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## Are We “Paper Tigers”? The Limited Procedural Power of Arbitrators Under Chinese Law

Chi Manjiao\*

### I. INTRODUCTION

Given the contractual nature of arbitration and the principle of party autonomy, parties' agreement on arbitral procedures should be respected unless it violates any applicable mandatory rules.<sup>1</sup> In cases where parties have not agreed on arbitral procedures, arbitrators (or arbitral tribunals) are required to conduct arbitration in accordance with applicable arbitration rules and the *lex loci arbitri*.<sup>2</sup> Under many arbitration instruments and leading institutional arbitration rules,<sup>3</sup>

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1. George A. Bermann, *Introduction: Mandatory Rules in International Arbitration*, 18 AM. REV. INT'L ARB. 1, 5 (2007) (“There is widespread agreement that, irrespective of what the generally applicable law might be, an international arbitral tribunal is bound to apply or otherwise respect the mandatory rules of arbitral procedure of the place of arbitration.”).

2. See ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 282, 294 (KLUWER LAW AND TAXATION, 1981); GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 54 (The Hague: Kluwer Law International, 2d ed. 2001).

3. In this paper, leading institutional arbitration rules refer to: the United Nations Commission on International Trade Law (UNCITRAL), G.A. Res 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976) [hereinafter 1976 UNCITRAL Rules], available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>; the International Chamber of Commerce Rules of Arbitration (1998) [hereinafter ICC Rules], available at <http://www.iccwbo.org/court/arbitration/id4093/index.html> (follow links for preferred language translation); the London Court of International Arbitration Rules (1998) [hereinafter LCIA Rules], available at [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration\\_Rules.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx); the World Intellectual Property Organization Arbitration Rules (2002) [hereinafter WIPO Rules], available at <http://www.wipo.int/amc/en/arbitration/rules>; the China International Economic and Trade Arbitration Commission Rules (2005) [hereinafter CIETAC Rules], available at <http://www.cietac.org/index/rules/47607adcb68427f001.cms> (English translation); the Hong Kong International Arbitration Centre Rules (2008) [hereinafter HKIAC Rules], available at [http://www.hkiac.org/show\\_content.php?article\\_id=375](http://www.hkiac.org/show_content.php?article_id=375) (follow link and choose the English translation); the American Arbitration Association Rules (2009) [hereinafter AAA Rules], available at <http://www.adr.org/sp.asp?id=22440> (follow links for specific rules); the United Nations Commission

arbitrators are granted broad procedural power in conducting arbitration. Arbitrators can not only “shape” arbitration by exercising broad procedural power, but they can also make arbitration a more flexible dispute settlement mechanism vis-à-vis litigation. Typical forms of such procedural power include, *inter alia*: (1) the power of making jurisdictional decisions (jurisdictional power); (2) the power of making applicable law decisions (choice-of-law power); and (3) the power of issuing interim measures. Even though these forms are not exhaustive, they are indicative during key stages of arbitration. The extent to which arbitrators may exercise their procedural power, though, often varies at the international level due to the diversity of rules and laws regarding arbitration. The variance of this power could be quite distinct between “arbitration-friendly countries” and “arbitration-unfriendly countries.”

China is trying to build itself into an “arbitration-friendly” country in an effort to become a more attractive destination for international trade and investment.<sup>4</sup> Leading Chinese arbitration institutions witnessed an expanding caseload in recent years as China experienced rapid economic development.<sup>5</sup> Because China has a long-term interest in continually attracting international trade and investment, China must evaluate arbitrators’ procedural power under Chinese law to determine whether China is becoming an “arbitration-friendly country.”

The purpose of this paper is to study how and to what extent arbitrators exercise procedural power under Chinese law. Throughout this paper, arbitrators’ procedural power under Chinese law is compared to their international counterparts to understand the extent of their procedural power. The result of the study will help the legal and business communities to better understand whether China has grown into an “arbitration-friendly country,” and if not, where further improvements should be made.

This article explores the extent arbitrators exercise procedural power under Chinese law in six parts. Part II briefly provides background information for the legal framework of Chinese arbitration law and the “dual-track system” in the Chinese arbitration regime. The ensuing parts deal with the three major aspects of arbitrators’ procedural power respectively: Part III discusses the power of making jurisdictional decisions, Part IV analyzes the power of making applicable law decisions, and Part V explores the power of issuing interim measures. Part VI concludes that in all three aspects, the procedural power of arbitrators under Chinese law is heavily restricted or denied when compared to their international counterparts. Chinese law is restrictive because arbitrators’ procedural power is allo-

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on International Trade Law (UNCITRAL), G.A. Res 65/22, U.N. Doc. A/RES/65/22 (Jan. 11, 2011) [hereinafter 2010 UNCITRAL Rules], available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>; the Stockholm Chamber of Commerce Arbitration Rules (2010) [hereinafter SCC Rules], available at <http://www.sccinstitute.com/skiljedomsregler-4.aspx> (follow links for English translation); the Singapore International Arbitration Center Rules (2010) [hereinafter SIAC Rules], available at [http://www.siac.org.sg/cms/index.php?option=com\\_content&view=article&id=210&Itemid=130](http://www.siac.org.sg/cms/index.php?option=com_content&view=article&id=210&Itemid=130).

4. For the purpose of the current study, the term “arbitration” refers only to “foreign-related commercial arbitration,” while state-investor arbitration and purely domestic arbitration are excluded.

5. For instance, according to the statistics provided by the Legal Affairs Office of the State Council of China, the combined caseload of the 202 arbitration institutions in Mainland China is 74,811 in 2009, a 15% increase over that of 2008. LEGAL AFFAIRS OFFICE OF THE STATE COUNCIL PEOPLE’S REPUBLIC OF CHINA, <http://www.chinalaw.gov.cn/article/fzjd/zcgz/201009/20100900263261.shtml> (last visited August 29, 2011).

cated to the state, represented mainly by courts. Even though the centralization of procedural power is expected in China, restricting or denying arbitrators’ procedural power under Chinese law is harmful to Chinese arbitration and turning them into “paper tigers.” Moreover, the centralization of procedural power could potentially harm China’s long-term goal of becoming an international trade and investment destination. China can remedy its harm to Chinese arbitration, however, through a full-range judicial reform.

## II. LEGAL FRAMEWORK FOR CHINESE ARBITRATION LAW AND THE “DUAL-TRACK SYSTEM”

To understand the procedural power of arbitrators under Chinese law, it is necessary to understand the two basic aspects of Chinese arbitration law: the legal framework for Chinese arbitration law and the special “dual-track system” codified in Chinese arbitration law.

### A. The Legal Framework for Chinese Arbitration Law

In short, the legal framework for Chinese arbitration law is composed of persuasive and mandatory authority.<sup>6</sup> Persuasive authority in Chinese arbitration law refers to the 1985 UNCITRAL Model Law on International Commercial Arbitration (1985 Model Law). The 1984 Model Law laid a substantial foundation for the 1994 Arbitration Law of the People’s Republic of China (CAL), China’s only comprehensive arbitration code.<sup>7</sup> Mandatory authority is mainly composed of three branches: international treaties,<sup>8</sup> domestic laws, and the Supreme People’s Court (SPC) judicial interpretations.

The first branch of mandatory authority is the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) which China joined with two reservations.<sup>9</sup> The New York Conven-

6. See Zhao Xiuwen & Lisa A. Kloppenberg, *Reforming Chinese Arbitration Law and Practices in the Global Economy*, 31 U. DAYTON L. REV. 421, 428-435 (2006); Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM. L. & POL’Y J. 403, 409-414 (2006).

7. See John Mo, *Probing the Uniformity of the Arbitration System in the PRC*, 17 J. INT’L ARB. 1, 12 (2000); Zhang Yulin, *Towards the UNCITRAL Model Law — A Chinese Perspective*, 11 J. INT’L ARB. 87, 124 (1994).

8. As this paper focuses on commercial arbitration, such international treaties do not include the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) and many Sino-Foreign bilateral investment treaties (BITs), most of which contain arbitration clauses directing contracting states and their nationals to international arbitration. See INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet> (last visited Aug. 31, 2011) (follow link to see China’s signatory status of the ICSID Convention); MINISTRY OF COMMERCE OF THE PEOPLE’S REPUBLIC OF CHINA DEPARTMENT OF TREATY AND LAW, <http://tfs.mofcom.gov.cn/h/h.html> (last visited Aug. 31, 2011) (for general statistics on Sino-Foreign BITs); see also JINGZHOU TAO, *ARBITRATION LAW AND PRACTICE IN CHINA* 12-15 (The Hague: Kluwer Law Int’l 2005).

