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Recent Developments in Arbitration in China - Interim Measures, How to Achieve Proper Relief

CONTENTS

**56 1. INTRODUCTION*

China has seen a heated economic and trade development in recent years. In light of this evolution and with the acknowledgement of the rise of international commercial disputes, China became aware that an efficient, neutral and internationally recognized dispute resolution mechanism is a precondition to attract foreign investors and maintain the business community's continuing confidence and funds. [2] This, along with the ever-increasing importance of Asian parties and seats of arbitration, [3] makes it compelling to conduct an in-depth study of the most recent developments in the Chinese arbitral framework.

Interim measures, aiming at safeguarding rights of the parties and a final award, are an "unavoidable" [4] tool of practice in international commercial arbitration. Indeed, the "quality of justice provided for the parties in arbitration" is at stake when interim measures are the "hot topic". [5] Issues regarding their availability and enforceability in Chinese territory

are the focus of this study. At the outset, "Chinese Territory" within the context of this analysis *excludes* Chinese Taiwan and the Special Administrative Regions of Hong Kong and Macau. [6] The analysis likewise excludes investor-state arbitration.

The strategy chosen for the analysis of the topic was four-fold and is presented as follows: *firstly*, an overview of international commercial arbitration and its advantages is presented; *secondly*, international standards regarding interim measures are explored, with a special focus on their availability and enforceability; *thirdly*, the attention shifts to arbitration in China and its peculiarities; and *finally*, a detailed analysis of interim ***57** measures granted in arbitration in China is undertaken, with emphasis on the most recent amendments to *Chinese Civil Procedural Law of the People's Republic of China (with 2012 amendment), Standing Committee of the National People's* (*CPL*) *(2012)* and *CIETAC Arbitration Rules (2015)*.

2. INTERNATIONAL COMMERCIAL ARBITRATION - THE FRAMEWORK

After analysing the concept behind international commercial arbitration, its key features are briefly described and its advantages and disadvantages are considered.

2.1. CONCEPT AND KEY FEATURES

International commercial arbitration is a method of alternative dispute resolution, as opposed to the ordinary method of litigation. [7]

The concept is simple - parties agree to submit a dispute to a third person whose judgment they trust, in order to obtain a final and binding decision on the matter. [8] The scope of commercial arbitration extends to "all economic exchanges across national boundaries" [9] and is considered "international" if parties are of different nationalities, the seat of arbitration is foreign to the parties or if the subject matter is international. [10]

Consent is the "foundation stone" [11] of arbitration. Without a valid arbitration agreement, conveying that "all disputes [arising from the underlying contractual relationship] shall be finally resolved by arbitration", [12] there can be no valid arbitration proceedings. [13] To ***58** further empower party autonomy, parties choose their arbitrator(s), [14] possibly experts [15] or other legal professionals to resolve the dispute. Parties can also select the seat of arbitration [16] and the applicable law to substantive and procedural matters. [17] In addition, international commercial arbitral awards are final and generally not subject to appeal. [18]

If a party fails to comply with the arbitral award, it can be enforced both in the seat of arbitration or in any foreign country [19] where the losing party has assets [20] mostly with the aid of the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (*New York Convention*) - its 156 [21] contracting States are bound to recognize and enforce both foreign arbitration agreements and awards.

2.2. TYPES

Firstly, institutional arbitration occurs when the parties expressly provide in their arbitration agreement that the proceedings shall take place under the administration of an arbitration institution (*e.g.* American Arbitration Association and International Center for Dispute Resolution (AAA and ICDR), Cairo Regional Center for International Commercial Arbitration (CRCICA), Hong Kong International Arbitration Center (HKIAC), International Chamber

of Commerce (ICC), London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC), Singapore ***59** International Arbitration Center (SIAC), World Intellectual Property Organization Arbitration Center (WIPO Arbitration Center) and its arbitration procedural rules.

Institutional rules undergo frequent revision, taking into account input of practitioners and new practical developments international.[22] The institutions act as middlemen between the arbitral tribunal and the parties,[23] and have qualified and experienced staff.[24] All steps of arbitral proceedings go through the "machinery" of an arbitral institution,[25] and in delaying it, costs and fees may also be higher.[26]

An alternative, *ad hoc* arbitration, takes place without the involvement of an arbitration institution. The rules are established by the parties or by the arbitral tribunal, or the parties may refer to an established set of rules (*e.g. UNCITRAL Rules*).[27] This is a "tailor-made" procedure with enhanced flexibility[28] that can also take into account particular statuses of the parties or sensitive requirements.[29] These advantages largely depend, however, on the cooperativeness of the parties and on an adequate legal system in the seat of arbitration.[30] Dilatory tactics may cause delay and unpredictability in the proceedings.[31]

2.3. WHY ARBITRATE?

2.3.1. ADVANTAGES

Parties are able to choose a "neutral" but convenient forum and can select a "neutral" or a "genuinely-international"[32] arbitral tribunal, with enhanced expertise, experience, objectivity and sophistication that state judges may lack.[33] Additionally, in comparison with forum selection clause,[34] arbitration agreements are more "readily and more ***60** expeditiously" enforced and "more broadly" interpreted in most national courts.[35] Similarly, the enforcement of arbitral awards in foreign countries undergoes a smoother process in comparison with a court judgment.[36] The arbitral procedure has also the traits flexibility[37] and adaptability, being substantially more private, and at times confidential.[38]

2.3.2. DISADVANTAGES

Commonly criticized aspects of current international commercial arbitration include: its costs,[39] delay in constituting the arbitral tribunal and in rendering the arbitral award,[40] limits on arbitrators' powers (namely the lack of coercive and enforcement powers),[41] difficulties arising from multi-party arbitration or in joining third-parties to arbitration, conflicting awards[42] and the "judicalization" of arbitration.[43]

The popularity[44] of international commercial arbitration arises from its comparative advantages and it has become the "principal",[45] "preferred"[46] and "by far the most popular"[47] method for disputes arising from international commerce.

***61** *3. INTERIM RELIEF - THE TOOLS*

The focus now shifts to interim measures: the conditions and types sought, the granting and enforcement in international commercial arbitration.

3.1. GENERAL REMARKS

Interim measures are broadly defined as a "form of temporary and urgent relief" [48] "aimed at safeguarding the rights of parties to a dispute pending its final resolution". [49] Complementing final relief, [50] its aim is to facilitate the "effectiveness of judicial [or arbitral] protection". [51] In other words, these measures "are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the [tribunal] having jurisdiction as to the substance of the case". [52]

This takes into account long proceedings [53] where specific risks may arise, [54] accentuated by the counterparty's concurrent behaviour. [55] Additionally, these measures can be misused as instruments to exert pressure on the opposing party. [56]

The terms "interim" or "provisional" refer to the nature of these measures [57] and the terms "protective" or "conservatory" to the purpose of these measures. [58] For the ***62** purpose of this study, the term "interim measures" will be used to address all issues related to interim measures of protection.

3.2 SOURCES OF ARBITRAL POWER TO GRANT INTERIM MEASURES

The sources of arbitral authority [59] to grant interim measures are: [60]

> *(1) The parties' arbitration agreement may expressly allow (amend or deny [61]) the arbitral tribunals' power to grant interim measures, or include it, through incorporation, by reference to ad hoc or institutional rules that allow for arbitrators to grant such measures.* [62]

> *(2) The lex arbitri [63] also governs the arbitral tribunal's authority to grant interim relief, [64] and may empower the arbitrators for such task.* [65]

> *(3) When neither of the above mentioned take position on this issue, theories such as the doctrine of inherent powers, the doctrine of implied powers or arguments based on powers of the arbitrator may attempt to give arbitrators such authority.* [66]

***63** Mandatory rules of the applicable law can restrict or limit the powers of arbitral tribunals. Measures issued in conflict with the law of the place of arbitration (and the law of place of enforcement, if indicated during proceedings) may be set aside at the courts of the place of arbitration [67] or its enforcement might be contested. [68]

3.3 RELIEF SOUGHT

3.3.1 STANDARDS

Contractual standards and institutional rules[69] are usually silent on which standards to apply in granting interim measures, so arbitral tribunals have discretion to define them[70] and should regard international sources for guidance.[71] Most international arbitral tribunals will, require the following conditions:[72]

(1) The arbitral tribunal should establish its jurisdiction prima facie;[73]

(2) The moving party must demonstrate it has prima facie case (or fumus boni iuris): a probability of prevailing in its case[74] *or a legitimate interest in its request for the interim measure;*[75]

***64** *(3) There must exist urgency, the necessity*[76] *of immediate or prompt*[77] *protection of rights;*

(4) There must exist risk of "irreparable" harm (common law jurisdictions),[78] *periculum in mora (civil law jurisdictions),*[79] *or mere "serious" injury;*[80]

(5) The possible injury caused by the requested measure should not be out of proportion with the advantage gained by the applicant - "balance of hardships".[81]

Different types of interim measures granted by different arbitral tribunals will demand different showings of these requirements.[82] Security for damages may be required as a condition for granting interim measures, to guarantee that if the interim measure was unjustified the harmed party can be indemnified.[83]

It must be noted that courts, when granting interim measures, will apply their respective national law and national standards.[84]

3.3.2 TYPES

Types of interim measures that can be granted vary between jurisdictions,[85] and international commercial arbitrators have broad discretion to grant any kind of interim relief in the proceedings.[86] Interim measures may be categorized according to their function:[87]

***65** *(1) Measures related to preservation of evidence:*[88] *to avoid disappearance or maltreatment of evidence;*

(2) Measures related to conduct of arbitration and relations between parties during arbitral proceedings: injunctions providing for parties to act or to refrain from acting, in order to protect a right;[89]

(3) Measures aimed to facilitate later enforcement of the final award: including orders not to move assets; for deposit of the amount in dispute or of the movable asset with a third person; to provide security for claim; [90]

(4) Interim payment: an atypical measure that allows for a payment of claimed amounts to the moving party. [91]

Ex parte interim measures are controversial [92] since they are granted without a prior hearing with its addressee [93] (thus with the "element of surprise" [94]) assuming there is a risk that that party might take swift action causing serious damage to the applicant. [95] This runs counter to the very considerations underlying equal treatment and opportunity to be heard. [96]

66 *3.4 GRANTING INTERIM MEASURES

3.4.1. GENERAL JURISDICTION OF ARBITRAL TRIBUNALS

Traditionally there are two *fora* that parties in arbitration can apply to obtain interim measures: arbitral tribunals and state courts. Reasons supporting the now accepted position [97] that the arbitrator is the "natural judge" [98] for granting interim relief are: [99]

Respect for the parties' will to arbitrate (party autonomy);

Respect for risk allocation agreed by the parties and the centrality [100] *and neutrality of the arbitral forum;*

If arbitrators are trusted by the parties to decide finally on the dispute, they should be able to decide provisionally; [101]

Due to continuity of role, arbitrators are familiarized with the proceedings and can distinguish genuine need of an interim measure from abusive requests;

Arbitrators may have better expertise, [102] *decide quicker* [103] *and may choose the most suitable type and form of interim relief to the case at hand;* [104]

Possible confidentiality of interim measure proceedings; [105]

Tribunal-awarded interim measures have a less disruptive effect on the parties' commercial relationship.

