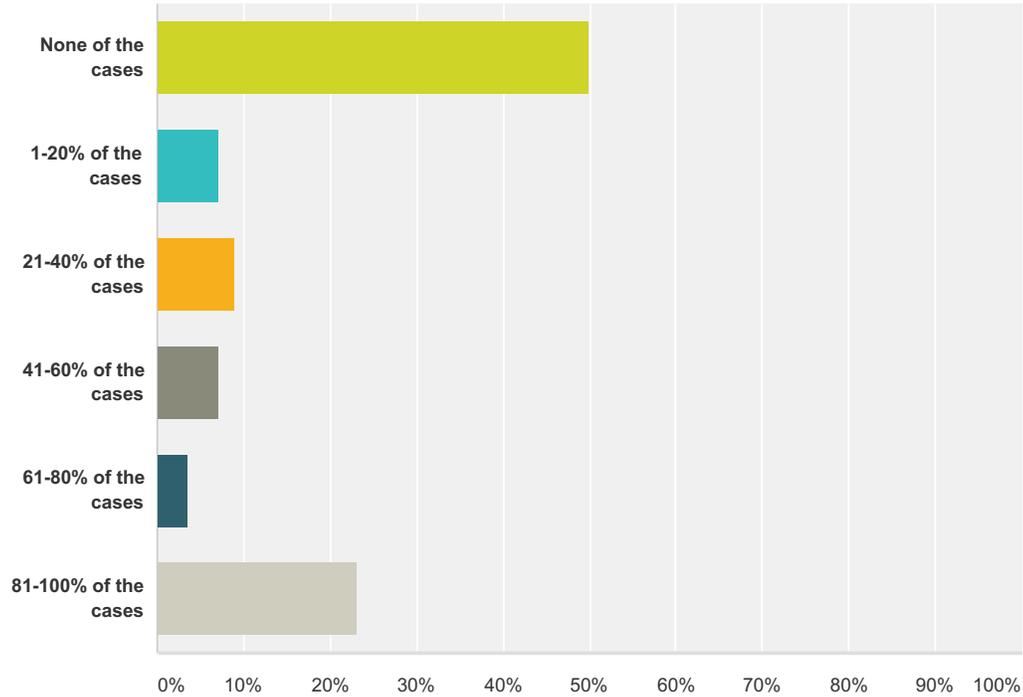
Answered: 58 Skipped: 0



Answer Choices	Responses	
Yes	24.14%	14
No	67.24%	39
I have no opinion	8.62%	5
Total		58

Q35 In what percentage of the applications for IM in aid of arbitration was there the request for security, based on your personal experience in Mainland China during the last five years?

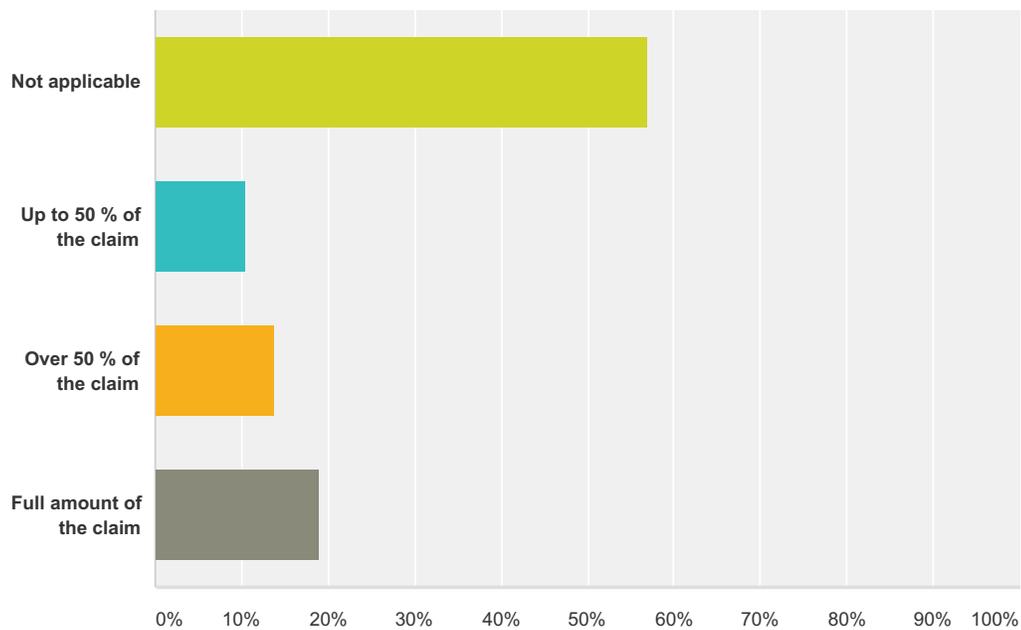
Answered: 56 Skipped: 2



Answer Choices	Responses	
None of the cases	50.00%	28
1-20% of the cases	7.14%	4
21-40% of the cases	8.93%	5
41-60% of the cases	7.14%	4
61-80% of the cases	3.57%	2
81-100% of the cases	23.21%	13
Total		56