9. The New York Convention came into force in China as of 1987 subject to two reservations relating respectively to the application scope and the commercial nature of the awards. See *Status, 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Mar. 10, 2011).

tion takes prevalence over domestic laws when the two bodies of law are in conflict.<sup>10</sup>

The second branch, domestic laws, mainly consist of the CAL and the 1991 Civil Procedure Law of the People's Republic of China as amended in 2007 (CPL), both of which dedicate a chapter exclusively to foreign-related arbitration.<sup>11</sup>

SPC judicial interpretations make up the third branch and are supposed to guide all Chinese courts in handling cases.<sup>12</sup> The SPC judicial interpretations constitute a *de facto* "source" of Chinese arbitration law given their practical influence.<sup>13</sup>

### B. The "Dual-Track System"

In addition to mandatory and persuasive authorities of law, Chinese arbitration law also adopts the "dual-track system." Essentially, this system divides arbitration into "foreign-related arbitration" and "domestic arbitration." The "dual-track system" determines whether any foreign element is involved in the dispute, and treats them accordingly.<sup>14</sup> Although the term "dual-track system" *per se* never

10. Civil Procedure Law of the People's Republic of China (promulgated by the Nat'l People's Cong. Apr. 9, 1991, effective Apr. 9, 1991), art. 236, translated at [www.lawinfochina.com](http://www.lawinfochina.com) (search for the English title of the document using the English translation search) [hereinafter LAWINFOCHINA] (last visited Oct. 6, 2011) [hereinafter CPL].

11. Arbitration Law of the People's Republic of China, Ch. 7 (promulgated by the Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995) [hereinafter CAL], translated in LAWINFOCHINA; CPL, *supra* note 10, Ch. 28.

12. See Mark Lin, *Supreme People's Court Rules on PRC Arbitration Issues*, 24 J. INT'L ARB. 597, 597 (2007) (holding that SPC interpretations are gaining importance in judicial practice and suggests that they constitute laws).

13. In practice, SPC judicial interpretations can be generally divided into four types: (1) those that require local courts to abide by the New York Convention provisions, such as *The SPC Notice on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which China Has Acceded* (SPC Judicial Interpretation No. 1987-5, adopted on Apr. 10, 1987); (2) those to guide local courts to deal with foreign-related arbitration, such as *The SPC Notice on Issues Related to the Handling of Foreign-related Arbitration and Foreign Arbitration* (SPC Judicial Interpretation No. 1996-18, adopted on Aug. 28, 1995); (3) those to provide interpretation of CAL or CPL to guide the local courts to correctly apply these laws, such as *The SPC Interpretation on Certain Issues Relating to the Application of the Arbitration Law of the People's Republic of China* (SPC Judicial Interpretation No. 2006-7, adopted on Aug. 23, 2006); *The SPC Notice on Certain Issues Relating to the Implementation of the Arbitration Law of the People's Republic of China* (SPC Judicial Interpretation No. 1997-4, adopted on Mar. 26, 1997); and *The SPC Opinions Regarding Various Issues Arising from the Application of the Civil Procedural Law of 1991* (SPC Judicial Interpretation No. 1992-22, adopted on July 14, 1992); (4) those to make special arrangements between Mainland China and Hong Kong and Macao Special Administrative Regions, such as *The SPC Arrangement on Mutual Recognition and Enforcement of Arbitral Awards between Mainland and Hong Kong Special Administrative Region* (SPC Judicial Interpretation No. 2000-3, adopted on Jan. 24, 2000); *The SPC Arrangement on Mutual Recognition and Enforcement of Arbitral Awards between Mainland and Macao Special Administrative Region* (SPC Judicial Interpretation No. 2007-17, adopted on Dec. 12, 2007). For more such SPC judicial interpretations, refer to Jian Zhou, *Judicial Intervention in International Arbitration: a Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM. L. & POL'Y J. 403, 421 (2006); Lin, *supra* note 12 at 587-99.

14. Chinese law does not contain a clear definition of the term "foreign-related arbitration," but according to art. 304 of SPC Judicial Interpretation No. 1992-22, a case is "foreign-related" if (1) one of or both parties are foreign nationals, stateless persons or foreign companies or organizations; or (2) the legal actions leading to the formation, amendment or termination of a legal relationship occurred in

formally appears in China's arbitration law, the definition can still be ascertained from many aspects of Chinese law and practices.<sup>15</sup> For the purpose of this current study, this paper only focuses on foreign-related arbitration.

### III. POWER OF MAKING JURISDICTIONAL DECISIONS

When challenges to the jurisdiction of an arbitral panel arise in international arbitration—on grounds ranging from the validity of an arbitration agreement to the composition of an arbitral panel—the competence-competence doctrine vests power in arbitrators to determine their jurisdiction. As explained below, in China, however, the competence-competence doctrine does not necessarily give arbitrators the power to determine their jurisdiction when compared to international practice.

#### *A. The International Practice*

It can hardly be denied that the competence-competence doctrine has been well established in international commercial arbitration over time.<sup>16</sup> The competence-competence doctrine often goes hand in hand with the doctrine of the separability of arbitration agreements, and leading arbitration rules usually recognize both doctrines simultaneously. Further, many international instruments, domestic laws, and leading arbitration rules have codified the competence-competence doctrine. For instance, Article 23(1) of the 2010 UNCITRAL Arbitration Rules (2010 UNCITRAL Rules) states:

The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

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a foreign country; or (3) the subject matter is located in a foreign country. Besides, Hong Kong and Macau Special Administrative Regions and Taiwan are all deemed under Chinese law as "foreign."

15. In practice, there are various aspects of the "dual-track system" in Chinese arbitration. For instance, in "foreign-related arbitration," only the intermediate courts can make decisions on jurisdictional challenges and issue interim measures; but in domestic arbitration, such courts are basic-level courts. Besides, the two types of arbitration are subject to different judicial review standards in the enforcement stage: domestic arbitral awards may be rejected for enforcement on substantive grounds, particularly the incorrect application of law by the arbitrators, but foreign-related arbitral awards may only be rejected on procedural grounds as provided in the New York Convention. See Jian Zhou, *supra* note 5, 445-450 (detailing the "dual track system"); see also An Chen, *On the Supervision Mechanism of Chinese Arbitration Involving Foreign Elements and Its Tallying of International Practice*, 14 J. INT'L ARB. 39, 41-75 (1997); Wang Wenyong, *Distinct Features of Arbitration in China: A Historical Perspective*, 23 J. INT'L ARB. 49, 60-71 (2006); Chi Manjiao, *Drinking Poison to Quench Thirst: The Discriminatory Arbitral Award Enforcement Regime under Chinese Arbitration Law*, 39 HONG KONG L. J. 541, 546-548 (2009).

16. The competence-competence doctrine essentially states that arbitrators shall have the power to rule on their own jurisdiction. See EMMANUEL GAILLARD & JOHN SAVAGE, *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* 396 (KLUWER LAW INT'L, 1999).

Similar provisions are incorporated in the 1985 Model Law,<sup>17</sup> the 2006 Amendment to the 1985 Model Law (2006 Model Law),<sup>18</sup> and many leading institutional arbitration rules.<sup>19</sup>

### *B. The Chinese Practice*

Chinese arbitration law only partly recognizes the competence-competence doctrine, which deserves careful review.

#### *1. CAL and the Competence-Competence Doctrine*

Unlike Article 23(1) of the 2010 UNCITRAL Rules, CAL does not clearly provide that arbitrators have competence to decide their own jurisdiction regardless of the validity or existence of the underlying contract. In fact, the competence-competence doctrine as codified in CAL—if it does indeed exist—is quite “unique.” Article 19 of the CAL states:

An arbitration agreement stands on its own. Modification, rescission, termination of the contract or its being declared invalid does not affect the arbitration agreement's validity. The arbitration tribunal has the power to confirm the validity of the contract.

Article 19 deserves a careful reading because the first two sentences recognize the doctrine of the separability of the arbitration agreement by drawing a clear distinction between an arbitration agreement contained within the underlying contract—which seems to conform to the international practice.<sup>20</sup> However, the last sentence deviates from the international practice because arbitrators are only allowed to confirm the validity of the contract but not the arbitration agreement. Because Article 19 is silent on arbitrators' ability to determine their competence, a procedural question naturally arises: who should make jurisdictional decisions under Chinese law?

The above question is partly answered by Article 20 of the CAL, which deals exclusively with the situation where the parties challenge the validity of the arbitration agreement. The relevant part of Article 20 reads:

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17. Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL), G.A. Res 40/72, U.N. Doc. A/RES/40/72, art.16 (1) (Dec. 11, 1985) [hereinafter 1985 Model Law], available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf).