***67** However, arbitral tribunals have inherent limitations: [106]

They cannot generally act or specifically grant interim measures before they are constituted; [107]

Interim measures sought against a third party fall outside the scope of the arbitral tribunal's powers, since arbitration is of a contractual nature; [108]

Arbitrators have iuris dictio - power to say the law, [109] *but no imperium to directly enforce their decisions, i.e. interim measures are not self-executing;* [110]

An interim measure might have to be requested directly near the court of place of execution, [111] *which will only be granted if court assistance to foreign arbitration is recognized;* [112]

National law may deny or restrict the arbitrators' authority to grant interim measures. [113]

3.4.2. EXCLUSIVE JURISDICTION OF ARBITRAL TRIBUNALS

No national law provides for the exclusive power of arbitral tribunals to order interim measures. [114] The main benefit would be the existence of a centralized forum for both interim and final relief. [115]

3.4.3. EXCLUSIVE JURISDICTION OF COURTS

A few national arbitration laws (e.g. Argentina, China, Italy, Thailand) and institutional rules confer the monopoly of interim relief to courts. [116] The main reason justifying this ***68** option is the lack of coercive powers by arbitral tribunal. [117] The only advantage of this system is reducing its “complexity”. [118] It is highly criticized for misunderstanding interim relief and contradicting the objectives of the international arbitral process [119] and has mostly been abandoned. [120]

3.4.4. CONCURRENT POWERS

It is widely accepted that concurrent powers of both arbitral tribunals and courts (at the seat of arbitration and outside [121]) is beneficial. State court's involvement in support of arbitration is essential to guarantee the efficiency of

interim relief, [122] notwithstanding the trend of increasingly broad authority of arbitral tribunals in conferring such relief. [123]

UNCITRAL Model Law on International Commercial Arbitration (1985) with 2006 amendments (*UNCITRAL Model Law*), along with Austria, Belgium, England, France, Germany, Hong Kong, India, Japan, Netherlands, Switzerland and other countries opt for this allocation of power to grant interim measures. [124]

UNCITRAL Rules, and rules from the AAA and ICDR, ICC, HKIAC, LCIA, SCC, SIAC and the *Swiss Arbitration Rules* all provide expressly for the arbitral tribunal's power to issue interim measures. [125]

In this system, the doctrine of compatibility [126] is accepted: firstly, applying to a court for interim relief does not amount to a "waiver" of the right to submit the merits of the ***69** dispute to arbitration, [127] and secondly, the existence of an arbitration agreement does not prevent a court from granting interim measures. [128]

3.4.5. PRE-ARBITRAL RELIEF: EMERGENCY ARBITRATOR

Since "[t]he most critical time for seeking provisional measures is often at the outset of the parties' dispute (...)", [129] before the arbitral tribunal is legally constituted, parties may resort to state courts or, in alternative, to a party-determined authority to obtain urgent relief at a pre-arbitral stage. [130]

The concept of an Emergency Arbitrator is an ambitious mechanism, [131] originally from the *2006 AAA* and *ICDR rules*, and adopted by the ICC in 2012 (and recently, the Australian Center for International Commercial Arbitration (ACICA), China International Economic and Trade Arbitration Center (CIETAC), Netherlands Arbitration Institute (NAI), the Singapore International Arbitration Centre (SIAC) and the Stockholm Chamber of Commerce (SCC)). An opt-out approach was put in place, [132] boosting its accessibility. [133] The arbitral tribunal can later review orders issued by the emergency arbitrator. [134]

***70** Other alternatives to this procedure are: the ICC Pre-arbitral referee introduced in 1990s, [135] the expedited formation of arbitral tribunals (LCIA and Dubai International Arbitration Centre (DIAC)), [136] the granting of interim measures by arbitration institution (Court of Arbitration for Sport (CAS) and Italian Association for Arbitration (AIA)), [137] summary arbitral proceedings (NAI) [138] or any *ad hoc* solutions agreed by the parties. [139]

3.5. ENFORCING INTERIM MEASURES

Commercial parties in international arbitration regularly comply with interim measures and avoid antagonizing the arbitrators, attempting to create a positive and credible impression near the arbitral tribunal. [140] Arbitrators can also order sanctions [141] to compel the parties to observe such measures, such as adverse inference from missing evidence [142] and liability for damages and costs. [143]

***71** However, this does not mitigate the need for States to "lend their enforcement machinery" to the enforcement of tribunal-awarded interim measures. [144]

3.5.1. IN COURTS AT THE SEAT OF ARBITRATION

National arbitral legislations tend to only address enforcement within their territories. [145] This enforcement takes place through national courts, [146] be it through direct enforcement, [147] executor assistance [148] or through transposition of the arbitral measure or a renewed measure issued by the court. [149]

3.5.2. IN FOREIGN COURTS

Measures issued by arbitral tribunals, may need to be enforced abroad (*e.g.* in courts where the parties have assets or where actions occur). [150] While there is no harmonized approach on this issue, [151] some national laws provide for the enforcement by courts of interim measures issued overseas (e.g. Australia, Hong Kong, Switzerland), [152] in aid of arbitration. [153] Whether the *New York Convention* allows for extraterritorial effect of interim measures is debated. [154]

In turn, rules of private international law apply [155] to interim measures granted by courts that need enforcement elsewhere, since a court's jurisdiction is territorial. [156]

3.5.3. GROUNDS FOR SETTING ASIDE AND REFUSING ENFORCEMENT

If enforcement is possible, defences can be raised to oppose it.

***72** On the one hand, regarding courts located at the seat of arbitration, the local laws, providing grounds for the annulment of final awards, [157] are available to oppose enforcement. On the other hand, in foreign courts, grounds similar to Art. V of the *New York Convention* may justify refusing enforcement. [158]

It can be argued however, that due to the impending urgency, the test for enforcement procedure of interim measures be a simplified one. [159] Additionally, the need for speed could justify specialization of judges in this matter, [160] or granting retroactive effect to a court's decision of enforcement. [161]

3.5.4. SPECIAL POSITION OF THE EMERGENCY ARBITRATOR

It can be argued that the legal framework pertaining to arbitrators applies equally to emergency arbitrators regarding enforcement of decisions. [162] It has also, contrarily, been held that only arbitral tribunals can review interim measures issued by an emergency arbitrator order. [163] Ultimately therefore, it depends on the arbitration rules and national arbitration legislation, form of the measures and their subsequent possibility of enforcement. [164]

Arbitrators have shown themselves willing to grant interim measures. [165] However, based on the previous considerations, the answer to the question of where to apply for interim measures is: “it depends!” - on the parties' agreement, applicable law, the relief sought, and relevant factual circumstances. [166]

***73** *4. ARBITRATION IN CHINA - THE STATE OF LAW*

In reflecting on the pros and cons of choosing China as the seat of arbitration, an understanding of the peculiarities of locally conducted commercial arbitration is indispensable.

4.1. BRIEF HISTORICAL OVERVIEW

The culture of opting for a non-litigious dispute settlement mechanism in China has deep-rooted influences. [167] This originates from the Confucian philosophy - where an idea of social harmony promoted a preference for non-adversarial dispute resolution. An ancient Chinese proverb portrays that "To harmonize is invaluable; to litigate is ominous". [168]

The 1970s heralded modern arbitration. With China's era of Open Door and Reform Policy, concomitant with economic development, economic disputes multiplied, reflecting the rise in business transactions and investment opportunities. [169] It was only with the enactment of the *Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures (1979, amended on 2001)* (*Law on Chinese-Foreign Equity Joint Ventures*), that arbitration was addressed as a mechanism for dispute settlement. [170]

Before 1994, domestic arbitration took place near administrative bodies that were controlled by governmental authorities. [171] This system was mandatory, [172] not final, and ***74** its practices departed from modern arbitration principles. [173] Quite differently, foreign-related arbitration proceedings were administered by CIETAC and China Maritime Arbitral Commission (CMAC), institutions established in the 1950s for this purpose, issuing awards considered final by Chinese courts. [174]

In 1986, China ratified the *New York Convention*, an event considered a stepping-stone for the promotion and development of international arbitration in China. [175]

In 1994, the *Arbitration Law of the People's Republic of China (1994, with 2009 amendment) Standing Committee of the National People's Congress* (*CAL*) was enacted, aiming at reforming, unifying and improving the existing arbitration system in China, bringing it in line with international practice. [176] Following its implementation, until 2012, 215 local arbitration commissions were created. [177]

The *State Council's Notice Concerning Clarification of Several Issues Regarding the Implementation of the Arbitration Law of the PRC (8 June 1996)* (*State Council's Notice 1996*) authorized domestic arbitration institutions to also host foreign-related arbitration cases. [178] Additionally, CIETAC revised its *Arbitration Rules* in 1998 and expanded its scope of administered cases, to include domestic disputes. [179] As a result, all arbitral institutions in China can now administer domestic and foreign-related arbitration. [180]

After these developments, several statute amendments and judicial interpretations were issued to fill gaps and unify application of law to arbitration, in an effort to modernize and make more efficient the existing framework.

4.2. RELEVANT LAW

The legal framework of Chinese arbitration is composed by several sources of law: -The China Arbitration Law (CAL), the Chinese arbitration "code", last amended 2009;

***75** -The Civil Procedure Law (CPL), in its Chapter 27 deals with arbitration with foreign elements, last amended 2012;

-Other laws also include provisions on international commercial arbitration, e.g. Law on Chinese-Foreign Equity Joint Ventures and Contract Law of the People's Republic of China (1999) (China Contract Law);

-Regarding international conventions, China is a contracting state to the New York Convention, having made the reciprocity reservation and the "commercial" reservation in its accession process; [181]

-The Supreme People's Court (SPC) publishes judicial interpretations on the CAL, acting as a "de facto rulemaking power-holder", [182] that clarify practical aspects or fills in gaps of these statutory provisions; these interpretations take the form of replies or notices; [183]

Arbitral institution rules are also part of arbitration's legal framework.

4.3. PECULIARITIES OF ARBITRATION IN CHINA

In China, the *lex arbitri* is the *CAL*, a detailed statute where party autonomy has a reduced role. [184] This law applies when parties agree in their arbitration clause, when the seat of arbitration is China or when a Chinese tribunal is seized. [185]

4.3.1. OWN VALUES

Often referred to as a milestone, the *CAL* was implemented taking into consideration international standards, e.g. principles of party autonomy, of denial of court jurisdiction if there is an arbitration agreement, of severability, of independence and of finality. [186]

Further, in its Art. 1, the *CAL* very clearly stipulates that it aims to provide a healthy development of the socialist market economy. [187] This amounts to an additional standard, in line with the Chinese historical and social-economic context. This input deems the *CAL* a tool to pursue Chinese distinctive values, in a legal regime also deemed distinctive, as described below.

**76 4.3.2. NO AD HOC ARBITRATION ALLOWED*

Article 16 of *CAL* requires, as an essential element to the validity of the clause, that an arbitration agreement subject to Chinese law must designate and clearly identify an arbitration commission (i.e. arbitration institution). [188] Without this, the arbitration agreement will be invalid, and the subsequent award either set aside or not enforced, since there is no valid arbitration agreement under the applicable law. [189] This can be avoided if the parties amend the arbitration agreement or the institution can be determined by the arbitration rules chosen. [190] This and other provisions confirm that *ad hoc* arbitration has no place in China. [191]

Furthermore, *CAL* regulates in a detailed manner the establishment, organization and legal status of domestic and foreign-related arbitration institutions. [192] This regime does not expressly allow nor prohibit foreign arbitration institutions, meaning any arbitral institution not established in China [193] (like the ICC [194]) to administer proceedings with the seat in China, however such institutions may not qualify as arbitration institutions ***77** *per se* under Chinese law. [195] As a consequence, a foreign award issued in China might not be enforceable in local courts. [196]

This choice to limit party autonomy, excluding the possibility to resort to *ad hoc* arbitral tribunals, is motivated by the traditional Chinese "respect to the power of office" [197] and the mistrust of individual control. [198]

4.3.3. DUAL-TRACK ARBITRATION

The Chinese legal system differentiates between domestic, foreign-related and foreign arbitration, based on the nature of the underlying dispute. [199]

Domestic arbitration has all its elements contained within China, [200] and can only be arbitrated by a Chinese arbitration institution. [201] Foreign Investment Enterprises are incorporated as legal persons in China, therefore, unless a foreign element is present, disputes involving such a party will be considered domestic. [202] This justifies an attentive analysis of domestic arbitration regime.

Foreign-related arbitration refers to proceedings administered by an arbitral institution established in China, when a foreign element is present. [203] Article 522 of *SPC Opinions 2015*, provides that a foreign element exists where:

> *i. One party or both parties to the contract are foreign legal persons,*
>
> *ii. One party or both parties to the contract have their habitual residence outside of China,*
>
> *iii. The subject matter of the contract is located in a foreign country, or*
>
> *iv. The act that gives rise to, modifies or extinguishes the rights and obligations under the contract occurs in a foreign country,* ***78** *v. Other circumstances exist that can constitute a foreign-element.* [204] Additionally, disputes involving parties from Macau, Hong Kong and Taiwan, are also considered foreign-related. [205]

There is no geographical restriction in selecting the arbitral seat in foreign-related arbitration.

Foreign arbitration relates to arbitration with foreign interests, administered by a foreign arbitral institution or an *ad hoc* arbitration outside of China. [206] *CAL* covers the first two categories of arbitration, forming a dual-track system, and incorporates provisions that apply equality to both, but also provides for privileges exclusive to foreign-related arbitration, [207] which include greater organizational autonomy, [208] more flexible rules regarding choice of arbitrators [209] or interim measures of protection, [210] and courts' judicial review. [211]

***79** This division is not in accordance with international practice, which determines the “nationality” of an arbitral award according to the seat of arbitration. [212]

4.3.4. COMBINATION OF MEDIATION AND ARBITRATION

Combining mediation and arbitration is a characteristic of all Chinese arbitration institutions [213] and has been praised, for its enhanced flexibility, [214] in contrast with the criticized "judicalization" in western arbitration, [215] and also for its relative success rate. [216]

This hybrid "Med-Arb" procedure [217] occurs when arbitrators assist the parties to achieve settlement. [218] Article 49 *CAL* allows parties to reach reconciliation at their own accord even after applying for arbitration. Article 51 *CAL* provides that if parties suggest mediation proceedings, the arbitral tribunal is obliged to conduct them. *CIETAC Rules* reflect this mixed approach, [219] which contrasts with the western strict separation of mediation and arbitration proceedings. [220] If a "consent award" is achieved it can subsequently be recognized and enforced under the *New York Convention*. [221]

4.3.5. ROLE OF COURTS

The national courts involvement in arbitration in China is "necessary and unavoidable". [222] The courts' judicial interpretations, especially the SPC's regulatory ***80** intervention, allow uniform application of arbitration provisions; alongside this, intervention near domestic courts stretches further.

