

The Preservation of Evidence in China's International Commercial Arbitration

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I. Introduction

It has been more than ten years since the promulgation of the Arbitration Law of the People's Republic of China in 1994.¹ During this past decade, the Arbitration Law has been playing a substantial role in promoting arbitration, especially international commercial arbitration of China. However, from the perspective of general international standards, and particularly in the light of China's accession to the World Trade Organization (WTO), the Arbitration Law is still rigid and old-fashioned in many places. Among other things, its provisions concerning the preservation of evidence leave much to be desired compared to those of developed arbitration statutes.

Measures ordered to preserve evidence are generally recognized as one form of interim relief of protection in arbitration.² Considering the importance of preserving the evidence that may be relevant and material to the resolution of the dispute, one may always be surprised to find the

scarcity and ambiguity of relevant legal texts in this regard, especially as the issue of interim measures of protection has kept on generating piles of discussions and commentaries in recent years.³ This article endeavours to address the particular issue of evidence preservation in China's international commercial arbitration. The article begins with a description of the Chinese legal system, followed by a short account of how evidence is preserved in litigation procedures in order to give the necessary background information. By probing into the problems in practice caused by the inadequacy of relevant legal texts, an in-depth analysis is made and some possible legislative resolutions are suggested.

II. Background Information

1. Institutional Framework

The Chinese arbitration system primarily consists of the China International Economic and Trade Arbitration Commission (CIETAC), the China Maritime Arbitration Commission (CMAC) and more than 160 local arbitration commissions set up in large and medium-sized cities throughout China. These domestic arbitration commissions were called upon to handle international arbitration cases by the Circular of the General Bureau of the State Council on Several Issues Concerning the Implementation of Arbitration Law (State Council Circular).⁴ Although the presumed intention of such State Council Circular was to offer a wider variety of choices for parties to tailor the arbitral proceedings better to their different needs, the competence in handling

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¹ Arbitration Law of the People's Republic of China (《中华人民共和国仲裁法》), August 31st, 1994, (最新中华人民共和国常用法律法规全书), Beijing 2003, pp. 1426-1430; English translation available at <http://english.sohu.com/2004/07/04/78/article220847885.shtml> (visited April 25th, 2005).

² Alan Rerfern/Martin Hunter, *Law and Practice of International Commercial Arbitration*, London 1999, section 7-20: "[t]he first category of interim measures, directed to the taking of preservation of evidence"; W. Laurence Craig/William Park/Jan Paulsson, *International Chamber of Commerce Arbitration*, New York 2000, pp. 460: "[i]nterim measures are said to cover... those that have to do with the discovery, preservation and production of evidence concerning the dispute"; Emmanuel Gaillard/John Savage, Fouchard, Gaillard and Goldman on *International Commercial Arbitration*, the Hague 1999, Part 4, Chapter III: "a protective or conservatory ruling preserves a party's right, the *status quo* or evidence" and Report of the Working Group on Arbitration on the work of its thirty-sixth session (New York, 4-8 March 2002), A/CN.9/508, pp. 19: "With a view to facilitating the issuance of interim measures aimed at preventing destruction of evidence, it was suggested that among the illustrative list contained in paragraph (4), mention should be made of 'a measure intended to provide a preliminary means of preserving evidence'. That suggestion was accepted by the Working Group."

³ This is largely due to the effort made by the UNCITRAL Working Group II to design uniform provisions on interim measures of protection and its enforcement since the year of 2000. Jason Fry, *Interim Measures of Protection: Recent Developments and the Way Ahead*, in: *International Arbitration Law Review*, Vol. 6 (2003), No. 5, pp. 158-159.

⁴ 3rd Section of the Circular of the General Bureau of the State Council on Several Issues Concerning the Implementation of Arbitration Law (《国务院办公厅关于贯彻实施《中华人民共和国仲裁法》需要明确的几个问题的通知》), June 8th, 1996, available at http://www.law-lib.com/law/law_view.asp?id=12496 (visited April 27th, 2005).

foreign-related cases of many domestic arbitration commissions is still far from satisfactory. It is noted that the problems of lack of expertise and political interference from local administrative authorities still exist in such domestic arbitration commissions, and a number of them tend to run short of caseload on a regular basis.⁵

CIETAC has been, and still by far is, the most important and popular forum for foreign investors. In the beginning of 2005, it promulgated its latest version of CIETAC Arbitration Rules (CIETAC Rules), which will be in effect from May 1st of this year.⁶

2. Statutory Framework

Chinese law basically takes the following five forms:

- Laws adopted by National People's Congress or its Standing Committee;
- Regulations formulated by the State Council and various ministries or equivalents under it;
- Provisions issued by provincial municipalities;
- Interpretations made by the Supreme People's Court (SPC) ("judicial interpretations");
- Others.