18. Revised Articles of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL), G.A. Res 61/33, U.N. Doc. A/RES/61/33, art.16 (1) (Dec. 18, 2006) [hereinafter 2006 UNCITRAL Model Law], available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf>.

19. ICC Rules, *supra* note 3, art. 6.2; LCIA Rules, *supra* note 3, art. 23.1; WIPO Rules, *supra* note 3, art. 36(a); HKIAC Rules, *supra* note 3, art. 20.1; AAA Rules, *supra* note 3, art. 15.1; SIAC Rules, *supra* note 3, art. 25.2.

20. See Gu Weixia, *China's Search for Complete Separability of the Arbitral Agreement*, 3 ASIAN J. INT'L ARB. 163, 173 (2007).

Where a party raises the challenge to the validity of the arbitration agreement, he may request the arbitration commission to make a decision or the people’s court to make a judgment. Where one party requests the arbitration commission to make a decision while the other party requests the people’s court to make a judgment, the people’s court shall make a judgment.

Article 20 permits the challenging party to allocate jurisdictional power to either the arbitration institutions or the court to determine the validity of the arbitration agreement. The court, however, automatically has jurisdictional power to determine the validity of the arbitration agreement under Article 20 if the parties cannot agree upon whether the arbitration institutions or the court has jurisdictional power.

## 2. SPC and the Competence-Competence Doctrine

Due to the “dual-track system” in Chinese arbitration law, Articles 19 and 20 of the CAL are further clarified and supplemented by the SPC judicial interpretations that deal exclusively with foreign-related arbitration. First, SPC Judicial Interpretation No. 2006-7 addresses the question of the court’s competence to determine a jurisdictional challenge by stating that only intermediate courts have the power to make jurisdictional decisions.<sup>21</sup> Second, SPC Judicial Interpretation No. 1995-18 addresses the question of procedures in such challenges by establishing the “pre-reporting scheme.”<sup>22</sup> Under this scheme, if an intermediate court negatively rules on a jurisdictional challenge for lack of a valid or executable arbitration agreement, it must automatically report to the competent high court. If the high court upholds the intermediate court’s decision, the higher court must report to the SPC for a final decision.<sup>23</sup> This scheme substantially marginalizes the jurisdictional power of the lower courts because it subjects the intermediate

21. Zuigao renmin fayuan guanyu shiyong (zhonghua renmin gongheguo zhongcai fa) ruogan wenti de jieshi [Interpretation of the Supreme People’s Court concerning Some Issues on Application of the Arbitration Law of the People’s Republic of China] (promulgated by the Sup. People’s Ct., Dec. 26, 2005, effective Aug. 23, 2006), translated in LAWINFOCHINA (last visited Sep. 29, 2011) [hereinafter SPC Judicial Interpretation No. 2006-7], art. 12, ¶ 2. According to this SPC Judicial Interpretation, the intermediate court could be that of the place 1) where the arbitration institution is located; or 2) where the arbitration agreement is concluded; or 3) where the domicile of the applicant is located; or 4) where the domicile of the respondent is located.

22. See Zuigao renmin fayuan guanyu shiyong “zhonghua renmin gongheguo zhongcai fa” ruogan wenti de jieshi [Sup. People’s Ct. Notice on Issues Related to the Handling of Foreign-related Arbitration and Foreign Arbitration] (promulgated by the Sup. People’s Ct., Aug. 28, 1995, effective Aug. 28, 1995), translated in LAWINFOCHINA (last visited Sep. 29, 2011) [hereinafter SPC Judicial Interpretation No. 1995-18], art. 1, 2 (this SPC Judicial Interpretation contains two provisions dealing with jurisdictional challenge (art. 1) and rejection of the enforcement of awards (art. 2) respectively); see also Zuigao renmin fayuan guanyu tiaozheng zhongguo renmin gongheguo minshi susong fa “de shunxu bianhao fayuan de jue ding, yin sifa jieshi ji qita wenjian [Decision of the Supreme People’s Court on Adjusting the Sequential Number of the Articles of the Civil Procedure Law of the People’s Republic of China Cited in Judicial Interpretations and Other Documents] (promulgated by the Sup. People’s Ct., Dec. 16, 2008), translated in LAWINFOCHINA (last visited Sep. 29, 2011) [hereinafter SPC Judicial Interpretation No. 2008-18] (Article 2 of the SPC Judicial Interpretation No. 1995-18 has been amended, but art. 1 remains effective.).

23. SPC Judicial Interpretation No. 1995-18, *supra* note 22, art. 1.



courts' decisions to review if the immediate courts' negatively rule on the jurisdictional challenge concerning the arbitration agreement. Consequently, intermediate courts must issue an affirmative ruling on jurisdictional challenges to prevent their decisions from automatically being reviewed by the higher court and possibly the SPC.

*a. Comments on the CAL, SPC, and the Competence-Competence Doctrine*

Several observations can be drawn from the analysis of the above provisions. First, they deprive arbitrators of their power of making jurisdictional decisions, but grant such power to arbitration institutions and intermediate courts, with the SPC retaining the final say.<sup>24</sup> Such provisions constitute a *de facto* exclusion of the competence-competence doctrine. Second, they restrict the legal grounds for raising jurisdictional challenges to non-existent, invalid and non-executable challenges against the arbitration agreement while excluding other grounds such as improper composition of the arbitral tribunal. While such procedural defects may, in theory, be "cured" in the award enforcement stage should the injured party apply for rejection or to set-aside the award, such judicial remedy would often be too late and costly to the injured party. Third, the provisions contain a hidden defect because the provisions allow parties to freely choose the decision-maker of the jurisdictional challenge. This is problematic because the process allows the parties to choose whether they would like to submit their challenge to the arbitration institutions or to the court. As a consequence, a challenging party can exclude the arbitration institution if they choose to raise their challenge to the court. Given that court proceedings are generally more rigid and time-consuming than arbitral proceedings and that the "pre-reporting scheme" is particularly lengthy, there is a risk that parties will abuse Articles 19 and 20 of the CAL by intentionally delaying or frustrating the arbitration process.<sup>25</sup>

Additionally, these provisions also put Chinese arbitration institutions in an awkward situation. On the one hand, arbitration institutions need to recognize the competence-competence doctrine to keep their rules and practice abreast with international practice and enhance their global competitiveness. On the other hand, they must make sure that their rules conform to the mandatory CAL provisions, which essentially go against the competence-competence doctrine. To cope with this tension, many Chinese arbitration institutions make "special arrangements"<sup>26</sup> which is evident in CIETAC.

24. Andrew Shields, *China's Two-Pronged Approach to International Arbitration: New Rules and New Law*, 15 J. INT'L ARB. 67, 69 (1998).

25. See Chi Manjiao, *Is Chinese Arbitration Law Arbitration-Friendly? — Determining the Validity of Arbitration Agreement under Chinese Law*, 4 ASIAN J. INT'L ARB. 104, 118-19 (2008).

26. See CIETAC Rules, *supra* note 3, art. 6 (1); Beijing Arbitration Commission Rules, art. 6 (3)-(4) (2008) [hereinafter BAC Rules], available at <http://www.bjac.org.cn/en/arbitration/index.html> (last visited Oct. 9, 2011); Shenzhen Arbitration Commission Rules art. 12 (2008) [hereinafter SZAC Rules], available at <http://www.szac.org/en/service/rule.aspx?MenuID=02030305> (last visited Oct. 9, 2011); Shanghai Arbitration Commission Rules, art. 12 (2005) [hereinafter SHAC Rules], available at <http://www.accsh.org.cn/accsh/english/node67/node68/index.html> (last visited Oct. 9, 2011) (The SHAC Rules only recognize that the SHAC can make jurisdictional decisions but are silent as to whether such power can be delegated to the arbitrators).