Firstly, in aid of arbitration, only courts have the authority to grant and enforce interim measures. [223]

Secondly, it is for the courts ultimately to assess of an arbitral tribunal's jurisdiction, since it can directly rule on the existence and validity of an arbitration agreement, before the arbitral institution (but not the arbitral tribunal itself) assesses the matter. [224] This position makes clear the absence of the principle of competence-competence from arbitration in China. [225]

Thirdly, Chinese courts review arbitral awards, and if grounds for non-enforcement of foreign [226] or foreign-related [227] awards are mainly limited to procedural issues, domestic awards undergo further scrutiny. [228]

Finally, a centralized reporting system was established within courts, with *Notice of the Supreme People's Court Regarding the Handling by the People's Court of Certain Issues Relating to International Arbitration and Foreign Arbitration (28 August 1995)* (*SPC Notice 1995*) and *Supreme People's Court on relevant Issues Relating to the Setting Aside of International Awards by the People's Court (23 April 1998)* (*SPC Notice 1998*), on the enforcement of foreign-related and foreign arbitration. Lower courts mandatorily report to upper level courts, and finally to the SPC, in order to obtain approval to deny enforcement of foreign-related or foreign arbitration agreements or awards. This is said to be helpful [229] to fight local protectionism by lower courts and to boost foreign investors' confidence. [230] However, commentators also argue that this system is "challenged on arguments of procedural transparency and judicial ***81** resources"; [231] there is no time limit for the process, and the law does not provide for liability or compensation to the parties if lower courts disrespect this system. [232] This system does not supervise domestic arbitration agreements and arbitral awards. [233]

In summary, it is said that state courts in China have both a "supportive" and a "supervisory" role in arbitration. [234]

4.4. ARBITRAL INSTITUTIONS

A local arbitration institution that has grabbed attention is Beijing Arbitration Commission (BAC). With revised rules from 2014, it is one of the most active domestic arbitral institutions in China, praised also for its economic autonomy

and expert panel of arbitrators. [235] Other relevant local arbitration institutions are for e.g. Shanghai International Arbitration Center (SHIAC) and Shenzhen Court of International Arbitration (SCIA).

In regard to foreign-related arbitral institutions, CIETAC is considered a critical actor in the history of international commercial arbitration in China, along with CMAC. It is one of the largest arbitral centers in the world [236] and its caseload increased considerably in the last years, with 1610 arbitrations filed in 2014 (387 of which foreign-related) and 1968 in 2015 (437 of which foreign related). [237]

CIETAC has now offices in Shanghai, Shenzhen, Chongqinq, Tianjin, Hangzhou, Wuhan, Fuzhou and Hong Kong. [238] It has regularly revised its arbitration rules; also a trend of specialization is identifiable, as complexity of disputes increase. [239]

4.5. WHY ARBITRATE IN CHINA?

*82 *4.5.1. ARBITRATION IN CHINA V. LITIGATION IN CHINA*

In some situations, there is no choice but to arbitrate in China. Reasons to select to arbitrate in China, rather than to litigate, are linked with the comparative advantages of arbitration and specific practical concerns regarding the judiciary:

(1) Confidentiality of arbitral proceedings, compared to proceedings in most Chinese national courts; [240]

(2) Flexibility of proceedings, especially with regards to the language adopted; [241]

(3) Enforceability of arbitral awards, compared to the lack of reciprocity of foreign judgments; [242]

(4) National courts' lack of expertise, delay and possible protection of the local party's interests, due to political and social pressure. [243]

4.5.2. ARBITRATION IN CHINA V. ARBITRATION IN OTHER COUNTRIES

Should foreign risk takers agree to arbitrate in China, rather than in another seat? Some concerns should be taken into consideration:

(1) Absence of ad hoc arbitration, rigid procedural rules and strict requirements regarding the arbitration agreement and the arbitral procedural all harm party autonomy; [244]

(2) Predominant role of the courts in arbitration proceedings, dragging along all disadvantages parties want to escape from; [245]

(3) Arbitration institutions' "omnipresence", coordinating and facilitating the relationship parties-tribunal, but also scrutinizing the awards; [246]

***83** (4) A "persisting administrative intervention" [247] of the government, monitoring institutions and cases, harms independence and impartiality of arbitrators. [248]

These obstacles deserve revision, namely to enhance party autonomy and enforceability of arbitration agreements and awards. [249] Some scholars argue that since every arbitral procedure should be "handmade", [250] allowing *ad hoc* arbitration is a priority. [251] This would allow competition among arbitration service providers, increasing the quality of institutional-administered arbitral proceedings. [252]

4.5.3. CHOOSING CHINA AS SEAT OF ARBITRATION

In any case, choosing China as the seat of arbitration will have two consequences. Firstly, *CAL* will apply, regulating the arbitral proceedings. Even if parties select for this purpose a law other than the law of the seat, the mandatory provisions of *CAL* will still apply [253] and Chinese courts will very likely not uphold the selected foreign law.

Secondly, *CAL* does not distinguish between physical and legal place of arbitration, and provides that the court at the place where the arbitration institution has its location (and not the court at the seat) be the competent court for setting aside the award. [254]

5. INTERIM MEASURES IN CHINESE ARBITRATION INSTITUTIONS - THE CHALLENGE

We now look into *CPL*, *CAL* and institutional rules, with special attention to *CIETAC Arbitration Rules*.

5.1. AVAILABILITY

***84** *5.1.1. WHICH INTERIM MEASURES ARE AVAILABLE*

Parties to an arbitration seated in China may only apply for two categories of interim measures:

(1) Preservation of property, according to article 28 CAL,

(2) Preservation of evidence, according to articles 46 and 68 CAL.

CAL makes no mention of *ex parte* interim measures for arbitration. However, according to Art. 100 *CPL*, courts can *sua sponte* [255] grant interim measures when necessary, and there is the possibility to expedite the procedure in case of urgency. This is a very limited regime, referred to as a "uniqueness" [256] of the Chinese arbitral system.

5.1.2. HOW IS INTERIM RELIEF GRANTED

Since courts have exclusive jurisdiction to grant interim relief in arbitration, neither arbitration institutions, nor arbitral tribunals can do so.

Firstly, as to the procedure, a two-step system is in effect according to Arts. 28, 46 and 68 *CAL*: the interested party shall submit an application for the desired measure to the arbitration institution and subsequently the arbitration institution, acting as an "intermediary" [257] submits such application to the court at the place where the party against whom the application is made is domiciled or where his or her property is located, or at the place where the evidence is located.

In domestic arbitration, according to Arts. 28 and 46 *CAL*, the basic-level People's Court will be competent to receive such applications, whereas in foreign-related arbitration the Intermediate People's Court will be competent, pursuant to Art. 272 *CPL*. To explain this differentiation, concerns relating to People's Courts lack of experience and expertise are indicated. [258]

This system causes delay and is further criticized by scholars, who argue that Chinese arbitral institutions are no less competent than overseas arbitral institutions to grant such measures. [259]

***85** What if parties were to go directly to courts? This hypothesis is not expressly prohibited by the *CPL*, but practice shows such an application is to be rejected, as ruled in Art. 7 of *Opinion on Certain Issues of the enforcement of Chinese Arbitration Law by the High People's Court of Shanghai Municipality (1 March 2001)* (*the HPC of Shanghai Opinion 2001*). [260]

CIETAC therefore cannot review interim measures applications or grant any order in this respect. Curiously, between 1954 and 1982 this was not the case, since the Chinese Central Government awarded such powers to this arbitral institution. [261]

Article 23(3) *CIETAC Arbitration Rules* provides that "[a]t the request of a party, the arbitral tribunal may decide to order or award any interim measure it deems necessary or proper in accordance with the applicable law or the agreement of the parties". This provision, introduced in 2012, can only be of use in arbitration conducted outside of China, namely in CIETAC arbitration administered in Hong Kong. [262] Even so, doubts arise as to the enforceability in China of interim measures granted in that situation. [263]

Secondly, as to standards for the granting of interim measures, a "legal gap" [264] is said to exist, since neither Art. 28 nor Art. 46 *CAL* provide for specific instructions.

Article 28 *CAL* and Art. 100 section 1 *CPL*, vaguely stipulate that preservation of property may be applied for when, due to acts of the opposing party, or to other reasons, the enforcement of the award would become impossible or difficult. Article 46 *CAL* merely provides that preservation of evidence can be applied for when evidence is at risk of being destroyed or of disappearing.

The requirement of monetary security (including bank guarantees [265]) may be a condition for the granting of measures of preservation of property pursuant to Art. 100 section 2 *CPL*, and in fact when required and not provided for, the application for preservation of property will be rejected. Article 542 of *CLI.3.242703(EN),* ***86** *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (30 January 2015)* (*SPC Interpretation 2015*) makes security mandatory for an application of preservation of property in foreign-related arbitration, whereas for applications for preservation of evidence in similar proceedings the court has discretion to exempt the applicant from such condition, if it is not necessary. [266]

This can lead to discretionary judicial action in granting interim relief, or otherwise mean security will be a constant requirement. [267] Scholars greatly criticize this legal *lacuna*, and suggest that China follow international standards. [268]

5.1.3. CHINESE CIVIL PROCEDURAL LAW - 2012 LATEST DEVELOPMENTS

In 2012 the *CPL* was amended to accommodate relevant changes, two of which deserve further analysis.

5.1.3.1. PRE-ARBITRAL RELIEF

Before 2012 and according to the former Art. 93 *CPL*, a party to an arbitration agreement could not apply for interim measures before arbitral proceedings would start, [269] but a party to litigation could.

After the 2012 amendments to the *CPL*, this scenario changed. Now parties to potential arbitration can apply directly to the competent courts for pre-arbitration: as for preservation of evidence, pursuant to Art. 81, the applicant should apply to the courts where the evidence to be preserved is located or the place where the respondent is domiciled; in regards to preservation of property, in accordance with Art. 101, the applicant should apply to courts at the place where the applicant is located or court which has jurisdiction over the case for the adoption of property preservation measures.

An example of such a measure can be pre-arbitration attachment of property (by sealing up, seizure, freezing or other methods prescribed by law), provided for in Art. 103 *CPL.* The same article provides that this measure can be granted *ex parte*.

In these articles the *CPL* is somewhat more cautious as to the standards of pre-arbitral relief. Article 101, regarding preservation of property, requires urgency, irreparable ***87** harm and mandatory security. [270] Article 81, regarding preservation of evidence, requires urgency and loss or difficulty in obtaining evidence in the future.

The court will grant the measure in forty-eight hours, and execution starts immediately; [271] following this the applicant party has thirty days to apply for arbitration. [272]

This change was welcomed, mainly to mitigate the difference of rights between parties to litigation and parties to arbitration; [273] it also allows avoidance of irrecoverable loss near the applicant party, also previously criticized. [274] This is an opportune court intervention enhancing effectiveness of arbitration in China.

It should be noted that although parties can directly apply for the competent court to grant interim measures of protection prior to commencement or arbitration, during arbitration proceedings the two-step approach remains in force. In practice an "awkward procedure" [275] now exists, since parties can achieve quicker relief applying to courts before filling for arbitration, rather than during pending arbitral proceedings. [276]

Also, this pre-arbitral relief mechanism does not apply equally to all types of arbitration. *Special Maritime Procedure Law of the People's Republic of China (1999)* (*Special Maritime Procedure Law*), operating with experienced Chinese maritime courts, allows for parties to a potential offshore arbitration to apply for pre-arbitral measures near Chinese courts. [277] However, the same is not expected to happen in foreign commercial arbitration proceedings. Reasons are that firstly, ordinary civil courts, that will receive the pre-arbitral interim relief applications, tend to keep to a restrictive application of law; secondly, Chinese courts are in general reluctant to enforce interim measures ordered by foreign arbitral tribunals. [278]

***88** When it comes to foreign-related arbitration, the situation is unclear. Articles 81 and 101 *CPL* might only apply to domestic arbitration, since foreign-related arbitration is dealt with in a different chapter of *CPL* - Chapter 23, which only provides for interim relief during arbitration. [279] Consequently, according to a systematic and restrictive interpretation, preservation of property in foreign-related arbitral proceedings is only available during an arbitral procedure, but not before. [280]

5.1.3.2. WIDER RANGE OF MEASURES AVAILABLE

The new Art. 100 of *CPL* also provides for a new category of interim measures for civil procedure in China. Since 2012 parties can apply for courts to order the opposing party to perform or refrain from performing certain acts [281] - orders of specific performance or injunctive relief. [282]

This apparent positive novelty however makes no mention of arbitration. This differentiation is considered a disadvantage to parties in arbitration proceedings in China. [283]

5.1.4. INSTITUTIONAL RULES - 2015 CIETAC LATEST DEVELOPMENTS

The 2015 update of *CIETAC Arbitration Rules* was another step to enhance the international character of CIETAC, including the introduction of the emergency arbitrator.