Therefore, when parties choose to arbitrate their disputes in China, they shall bear in mind their *lex arbitri* – the law governing the arbitral proceedings, usually the law of the place of arbitration – by no means only refers to the Arbitration Law. Relevant provisions in the Civil Procedure Law of the People's Republic of China (Civil Procedure Law),⁷ the State Council Circular, and 21 Judicial Interpretations are all legally binding authorities directly or indirectly dealing with arbitration.⁸ In addition, China as a member of the New York Convention on the Recognition and Enforcement of

Foreign Arbitral Awards (New York Convention) is subject to the reciprocity reservation, hence it is under the obligation to recognize and enforce foreign arbitral awards made in the territory of other contracting states of the Convention.⁹

China is not a common law country. It has only recently adopted a solid practice of reporting cases when the SPC started reporting its cases in the Gazette of the Supreme People's Court of the People's Republic of China. Nowadays, more and more people's courts as well as arbitration institutes begin to publish cases, but they are not very systematic. It must be borne in mind that these cases are more influential in academic studies than in legal practice, where they only have persuasive or suggesting value rather than binding force as precedents.¹⁰

As this article focuses on evidential issues, importance shall be attached to another source of law, the Several Rules of Evidence Concerning Civil Litigation of the Supreme People's Court (Civil Evidence Rules), which came into force on April 1st, 2002.¹¹ The Civil Evidence Rules are essentially Judicial Interpretations for a better implementation of the Civil Procedure Law,¹² they apply equally to both domestic cases and cases involving foreign elements.¹³ Since China has no unified evidence code *per se*, the Civil Evidence Rules are widely considered to be the most important attempt of the SPC in helping to further improve judicial justice in China and to be the most developed legal text on evidential issues besides the relevant provisions in the Civil Procedure Law.¹⁴

3. Evidence Preservation in Judicial Procedure

It is common practise for courts to order interim relief for evidence preservation. Art. 74 Civil Procedure Law confers upon the parties in litigation the right to apply directly to the people's court for preservation of evidence:

⁵ The Resolution of China Disputes Through Arbitration (Freshfields Bruckhaus Deringer, Hong Kong), May 2004, pp. 8-9, available at <http://www.freshfields.com/practice/disputeresolution/publications/pdfs/8287.pdf>.

⁶ 中国国际经济贸易仲裁委员会仲裁规则, January 11th, 2005, available at <http://www.cietac.org.cn/>; English translation available at <http://www.cietac.org.cn/english/rules/rules.htm> (both visited April 25th, 2005.) Read more about CIETAC and China's arbitral system at http://www.cietac.org.cn/english/introduction/intro_1.htm (visited April 25th, 2005).

⁷ Civil Procedure Law of the People's Republic of China (中华人民共和国民事诉讼法), April 9th, 1991, (最新中华人民共和国常用法律法规全书), Beijing 2003, pp. 1389-1409, English translation available at http://www.novexcn.com/civil_procedure_law.html (visited April 26th, 2005). Arbitration-related provisions are Art. 257-261, Art. 266 (2) and Art. 269 Civil Procedure Law.

⁸ Jerome A. Cohen/Neil Kaplan/Peter Malanczuk, Arbitration in China, A practical Guide, Hong Kong 2004, pp. 457-508.

⁹ The New York Convention was ratified by China on January 22nd, 1987 and effective from on July 22nd, 1987.

¹⁰ For a collection of reported cases in the PRC see <http://www.qis.net/chinalaw/prclaw8.htm> (visited April 20th, 2005).

¹¹ Several Rules of Evidence Concerning Civil Litigation of the Supreme People's Court (最高人民法院关于民事诉讼证据的若干规定), December 21st, 2001, available at http://www.law-lib.com/law/law_view.asp?id=16829 (visited April 25th, 2005).