### 3. CIETAC and the Competence-Competence Doctrine

CIETAC is the leading arbitration institution in China and it handles a large sum of cases each year.<sup>27</sup> The jurisdictional provision of the CIETAC Rules reads, “CIETAC shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. CIETAC may, if necessary, delegate such power to the arbitral tribunal.”<sup>28</sup> The first sentence of this provision confirms the position of CAL, but the second sentence partly adopts the competence-competence doctrine by allowing CIETAC arbitrators to make jurisdictional decisions with its authorization. By doing so, CIETAC plays “edge ball.”<sup>29</sup>

There are several hidden defects in this construction. First, the authorization is neither general nor automatic but is granted on a case-by-case basis, which lacks predictability and reliability in practice. Second, and perhaps more fundamental when considering that arbitration rules must conform to the mandatory rules of the *lex loci arbitri*, it remains unclear whether CIETAC can legally delegate its jurisdictional power to arbitrators. CAL is silent as to if and to what extent the arbitration institutions can delegate its jurisdictional power to arbitrators. However, one may sense that the CIETAC Rules in various provisions is quite cautious and generally retains procedural power for itself. For instance, arbitrators do not have power to grant interim measures and arbitration institutions must submit such a request to the court. A reason for this process is to prevent a multi-member tribunal from determining whether arbitration should continue when an arbitrator withdraws from the tribunal. In this case, the CIETAC’s director will rule whether the arbitration proceedings should continue instead of the remaining tribunal members.<sup>30</sup>

Interestingly, such arrangements have not been challenged in the award enforcement stage for practical considerations because parties could have raised the challenge to the court if they had ever wanted to avoid the delegation of power. This arrangement may still be criticized on the ground that arbitrators but not arbitration institutions are in a better position to make jurisdictional decisions because they are the persons who really know about and deal with the dispute. It is this reason that some commentators have suggested that “Kompetenz-Kompetenz is painted with Chinese characteristics in CIETAC arbitration,”<sup>31</sup> and that China is “the only country” that adopted legislation “in open contradiction to the competence-competence principle.”<sup>32</sup> Despite the legality of CIETAC delegating juris-

27. See Introduction, CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, [www.cietac.org/index.cms](http://www.cietac.org/index.cms) (last visited Sep. 4, 2011).

28. CIETAC Rules, *supra* note 3, art. 6 (1).

29. “Edge ball” is a phrase often used in Chinese games to describe a situation where a ball lands on the out-of-bounds marker of a court. Such a scenario creates a gray area in the game’s rules regarding whether the ball is legally playable. Similar to the gray area that “edge ball” creates in a game’s rules, CIETAC’s act of delegating power to arbitrators is “edge ball” in Chinese law because the law is not clear whether CIETAC can legally do so.

30. CIETAC Rules, *supra* note 3, art. 28.

31. Yulin, *supra* note 7, at 108.

32. Antonias Dimolitsa, *Separability and Kompetenz-Kompetenz*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 231 (Albert J. Van Den Berg, Kluwer Law Int’l, 1998).

dictional power to arbitrators, it is still questionable whether arbitrators can truly exercise such power independently. Although CAL provides that arbitration shall be conducted independently<sup>33</sup> and that arbitration institutions are independent organs,<sup>34</sup> the independence of these institutions is doubtful<sup>35</sup> because CIETAC maintains close relations with government agencies.<sup>36</sup>

### C. Comparing International Arbitration to Arbitration Under Chinese Law

In modern international arbitration, the competence-competence doctrine has been well established. This doctrine is fundamental because it not only respects the autonomy of arbitrators and the private nature of arbitration; it also helps avoid pre-enforcement judicial interference into arbitration, which is essential for the maintenance of the efficiency, flexibility and autonomy of arbitration. CAL, on the other hand, does not fully and truly recognize the competence-competence doctrine. Instead, CAL allocates the jurisdictional power to arbitration institutions and courts, improperly grants courts too much power which could invite premature judicial interference into arbitration, and creates a legal framework that potentially permits parties to abuse jurisdictional power. Although some arbitration institutions may delegate their statutory jurisdictional power to their arbitrators, this delegation of power is questionable concerning its lack of predictability, legality, and real efficacy.

## IV. POWER OF MAKING APPLICABLE LAW DECISIONS

Applicable law plays a fundamental role in deciding the result of arbitration. Almost all leading arbitration instruments contain certain forms of applicable law provisions, which essentially deal with two major aspects: what law should be applied to solve the dispute and how such law should be identified. The first aspect explores the sources of applicable law, which could be roughly categorized as three types: international law rules, domestic law rules, and supranational or a-national rules which belong to no state such as trade usages or *lex mercatoria*.<sup>37</sup>

33. CAL, *supra* note 11, art. 8.; CPL, *supra* note 10, art. 8.

34. CAL, *supra* note 11, art. 14.; CPL, *supra* note 10, art. 14.

35. The level of independence of the arbitration institutions in China is quite low for various reasons: they used to be affiliated organs of state administrative organs, they are financially dependent on government budgets, and their high-ranking leadership positions are often held by public officers. However, it is suggested that Beijing Arbitration Commission (BAC), a prominent local arbitration institution in China, has largely achieved independence particularly because of its wise and strong leadership. See Fuyong Chen, *Striving for Independence, Competence and Fairness: A Case Study of the Beijing Arbitration Commission*, 18 AM. REV. INT'L ARB. 313, 351 (2007).

36. Although there are no legislative documents that expressly establish formal relations between CIETAC and government organs, such relations can be shown by many other aspects. For instance, CIETAC is under the leadership of the Chinese Council for Promotion of International Trade (CCPIT), a state administrative organ, while the President of CCPIT is also the Director of CIETAC; the leadership of CIETAC is also largely composed of high-ranking civil servants of China. See Russell Thirgood, *A Critique of Foreign Arbitration in China*, 17 J. INT'L ARB. 89, 97-98 (2000).

37. For a general discussion on the topic of *lex mercatoria*, see generally KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* (The Hague: Kluwer 1999); Ralf Michaels, *The True Lex Mercatoria: The Law beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 447 (2007); Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2

The second aspect explores whether arbitrators can freely make applicable law decisions (choice-of-law power). If arbitrators freely have a choice-of-law power, to what extent can they exercise such power. This Part will focus on the choice-of-law power of arbitrators under Chinese law.

### A. *The International Practice*

The extent to which arbitrators may exercise their choice-of-law power varies depending on the applicable arbitration laws and rules. At the international level, there are three major patterns, which are briefly summarized below.

#### 1. *Unlimited Choice-of-Law*

The first pattern grants the arbitrators “unlimited choice-of-law power,” which is adopted exclusively in arbitration *ex aequo et bono* or *amiable compositeurs*.<sup>38</sup> Under this pattern, the arbitrators do not necessarily need to base their awards on any specific rule(s) or law(s) of any state. Rather, they are allowed to decide the dispute according to the legal principles they believe are just such as the principles of equity or good faith. At the global level, many leading arbitration rules and laws allow such arbitration as long as the parties expressly consent to arbitrators’ “unlimited choice-of-law power.”<sup>39</sup> It is fair to say that this pattern represents the highest level of choice-of-law power available in practice.

#### 2. *Substantive Choice-of-Law*

The second pattern grants the arbitrators “substantive choice-of-law power,” which allows them to directly decide the substantive law without necessarily resorting to any conflict-of-laws rule(s). A typical example of this pattern employs such terms as “the arbitrators may apply the law or rules of law they deem appropriate.” Similar terms are found in the newly adopted 2011 French Arbitration Law and the newly revised 2010 UNCITRAL Rules, both of which provide that arbitrators shall decide the disputes according to “the rules of law they deem appropriate” absent parties’ choice.<sup>40</sup>

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EMORY J. INT’L DISP. RESOL. 235, 235 (1987); Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B. U. INT’L L. J. 317, 317 (1984); Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT’L & COMP. L.Q. 747, 747 (1985); Michael Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, 4 ARB. INT’L 86, 86 (1988).

38. Mauro Rubino-Sammartano, *Amiable Compositeur (Joint Mandate to Settle) and Ex Bono et Aequo (Discretionary Authority to Mitigate Strict Law): Apparent Synonyms Revisited*, 9 J. INT’L ARB. 5, 14 (1992) (“*Amiable compositeur* and *ex bono et aequo* are frequently held to be synonyms. This basically derives from French law, which construes the role of *amiable compositeur* as that of deciding *en équité* (in equity)”).

39. ICC Rules, *supra* note 3, art. 17(3); LCIA Rules, *supra* note 3, art. 22(4); WIPO Rules, *supra* note 3, art. 59(a); HKIAC Rules, *supra* note 3, art. 31(2); AAA Rules, *supra* note 3, art. 28(3); 2010 UNCITRAL Rules, *supra* note 3, art. 35(2); SCC Rules, *supra* note 3, art. 22(3); SIAC Rules, *supra* note 3, art. 27(2).

40. The décret n° 2011-48 portant réforme de l’arbitrage [Law 2011-48 of January 13, 2011 regarding Reform of Arbitration], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 14, 2011, p. 777; 2010 UNCITRAL Rules, *supra* note 3, art. 35(1).