5.1.4.1. EMERGENCY ARBITRATOR

This is a mechanism in general absent from China's arbitration practice, [284] where courts are since 2012 the place to obtain urgent relief in domestic arbitration proceedings, and questionably also during foreign-related arbitration.

Article 23 of *CIETAC Arbitration Rules* and *CIETAC Emergency Arbitrator Procedures (Appendix III)* provide for the assistance of an emergency arbitrator.

After the CIETAC Arbitration Court accepts the application for an emergency arbitrator, an emergency order can be granted within fifteen days of acceptance of appointment. [285] The applicant party may have to provide security. [286] The decision will be binding on ***89** both parties. [287] Its powers cease when the arbitral tribunal is constituted, and its jurisdiction runs parallels with courts' jurisdiction to grant interim measures. [288]

Mandatory provisions of the *CAL* confer to courts the exclusive jurisdiction to grant interim measures after the arbitration institution forwards the parties' application for interim relief, denying the intervention of an emergency arbitrator. Consequently, in arbitrations seated in China, the possibility of its intervention is null. Even if CIETAC has pointed out that these provisions aim to supplement the current system, by allowing the emergency arbitrator to grant

interim relief not reserved for the Chinese courts or by granting interim measures meant to be enforced abroad, [289] this seems improbable.

This mechanism can only be effective in arbitration conducted by CIETAC outside of China, namely in Hong Kong - *Hong Kong Arbitration Ordinance, Chapter 609 of the Laws of Hong Kong (last amended 2013)* (*HKAO*) allows since 2013 for the enforcement of relief granted by an emergency arbitrator in its territory, [290] or also in other jurisdictions where emergency arbitrators are allowed, based on the applicable law or on parties' agreement. [291] Practitioners still raise some doubts regarding the enforceability in Chinese territory of measures granted overseas by an emergency arbitrator under *CIETAC Rules*. [292]

A safer alternative would be simply to go to courts at a pre-arbitral stage.

5.2. ENFORCEABILITY

5.2.1. FOREIGN INTERIM MEASURES

***90** Since national courts have exclusive jurisdiction to grant and enforce interim measures in aid of domestic and foreign-related arbitration, the question now is "how are interim measures granted in foreign arbitration enforced in China"?

The *CAL* does not postulate for any specific method of enforcement, and the *CPL* provides merely for the immediate enforcement of interim measures granted by national courts in domestic and foreign-related arbitration, in a similar way as provided for litigation in its Art. 100 section 3. [293]

Judicial practice shows that Chinese courts are reluctant to enforce interim measures ordered by foreign arbitral tribunals. [294] Evidence of this is the *Hemofarm DD et al. v. Yongning Pharmaceutical (2009), SPC, [2008]* <<Foreign Language>> *(Shandong HPC), 2 June 2008* (*Hemofarm case*).

In this case, a Serbian and a Chinese company entered into a joint venture contract. A rental contract between the new enterprise and its Chinese stockholder lead this party to apply for a measure of preservation of property near Chinese courts. In litigation proceedings it was held that this rental relationship was not within the scope of arbitrability according to Chinese law, and the measure was granted. Following this, and other litigation proceedings, the Serbian party applied for arbitration near the ICC, and the arbitral tribunal found the measure for preservation of property lacked legal grounds and amounted to a breach of the underlying contract, rendering an award in favour of the Serbian party's claims. When seeking recognition and enforcement of this award in China, the SPC ruled just as the previous Chinese court in litigation, and the arbitral award was not enforced, on grounds that the arbitral tribunal exceeded is scope of jurisdiction and on grounds of public policy.

In any case, the absence of explicit criteria allows the courts to exercise wide discretion in deciding how interim measures are to be applied. [295] Unfamiliar measures might also not be enforceable in China. [296]

As mentioned, doubts of the enforceability of interim measures granted by an emergency arbitrator in Chinese territories or outside of China remain.

5.3. MAIN CHALLENGES AND POSSIBLE SOLUTIONS

In the opinion of some scholars, the CAL "falls short of practical needs" [297] and the Chinese arbitral system still entertains obvious shortcomings regarding interim relief.

***91** Firstly, the availability of interim measures is limited and somewhat unclear. Further judicial interpretations are necessary to clarify this procedural aspect, if not a legislative change in order to allow parties in arbitration a wider range of measures to fit their needs. Accordingly, standards for granting interim measures should be clarified and updated.

Secondly, the option to allocate the jurisdiction regarding interim relief solely near the courts is not a popular choice worldwide.

Thirdly, arbitration institutions' interference causes additional costs and delays.

A possible solution to this would be to eradicate this interference, and allow parties to apply directly to local courts for interim measures, [298] creating a consistent system for before and after the commencement of the arbitral procedure.

Alternatively, or "ideally", [299] an amendment to the CAL allowing arbitration institutions to issue interim measures could also solve this concern [300] and go beyond, altering the jurisdiction distribution of *auctoritas* in interim relief in arbitration in China. However, this alteration would still face the challenges of judiciary resistance and protectionism. [301]

Fourthly, although pre-arbitral relief by courts is now available to arbitration in China, it is only partly so. There is no reason to exclude foreign-related arbitration from this regime or to refuse pre-arbitral relief to foreign arbitration. Further judicial elucidation is necessary on this topic.

Finally, the tendency of refusing enforcement of interim measures granted in foreign arbitration in Chinese territories greatly harms efficiency of arbitration, going against the internationally praised spirit of court aid to arbitration, be it domestic or foreign. This judiciary practice may inhibit foreign entrepreneurs from conducting business with Chinese parties, and is a key behaviour to be altered. Normative changes would also enhance enforcement of interim measures granted in foreign arbitration - inspiration could be drawn from Art. *17H of the UNCITRAL Model Law*. [302]

***92** Being classified by scholars as the "heart of the problem", [303] a potential solution to this issue at a wider transnational level would be the creation of an international convention on enforcement of interim measures, similar to the *New York Convention*, congregating as many contracting states as possible. [304]

6. CONCLUSION

The proposed analysis is aimed at understanding the current legal framework and practice in Chinese arbitration, regarding interim measures. Businessmen can choose between resorting to national courts or to international commercial arbitral tribunals to manage the risk of potential disputes, [305] and most tend to pick the latter, [306] based on the neutral, efficient, expert, reliable and flexible character of arbitral proceedings.

Arbitration in China demonstrates several key features that demonstrate that its structure has a marked administrative character, rather than a contractual one. [307] This is due to the historical development of modern arbitration, with deep administrative roots, but also to the general and historical lack of private initiative in China i.e. predominant presence of the state in all matters social and political.

A pragmatic perspective, considering realistic probability of change, recommends that the Chinese local arbitration distinctiveness be taken into account, and a system that ultimately provides for the protection of the parties' rights be refined. After all, justice and efficiency [308] are the main aims of interim relief in arbitration, where rights must be protected and time is of essence.

Accordingly, reasonable suggestions should primarily focus on the judiciary. The Chinese arbitration-related laws have many gaps and ambiguous provisions, and SPC judicial interpretations would be the appropriate means to clear the air and enhance a uniform and progressive application of these legal texts, especially *CAL*. It must be noted that SPC interpretations have had a pro-arbitration development in general. [309]

***93** Furthermore, the constant concerns regarding governmental protectionism of the judiciary, and also bias of arbitrators, must be corrected, in order to acquire and maintain the trust of the users of Chinese arbitration.

Following this or in a concomitant manner, China would do well to update its legislation according to international practice, by allowing *ad hoc* arbitration, promoting party autonomy, and erasing the dual-track system. It is also essential, specifically regarding interim relief, to widen the range of available interim measures in arbitration and clarify the applicable standards, either allow parties to directly apply near courts for interim measures or allow arbitral institutions to grant such measures, make pre-arbitral relief available without discrimination between domestic and foreign-related arbitration, and enhance the recognition and enforcement of foreign arbitral-awarded interim measures.

The incorporation of these changes could improve speed and efficiency in the Chinese arbitral system. Chinese arbitral institutions play an important role in this aspect, since they are aware of international practices and of foreign parties' expectations. The effort to keep updating their arbitration rules is proof of acknowledgment of their own limitations, of the limitations of their legal background and of their wish to pursue a position of prominence among other internationally acclaimed arbitral institutions. [310] The new figure of the emergency arbitrator is a reflection of this effort, although its implementation might be complex.

It should also be highlighted, that features such as Med-Arb procedures may grow to influence the international arbitral stage, contrary to the most common trend of acceptance of international principles. [311]

The *CAL* also provides for the existence of a China Arbitration Association, in its article 15 *CAL*, however such an institution remains unestablished. This organization would exist to supervise arbitration institutions and arbitrators in China, and also, according to article 75 *CAL* would formulate unified arbitration rules for domestic arbitration institutions. [312] In a potentially powerful position, it remains to be seen the influence this institution can have in Chinese arbitration, notably in upgrading of regulations and improving efficiency of institutions.

The above considerations are constructive suggestions to attain a better interim relief system in China, a factor that businessmen and lawyers also take into account when choosing an arbitration forum.

***94** Foreign entrepreneurs dealing with Chinese partners or considering arbitrating in China should consider on the one hand the mandatory resort to an arbitral institution under *CAL*, [313] the limited availability of interim relief, the partial possibility pre-arbitral relief but also, on the other hand the problematic enforcement in China of interim measures granted abroad, as the rules exist at the present moment.

All in all, arbitration remains the preferred method of dispute resolution for foreign businessmen in China. [314]

Footnotes

a1 Trainee Lawyer at PLMJ - Law Firm, Lisbon, Portugal. This article was originally the author's LLM thesis, presented at the China-EU School of Law.

2 In which Portuguese-speaking countries are included. About the potential of Macau as a seat to Sino-lusophone arbitration see Simões, Fernando Dias, *Commercial Arbitration between China and the Portuguese-speaking World*, 2014, Kluwer Law International. Regarding arbitration in Portuguese-Speaking countries see Machava, Almeida, "A Arbitragem Comercial nos Países Africanos de Língua Oficial Portuguesa" [*Arbitration in Portuguese Speaking Countries in Africa*] (2007) 111 *Boletim da Faculdade de Direito da Universidade de Macau Ano XI N.23*, and Pires, Cândida da Silva Antunes, & Dantas, Álvaro Mangas Abreu, "Justiça Arbitral em Macau - A Arbitragem Voluntária Interna" [*Arbitral Justice in Macau - Domestic Voluntary Arbitration*] (2010) *Centro de Formação Jurídica e Judiciária*.

3 For an analysis of Asian influence in international arbitration see Moser, Michael J., "How Asia Will Change International Arbitration" (2013) *International Arbitration: The Coming of a New Age?* ICCA Congress Series, Volume 17, Kluwer Law International 62 (Van den Berg, Albert Jan ed., 2013) at p. 62. Exploring the competitiveness of other forums, in comparison with China -Aglionby, Andrew, "Arbitration Outside China: the Alternatives" (2007) *Journal of International Arbitration*, Volume 24 Issue 6, Kluwer Law International 673.

4 Zamora, José Maria Abascal, "The Art of Interim Measures, in International Arbitration 2006: Back to Basics?" (2007) 751 *ICCA International Arbitration Congress*, Kluwer Law International, The Hague, (Van den Berg, Albert Jan ed., 2007) at p. 752.

5 Yesilirmak, Ali, *Provisional Measures in International Commercial Arbitration*, 2005, Kluwer Law International, at p. 16.

6 For information on these territories arbitration framework see Sanger, Kathryn, Segorbe, Beatriz & Niu Jill, "Arbitration in Greater China: Hong Kong, Macau and Taiwan" (2007) *Journal of International Arbitration*, Volume 24 Issue 6, Kluwer Law International 651.

7 Lew, Julian, Mistelis, Loukas, & Kroll, Stefan Michael, *Comparative International Commercial Arbitration*, 2003, Kluwer Law International, at p. 4.