¹² Under Art. 33 of the Organizational Law of the People's Court of China (中华人民共和国人民法院组织法, September 2nd, 1983, (最新中华人民共和国常用法律法规全书), Beijing 2003, pp. 65-68, the SPC shall have the power to interpret laws and regulations as to how they are going to be applied in the course of judicial practice.

¹³ Mo Zhang/Paul J. Zwier, Burden of Proof: Developments in Modern Chinese Evidence Rules, in Tulsa Journal of Comparative and International Law (2003), pp. 463.

¹⁴ Art. 63-74 Civil Procedure Law.

“Should the evidence be destroyed or lost, or should it be difficult to obtain afterwards, the parties in litigation may request the people's court for the preservation of such evidence; the people's court may also take security measures on its own initiative.”

The apparent vagueness and ambiguity of this provision is substantially reduced by the Civil Evidence Rules. Art. 23 Civil Evidence Rules requires that if the parties apply to the people's court for preservation of evidence under Art. 24 of the Civil Procedure Law, the application shall be made no later than seven days before expiration of the period for evidence production. It is also provided that when a party applies for preservation of evidence, the people's court may ask such party to provide a corresponding security. It is further set out that if applicable laws or judicial interpretations contain provisions on pre-litigation preservation of evidence, such provisions shall apply.

Art. 24 Civil Evidence Rules follows by listing a variety of different methods that may be employed to carry out the evidence preservation, once such request is granted by the people's court. Such methods include, without limitation, sealing-up, detaining, taking of photographs, audio recording, video recording, copying, verifying, inspecting or preparation of records. With regard to whether the relevant party or his representative should be present when making preservation of evidence by the people's court, Art. 24 Civil Evidence Rules only provides that the people's court *may* ask for the presence of the party or his representative.¹⁵

III. Evidence Preservation in Arbitral Proceedings

1. No Power for Arbitral Tribunals to Order Interim Relief to Preserve Evidence

Unlike many developed legal systems,¹⁶ Chinese law does not grant arbitrators the power to order measures for evidence preservation, rather the relevant power still lies with the people's courts, as provided in Art. 46 Arbitration Law:

¹⁵ Note that this is different from the issue of *ex parte* preservation of evidence. The word “making” here refers to the carrying out of a particular method of evidence preservation, not the decision-making process of the people's court on whether to grant evidence preservation.

¹⁶ In general, most developed arbitration statutes have moved towards a willingness to permit arbitrators to grant provisional relief. This trend reflects the increasing acceptance of arbitration as a satisfactory mechanism for resolving complex international commercial disputes and an increasing recognition by national courts that interlocutory judicial interference in the arbitral process is often counterproductive. Gary B. Born, *International Commercial Arbitration: Commentary and Materials*, New York 2001, Part III, Chapter 14.

“If the evidence is perishable or if the evidence may be hard to obtain in the future, parties may request that the evidence shall be preserved. Where a party requests preservation of the evidence, the arbitration commission shall submit the request to the Basic Level People's Courts (BPC)¹⁷ of the location where the evidence is obtained.” And further in Art. 68 Arbitration Law: “When a party requests preservation of evidence in an arbitration which involves foreign elements,¹⁸ the arbitration commission shall submit the party's request to the Intermediate People's Court (IPC) in the place where the evidence is located.” Art. 23 para. 2 CIETAC Rules echoes the above two provisions: “When a party applies for taking interim measures of preservation of evidence, the Arbitration Commission shall submit the party's application to the people's court in the place where the evidence is located for a ruling.” Since the people's court still is the only competent venue to grant preservation of evidence in China, Art. 23 and 24 Civil Evidence Rules shall be also applicable in the practice of courts in ordering preservation of evidence in aid of arbitration.¹⁹

2. Reasons for Giving the Court Exclusive Competence

a) Historical and Cultural Reasons

Although this allocation of power between the arbitral tribunal and the people's courts in terms of granting interim measures may be contrary to the general international practice, it is consistent with the Chinese cultural perception that embodies its legal system. During China's two-thousand-year history of feudalism, the law has always been equated with the concept of punishment. This tumultuous history of ‘rule of man’ rooted in a traditional agrarian economy and Confucian culture make Chinese people regard the law as a source of trouble; unless they are driven from pillar to post,

¹⁷ There are three levels of local people's courts: Basic Level People's Court (BPC), Intermediate People's Court (IPC), and High People's Court (HPC), with the Supreme People's Court (SPC) as the highest judicial organ of the State. It supervises the adjudication of the local people's courts at various levels and special people's courts. Article 2 Organizational Law of the People's Court of China.