Similarly, before the adoption of the International Chamber of Commerce Rules (ICC), eminent ICC arbitrators have been well aware that they “are not bound to apply the rules of conflict of one country rather than another,” and suggested that they “are not subject to binding rules of conflict or substantive rules requiring compulsory application” and that “there is no system regulating international private law relations that is specific to international arbitration.”<sup>41</sup> It is perhaps for such reasons that the ICC Rules expressly provide that “. . . the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.”<sup>42</sup> Similar provisions may also be found in other leading arbitration rules.<sup>43</sup>

### 3. Procedural Choice-of-Law

The third pattern grants arbitrators “procedural choice-of-law power.” This means that arbitrators cannot directly decide the substantive law to settle a dispute but can choose the conflict of laws rule(s) to settle the dispute. Compared to the first and the second patterns this pattern grants less of a choice-of-law power to arbitrators. Typical examples of this pattern might employ clauses like “the arbitrators may apply the law directed by the conflict-of-laws rules they deem appropriate.” For example, the 1985 Model Law provides that “. . . the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”<sup>44</sup> An identical provision also appears in the 2006 Amendments of the Model Law (2006 Model Law).<sup>45</sup> Similar provisions can also be found in the 1961 European Convention on International Commercial Arbitration,<sup>46</sup> and the 1996 English Arbitration Act.<sup>47</sup>

A recent trend has emerged in international arbitration to broaden arbitrators’ choice-of-law power. In this regard, the “pattern-switch” of the applicable law provisions of the UNCITRAL Rules is particularly noteworthy. Originally, the applicable law provision of the 1976 UNICITRAL Rules merely granted the arbitrators “procedural choice-of-law power” (the second pattern), which in relevant part reads that “. . . the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”<sup>48</sup> However, as mentioned above, this provision was recently revised and the 2010 UNICITRAL Rules clearly switched to the third pattern to grant the arbitrators “substantive choice-of-law power.” The implication of such “pattern-switch” could be quite far-reaching if

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41. Yves Derains, *The Role of the UNIDROIT Principles in International Commercial Arbitration (1): A European Perspective*, ICC INT’L COURT ARB. BULL. 9, 12 (Supp. 2002).

42. ICC Rules, *supra* note 3, art. 17(1).

43. LCIA Rules, *supra* note 3, art. 22(3); AAA Rules, *supra* note 3, art. 28(1); WIPO Rules, *supra* note 3, art. 59(a); HKIAC Rules, *supra* note 3, art. 31(1); SCC Rules, *supra* note 3, art. 22(1); SIAC Rules, *supra* note 3, art. 27(1).

44. UNICTRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 28(2) (1985).

45. UNICTRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 28(2) (2006).

46. European Convention on International Commercial Arbitration, art. VII(1), Apr. 21, 1961, 484 U.N.T.S. 349.

47. English Arbitration Act, 1996 c. 23, § 46 (Eng.).

48. 1976 UNICTRAL Rules, *supra* note 3, art. 33(1).

one considers the profound and wide influence of the UNCITRAL Rules in international *ad hoc* arbitration and domestic law-making undertakings.<sup>49</sup>

### B. The Chinese Practice

The “Chinese pattern” is fundamentally different when compared to the above three prevailing patterns. It is important to note at the outset that Chinese law does not grant the arbitrators “unlimited choice-of-law power” because arbitration *ex aequo et bono* or *amiables compositeurs* is prohibited in China.<sup>50</sup> Thus this paper will only compare the “Chinese pattern” with the second and the third patterns.

An example of the “Chinese pattern” is in the CAL. Article 7 of the CAL states, “The dispute shall be settled on the basis of the facts, in accordance with the law and in a fair and reasonable manner.” The position of CAL is followed by arbitration rules in China.<sup>51</sup> For example, the CIETAC Rules do not contain a clearly-defined applicable law provision. However, they do contain characteristics of an applicable law provision in Article 43 which is titled “The Making of the Arbitral Award.” Article 43(1) states:

The arbitral tribunal shall independently and impartially make its arbitral award on the basis of the facts, in accordance with the law and the terms of the contracts, with reference to international practices and in compliance with the principle of fairness and reasonableness.

It is important to point out that the CIETAC Rules require arbitrators to consider several different types of grounds when making awards, namely: (1) the facts, (2) the law and the terms of contract, (3) international practices, and (4) the principle of fairness and reasonableness. Although it is clear that “law” is one of the grounds for the awards, it is unclear as to how arbitrators can identify such law. This provision neither grants the choice-of-law power to nor provides any operable guidance for arbitrators to make applicable law decisions. Given the vagueness of this provision, it is imperative to explore the applicable law identification process in CIETAC arbitration. This process could be quite complicated and involve several steps depending on individual cases.

In general, after CIETAC arbitrators confirm their jurisdiction over a case, they have a duty to settle the dispute in accordance with “the law” as required by the CIETAC Rules and CAL. Here, two possibilities exist. The first is that the law chosen by parties shall be applied if there is a choice-of-law agreement unless it violates the mandatory rule of Chinese law. The second (and most usual) possibil-

49. Pieter Sanders, *UNCITRAL’s Model Law on International and Commercial Arbitration: Present Situation and Future*, 21 ARB. INT’L 443, 443 (2005) (“...some 50 states from all parts of the world have adopted the ML for their national arbitration legislation. The ML was conceived for international commercial arbitration, but a large number of states adopted the ML also for domestic arbitration.”).

50. Though no express prohibition of Arbitration *ex aequo et bono* or *amiables compositeurs* can be found in Chinese law, according to art. 7 of CAL, it is a mandatory obligation for the arbitrators to adjudicate the case “on the basis of facts, in conformity with law and in a just and reasonable manner.” Such a provision sets up a *de facto* ban on Arbitration *ex aequo et bono* or *amiables compositeurs*.

51. CIETAC Rules, *supra* note 3, art. 43(1); BAC Rules, *supra* note 26, art. 60(2); SHAC Rules, *supra* note 26, art. 5; SZAC Rules, *supra* note 26, art. 5.

ity is that, should there be no existing choice-of-law agreement, arbitrators must identify the applicable law to settle the dispute. It is at this point that the Chinese law system comes into play.

Because the CIETAC Rules grant neither “substantive choice-of-law power” nor “procedural choice-of-law power” to arbitrators, the first step of the applicable law identification process would be to identify the applicable conflict-of-laws rule(s). Yet, as the CIETAC Rules provide no conflict-of-laws rule, arbitrators must turn to the *lex loci arbitri* for guidance. Concerning conflict-of-laws rule(s), although CAL and CPL are the most pertinent domestic laws in the field of foreign-related arbitration, neither of them provides operable conflict of laws rules. Such a vacuum is filled by the 1999 Contract Law of the People’s Republic of China (CCL), the 1986 General Principles of the Civil Law of the People’s Republic of China as amended in 2009 (GPCL) and the newly adopted 2010 Law on the Applicable Laws in Foreign-Related Civil Relations of the People’s Republic of China (LAL).<sup>52</sup> All of these laws provide that in the absence of parties’ choice, “the law that has the closest connection with the contract” shall be applied (closest connection formula).<sup>53</sup> As suggested by some Chinese scholars, this formula has evolved into the most prominent conflict-of-laws rule in Chinese private international law, particularly in the field of contract law.<sup>54</sup>

Under Chinese law, the “closest connection formula” is not a single rule to be applied at the arbitrators’ discretion; on the contrary, it stands for a cluster of conflict-of-laws rules according to the SPC Judicial Interpretation No. 2007-14.<sup>55</sup> This judicial interpretation divides foreign-related contracts into 17 general types, and designs 19 conflict- of-laws rules to deal with each of these types respectively.<sup>56</sup> Such a division is based on the “characteristic performance” test.<sup>57</sup> For instance, the state where the seller’s domicile is located at the conclusion of the contract is considered to have the closest connection with an international sales contract, and thus such state’s law will control.<sup>58</sup> However, in a dispute involving a foreign-related construction contract, the controlling law will be that of the state

52. The LAL was adopted by the 17<sup>th</sup> Session of the Standing Committee of the 11<sup>th</sup> National People’s Congress on October 28, 2010 and will come into effect as from April 1, 2011.

53. Zhongguo renmin gongheguo hetong fa [Contract Law of the People’s Republic of China] [hereinafter CCL], translated in LAWINFOCHINA (last visited Oct. 6, 2011) (will come into effect from April 1, 2011); Zhonghua renmin gongheguo minfa tongze [General Principles of Civil Law of the People’s Republic of China] (promulgated by the Arb. Int’l Congr., Aug. 27, 2009), art. 145 [hereinafter GPCL], translated in LAWINFOCHINA (last visited Oct. 6, 2011); Zhong hua ren min gong he guo she wai min shi guan xi fa lu shi yong fa [Law of the Application of Law for Foreign-Related Civil Relations of the People] (promulgated by the Standing Comm. Nateign-Related Civil Relations of the People in a fair and), art. 2 [hereinafter LAL], translated in LAWINFOCHINA (last visited Sep. 30, 2011).