8 Blackaby, Nigel, Partasides, Constantines, Redfern, Alan & Hunter, Martin, *Redfern and Hunter on International Arbitration,* 2009*,* Oxford University Press, Oxford at p. 1. Being a combination of contractual and judicial elements - Fouchard, Philippe Gaillard, Emmanuel, Goldman, Berthold & Savage, John, *Fouchard, Gaillard, Goldman On International Commercial Arbitration*, 1990, Kluwer Law International, at p. 1. This last characteristic distinguishes arbitration from other methods of alternative dispute settlement, namely conciliation or mediation - *Ibid.* 27.

9 Fouchard, P., *On International Commercial Arbitration*, *supra* fn 8, at p. 35. A broad definition was also adopted in the *UNCITRAL Model Law* n. 2.

10 Redfern, A., *International Arbitration,* supra fn 8*,* at p. 12. *UNCITRAL Model Law* provides a definition in article 1(3). Also Lew, J., *Comparative International Commercial Arbitration*, *supra* fn 7, at p.1.

11 Redfern, A., *International Arbitration, supra* fn 8*,* at p. 15, Moses, Margaret L., *The Principle and Practice of International Commercial Arbitration*, 2008, Cambridge University Press, at p. 2.

12 Born, Gary B.*, International Commercial Arbitration, 2014,* Kluwer Law International, the Hague, at p. 204.

13 Redfern, A., *International Arbitration,* supra fn 8, at p. 75.

14 Greenberg, Simon, Kee, Christopher and Weeramantry, J. Romesh, *International Commercial Arbitration - An Asia-Pacific Perspective*, 2011, Cambridge University Press, at p. 22; also Redfern, A., *International Arbitration, supra* fn 8*,* at p. 25. Arbitral tribunals are "creatures of contract" - Donovan, Donald Francis F., "The Scope and Enforceability of Provisional Measures in International Commercial Arbitration A Survey of Jurisdictions, the Work of UNCITRAL and Proposals For

Moving Forward in International Commercial Arbitration: Important Contemporary Questions" (2003) ICCA Congress Series, Volume 11, Kluwer Law International 82, at p. 132.

15 Greenberg, S., *International Commercial Arbitration*, *supra* fn 14, at p. 22.

16 The arbitration law of the seat will govern the arbitral proceedings and the arbitral award will be made under its law; this choice will have impact in the extent of court intervention in arbitral proceedings - Born, G. B., *International Commercial Arbitration, supra* fn 12, at pp. 206-207.

17 Born, G. B., *International Commercial Arbitration, supra* fn 12, at p. 84. For more on choice of law - *Ibid.* 208ff.

18 Greenberg, S., *International Commercial Arbitration*, *supra* fn 14, at p. 23. Grounds to set aside are limited - see *UNCITRAL Model Law* Article 34.

19 Redfern, A., *International Arbitration, supra* fn 8, at p. 29.

20 *Ibid.* at p. 31. See also for a thorough explanation Lima Pinheiro, L., *Arbitragem Transnacional - A Determinação do Estatuto da Arbitragem*, [*Transnational Arbitration - Determining Arbitration's Status*], 2005, Almedina, at p. 75.

21 See Status of the *New York Convention*. Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. Last checked 20 January 2017. Angola is soon expected to join this list - see http://www.newyorkconvention.org/news/angola+accedes+to+the+new+york+convention.

22 Redfern, A., *International Arbitration, supra* fn 8, at p. 55, Born, G., *International Commercial Arbitration, supra* fn 12, at p. 171.

23 Greenberg, S. et al., *An Asia-Pacific Perspective*, *supra* fn 14, at p. 26.

24 Redfern, A., *International Arbitration, supra* fn 8, at p. 56, Born, G., *International Commercial Arbitration,* supra fn 12, at p. 171.

25 Redfern, A., *International Arbitration, supra* fn 8, at p. 57.

26 *Ibid.* at p. 56.

27 *Ibid.* at p. 53. See also Greenberg, S., *International Commercial Arbitration*, *supra* fn 14, at pp. 26-27.

28 Redfern, A., *International Arbitration, supra* fn 8, at p. 53 and Fouchard, P., *On International Commercial Arbitration*, supra fn 8, at p. 33.

29 Redfern, A., *International Arbitration, supra* fn 8, at p. 53.

30 *Ibid.* at p. 54.

31 *Ibid.*, also Born, G., *International Commercial Arbitration, supra* fn 12, at p. 171.

32 Redfern, A., *International Arbitration, supra* fn 8, at p. 32.

33 *Ibid.* at p. 43, also Born, G., *International Commercial Arbitration, supra* fn 12, at p. 79.

34 "[...] an agreement which either permits or requires its parties to pursue their claims against one another in a designated national court" Born, G., *International Commercial Arbitration, supra* fn 12, at p. 72.

35 *Ibid.* 78. Also see above reference to *New York Convention*. Redfern, A., *International Arbitration, supra* fn 8, at p. 32.

36 Greenberg, S., *International Commercial Arbitration*, *supra* fn 14, at p. 24. Redfern, A., *International Arbitration,* supra fn 8, at p. 32.

37 As opposed to the courts' "rigidity" - Lew, J., *Comparative International Commercial Arbitration*, *supra* fn 7, at p. 5.

38 For definitions of privacy and confidentiality see Born, G., *International Commercial Arbitration, supra* fn 12, at p. 89

39 This was appointed before as one of international commercial arbitration's greatest advantages (Fouchard, P., *On International Commercial Arbitration*, *supra* fn 8, at p. 1), but this has changed since arbitrators and administrative fees and expenses can be rather high - Redfern, A., *International Arbitration, supra* fn 8, at p. 35.

40 Redfern, A., *International Arbitration,* supra fn 8, at pp. 35-36.

41 *Ibid.* at p. 36.

42 There is no system of binding precedent in international commercial arbitration - *Ibid.* at p. 39.

43 *Ibid.* at p. 34.

44 For empirical data on the growth of popularity of international commercial arbitration - Born, G., *International Commercial Arbitration, supra* fn 12, at p.93.

45 Redfern, A., *International Arbitration, supra* fn 8, at p. 1. Referring to it as the "normal" method of dispute resolution in international commerce - Lima Pinheiro, L., *Arbitragem Transnacional*, *supra* fn 20, at p. 23.

46 Born, G., *International Commercial Arbitration, supra* fn 12, at p.1.

47 Greenberg, S., *International Commercial Arbitration*, *supra* fn 14, at p. 2.

48 Heilbron, Hilary, "Interim Measures in International Commercial Arbitration - Useful Weapon or Tactical Missile: By What Standards Should Arbitral Tribunals Fire the Shots?" (2015), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Volume 18, Kluwer Law International (Van den Berg, Albert Jan ed., 2015) at p. 241.

49 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 5. See definition in article 17(2) of *UNCITRAL Model Law*. For a historical development of interim measures see Yesilirmak, A., *Provisional Measures, supra* fn 4, at pp. 19 - 46, and Mendes, Armindo Ribeiro, "As Medidas Cautelares e o Processo Arbitral" [*Interim Measures and the Arbitral Procedure*], 2009, *Revista Internacional de Arbitragem e Conciliação*, Ano II, Associação Portuguesa de Arbitragem, Almedina 57, at pp. 58 - 66.

50 Fouchard, P., *On International Commercial Arbitration*, *supra* fn 8, at p. 710.

51 Opinion of Mr. Advocate General Tesauro on *Case C-213/89*, *R. v. Secretary of State for Transport, ex parte: Factortame Ltd*, I - 2450, 17 May 1990, para. 18.

52 Autonomous interpretation of article 24 of the *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968)* (*Brussels Convention 1968*), in *Case 391/95, Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line, (1998) ECR i-7091 ECJ,* para. 37. In this European Court of Justice (ECJ) decision, it was ruled that the *Brussels Convention* was applicable to an application of interim measures under its material scope and that its article 24 allows jurisdiction of a contracting state for those measures, even if an arbitral tribunal will be competent for the dispute itself.

53 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 15.

54 For e.g. dissipation of evidence or movement of assets to jurisdictions that most likely would not enforce the interim measures granted - Born, G., *International Commercial Arbitration,* supra fn 12, at p. 2426.

55 *Ibid.*

56 *Ibid.* at p. 2427, also Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 15. "(...) unmeritorious applications can involve considerable costs and delay and illegitimate and increased pressure on the opposing party to settle or adjust the presentation of its case" - Heilbron, H., *Interim Measures*, *supra* fn 51, at p. 241.

57 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 9.

58 *Ibid.*

59 Born, G., *International Commercial Arbitration,* supra fn 12, at p. 2428.

60 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 54.

61 *Ibid.* at p. 59 and Born, G., *International Commercial Arbitration,* supra fn 12, at p.2455. Arguing that it is the ultimate source of jurisdiction - Drahozal, Christopher R., "Party Autonomy and Interim Measures in International Commercial Arbitration" (2003) *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series, Volume 11, Kluwer Law International 179 (Van den Berg, Albert Jan ed., 2003) at p. 180. Emphasizing the contractual element in interim relief - Cabral, Márcia Costa, "O Procedimento Cautelar em Sede de Arbitragem - a Opção por uma Jurisdição de Natureza Contratualista" [*Interim Procedures in Arbitration - Choosing a Jurisdiction with Contractual Nature*] (2007) *Boletim da Faculdade de Direito da Universidade de Macau* Ano XI N. 23, at p. 2.

62 Yesilirmak, A., *Provisional Measures, supra* fn 4, at pp. 54-55.

63 Which is the law that governs the arbitral proceedings, normally the law of the seat of arbitration - Born, G., *International Commercial Arbitration,* supra fn 12, at p. 243. The power to order interim measures is considered a procedural issue - Lew, J., *Comparative International Commercial Arbitration*, *supra* fn 7, at p. 588.

64 *Ibid.* at p. 2459.

65 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 55. The lex arbitri "trumps" the parties' agreement - Werbicki, Raymond J., "Arbitral Interim Measures: Fact or Fiction?", (2010) *AAA Handbook on International Arbitration & ADR* Chapter 8, JurisNet LLC, 89, at p. 99, available at https://www.international-arbitration-attorney.com/. Last checked 20 January 2017.

66 Yesilirmak, A., *Provisional Measures, supra* fn 4, at pp. 56-58. About the mentioned theories, see Barrocas, Manuel Pereira, "Algumas Notas sobre Medidas Cautelares no Direito Comparado da Arbitragem" [A Few Notes about *Interim Measures in Arbitration Comparative Law*] (2011) available at http://arbitragem.pt/estudos/as-medidas-cautelares-na-arbitragem--manuel-pereira-barrocas.pdf, at p. 2 (last checked 20 January 2017), Karrer, Pierre A., "Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please" in *International Arbitration and National Courts: The Never Ending Story"* (2001) ICCA Congress Series, Volume 10, Kluwer Law International 97 (Van Den Berg, Albert Jan ed., 2001), at p. 99, and Mendes, A., *As Medidas Cautelares, supra* fn 52, at p. 75.

67 *UNCITRAL Model Law* article 34(2)(a)(iv). Born, G., *International Commercial Arbitration, supra* fn 12, at pp. 2431-2432; Iran-US Claims Tribunal adopted such reasoning - Brown, Chester, "The Enforcement of Interim Measures Ordered by Tribunals and Emergency Arbitrators in International Arbitration" (2013) *International Arbitration: The Coming of a New Age?* ICCA Congress Series, Volume 17, Kluwer Law International 279 (Van den Berg, Albert Jan ed., 2013), at p. 280.

68 *New York Convention* Article V(1)(d). See also Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 60-61; Redfern, A., *International Arbitration, supra* fn 8, at p. 26; Heilbron, H., *Interim Measures*, *supra* fn 51, at pp. 247-250.

69 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2467 and Redfern, A., *International Arbitration, supra* fn 8, at p. 322.

70 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 160, 171. Leading to lack of clarity and predictability - Hóber, Kaj, "Interim Measures by Arbitrators, in International Arbitration 2006: Back to Basics?" (2007) *ICCA International Arbitration Congress*, Kluwer Law International, The Hague 721 (Van den Berg, Albert Jan ed., 2007) at p. 731.

71 Mainly the product of arbitral case law - Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2464. Emphasizing transnational arbitration law, rather than domestic law - Lima Pinheiro, L., *Arbitragem Transnacional*, *supra* fn 20, at p.198.

72 Compare with *UNCITRAL Model Law* Article 17A.

73 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2483. See also Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 175 and Zamora, J., *The Art of Interim Measures*, *supra* fn 3, at p. 759.

74 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2478; mentioning "feasibility of claim" - Zamora, J., *The Art of Interim Measures*, *supra* fn 3, at p. 764.