Q36 What was the average amount of security requested by the state court in case of the applications for IM in aid of arbitration, based on your personal experience in Mainland China during the last five years? Note: Please choose "Not applicable" if you have never experienced the situation where there was the request for security in application for IM in aid of arbitration.

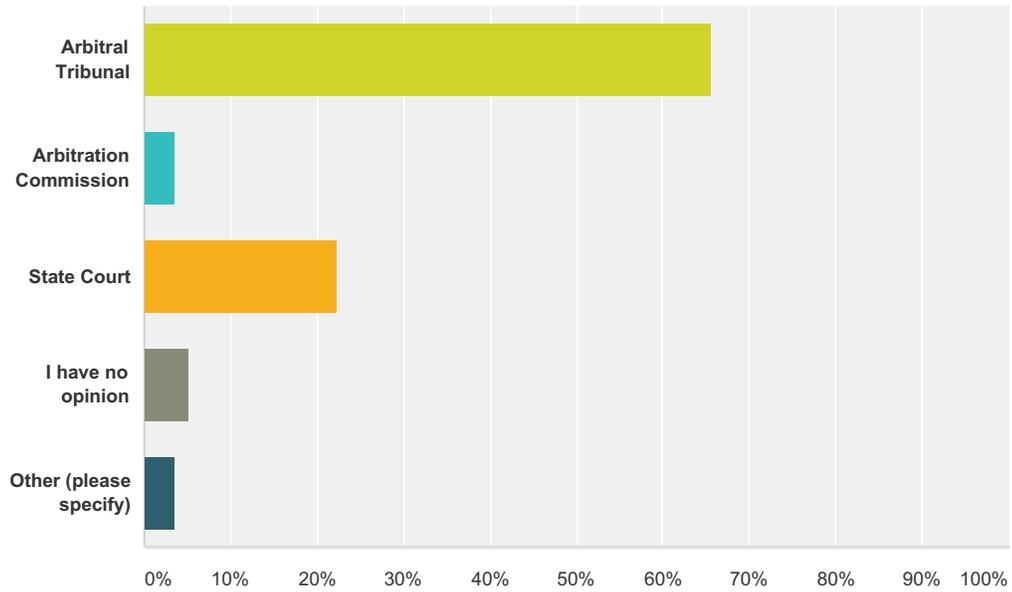
Answered: 58 Skipped: 0



Answer Choices	Responses	
Not applicable	56.90%	33
Up to 50 % of the claim	10.34%	6
Over 50 % of the claim	13.79%	8
Full amount of the claim	18.97%	11
Total		58

Q37 If you could choose, whom do you believe to be in the best position to grant IM in aid of arbitration in arbitration seated in Mainland China?