54. See Yu Shuhong, Xiao Yongping & Wang Baoshi, *The Closest Connection Doctrine in the Conflict of Laws in China*, 8 CHINESE J. INT’L LAW 423, 424-426 (2009).

55. See gao ren min fa yuan guan yu shen li she wai min shi huo shang shi ge tong jiu fen an jian fa lu kuo yong re gan wen ti de gui ding [Rules of the Supreme People’s Court on the Relevant Issues Concerning Application of Law in Dealing with Foreign-Related Civil and Commercial Disputes] (promulgated by the Sup. People’s Ct., effective Aug. 8, 2007), translated in LAWINFOCHINA [hereinafter 2007 SPC Interpretation].

56. *Id.*

57. Shuhong, Yongping, & Baoshi, *supra* note 54, at 428.

58. 2007 SPC Interpretation, *supra* note 55, art. 5(1).

where the construction site is located.<sup>59</sup> As an exception, only when a contract falls beyond the prescribed types and is not covered by the prescribed conflict-of-laws rules, can the arbitrators exercise their discretion to decide the applicable law.<sup>60</sup>

Normally, arbitrators will be directed to the applicable substantive law almost “automatically” after the conflict-of-laws rule is decided. There are times when an unusual situation occurs, however. In such situations, if arbitrators are directed to the law of a state which has more than one legal system, the application of regional conflict-of-law rule(s) may be needed, which could further complicate the applicable law identification process. On this issue, LAL clearly provides that if arbitrators are directed to the law of a country with more than one legal jurisdiction, they must apply the law of the jurisdiction with which the dispute bears “the closest connection.”<sup>61</sup>

### *1. Conflict in a Multi-Jurisdictional China*

Interestingly, China itself became a multi-jurisdictional country after the handover of Hong Kong in 1997 and Macao in 1999 according to the “one country, two systems” policy codified in international instruments and domestic laws.<sup>62</sup> This invites potential difficulty to the applicable law determination. For example, in the field of international sales contract, the 1980 United Nations Convention on Contracts for Sale of Goods (CISG) is probably the most important of any uniform law instruments.<sup>63</sup> China ratified CISG in 1986 with two reservations and CISG came into force in China since 1988.<sup>64</sup> However, China did not file a suitable depositary notification pertaining to the status of the CISG in Hong Kong with the United Nations Secretary General after the handover.<sup>65</sup> China’s failure to properly file makes the application of the CISG in Hong Kong controversial<sup>66</sup> and possibly inapplicable on this ground.<sup>67</sup>

59. *Id.* at art. 5(10).

60. *Id.* at art. 5.

61. LAL, *supra* note 53, art. 6.

62. See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, P.R.C.-U.K., art. 3(3), Dec. 19, 1984, available at <http://www.fmprc.gov.cn/eng/ljzg/3566/t25956.htm>; Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu Jibenfa [Basic Law of the Hong Kong Special Administrative Region] (promulgated by the Standing Comm. and the Government of the People’s Republic of China, effective July 1, 1997), pmbl., arts. 2 & 5 (China), available at <http://www.fmprc.gov.cn/eng/wjb/zzjg/tyfl/2626/t15466.htm>.

63. By July 29, 2011, there were 77 state parties to CISG. The status of CISG is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html) (last visited Aug. 24 2011).

64. China’s reservations on CISG concern respectively the application scope of CISG (art. 1(1)(b)) and the formal requirement of contract (art. 11). See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

65. See Xiao Yongping & Long Weidi, *Selected Topics on the Application of CISG in China*, 20 PACE INT’L L. REV. 61, 62 & n. 2 (2008).

66. *Id.* at 61-84; see also Ulrich G. Schroeter, *The Status of Hong Kong and Macao under the United Nations Convention on Contracts for the International Sale of Goods*, 16 PACE INT’L L. REV. 307, 312-32 (2004).

67. For instance, in the Telecommunications Products Case, the dispute concerns an international sales contract between a French party and a Hong Kong Party. The French Cour de Cassation held that



## 2. Identification of the Rules

Finally, even if arbitrators successfully identify the suitable applicable substantive law, this is not the end of the process. As “applicable law” generally refers to the state law system as a whole,<sup>68</sup> arbitrators may still need to identify the exact rule(s) of that law to settle the dispute. At this point, arbitrators are allowed to exercise their choice-of-law power. For instance, if Chinese contract law is to be applied, arbitrators may exercise their discretion to pick up the suitable rule(s) to settle the dispute. Yet, this could be a tough job in certain cases considering that Chinese contract law has complicated sources which include, *inter alia*, CCL as the core, relevant laws such as the GPCL, various SPC Judicial Interpretations and numerous local legislations.<sup>69</sup> Also, the speed of China’s legislative and regulatory activities in recent years—fueled by its fast economic growth and imbalanced regional development—may further complicate the process. Generally, upon completing the “four-step process,” the dispute can be settled.

## 3. An Exceptional Situation of the Applicable Law Identification Process

But one should not oversee an exceptional situation where the applicable law does not contain any rule or such a rule is insufficient or ineffective to settle the dispute. Should this situation exist, according to both the CIETAC Rules<sup>70</sup> and GPCL,<sup>71</sup> arbitrators may be free to apply “international practices” or “principle of fairness and reasonableness” to settle the dispute, despite the fact that Chinese law does not provide a clear definition of these terms. For example, in a CIETAC case concerning an international sales contract between a Chinese party and a Korean party, the parties made no choice of law and Korea was not a party to CISG by the time of arbitration.<sup>72</sup> The claimant requested the tribunal to apply the UNIDROIT Principles on International Commercial Contracts (UNIDROIT Principles), but the tribunal rejected this application and decided to apply Chinese contract law

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“According to art. 93 CISG, any Contracting State in which different systems of law are applicable in relation to the matters dealt with in the Convention may declare that the Convention is to extend only to one or more of its territorial units by way of notification to the Secretary General of the United Nations stating expressly the territorial units to which the Convention extends... The People’s Republic of China deposited with the Secretary General of the United Nations a declaration announcing the conventions to which China was a party at that date which should apply to Hong Kong. The CISG did not figure on that list, nor had the CISG applied to Hong Kong before the retrocession of this territory to the People’s Republic of China by the United Kingdom. Thereby, the People’s Republic of China has effectuated with the depositary of the Convention a formality equivalent to what is provided for in art. 93 CISG. Consequently, the CISG is not applicable to the special administrative region of Hong Kong.” See Cour de cassation (Cass.) [supreme court for judicial matters] 1e civ., Apr. 2, 2008, Bull. civ. I, No. 04-17726 (Fr.), available at <http://cisgw3.law.pace.edu/cases/080402f1.html>.

68. See, e.g. COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 42 (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009) (elaborating on the difference between “rule” and “law” or “law of a state” when discussing the applicability of the UNIDROIT Principles by the arbitrators).

69. See Fan Yang, *The Application of the CISG in the Current PRC Law & CIETAC Arbitration Practice*, 2 NORDIC J. COMMERCIAL L. 2, 2-28 (2006).

70. CIETAC Rules, *supra* note 3, art. 43.

71. GPCL, *supra* note 53, art. 142.

72. Contract for International Sale of Goods (P.R.C. v. Republic of Korea)(CIETAC 2007), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=1208&step=Abstract>.

pursuant to the “closest connection formula.”<sup>73</sup> To explain its rejection, the tribunal held that, although UNIDROIT Principles did qualify as “international practices,” they could only be applied “in the absence of relevant rules of the applicable domestic law.”<sup>74</sup> As Chinese contract law contains rules to settle the dispute, there is no justification to resort to “international practices.”<sup>75</sup>

#### 4. *The Chinese Four-Step Process in the Applicable Law Identification Process*

As summarized above, in a typical case, the applicable law identification process under the “Chinese pattern” has four steps, meaning that arbitrators must in turn identify (1) the type of the contract, (2) the applicable conflict of laws rule(s), (3) the applicable substantive law and (4) the exact rule(s) of the applicable substantive law. These four steps are not always clear-cut, but can often be fulfilled in an integral manner in practice. As indicated above, with such a process in place, the space for arbitrators to exercise their choice-of-law power is rather limited; rather, arbitrators’ choice-of-law power can only be exercised in a few exceptional situations.