¹⁸ A case with foreign elements would refer to an action where: (a) at least one party is a foreigner, stateless person, or a foreign company or organization; (b) the legal facts creating, changing, or terminating the legal relations between the parties take place in a foreign country; or (c) the subject matter of the dispute is located in a foreign country. *Mo Zhang; Paul J. Zwiwer*, supra note 13, p. 463.

¹⁹ Note that not all the three paragraphs of Art. 23 Civil Evidence Rules are applicable. Art. 23 para. 1 Civil Evidence Rules may only be applied to the preservation of evidence in litigation and para. 3 deals with pre-litigation preservation of evidence, whose counterpart is not yet available in arbitration.

they would not go for the 'last resort' to which the citizens turn to resolve their disputes with each other or with the government.²⁰ Therefore it is natural that courts and judges are expected to play the role of ultimate protectors of the citizens. In fact, after thousands of years, they have already been considered the one and only competent forum to measure justice,²¹ and this belief makes it unimaginable to confer the duty of determining evidence to a private institution, i. e., the arbitral organization, even if such institution is not as "private" as it is intended to be.

b) Realistic Reasons

The reason for the Arbitration Law to vest the people's court with the exclusive power in ordering interim relief has more to do with the reality of arbitration commissions in China. It is worth noting that the arbitrators' power to issue interim measures is *not* altogether absent in the history of international arbitration in China.²² Under Art. 15 and 16 Provisional Arbitration Rules of CMAC (1959),²³ the president of the Arbitration Commission may order interim measures of protection, which may be enforced upon application by one of the parties.²⁴

Unfortunately, starting from the establishment of the Foreign Trade Arbitration Commission in 1954, the development of arbitration commissions during the past 40 years in general is not satisfactory.²⁵ Lots of arbitration commissions in China, especially local ones, were politically subservient to the Communist Party, institutionally dependent on local governments for funding, and there is no adequate personnel and expertise to deal with international commercial arbitration cases.²⁶

Moreover, given the multitudinous regulations and other measures undertaken by various governmental ministries as well as those taken by provincial and other local authorities, and taking into account that the details on how the more general laws, regulations and other measures of the central government would be implemented often differed among various jurisdictions. Therefore, it is not surprising that some arbitration commissions might use the governmental influences or administrative powers to promote local arbitrations - which appeared to be a good source of revenue - by forcing the parties to add an arbitration clause designating the local arbitration commission where the Chinese party domiciled or had business as the venue for their dispute. Considering the aforesaid, the Arbitration Law ended up with the denial of the power of arbitration commissions to order interim measures.²⁷

3. Possibility of Circumventing the Regime

Since the Arbitration Law prevents arbitrators from ordering evidence preservation, it is natural for parties of an international arbitration to consider the possibilities of circumventing these provisions by vesting power in the arbitrators by means of the arbitration agreement.

The first choice is to opt-in other arbitration laws that allow arbitrators to exercise the power of granting interim relief. Intentionally or negligently, the Arbitration Law does not set forth its scope of application, i. e., whether the law is to be applicable to arbitral proceedings that designate China as the place of arbitration.²⁸ Such absence may be understood in a way to infer the possibility for parties to opt-in other laws by agreement. However, as already affirmed by the great majority of national laws, the place of arbitration is always employed as the exclusive criterion in deciding the *lex arbitri*,²⁹ and "[i]t is hardly acceptable for two arbitration laws to be applied as this can lead to almost

²⁰ WANG Zhenmin, The Developing Rule of Law in China, in: Harvard Asia Quarterly, Volume IV, No.4, 2000, available at <http://www.fas.harvard.edu/~asiacr/haq/200004/0004a007.htm> (visited April 25th, 2005).

²¹ This perception has changed somehow in those opened-up regions in recent years. But generally speaking, the Chinese people still cherish awe-stricken worship towards people's courts.