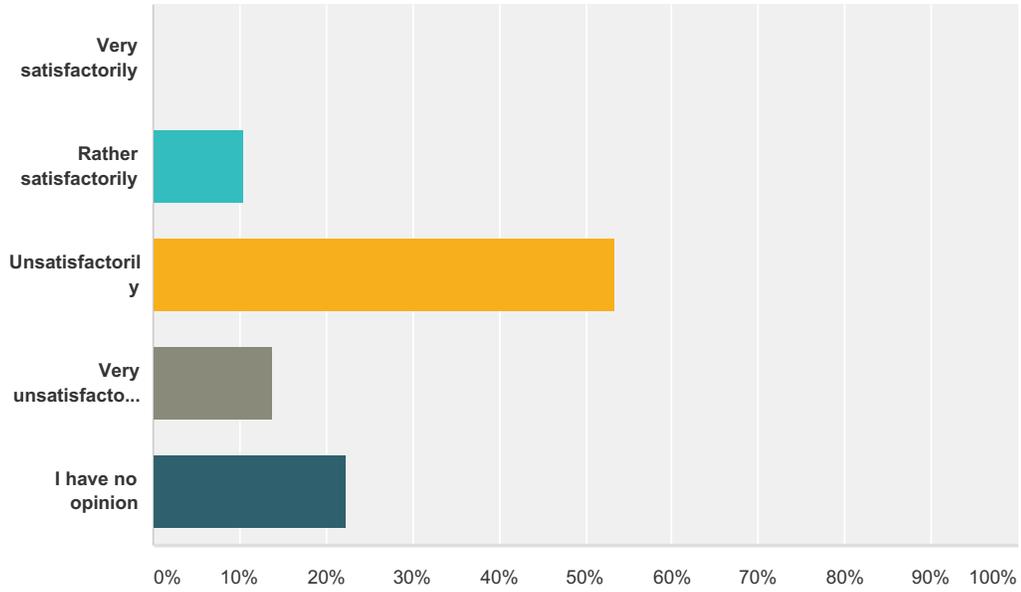
Answered: 58 Skipped: 0



Answer Choices	Responses	Count
Arbitral Tribunal	65.52%	38
Arbitration Commission	3.45%	2
State Court	22.41%	13
I have no opinion	5.17%	3
Other (please specify)	3.45%	2
Total		58

Q38 How do you assess the current regulation in the area of IM in aid of arbitration under the Chinese system?

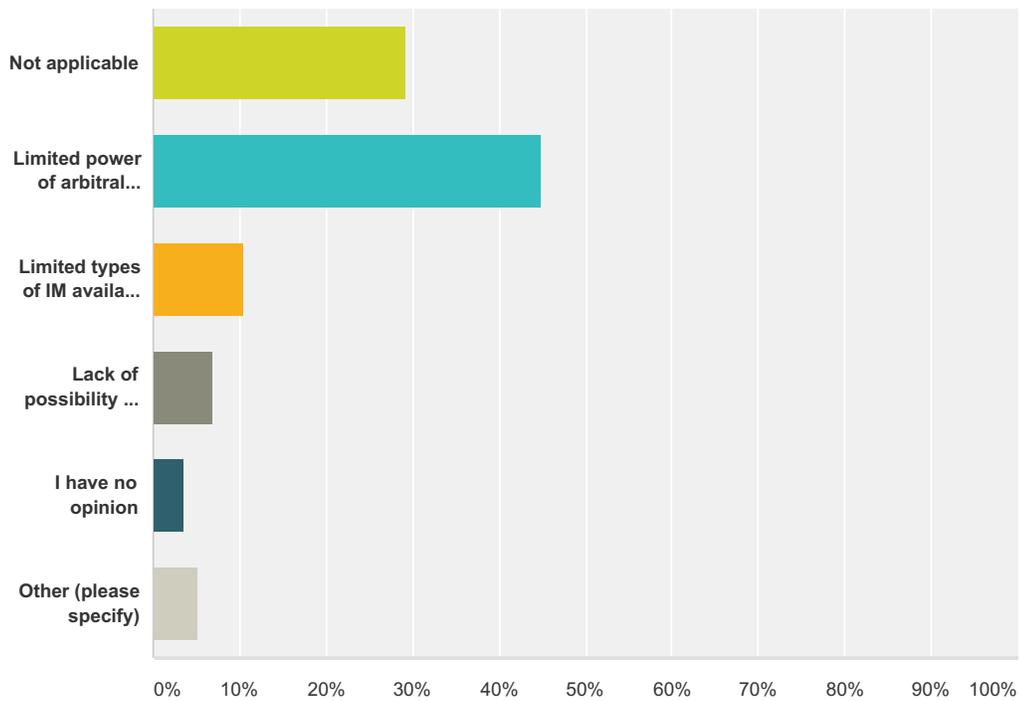
Answered: 58 Skipped: 0



Answer Choices	Responses	Count
Very satisfactorily	0.00%	0
Rather satisfactorily	10.34%	6
Unsatisfactorily	53.45%	31
Very unsatisfactorily	13.79%	8
I have no opinion	22.41%	13
Total		58

**Q39 In case in the question above you chose the answer “Unsatisfactorily” or “Very unsatisfactorily”, what do you believe to be the main reason for dissatisfaction?
Note: Please choose “Not applicable” if you answered “Very satisfactorily”, “Rather satisfactorily” or “I have no opinion” in the preceding question.**