Although the “four-step process” can enhance the predictability of arbitration, the process has several defects. First, it complicates the applicable law identification process, which puts the efficiency and flexibility of arbitration in danger. Second, it actually confines arbitrators’ choice-of-law power to a few exceptional situations, which puts arbitrators under Chinese law in an inferior position compared with their international counterparts. Third, as this process is established by CCL, GPCL, LAL and the SPC judicial interpretations, it is not tailored for arbitration but applies to both arbitrators and the judges. By blurring the difference between arbitration and litigation, the private nature of arbitration is not sufficiently respected.<sup>76</sup> For these reasons, Chinese law’s restrictions amount to a *de facto* prohibition although Chinese law does not impose a *de jure* ban on arbitrators’ choice-of-law power. Thus one may have reason to say that the “Chinese pattern” actually represents the lowest level of the arbitrators’ choice-of-law power in modern international arbitration.

## V. POWER OF ISSUING INTERIM MEASURES

An interim measure generally refers to a temporary measure issued by either the courts or the arbitral tribunals at any time prior to the issuance of the final award, whether in the form of an award or in another form.<sup>77</sup> In international arbitration, interim measures may have substantial impacts on the final result because they often serve the purposes of protecting the evidence or assets before or during

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73. *Id.*

74. *Id.*

75. *Id.*

76. Chi Manjiao, *Application of the UNIDROIT Principles in China: Successes, Shortcomings and Implications*, 15 UNIF. L. REV. 5, 33 (2010).

77. See 2006 UNCITRAL Model Law, *supra* note 18, art.17(2).

the course of the proceedings.<sup>78</sup> But due to the silence of international treaties and diversified and insufficient domestic laws in this respect, the issue of interim measures has been one of the hurdles for the development of international commercial arbitration in the past decade.<sup>79</sup> It is thus necessary to explore and compare whether and to what extent arbitrators can issue interim measures in China and elsewhere.

### A. *The International Practice*

In international arbitration, there are two major approaches for granting interim measures, which can be roughly referred to as the “judicial approach” and the “concurrent approach.” The judicial approach is quite traditional, meaning that courts retain exclusive power of issuing interim measures while those ordered by arbitrators are proclaimed as inadmissible.<sup>80</sup> This approach is adopted by some domestic laws.<sup>81</sup> More recently, however, interim measures are increasingly relied upon in the practice of international commercial arbitration.<sup>82</sup> To meet the increased practical needs, many states began to recognize the need to allow arbitrators to order interim measures either by explicit provisions of law or agreement of parties.<sup>83</sup> Consequently, the “concurrent approach” has been gradually established and widely accepted, meaning that both courts and arbitrators have the power of issuing interim measures at their own discretion.

A typical manifestation of the “concurrent approach” can be found in the 1985 Model Law. The 1985 Model Law states, “Unless the parties have otherwise agreed, the Arbitral Tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. . . .”<sup>84</sup> The 1985 Model Law approach is revised by the 2006 Model Law. The 2006 Model Law not only confirms the “concurrent approach” but also broadens arbitrators’ freedom by removing the restrictive wording “in respect of the subject-matter of the dispute.” The provision now reads that, “[u]nless otherwise agreed by the parties, the arbitral

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78. See Raymond J. Werbicki, *Arbitral Interim Measures: Fact or Fiction?*, 57 DISP. RESOL. J. 62, 63 (2002); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY & MATERIALS 753-754 (Deventer/Boston: Kluwer Law and Taxation, 1994).

79. See generally Jean-Paul Beraudo, *Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals: A Comparison of the Congo Pre-Arbitral Referee Case*, 22 J. INT’L ARB. 245, 245-250 (2005).

80. See Zhivko Stalev, *Interim Measures of Protection in the Context of Arbitration*, in INTERNATIONAL ARBITRATION IN A CHANGING WORLD 105-108 (Albert J. Van Den Berg ed., Kluwer Law and Taxation 1994).

81. See, e.g., CÓDIGO DE PROCESSO CIVIL [BRAZILIAN CODE OF CIVIL PROCEDURE] arts. 1086-1087; KODIKAS POLITIKIS DIKONOMIAS [GREEK CODE OF CIVIL PROCEDURE] art. 685; ZIVILPROZESSORDNUNG [GERMAN CIVIL PROCEDURE CODE] (ceasing to be effective after The Arbitration Act of Germany came into force in 1998); CODICE DI PROCEDURA CIVILE [ITALIAN CODE OF CIVIL PROCEDURE], art. 818.

82. See U.N. Comm’n Int’l Trade Law (UNCITRAL), *Report of the Working Group on Arbitration on the work of its thirty-second session*, ¶ 13-16, U.N. Doc. A/CN.9/468 (Apr. 10, 2000).

83. See, e.g., WETBOEK VAN BURGERLIJKE RECHTSVORDERING [CODE OF THE CIVIL PROCEDURE OF THE NETHERLANDS], art. 1022; SCHWEIZERISCHES ZIVILGESETZBUCH [SWISS CIVIL PROCEDURE CODE], art. 183; BURGERLIJK WETBOEK [BELGIUM CIVIL CODE], art. 1696(1).

84. 1985 UNCITRAL Model Law, *supra* note 17, art. 17.

tribunal may, at the request of a party, grant interim measures.”<sup>85</sup> Similar provisions may be found in many leading arbitration rules.<sup>86</sup> In addition to express recognition of the “concurrent approach,” many arbitration rules also authorize arbitrators to “conduct the arbitration in the manner they deem appropriate” subject to the applicable arbitration rules and laws.<sup>87</sup> This provision may also be deemed to impliedly authorize the arbitrators to grant interim measures as they see appropriate.

### *B. The Chinese Practice*

Chinese law recognizes two types of interim measures: measures for evidence preservation in foreign-related arbitration and measures for property preservation. Interestingly, these measures are provided by different laws: CAL deals with measures for evidence preservation while CPL deals with measures for property preservation. The CAL provision states that, “[i]f a party applies for evidence preservation in a foreign-related arbitration, the arbitration institution shall submit such application to the intermediate courts of the place where the respondent has its domicile or where such evidence is located.”<sup>88</sup> The CPL provision though, states that, “[i]f a party applies for property preservation, the arbitration institution shall submit such application to the intermediate courts of the place where the respondent has its domicile or where such property is located.”<sup>89</sup> Indeed, there seems to be little reason why CAL does not deal with both types of interim measures in a more integral way.

CAL’s inability to deal with both interim measures in an integral way is “cured” by Chinese arbitration rules. For instance, the CIETAC Rules contain two provisions dealing with these two types of interim measures respectively. The provision in Article 17 regarding measures for the preservation of property states that:

When any party applies for the preservation of property, the CIETAC shall forward the party’s application for a ruling to the competent court at the place where the domicile of the party against whom the preservation of property is sought is located or where the property of the said party is located.

However, the provision in Article 18 regarding measures for preservation of evidence states that, “When a party applies for the protection of evidence, the CIETAC shall forward the party’s application for a ruling to the competent court at the place where the evidence is located.”

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85. 2006 UNCITRAL Model Law, *supra* note 18, art. 17(1).

86. 1976 UNCITRAL Rules, *supra* note 3, art. 26(1); ICC Rules, *supra* note 3, art. 23(1); LCIA Rules, *supra* note 3, art. 25; WIPO Rules, *supra* note 3, art. 46(a); AAA Rules, *supra* note 3, art. 21(1); HKIAC Rules, *supra* note 3, art. 24; SCC Rules, *supra* note 3, art. 32(1); 2010 UNCITRAL Rules, *supra* note 3, art. 26(1); SIAC Rules, *supra* notes 3, art. 26(1).

87. *See, e.g.*, SCC Rules, *supra* note 3, art. 19(1); 2010 UNCITRAL Rules, *supra* note 3, art. 17(1); SIAC Rules, *supra* note 3, art. 16(1).

88. CAL, *supra* note 11, art. 68.

89. CPL, *supra* note 10, art. 25.

Similar provisions may also be found in the BAC Rules,<sup>90</sup> and the SHAC Rules.<sup>91</sup> Interestingly, the SZAC Rules not only contain two similar provisions,<sup>92</sup> but also put forward an extra provision dealing with interim measures exclusively in “foreign-related arbitration proceedings.”<sup>93</sup> This extra provision is redundant since it is essentially the same as the other two.