75 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 177. Because provisional and incomplete, the analysis on the merits should not tantamount to a full prejudgment - Born, G., *International Commercial Arbitration, supra* fn 12, at pp. 2478-2480. This condition should serve to exclude frivolous or hopeless cases - Heilbron, H., *Interim Measures*, *supra* fn 51, at p. 252. See also Mendes, A., *As Medidas Cautelares, supra* fn 52, at p. 96.

76 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 175.

77 Born, G., *International Commercial Arbitration, supra* fn 12, at pp. 2474 - 2475.

78 See Zamora, J., *The Art of Interim Measures*, *supra* fn 3, at p. 765. Defending an economic interpretation rather than literal - Lew, J., *Comparative International Commercial Arbitration*, *supra* fn 7, at p. 605.

79 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 181; Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2470.

80 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 181; Berger, Klaus Peter, *International Economic Arbitration*, 1993, Kluwer Law International, at p. 336.

81 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2471; also position in *UNCITRAL Model Law* 17 A (1) (a). Arguing that this is a better standard than irreparable harm - Cossío, Francisco González De, "Interim Measures in Arbitration: Towards a Better Injury Standard" (2015) *Legitimacy: Myths, Realities, Challenges, ICCA Congress Series*, Volume 18, Kluwer Law International 260 (Van den Berg, Albert Jan ed., 2015) at p. 260.

82 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2468. Emphasizing on a pragmatic assessment, *Ibid.* 2475. See also Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 179.

83 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2507; Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 187.

84 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2551.

85 Redfern, A., *International Arbitration, supra* fn 8, at p. 451.

86 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2484. See also Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 205 and Karrer, P., *Less Theory, Please, supra* fn 69, at p. 109.

87 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 10.

88 Arguing that these do not constitute interim measures - Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2498 and Goswami, Lira, "Interim Reliefs: The Role of the Courts" (2001) *International Arbitration and National Courts: The Never Ending Story*, ICCA Congress Series, Volume 10, Kluwer Law International 111 (Van den Berg, Albert Jan ed., 2001) at p. 112.

89 Or the *status quo* - Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 210, Born, G., *International Commercial Arbitration,* supra fn 12, at p. 2484 and Zamora, J., *The Art of Interim Measures*, *supra* fn 3, at pp. 760-761.

90 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 12; UN DOC A/CN.9/WG.II/WP.108, 15, United Nations, General Assembly, Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement: Report of the Secretary General, A/CN.9/WG.II/WP.108 (14 January 2000) (UN DOC A/CN.9/WG.II/WP.108, 15). The aim is to ensure that the party's claim is not frustrated by deterioration of the other party's financial condition or diversion of assets - Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2492.

91 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 12. Arguing this rather amounts to a "partial final award" - Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2499.

92 Born, G., *International Commercial Arbitration, supra* fn 12, at pp. 2509 - 2510. *UNCITRAL Model Law* allows for "preliminary orders", see Articles 17B and 17C. Commentators in favour: Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 224; Huarte, Sonsoles Huerta de Soto, "The effective adoption of interim relief" (2010) *Revista del Club Español del Arbitraje*

Volume 2010 Issue 7, Wolters Kluwer España 77 (Fernández-Ballesteros, Miguel Ángel and Arias, David eds., 2010) at p. 86; Hóber, Kaj, "The trailblazers v. the Conservative Crusaders, Or Why Arbitrators Should Have the Power to Order Ex Parte Interim Relief" (2005) *New Horizons in International Commercial Arbitration and Beyond*, ICCA International Arbitration Congress, Kluwer Law International, the Hague 272 (Van Den Berg, Albert Jan ed., 2005), at p. 272 and Karrer, P., *Less Theory, Please, supra* fn 69, at p. 108, but under tight conditions.

93 Huarte, S., *The effective adoption of interim relief, supra* fn 95, at p. *76*.

94 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 220.

95 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2508.

96 *Ibid.* at p. 2509. Also Redfern, A., *International Arbitration, supra* fn 8, at p. 323.

97 The earlier position of scholars was opposite - see Fouchard, P., *On International Commercial Arbitration*, supra fn 8, at p. 721.

98 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 49.

99 *Ibid.* at p. 49ff.

100 Also Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2433, Graham, Luis Enrique, "Interim Measures: Ongoing Regulation and Practices (A View from the UNCITRAL Arbitration Regime)" (2009) *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series, Volume 14, Kluwer Law International 539 (Van den Berg, Albert Jan ed., 2009) at p. 562.

101 Also Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2433, Júdice, José Miguel, "As Providências Cautelares e a Arbitragem: em Que Estamos?" [*Provisional Measures and Arbitration: Where are we?*] (2010) *Revista Brasileira de Arbitragem* Volume VII Issue 28, Comitê Brasileiro de Arbitragem CBAr & IOB, 111, at p. 121.

102 Also Graham, L., *Interim Measures: Ongoing Regulation and Practices*, *supra* fn 103, at p. 565.

103 Whereas court judges might not be familiar with the technical issues, applicable foreign law to the merits, language of the dispute or underlying contract - Redfern, A., *International Arbitration, supra* fn 8, at p. 450.

104 That might not be available in the *lex fori* for state courts to grant - Boog, Christopher, "Swiss Rules of International Arbitration - Time to Introduce an Emergency Arbitrator Procedure?" (2010) *ASA Bulletin*, Volume 28 Issue 3, Kluwer Law International 462.

105 See Moses, M., *The Principle and Practice, supra* fn 11, at p. 110.

106 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 66, Born, G., *International Commercial Arbitration,* supra fn 12, at p. 2457. Similarly see Werbicki, R., *Arbitral Interim Measures*, *supra* fn 68, at p. 91.

107 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 69, also Redfern, A., *International Arbitration,* supra fn 8, at p. 445.

108 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2446, also Redfern, A., *International Arbitration, supra* fn 8, at p. 446. Nevertheless, business transactions do not "take place in a vacuum" - Huarte, S., *The effective adoption of interim relief, supra* fn 95, at p. 88, and some decisions will unavoidably affect banks and other third persons - Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 69, Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2545.

109 Karrer, P., *Less Theory, Please, supra* fn 69, at p. 97.

110 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 70 and Redfern, A., *International Arbitration, supra* fn 8, at p. 446. Arguing that interim measures granted by arbitrators will only be useful if the applicant party is confident that the counterparty will voluntarily comply with it - Barrocas, M., *Algumas Notas, supra* fn 69, at p. 4.

111 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2519.

112 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 80.

113 Redfern, A., *International Arbitration,* supra fn 8*,* at p. 445.

114 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 61.

115 *Ibid.* at p. 62.

116 *Ibid.* at p. 63.

117 *Ibid.* at p. 65.

118 Karrer, P., *Less Theory, Please, supra* fn 69, at p. 108.

119 Born, G.*, International Commercial Arbitration, supra* fn 12, at p. 2433.

120 *Ibid.* at p. 2432.

121 Recourse to foreign courts to obtain interim measures can be explained by the fact that the seat is often unconnected to the parties or the dispute and the "internationality" of the dispute - Guilhardi, Pedro, "Jurisdiction of National Courts for Interim Reliefs in Aid of Foreign Arbitral Proceedings: a Proposed Solution under the New York Convention*"* (2012) *Revista Brasileira de Arbitragem* Volume IX Issue 36, Comitê Brasileiro de Arbitragem CBAr & IOB, 56, at pp. 59-62.

122 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 67; Cabral, M., *O Procedimento Cautelar, supra* fn 64, at p. 14. Arguing that courts and tribunals should collaborate, since arbitration is to be an alternative and not a subsidiary means of dispute resolution - Júdice, J., *As Providências Cautelares*, *supra* fn 104, at p. 115.

123 Born, G.*, International Commercial Arbitration, supra* fn 12, at p. 2439; also Redfern, A., *International Arbitration, supra* fn 8*,* at p. 447.

124 Born, G.*, International Commercial Arbitration, supra* fn 12, at p. 2541.

125 *Ibid.* at p. 2441ff.

126 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 75.

127 Nor to a breach of the arbitration agreement, as evidenced by most arbitration rules - Redfern, A., *International Arbitration, supra* fn 8*,* at p. 448.

128 See *UNCITRAL Model Law* Article 9; Yesilirmak, A., *Provisional Measures, supra* fn 4, at pp. 75-76, Born, G.*, International Commercial Arbitration, supra* fn 12, at p. 2549 and Fouchard, P., *On International Commercial Arbitration*, *supra* fn 8, at p. 711ff.,715ff.

129 Born, G.*, International Commercial Arbitration, supra* fn 12, at p. 2451; Emphasizing that at this time "vital evidence or assets might disappear", Redfern, A., *International Arbitration, supra* fn 8*,* at p. 445.

130 Born, G.*, International Commercial Arbitration, supra* fn 12, at p. 2451. More on these mechanisms - Atlihan, Özen*, "*The Main Principles Governing Interim Measures In The Pre-Arbitral Proceedings - Specifically, The ICC Emergency Arbitrator Rules" (2012*) Annales de la Faculté de Droit d'Istanbul*, Bd. 43 N. 60, 203, Collins, Erin, *"*Pre-Tribunal Emergency Relief in International Commercial Arbitration*"* (2012) *Loyola University of Chicago International Law Review* Volume 10 Issue 1 105, at p. 105, Hosking, James, Lindsey, Erin & Valentine, Chaffetz, "Pre-arbitral Emergency Measures of Protection: New Tools for an Old Problem" (2011), *Commercial Arbitration 201 1: New Developments and Strategies for Efficient*, Cost-Effective Dispute Resolution, 199 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. H-865, 2011), available at http://www.chaffetzlindsey.com/wp-content/uploads/2011/10/000954671.PDF at p. 199 (last checked 20 January 2017) and Baigel, Baruch, "The Emergency Arbitrator Procedure under the 2012 ICC Rules: A Juridical Analysis*"* (2014), *Journal of International Arbitration*, Volume 31, Issue 1, Kluwer Law International 1, at p. 1.

131 *Rules of Arbitration of the International Chamber of Commerce (2012)* (*ICC Rules*) Article 28(1).

132 *ICC Rules* Article 29(6).

133 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2453. See also Dunmore Michael, "Interim Measures by Arbitral Tribunals: The Enforceability Conundrum" (2012) *Asian International Arbitration Journal*, Volume 8 Issue 2, Kluwer Law International 222, at p. 222.

134 *ICC Rules* Article 28(3).

135 An opt-in procedure where an appointed referee would grant emergency relief - See Redfern, A., *International Arbitration, supra* fn 8, at p. 431, 446; experience shows it was seldom used - Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2451. For more about this mechanism Beraudo, Jean-Paul, "Recognition and Enforcement of Interim Measures of Protection Ordered by Arbitral Tribunals" (2005), *Journal of International Arbitration*, Volume 22 Issue 3, Kluwer Law International 245, at p. 250ff.

136 *London Court of International Arbitration Rules (2014)* (*LCIA Arbitration Rules*) Article 9 and *Dubai International Arbitration Center Arbitration Rules (2007)* (*DIAC Arbitration Rules*) Article 12; more in Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2453 and Redfern, A., *International Arbitration, supra* fn 8, at p. 432.

137 *Court of Arbitration for Sport Procedural Rules (Arbitration Code) (2013)* (*CAS Procedural Rules*) R52, and Article 8 of the *Regolamento di Arbitrato Associazone Internationazionale per l'Arbitrato, AIA Rules (2012)* (*AIA Arbitration Rules*); Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2453.

138 *Netherlands Arbitration Institution Arbitration Rules (2015)* (*NAI Arbitration Rules*) Articles 42 and 43, a single arbitrator is appointed for the sole purpose of deciding on interim measures; Redfern, A., *International Arbitration, supra* fn 8, at p. 445.

139 Possible, but the exception to common practice in emergency relief - Boog, C., *Swiss Rules of International Arbitration, supra* fn 107, at p. 465.

140 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 243. See Redfern, A., *International Arbitration, supra* fn 8, at p. 450; Zamora, J., *The Art of Interim Measures*, supra fn 3, at p. 759; Barrocas, M., *Algumas Notas, supra* fn 69.

141 Some jurisdictions allow arbitral tribunals to order financial penalties or sanctions for non-compliance - Born, G., *International Commercial Arbitration, supra* fn 12, at pp. 2447-2448.

142 This is a technique followed in production of evidence, also in *IBA rules* Articles 9(4) and 9(5). This tool should be limited to issues of proof - Graham, L., *Interim Measures: Ongoing Regulation and Practices*, *supra* fn 103, at pp. 565-566, the arbitrator still must decide the parties claims based on the merits of the dispute, Born, G., *International Commercial Arbitration, supra* fn 12, at pp. 2447-2448. Characterizing this as a mere "hollow threat", see Wagoner, David E., "Interim Relief In International Arbitration: Enforcement Is a Substantial Problem" (1996) *Dispute Resolution Journal*, Volume 51, 68, at p. 69. Also Ferguson, Stephen M., "Interim Measures of Protection in International Commercial Arbitration: Problems, Proposed Solutions and Anticipated Results" (2003) *Currents International Trade Law Journal* 55, at p. 57.