²² GAO Fei (高菲), Entry into the WTO - Where Shall the International Commercial Arbitration of China Go? (入世: 中国国际商事仲裁向何处去?), in: Arbitration in China (中国仲裁) 2002, No. 8, pp. 10 et seq.

²³ The Provisional Rules were annulled on January 1st, 1989. The current CMAC Arbitration Rules (中国海事仲裁委员会仲裁规则, CMAC Rules) will come into effect on May 1st, 2005, available at www.cmac.org.cn (visited April 25th, 2005).

²⁴ Now the CMAC Rules generally provide that the Arbitration Commission shall submit the party's application for interim measures of protection to the competent maritime court. See Art. 23 para. 2 CMAC Rules.

²⁵ The Foreign Trade Arbitration Commission was first established within the China Council for the Promotion of International Trade on May 6th, 1954 at the 215th Session of the Government Administration Council and the Arbitration Law was promulgated in 1994.

²⁶ Randall Peerenboom, The Evolving Regulatory Framework for Enforcement of Arbitral awards in the People's Republic of China, in: Asian-Pacific Law & Policy Journal, 12, pp. 4.

²⁷ To further detach administrative power from the arbitration commissions, the Arbitration Law stipulates explicitly in art. 14 that arbitration commissions shall be independent from administrative organs.

²⁸ The only provisions on applicability of the Arbitration Law are about arbitrability. See art. 2 and 3 Arbitration Law.

²⁹ Explanatory Note by the UNCITRAL Secretariat on UNCITRAL Model Law on International Commercial Arbitration, para. 13, available at <http://www.uncitral.org/en-index.htm> (visited April 27th, 2005). Examples include s.46 of Swedish Arbitration Act, s.2 (1) of 1996 English Arbitration Act (English Arbitration Act), art.176 (1) of Swiss Private International Law and art.1 (2) of UNCITRAL Model Law on International Commercial Arbitration (MAL). This scope of application is generally referred to as the "strict territorial criterion".

irresolvable conflicts of law.”³⁰ To say the least, there will be hardly any interest for China if arbitral proceedings taking place there are to be governed by a procedural law other than that of China. Therefore, although the Arbitration Law is silent on the scope of application, it is still quite doubtful that this choice will be practically operative.

The second choice is to accept the application of the Arbitration Law while trying to override only Art. 68 Arbitration Law. This is permitted as long as the provision to be overridden is not mandatory.³¹ Thus the threshold question here is whether Art. 68 Arbitration Law is mandatory and only if the answer to this threshold question is “no”, the parties can exclude its effect, either by explicitly spelling out arbitrators’ power in their arbitration agreement or by incorporating positive provisions coming from foreign laws or institutional arbitration rules.³²

Mandatory rules are usually defined as from the viewpoint of an individual state being so essential that their application may never be set aside by foreign laws.³³ This was affirmed in the renowned Interim ICC Award of July 16th, 1986, in which the Court ruled that mandatory provisions of the law of the arbitral *situs* should apply even where the parties had agreed on a foreign curial law.³⁴ With respect to arbitration laws, there are certain procedural rules that “express the demands made by the state on the arbitrators’ administration of justice.”³⁵ Semantically speaking, such demands by the state may include not only those requiring arbitrators’ action – e. g. to consent to the taking of evidence – but also those requiring their inaction. As already discussed above, several reasons count for the denial in Chinese legislation of arbitral power ordering preservation of evidence in arbitration. In other words, such inaction of arbitrators results from the state’s opinion that only the people’s courts acting alone, would be able to guarantee justice of evidence preservation in arbitration. In addition, the use of “shall” in the wording of Art. 68 Arbitration Law further suggests that this provision is mandatory. As a result, the arbitrators and parties of international arbitrations shall comply with this article and may not agree on the exclusion of its application, neither by means of an express clause in

their arbitration agreement nor by incorporating other institutional rules. The only way for the parties then is to arbitrate outside of China, which is possible according to some legal authorities.³⁶

4. Operation of the Current Regime and Some Practical Problems

The following note will demonstrate – in a sequential order – how the current regime on preservation of evidence runs in China. The first question to be examined is the question of power allocation and the problems it imposes on the judges.