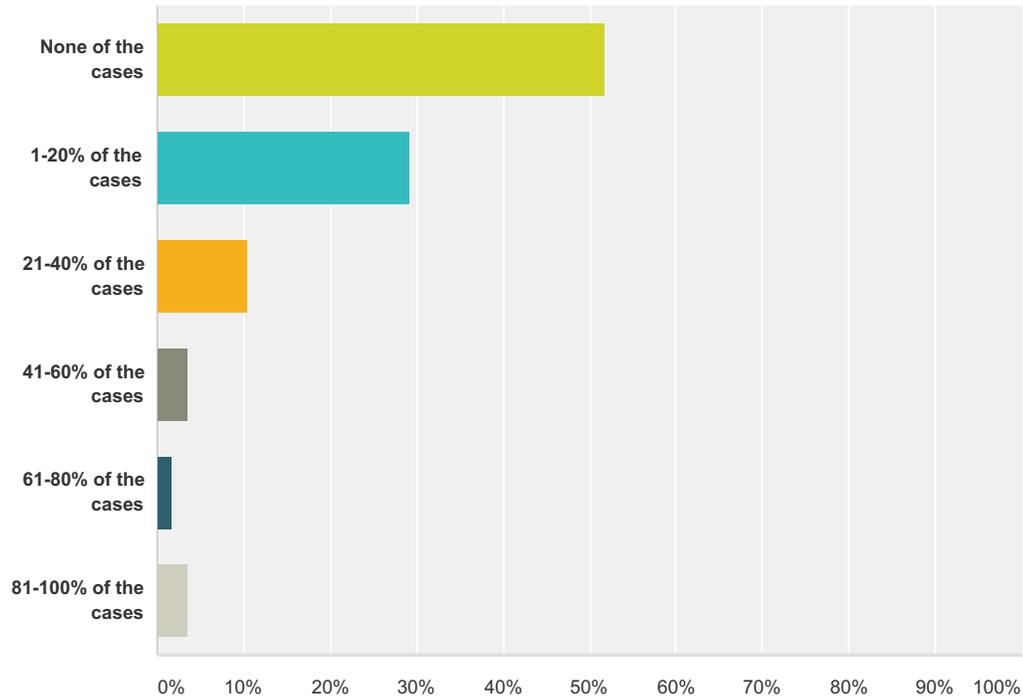
Answered: 58 Skipped: 0



Answer Choices	Responses	
Not applicable	29.31%	17
Limited power of arbitral tribunal in deciding on IM	44.83%	26
Limited types of IM available in aid of arbitration	10.34%	6
Lack of possibility to apply directly to the state court in case of application made after arbitration proceeding was commenced	6.90%	4
I have no opinion	3.45%	2
Other (please specify)	5.17%	3
Total		58

Q40 In what percentage of the cases was the arbitral tribunal ordering evidence taking on its own initiative, based on your personal experience in Mainland China during the last five years?

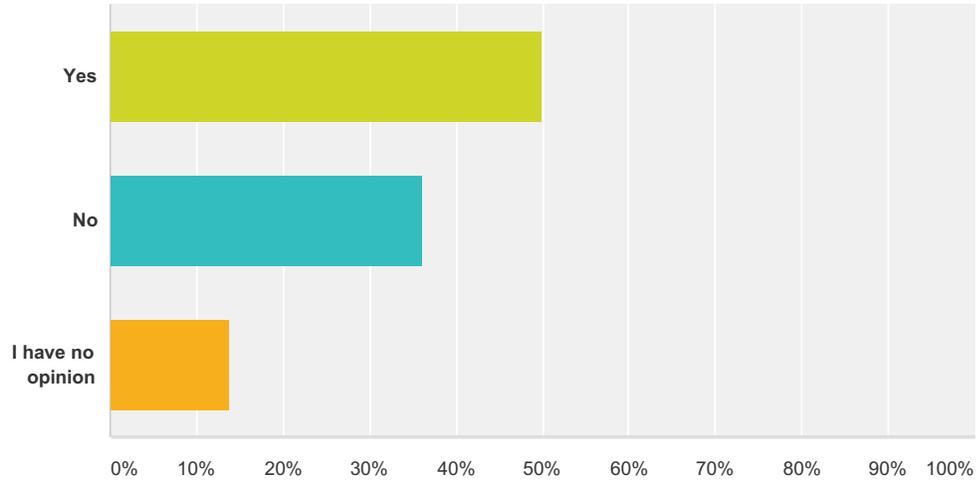
Answered: 58 Skipped: 0



Answer Choices	Responses
None of the cases	51.72% 30
1-20% of the cases	29.31% 17
21-40% of the cases	10.34% 6
41-60% of the cases	3.45% 2
61-80% of the cases	1.72% 1
81-100% of the cases	3.45% 2
Total	58

Q41 Do you believe the state court assistance in obtaining evidence would increase the efficiency of arbitration proceedings in Mainland China?

Answered: 58 Skipped: 0



Answer Choices	Responses	
Yes	50.00%	29
No	36.21%	21
I have no opinion	13.79%	8
Total		58