143 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 243, Karrer, P., *Less Theory, Please, supra* fn 69, at p. 103. Also *Atlihan, Ö.*, *The Main Principles, supra* fn 133, at p. 211.

144 Donovan, D., *The Scope and Enforceability, supra* fn 14, at p. 147. This promotes legal certainty - Yesilirmak, A., *Provisional Measures, supra* fn 4, at pp 238.

145 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2511, 2517.

146 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 246.

147 Ecuador, Colombia - Huarte, S., *The effective adoption of interim relief, supra* fn 95, at p. 84; Switzerland - Karrer, P., *Less Theory, Please, supra* fn 69, at p. 107.

148 England, Germany, Hong Kong - Huarte, S., *The effective adoption of interim relief, supra* fn 95, at p. 84.

149 Regarding all these methods, see Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 247.

150 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2520.

151 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 247. See Article 17 H of the *UNCITRAL Model Law*.

152 Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 258.

153 *Ibid.*

154 *Ibid.* at p. 259ff. The debate revolves around de "final" nature of an award of interim measures, under article 5 of the *New York Convention*, and the form in which these measures are granted. See more at Dunmore, M., *The Enforceability Conundrum*, *supra* fn 136.

155 These may not qualify under the existing enforcement regimes - Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2561.

156 This is one of the court's limitations regarding interim measures. Zamora, J., *The Art of Interim Measures*, *supra* fn 3, at p. 758.

157 *Ibid.* at p. 2560.

158 Under which no review of the substance of the interim measure is allowed - Huarte, S., *The effective adoption of interim relief, supra* fn 95, at p. 80. Article 17 I of *UNCITRAL Law* was a similar scope of review as *New York Convention* article V.

159 Arguing for the approach of Swiss Law, which only controls jurisdiction of the arbitral tribunal and public policy of state of enforcement, *Ibid.* at p. 82.

160 *Ibid.* at p. 83.

161 The effect would be that the interim measure would be as if issued by the court from its initial moment, and a party would be liable for disrespecting it from that moment - *Ibid.*

162 Born, G., *International Commercial Arbitration, supra* fn 12, at pp. 2521 - 2522; Dunmore, M., *The Enforceability Conundrum*, *supra* fn 136, at p. 227. Since the emergency arbitrator will not look into the merits of the dispute, parties have less of an incentive to comply with its decisions - Boog, C., *Swiss Rules of International Arbitration, supra* fn 107, at p. 476.

163 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2522 n. 521 - *Case 10CV2467 WQH (NLS) Chinmax Medical Systems Inc. v. Alere San Diego, Inc. (2011) WL 2135350 at *3 (S.D. Cal.)*.

164 Brown, C., *The Coming of a New Age?*, *supra* fn 70, at p. 287. Robert Sills concludes that this possibility of enforcement remains unclear, a situation that potentiates resorting to courts - Sills, Robert, "The Continuing Role of the Courts in the Era of the Emergency Arbitrator" (2015) *Legitimacy: Myths, Realities*, Challenges, ICCA Congress Series, Volume 18, Kluwer Law International 278 (Van den Berg, Albert Jan ed., 2015) at pp. 281-284.

165 Overcoming the fear of appearing partial to one of the parties in assessing the merits of the case - Born, G., *International Commercial Arbitration, supra* fn 12, at p. 2462 and Yesilirmak, A., *Provisional Measures, supra* fn 4, at p. 73.

166 Redfern, A., *International Arbitration, supra* fn 8, at pp. 449-450.

167 Born, G., *International Commercial Arbitration, supra* fn 12, at p. 58, Wang Guiguo, "The Unification of the Dispute Resolution System in China Cultural, Economic and Legal Contributions" (1996) *Journal of International Arbitration* Vol. 13 Issue 2, Kluwer Law International 5, at p. 7. See also Constant, Frédéric, "L'arbitrage en Chine, des Ming (1368-1644) Jusqu'à nos Jours" [*Arbitration in China, from the Ming to the present day*] (2013) *Revue de l'Arbitrage*, Comité Français de l'Arbitrage, Volume 2013 Issue 1 3, *at p.* 54, and Kun Fan, "Globalization of Arbitration: Transnational Standards Struggling with Local Norms - Through the Lens of Arbitration Transplantation in China" (2013) *Harvard Negotiation Law Review*, Volume 18 175, at p. 184ff.

168 Wang, G., *The Unification of the Dispute Resolution System, supra* fn 173, at p. 7.

169 Gu Weixia, "Arbitration in China - Chapter 3"(2013) *International Commercial Arbitration in Asia*, JurisNet LLC 77, at p. 77.

170 This Law provided for arbitration between foreign investors and local parties. See Chi Manjiao, "Is It Time for Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law" (2009) *Asian International Arbitration Journal*, Volume 5 Issue 2, Singapore International Arbitration Centre (in co-operation with Kluwer Law International) 142, at p. 145, and Liu Ge & Lourie, Alexander, "International Commercial Arbitration in China: History, New Developments, and Current Practice" (1994) *The John Marshall Law Review*, Volume 28 539, at pp. 540ff.

171 Kun Fan, "Arbitration in China: Practice, Legal Obstacles and Reforms" (2008) *ICC International Court of Arbitration Bulletin*, Volume 19 No. 2, International Chamber of Commerce 25, at p. 25. See also Glück, Ulrike and Lichtenstein, Falk, *Arbitration in the People's Republic of China, CMS* (2012) *CMS Guide to Arbitration*, Volume I 207, available at https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_CHINA.pdf, at p. 211 (last checked 20 January 2017).

172 Denying party autonomy - Tao Jingzhou, "Arbitration Law of the PRC, Chapter I" (2010) *Concise International Arbitration*, Kluwer Law International 657 (Mistellis, Loukas A. ed., 2010), at p. 657.

173 Moser, Michael J. (ed.), *Managing Business Disputes in Today's China: Duelling with Dragons*, 2007, Kluwer Law International, at p.54; Wang Wenying, "*Distinct Features of Arbitration in China*" (2006) *Journal of International Arbitration*, Volume 23 Issue 1, Kluwer Law International 49, at p. 51.

174 Tao, Jingzhou, *Arbitration Law and Practice in China,* 2012, Kluwer Law International, at p. 9. In contrast with domestic awards, at the time.

175 *Ibid.* at p. 14. Until then Chinese national legislation and judicial practice had been classified as "less supportive" to arbitration - Born, G., *International Commercial Arbitration, supra* fn 12, at pp. 166-167.

176 See for eg. *CAL* article 15, regarding independence of domestic arbitration institutions. Also Gu, W., *Arbitration in China, supra* fn 175, at p. 79, Kun, F., *Arbitration in China supra* fn 177, at p. 25, Wang, W., *Distinct Features of Arbitration, supra* fn 179 at p. 49.

177 Tao, J., *Arbitration Law, supra* fn 180, at p. 5.

178 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 82, Kun, F., *Arbitration in China, supra* fn 177, at p. 26.

179 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 130, Kun, F., *Arbitration in China*, *supra* fn 177, at p. 26. Explaining reasons for such expansion of scope - Tao, J., *Arbitration Law, supra* fn 180, at pp. 101ff.

180 It can be argued that this distinction has become "meaningless"-Kun, F., *Arbitration in China*, *supra* fn 177, at p. 26.

181 See Status of the *New York Convention*.

182 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 82. About the Chinese judicial organization - Kun, F., *Arbitration in China - A Legal and Cultural Analysis*, 2013, Hart Publishing, at p. 10.

183 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 82.

184 Tao, J., *Arbitration Law, supra* fn 180, at p. 108. For further analysis, see Johnston, Graeme, "Party Autonomy in Mainland Chinese Commercial Arbitration" (2008) *Journal of International Arbitration*, Volume 25 Issue 5, Kluwer Law International 537.

185 Tao, J., *Arbitration Law, supra* fn 180, at p. 109, Kun, F., *Arbitration in China*, *supra* fn 188, at pp. 20-21.

186 Gu, W., *Arbitration in China*, *supra* fn 175, at pp. 79-81, respectively *CAL* Articles 4, 5, 19, 8 and 9, inspired from *UNCITRAL Model Law*.

187 Arguing that the *CAL* can be too vague - Kun, F., *Globalisation*, *supra* fn 173, at p. 171.

188 "Arbitration commission" of Article 10 of *CAL* refers to an arbitral institution established in China - *CMS Guide, supra* fn 177, at p. 211.

189 Articles 58, 63, 70, 72 of CAL. Such a position was also confirmed by the *SPC* in *People's Insurance Company of China, Guangzhou v Guanghope Power et al,* <<Foreign Language>> *(SPC) 2003*.

190 Article 4 of *CLI.3.79378(EN), Interpretation of Supreme People's Court on Certain Issues Relating to Application of the Arbitration Law of the PRC (23 August 2006)* (*SPC Interpretation 2006*). See also Song Lu, "National Report for China", (2014) *ICCA International Handbook on Commercial Arbitration*, Kluwer Law International, 1 (Paulsson, Jan & Bosman, Lise eds., 1984, Supplement No. 80, July 2014), Chapter II.

191 Tao, J., *Arbitration Law, supra* fn 180, at p. 77. However, signalling a future trend, the SPC issued issued *Opinions on Providing Judicial Protection for the Construction of Pilot Free Trade Zones* (30 December 2016) (SPC Opinions 2016), allowing for *ad hoc* arbitration for companies registered in Free Trade Zones - Feng, Sophia, "China's Path to Ad Hoc Arbitration emerges from the Free Trade Zones" (21 January 2017) available at: http://kluwerarbitrationblog.com/2017/01/21/chinas-path-to-ad-hoc-arbitration-emerges-from-the-freetradezones/ (last checked 20 January 2017).

192 Articles 10 to 15 of the *CAL* apply to both kinds of institutions, and Articles 65 to 73 additionally apply to foreign-related institutions.

193 *CMS Guide, supra* fn 177, at p. 214.

194 See more on Briner, R., "Arbitration in China seen from the Viewpoint of the International Court of Arbitration of the International Chamber of Commerce" (2005) *New Horizons in International Commercial Arbitration and Beyond*, ICCA International Arbitration Congress, Kluwer Law International, the Hague 21 (Van Den Berg, A. Jan ed., 2005) and Moser, M., "Commentary on Arbitration and Conciliation Concerning China" (2005) *New Horizons in International Commercial Arbitration and Beyond*, ICCA International Arbitration Congress, Kluwer Law International, the Hague 89, at p. 92. Criticizing the uncertainty of this issue - Von Wunschheim, Clarisse and Kun Fan, "Arbitrating in China: The Rules of the Game, Practical Recommendations concerning Arbitration in China" (2008) *ASA Bulletin* Volume 26 Issue 1, Kluwer Law International 35, at p. 35.

195 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 90, Moser, M., *Managing Business Disputes*, *supra* fn 179, at p. 68.

196 *CMS Guide, supra* fn 177, at p. 214. Also Kun, F., *Arbitration in China*, *supra* fn 177, at p. 37 and Wunschheim, V. and Kun, F., *Arbitration in China*, *supra* fn 200, at p. 37.

197 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 89.

198 Kun, F., *Arbitration in China*, *supra* fn 177, at p. 44.

199 *CMS Guide, supra* fn 177, at p. 214.

200 Song, L., *National Report for China, supra fn 196,* Chapter I.

201 *Ibid.*, Chapter II and IV. This reading is concluded by inference of article 271 of *CPL* (located in Part V of the *CPL* which deals only with foreign-relate procedure), otherwise the arbitral award obtained might not be enforceable in China - *Ibid.* Chapter IV. Article 128 of *China Contract Law* reaffirms such a conclusion - *Ibid.* Chapter IV n.18.

202 *CMS Guide*, *supra* fn 177, at p. 210. Most Foreign Investment Enterprises are Chinese-foreign equity joint venture companies, or wholly foreign-owned enterprises - *Ibid.* 217. Also Tao, J., *Arbitration Law, supra* fn 180, at p. 2.