Two basic observations can be drawn from a close reading of the above provisions. First, different from the international practices, arbitrators under Chinese law have no power to grant interim measures; rather, such power goes to courts. Particularly, as a typical result of the “dual-track system” in Chinese arbitration law, only intermediate courts are allowed to grant interim measures in foreign-related arbitration, while basic-level courts are allowed to grant interim measures in domestic arbitration.<sup>94</sup> Second, Chinese law is silent on the situation where parties submit their application directly to courts although Chinese law expressly requires parties to apply interim measures through arbitration institutions. On this issue, judicial practices present a negative answer. For example, the High Court of Shanghai clearly held that if parties directly apply for the issuance or termination of interim measures to the court, such application should be rejected.<sup>95</sup> Third, a practical defect lies in that, given the rampant local protectionism of courts in many parts of China, the denial of arbitrators’ power of issuing interim measures could reduce the chances for parties to obtain interim measures. Local protectionism is a typical consequence of the “central-local tension” incurred by the structure of the courts and the economic reform in China.<sup>96</sup> On one side, local governments are required to provide financial and personnel support to local courts;<sup>97</sup> on the other, local governments are deprived of certain revenue by the reform, which necessitates protection of the local enterprises as contributors of their revenues.<sup>98</sup> It is for this reason that local courts are sometimes reluctant to grant interim measures against local enterprises, particularly the measures to freeze their properties, since in reality “protecting” local enterprises is to protect the courts themselves.

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90. BAC Rules, *supra* note 26, art.14 (Preservation of Property), & art. 15 (Preservation of Evidence).

91. SHAC Rules, *supra* note 26, art.19 (Preservation of Property), & art. 38 (Preservation of Evidence).

92. SZAC Rules, *supra* note 26, ch. III, r. 23 (Preservation of Property), ch. V, r. 46 (Preservation of Evidence).

93. *Id.* at ch. XIII, r. 99.

94. CAL, *supra* note 11, arts. 28 & 46.

95. This Shanghai High Court decision was adopted on January 3, 2001 and came into force on February 1, 2001. See art. 7, available at [http://china.findlaw.cn/fagui/p\\_2/136440.html](http://china.findlaw.cn/fagui/p_2/136440.html) (last visited 16 Oct. 2011).

96. See David T. Wang, *Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System*, 48 SANTA CLARA L. R. 649, 659 (2008); Randall Peerenboom, *The Evolving Regulatory Framework for Enforcement of Arbitral Awards in People’s Republic of China*, 1 ASIAN-PAC. L & POL’Y J. 1, 63 (2000).

97. Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97, 120 (2005).

98. David T. Wang, *supra* note 96, at 658-60.

*C. Comparing Interim Measures in International Arbitration and Arbitration in China*

Interim measures are an important aspect of arbitration in both procedural and substantive senses. While it is widely recognized that international arbitrators are entitled to grant interim measures upon the request of parties without necessarily resorting to the courts, arbitrators under Chinese law are grossly deprived of such power. Rather, such power is monopolized by intermediate courts and parties must submit their applications through arbitration institutions. Given the increasing importance of interim measures in modern international arbitration, China's denial of arbitrators' power in issuing interim measures is fundamentally defective. It incurs intervention from both arbitration institutions and courts, which would inevitably hurt the efficiency and autonomy of arbitration. In essence, denial of arbitrators' power of issuing interim measures is simply a reflection of China's long-rooted distrust in arbitration. Nonetheless, even if the courts' monopolization were to be maintained given the current sociopolitical situation in China, it is still suggested that parties be allowed to directly apply for interim measures to the courts in order to remove unnecessary involvement of arbitration institutions for the sake of efficiency.<sup>99</sup> It is suggested that more types of interim measures be allowed as well.<sup>100</sup>

## VI. CONCLUSION

When arbitrators have procedural power in conducting arbitration, it is an implied reflection of the private and autonomous nature of arbitration—which has both procedural and substantive significance in practice. After comparing the practice of the three major aspects of arbitrator's power in international arbitration to arbitration in China, it is evident that arbitrators under Chinese law enjoy a much lower level of such power compared to their international counterparts. International arbitrators, on the other hand, are generally allowed to make jurisdictional decisions at their discretion pursuant to the competence-competence doctrine when exercising their procedural power. Chinese law, however, does not truly and fully adopt the competence-competence doctrine but instead allocates such power to the arbitration institutions and the courts.

Concerning the choice-of-law power, international arbitrators are generally granted "unlimited choice-of-law power," "substantive choice-of-law power," or at least "procedural choice-of-law power" and enjoy a higher degree of power. Chinese law, however, imposes heavy restrictions on arbitrators so that they can only exercise such power in exceptional situations. Regarding the power of issuing interim measures, international arbitrators are generally authorized to grant interim measures at their own discretion upon the request of parties. Chinese law, on the other hand, grants such power exclusively to courts.

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<sup>99</sup> Peter Thorp, *The PRC Arbitration Law: Problems and Prospects for Amendment*, 24 J. INT'L ARB. 607, 611 (2007).

<sup>100</sup> Chi Manjiao, *Is It Time for Chance? — A Comparative Study of Chinese Arbitration Law and the 2006 Revision UNICTRAL Model Law*, 5 ASIAN J. INT'L ARB. 142, 156 (2009).

Admittedly, these three aspects are different, but the common line running through them remains the same: they all demonstrate from different perspectives that arbitrators' procedural power is heavily restricted or denied under Chinese law. These restrictions have many defects: they complicate the arbitral proceedings, paralyze arbitrators in conducting arbitration, invite premature court intervention at various stages of arbitration, and ultimately hurt the flexibility, efficiency, and autonomy of arbitration. These defects are so harmful that they have the potential to make arbitration an "alter ego" of litigation in China. In this sense, it is not an exaggeration to state that arbitrators under Chinese law are "paper tigers" because their procedural power largely remains nominal which can hardly be realized to make them "genuine arbitrators." Further, these defects also show that China lacks a true autonomous arbitration regime. If China does not maintain a true autonomous arbitration regime, Chinese arbitration will lose its competitiveness at the international level in the long run.

More fundamentally, China's restriction on arbitrators' procedural power reflects the intense "struggle" between state (judicial) power and private (arbitral) power in the context of arbitration. Due to the private and autonomous nature of arbitration, arbitrators derive their power from parties' agreement and exercise such power at their own discretion. In some sense, vesting power into arbitrators would inevitably "result in" arbitrators encroaching on courts' judicial power. While it is true that a sound balance between judicial power and arbitral power is hard to achieve,<sup>101</sup> there does exist a global consensus that states are accommodating arbitration to further promote and liberalize international trade and investment. For instance, many states are gradually lifting their requirements on the issue of arbitrability to allow more types of disputes to be arbitrated, and that state themselves are getting more comfortable to resort to arbitration to settle their disputes with private parties.<sup>102</sup>

Though China is trying to build itself into an "arbitration-friendly country," the reality provides little reason for optimism. Although Chinese law and leading Chinese institutional arbitration rules appear quite similar to their international counterparts at first glimpse, they are essentially different. The difference lies in their respective strategies in balancing arbitral power vis-à-vis judicial power. Chinese law overstates the latter by sacrificing the former. The restriction or denial of arbitrators' power under Chinese law goes hand in hand with the strengthening of state power. This development is a result of China's long-rooted and highly centralized economic and political system. As long as the Chinese

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101. See Fuyong Chen, *Striving for Independence, Competence and Fairness: A Case Study of the Beijing Arbitration Commission*, 18 AM. REV. INT'L ARB. 313 (2007). This paper discusses the doubts of independence of Chinese arbitration institutions, which is a typical and most vivid explanation of the conflict between judicial/state control and arbitral power/party control in the Chinese contexts.

102. For instance, the ICSID is the most prominent forum for settling state-investor disputes, and 146 states have ratified or accepted the ICSID Convention up to now. See INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, available at <http://icsid.worldbank.org/ICSID/> (last visited Mar. 10, 2011). China ratified the ICSID Convention in 1993, but according its reservation under art. 25(4) of the Convention, the jurisdiction of ICSID is limited to "disputes over compensation resulting from expropriation and nationalization." As a matter of fact, up to now, the only ICSID case that directly involved China is the recent case of *Ekran Berhad v. P.R.C.* (ICSID Case No. ARB/11/15 (May 24, 2011)). Besides, many state-investor disputes are also settled under Chapter 11 of the North American Free Trade Agreement (NAFTA). See NAFTA CLAIMS, available at <http://www.naftalaw.org/disputes.htm> (last visited Mar. 10, 2011).

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government remains reluctant to carry out a full-range judicial reform in support of a truly autonomous arbitration regime, it would be hard to predict when and at what pace such a situation could be fundamentally changed. Until then, arbitrators in China are merely “paper tigers.”