a) Dilemma for the Judges

In China litigation bears the characteristics of an inquisitorial system in which the judges or the people’s courts play an active role in court proceedings and have control over the whole process. As a matter of fact, this role is extended virtually to the process of ascertaining facts. Judges of the people’s courts are required to investigate and collect the evidence that is supposed to determine the duties of the litigant participants.³⁷ They shall, in accordance with the legal procedure, examine and verify the evidence fully and objectively.³⁸ This is referred to as the “actuality doctrine” and was elaborated by the Civil Evidence Rules. Under the authority of Art. 63 Civil Evidence Rules, the judge shall make an independent determination on provability of the evidence after a full and objective examination of the evidence under prescribed procedures. When making such determination, the judge may use logical reasoning and daily living experiences in addition to adherence to law and judicial ethics. Another requirement is that the judges shall examine and evaluate all evidence of the case under such aspects as the degree of relevance between each element of evidence and the facts of the case, as well as the relationship among various elements of evidence.³⁹

Since the arbitral tribunal cannot decide in any respect on the issue of ordering evidence preservation, all the relevant decisions have to be left with

³⁰ Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure*, New York 2003, pp. 670.

³¹ *Id.*

³² Note that China does not recognize the *ad hoc* arbitration under the virtue of Art. 16 Arbitration Law: “An arbitration agreement shall have the following contents: ... (3) the chosen arbitration commission.”

³³ Kaj Hobér, *Extinctive Prescription and Applicable Law in Interstate Arbitration*, Uppsala 2001, pp. 111.

³⁴ Gary B. Born, *supra* note 16.

³⁵ Lars Heuman, *supra* note 31, p. 256.

³⁶ Art. 126 Contract Law of People’s Republic of China (《中华人民共和国合同法》), March 15th, 1999, (最新中华人民共和国常用法律法规全书), Beijing 2003, pp. 135-158; Art. 58, 70 and 71 Arbitration Law; and Art. 257 Civil Procedure Law. Foreign invested enterprises such as joint ventures are PR China legal persons. While the Contract Law does not expressly prohibit two PR China parties from arbitrating abroad, it is generally understood that the parties are limited to the arbitration within the territory of China. See *Randall Peerenboom*, *supra* note 26, p. 7.

³⁷ Mo Zhang/Paul J. Zweier, *supra* note 13, p. 429.

³⁸ Art. 64 para. 3 Civil Procedure Law.

³⁹ Art. 64 Civil Evidence Rules.

the judge. This means the judge has to follow the above requirements – obviously he cannot rule out of nothing – and has to know at least whether the requested evidence is relevant and provable to the case. In the meantime, unfortunately, beside his logical reasoning, daily living experiences and judicial ethics, the judge almost has no direct knowledge about “the facts of the case”, which surely plays a very important role in making such decision under the actuality doctrine. It is submitted that local courts are generally not willing to exercise their powers to order interim measures in aid of arbitration in the fear that their decision may turn out to be premature before the facts and law developed by the arbitral tribunal.⁴⁰ This situation has deteriorated as the result of this dilemma of judges. As they are required to second guess on the merits of a dispute which has to be decided by the arbitrators, they have to remain very cautious; hence they are reluctant to grant evidence preservation. This is obviously contrary to the original intention of the court assistance to arbitration. Comparatively, when the arbitrators have to make a decision on whether to grant the application for evidence preservation, they may have more information available about the merits of the case than a court. Moreover, they will not be hindered by the actuality doctrine contained in the above-mentioned provisions of Civil Procedure Law and Civil Evidence Rules, which only have binding effects on the people’s courts in civil litigation proceedings.

Recently, some delighting moves have been made in the practice of some local people’s courts. In these cases, although it is still the judges who make the final decisions on granting evidence preservation, the comments of the arbitral tribunal are taken into consideration to a larger extent. This indirectly suggests an instructive attempt to delegate the power of ordering interim measures to the arbitral tribunal – the private and confidential forum that parties originally agreed to submit their dispute to. The position adopted by Nantong IPC in the *Yingrui Kaiman Co Ltd v. Rugao Glass Fiber Factory (2001)* is such an example.⁴¹