203 Song, L., *National Report for China, supra fn 196,* Chapter I.

204 Similar interpretation was expressed previously in Article 178 of *CLI.3.3689(EN), Opinions of the Supreme People's Court on Several Issues concerning the Implementation of General Principles of Civil Law of the PRC (2 April 1988)* (*SPC Opinions 1988*) and in Article 304 of *CLI.3.5839(EN), Opinions of the Supreme People's Court relating to Several Issues Arising from the Implementation of the Civil Procedural Law of the PRC (14 July 1992)* (*SPC Opinions 1992*) - Gu, W., *Arbitration in China*, *supra* fn 175, at p. 91. The *SPC Interpretation 2015* confirms previous criteria and goes on to broaden the concept of "foreign element", adding two situations where such element is present (nos. 2) and 5) mentioned above) - Cao Lijun & Lu Leilei, "To Be or Not to Be: The Practical Implications of Choosing Foreign Arbitration for Purely Domestic Contracts"

(6 March 2015), available at http://kluwerarbitrationblog.com/blog/2015/03/06/to-be-or-not-to-be-the-practical-implications-ofchoosingforeign-arbitration-for-purely-domestic-contracts/ (last checked 20 January 2017). For further developments on this issue, Huawei Son, Leilei Lu, "Bold move by Shanghai Court in interpreting the phrase 'foreign-related element': A direction to follow?" (9 June 2016), available at http://kluwerarbitrationblog.com/2016/06/09/bold-move-by-shanghai-court-in-interpreting-the-phraseforeignrelated-element-a-direction-to-follow/ (last checked 20 January 2017).

205 *SPC Opinions 1992*. Also Gu, W., *Arbitration in China*, *supra* fn 175, at p. 91.

206 Song, L., *National Report for China, supra fn 196,* Chapter I. See also Kun, F., *Arbitration in China*, *supra* fn 177, at p. 37; Wang, W., *Distinct Features of Arbitration, supra* fn 179 at p. 58 - arguing that recognizing foreign (but not domestic) *ad hoc* arbitration is contradictory practice of Chinese courts.

207 Articles 65-73 of the *CAL*; see Gu, W., *Arbitration in China*, *supra* fn 175, at p. 91.

208 Article 66 and 10-15*, CAL.*

209 Articles 13 and 67*, CAL.*

210 Articles 68 and 46*, CAL.* Gu, W., *Arbitration in China*, *supra* fn 175, at p. 92.

211 Articles 70, 71 and 58*, CAL.* Even with the *CPL* 2012 amendments, which reduced the courts' discretion to review the merits of a domestic arbitral award (*CPL* Article 237), scholars argue that still *CAL* is far from international standards for refusing enforcement, based only on procedural matters. See *UNCITRAL Model Law* Article 34(2) and Chen, Helena, "The impact of the 2012 amendments to the Civil Procedural Law to the People's Republic of China on the arbitration regime in China" (2012) *International Arbitration Law Review*, Volume 15 Issue 6 247, at p. 247.

212 Song, L., *National Report for China, supra fn 196,* Chapter 1. Under Chinese practice, an institution is deemed "foreign" according to its nationality, e.g. ICC arbitration will be foreign even if conducted in China - *Ibid.* n. 3. Also Kun, F., *Arbitration in China*, *supra* fn 177, at p. 25.

213 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 94.

214 Harpole, Sally A., "Novos Desenvolvimentos Mantêm a Tradição da Arbitragem na China*"* [*New Developments Keep the Tradition of Arbitration in China*] (2005) *Revista Brasileira de Arbitragem*, Volume II Issue 7, Comitê Brasileiro de Arbitragem (CBAr) & IOB 79, at p. 92.

215 Moser, M., *Managing Business Disputes*, *supra* fn 179, at p. 78.

216 *Ibid.*. at p. 9.

217 Wang Shengchang, "CIETAC's Perspective on Arbitration and Conciliation Concerning China" (2005) *New Horizons in International Commercial Arbitration and Beyond*, ICCA International Arbitration Congress, Kluwer Law International, the Hague 27 (Van Den Berg, A., Jan ed., 2005), at p. 40.

218 Song, L., *National Report for China, supra* fn 196*,* Chapter IV and Kun, F., *Globalisation*, *supra* fn 173, at p. 212. For a complete analysis of the previous mediation regime and current combined practice see Kun, F., *Globalisation*, *supra* fn 173, at pp. 155-169, Kaufmann-Kohler, Gabrielle and Kun, F., "Integrating Mediation into Arbitration: Why It Works in China*",* (2008) *Journal of International Arbitration*, Volume 25 Issue 4, Kluwer Law International 479, and Wang, W., *Distinct Features of Arbitration, supra* fn 179 at pp. 73ff.

219 *CIETAC Arbitration Rules* Article 47.

220 Concerns regarding the neutrality of arbitration may arise - Gu, W., *Arbitration in China*, *supra* fn 175, at p. 96, Kun, F.*, Arbitration in China, supra* fn 177, at p. 30, Moser, M., *Managing Business Disputes*, *supra* fn 179, at p. 9.

221 *CIETAC Arbitration Rules* Article 47.

222 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 86.

223 Article 68, *CAL.*

224 Articles 5 and 20, *CAL.* See Gu, W., *Arbitration in China*, *supra* fn 175, at p. 87 and Tao, J., *Arbitration Law, supra* fn 180, at pp. 96ff. Arguing arbitration institutions are administrative bodies and should not rule on jurisdictional challenges - Kun, F., *Arbitration in China*, *supra* fn 177, at p. 57.

225 Kun, F., *Arbitration in China*, *supra* fn 177, at p. 37. *CIETAC Rules* allow for the institution to "delegate such power to the arbitral tribunal" - *CIETAC Arbitration Rules* article 6(1) - Gu, W., *Arbitration in China*, *supra* fn 175, at p. 82.

226 *New York Convention*, Article V(1) and (2). These grounds are deemed procedural in nature - Song, L., *National Report for China, supra* fn 196, Chapter VI. However, in China, violation of public policy, perceived as "social public interest" of article 274 *CPL*, is always available as a ground for refusing recognition and enforcement by Chinese courts.

227 Article 70, CAL and Article 274, CPL. See Song, L., *National Report for China, supra fn 196,* Chapter V and VII.

228 Gu, W., *Arbitration in China*, *supra* fn 175, at pp. 87-88. See *CPL* at p. 273 and Article 58, *CAL.* This difference can be justified on concerns that arbitrators in domestic arbitration institutions lack experience and quality - *Ibid.* Also Kun, F., *Arbitration in China*, *supra* fn 177, at p. 32.

229 Tao, J., *Arbitration Law, supra* fn 180, at p. 18.

230 Kun, F., *Arbitration in China*, *supra* fn 177, at p. 33.

231 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 131.

232 Kun, F., *Arbitration in China*, *supra* fn 177, at p. 33 and Gu, Weixia, *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,* in *Wisconsin International Law Journal*, Volume 27 No. 2, 221 (2009), at p.233.

233 Moser, M., *Managing Business Disputes*, *supra* fn 179, at p. 65.

234 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 87 and Wang, W., *Distinct Features of Arbitration, supra* fn 179 at p. 68.

235 Song, L., *National Report for China, supra* fn 196, Chapter I. Also Moser, M., *Managing Business Disputes*, *supra* fn 179, at p. 58.

236 *CMS Guide, supra* fn 177, at p. 213.

237 Statistics available in CIETAC website, http://www.cietac.org/, under tab "About us", "Statistics".

238 http://www.cietac.org/index.cms, under "About Us" tab; also Song, L., *National Report for China, supra* fn 196, Chapter I, at p. 2. In 2012 CIETAC's sub-commissions in Shanghai and Shenzhen declared themselves independent, and now function as SHIAC and SCIA. More info - in the same *url*, under section "Important Notices", "CIETAC Announcement On Issues Concerning CIETAC Shanghai Sub-Commission and CIETAC South China Sub-Commission".

239 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 85. CIETAC introduced in *2012 Arbitration Rules* for Financial Disputes. For more on CIETAC see Kun, F., Globalization of Arbitration, *supra* fn 173, at p.117ff.

240 *CMS Guide*, *supra* fn 177, at p. 209.

241 *Ibid.*

242 *Ibid.*

243 *Ibid.*, and Gu, W., *Arbitration in China*, *supra* fn 175, at p. 78. See also Moser, M., *Managing Business Disputes*, *supra* fn 179, at p. 26.

244 Kun, F., *Arbitration in China*, *supra* fn 177, at p. 172, Wang, W., *Distinct Features of Arbitration, supra* fn 179 at p. 57. Unless if in relation to parties that are wholly-owned foreign companies that legally incorporated or registered in the FTZs agree - see SPC Opinions 2016 supra fn 197.

245 Chi, M., *Time for Change*, *supra* fn 176, at p. 165- highlights the lack of judicial independence and inappropriate institutional structure as the two major obstacles for improvement.

246 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 90. On the other hand, this scrutiny and the arbitral institution's reputation may enhance the enforceability of awards - Redfern, A., International Arbitration, *supra* fn 8, at p. 56, Greenberg, S., *International Commercial Arbitration*, *supra* fn 14, at p. 27.

247 Kun, F., *Arbitration in China*, *supra* fn 177, at p. 35.

248 Chi, M., *Time for Change*, *supra* fn 176, at p. 165, Kun, F., *Arbitration in China*, *supra* fn 177, at p. 36 and *CMS Guide, supra* fn 177, at p. 212. This harms the predictability of outcomes - Moser, M. *Managing Business Disputes*, *supra* fn 179, at p. 43, and is also pointed out for arbitration in CIETAC, in proceedings involving foreign parties - at pp. 194-195.

249 Kun, F., *Arbitration in China*, *supra* fn 177, at p. 40.

250 Yuan, Kong, "Revision of China's 1994 Arbitration Act--Some Suggestions from A Judicalization Perspective" (2005) *Journal of International Arbitration*, Volume 22 Issue 4, Kluwer Law International 323, at p. 324.

251 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 130. Arguing it is also an alternative to local partial arbitration institutions - Wang W., *Distinct Features of Arbitration, supra* fn 179 at p. 57.

252 Wang, W., *Distinct Features of Arbitration, supra* fn 179 at p. 59, Gu, W., *Arbitration in China*, *supra* fn 175, at p. 90.

253 Song, L., *National Report for China, supra fn 196,* Chapter IV. Reading of articles 58 and 70 of *CAL* together, *Song Lu* also argues that not all provisions of *CAL* (specifically those regarding foreign-related arbitration) should be interpreted to have this status, as that would harm party autonomy.

254 *Ibid.*

255 Without the application of one of the parties to arbitration. Born, G., *International Commercial Arbitration*, *supra* fn 12, at p. 2508.

256 Loong Yang Ing, "Provisional Measures" (2009) *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series 14, Kluwer Law International, the Hague 606 (Van Den Berg, Albert Jan ed., 2009), at p. 609.

257 Song, L., *National Report for China, supra fn 196,* Chapter IV.

258 Tao, J., *Arbitration Law, supra* fn 180, at p. 142.

259 Tao, Jingzhou, "Salient Issues in Arbitration in China," (2012) *American University International Law Review*, Volume 27 807, at p. 820.

260 Emphasizing that Chinese practice differs from article 17 *UNCITRAL Model Law* practice - Song, L., *National Report for China, supra* fn 196*,* Chapter IV.

261 Liu Ge, "UNCITRAL Model Law v. Chinese Law and Practice - A Discussion on Interim Measures of Protection*"* (2005) *New Horizons in International Commercial Arbitration and Beyond*, ICCA International Arbitration Congress, Kluwer Law International, the Hague 278 (Van Den Berg, Albert Jan ed., 2005), at p. 282.

262 Since under the *CAL* and *CPL*, tribunal-rendered interim measures would not be enforceable. See also Howlett, A., "CIETAC Issues New Arbitration Rules: Interim Measures and Consolidation Among the Highlights" (April 2012), http://www.jonesday.com/cietac_issues_new_arbitration_rules/ (last checked 20 January 2017).

263 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 110. Under the Chinese criteria of the nationality of the arbitral institution, these arbitration proceedings would still be considered seated in China - Aglionby, Andrew, "Notable Characteristics of Arbitration in China, Contemporary Issues" (2012) *International Arbitration and Mediation* - The Fordham Papers 2011, Martinus Nijhoff Publishers 310 (Rovine, A. ed., 2012), at p. 314.

264 Gu, W., A*rbitration in China*, *supra* fn 175, at p. 109.

265 Song, L., *National Report for China, supra* fn 196, Chapter V.

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267 Gu, W., *Arbitration in China*, *supra* fn 175, at p. 109.

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274 Chen, H., *Impact of 2012 Amendments*, *supra* fn 217, at p. 247.

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276 *Ibid.*

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278 Dutson, S, *supra* fn 283, *Arbitrating in China*.

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281 Article 100, s.1, CPL.

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283 Dutson, S, *supra* fn 283, *Arbitrating in China*, Song, L., *National Report for China, supra* fn 196, Chapter I. and *CMS Guide, supra* fn 177, at p. 221.

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