Yingrui Kaiman Co Ltd (the Claimant) and Rugao Glass Fiber Factory (the Respondent) entered

into a joint venture agreement to establish Nantong Times Garment Co. Ltd. (the Joint Venture). Pursuant to the agreement, the Claimant made its capital contributions, steadily increased its shares in the Joint Venture and finally became the majority shareholder of the Joint Venture. Alleging false capital contribution of the Respondent, the Claimant filed for arbitration to CIETAC, which accepted the case and declared its jurisdiction over the dispute.⁴² Responding to the request for arbitration, the Respondent applied to CIETAC on August 30th, 2001 for interim measures of evidence preservation to be taken on all the account books and financial reports of the Joint Venture. The Respondent pointed out that since the dispute concerned the capital contribution of the joint venture, the account books and vouchers, recording all the relevant acts of both parties, should be of great importance for the questions at issue. The Respondent argued that it was necessary to preserve them in case they would be destroyed or altered by the claimant, who *de facto* controlled the joint venture. Pursuant to Art. 68 Arbitration Law, CIETAC submitted a copy of the Respondent’s application to the IPC of Nantong – where the requested evidence located – for adjudication.

The collegiate bench constituted for the case in Nantong IPC first noted that although the requested evidence was controlled by a third party (the Joint Venture was an independent legal entity other than the Claimant and the Respondent),⁴³ it should still have jurisdiction over the case. Nothing in the Civil Procedure Law and the Arbitration Law required the requested evidence to belong to the parties of litigation or arbitration, and to say the least, it was the two arbitrating parties who had established this Joint Venture. Considering the arguments of the Respondent, the collegiate bench basically agreed upon the necessity for granting evidence preservation, but it did not base its ruling on this. Instead, the collegiate bench further analyzed that evidence preservation might exist in both judicial procedure and arbitral procedure and while the former undoubtedly fell within the power domain of the people’s courts, the case for the latter was not a simple bright line test. The collegiate bench found that since the application was raised during arbitration, the arbitrators should have better access to the case than the judges. Therefore it would be better for the arbitrators to state their opinion as to

⁴⁰ Grégoire Marchac, Interim Measures in International Commercial Arbitration under the ICC, AAA, LCIA and UNCITRAL Rules, in: American Review of International Arbitration Vol. 10, pp. 133.

⁴¹ DU Kailin (杜开林), A Review on a Case Concerning Evidence Preservation in Arbitration – Inadequacy of Legislation in This Regard (对一起仲裁证据保全案的评析——兼论现行仲裁证据保全法律规定的不足), in: Arbitration in China (中国仲裁) 2003, No. 1, available at http://www.jsourt.gov.cn/aljx/..%5Caljx%5Cms%5Cmsan_xa.htm. The author was one of the judges in this case.

⁴² The No. of this case at CIETAC is V20010246.

⁴³ Unless otherwise provided, judges shall work as a collegiate bench to adjudicate cases. Art. 10 Organizational Law of the People’s Court of China.

the relevance and provability of the requested evidence, which could serve as reference for the judges in making their final decision. It was also agreed that after preservation, such evidence should still be made use of by the arbitrators in their ruling on the merits of the case; and the people's court might copy, keep record of or return the evidence to the holder of such evidence, as the case may be.

Having asked for instructions from the HPC of Jiangsu Province, Nantong IPC made a verdict granting the requested evidence preservation on February 6th, 2002. Given the big amount of account books and vouchers, the IPC sealed them up on the spot and informed the CIETAC, who then sent for experts to examine and appraise the account books together with staff from the IPC.

b) Arbitral Commission or the Party

Under the Arbitration Law the roles with respect to the application for interim measures of protection are assigned to arbitration organizations rather than to arbitral tribunals.⁴⁴ An application for evidence preservation shall be submitted to the competent people's court by the arbitration commission under the virtue of Art. 46 and 68 Arbitration Law.⁴⁵ Although it is obvious that having to apply through an arbitration commission for evidence preservation rather than doing this directly could cause greater delays, it is still not altogether clear under existing laws whether the parties to arbitration may apply directly to the court or whether the arbitration commission must apply on their behalf.⁴⁶ It has been submitted that Chinese law does not expressly exclude a direct application by a party;⁴⁷ however, experience indicates that the people's courts tend to attach preference to those applications made by arbitration commissions under their letterhead.⁴⁸ If the only use of the arbitration commission is no more than a "postman" between the party and the people's court, what makes it too special to be eliminated?

Assumptions of the original intention of the Chinese legislators may help to answer the question.

⁴⁴ Peter Coles, Ground Handling in China - Investors Beware, in: Mondaq Business Briefing, December 9th, 2003. Arbitration commissions are also designated to determine the validity of an arbitration agreement (Art. 20 Arbitration Law) and to appoint arbitrators (Art. 31 and 32 Arbitration Law).

⁴⁵ Same for the application of property preservation. Art. 28 Arbitration Law.

⁴⁶ Randall Peerenboom, supra note 26, p. 46.

⁴⁷ Wang Shengchang, Resolving Disputes in the People's Republic of China, Hong Kong 1996, pp. 107.

⁴⁸ James Kwan, Interim Measures in PRC Arbitrations, in: Jerome A. Cohen/Neil Kaplan/Peter Malanczuk, Arbitration in China, A practical Guide, Hong Kong 2004, p. 201.

As the final vote goes to the arbitration commission, the possible considerations might have been:

- Concerns that the requesting party may obstruct arbitration proceedings if they are allowed to apply whenever they want.

- Being the administering body of arbitration and taking administration fees from the parties, it is the responsibility of an arbitration commission to take care of such matters for the parties.

If the consideration was the first, it is reasonable to expect the arbitration commission to be responsible for a *prima facie* determination whether the party's request is reasonable. Only if an arbitration commission satisfies that there is no attempt to obstruct shall it submit the application to the competent people's court. In this case, the role of arbitration commissions is necessary and cannot be eliminated. However, nothing in the wording of Art. 46 and 68 Arbitration Law suggests the duty of arbitration commissions to do so. They are only asked to "submit" the application to a competent people's court. To say the least, it is really doubtful that having the arbitration commission actively involved in the preservation of evidence will not cast a shadow on its independency and impartiality. Therefore, the first assumption is groundless.⁴⁹

The second consideration fits into the wording of Art. 46 and 68 Arbitration Law, i.e., the requirement for arbitration commissions is simply to transmit the requesting party's application to the competent people's court. Arbitration Law imposes no time limits on the arbitration commission to submit a party's application to the relevant people's court.⁵⁰ However, the real value of such intervention of arbitration commission has to remain doubtful. It is a common understanding that a state does not have to worry about whether the parties are in the best economical position. This is the question that should be resolved by the rules of the arbitration commission or taken care of by the parties themselves when such rules are silent or parties want to agree otherwise.⁵¹ Instead, what does matter for the success of an application for evidence preservation is its timeliness. The party should be allowed to apply directly if doing so is consistent with their best interest.

Above said, the value of such requirement is, in fact, nothing but a formality without any practical sense. Arbitrators are the soul of arbitration. Their

⁴⁹ Id.

⁵⁰ James Kwan, supra note 49, p. 199.

⁵¹ Lars Heuman, supra note 30, p. 6.

direction in fixing rules of arbitral proceedings is especially important in order to conduct international arbitration more efficiently and effectively.⁵² As far as evidence preservation is concerned, the Arbitration Law just creates an unnecessary formality whose function is nothing but making the parties shuttle between arbitration commissions and people's courts, wasting time, which is, in many cases, the one and only determining factor for the success of evidence preservation.

c) Two Levels of People's Courts Involved

As mentioned, the BPC at the location of the evidence has jurisdiction to order measures of preservation in domestic arbitration cases, whereas where a party requests evidence preservation in arbitration cases involving foreign elements, such requests shall be decided by the IPC where the evidence is located. At first sight, this scheme is similar with a type of arrangement adopted in some countries, in which there is one particular authority in charge of enforcement, with the purpose of relieving the applying party from complicated national civil jurisdiction rules and facilitating the enforcement of foreign arbitral awards. One such example is the Svea Court of Appeal in Sweden,⁵³ which normally is the second instance under the civil jurisdiction rule but acts as the first instance when a foreign award is to be enforced in Sweden. In terms of granting interim measures of protection assisting arbitration, however, it does make no difference whether the arbitration is foreign-related or not.⁵⁴ A Swedish district court is competent to order provisional attachment if the respondent is domiciled in Sweden; it is also competent to do so if the respondent only has assets in Sweden or is domiciled in an EU Member State.⁵⁵

Given the complexity of cases involving foreign elements and the imbalanced development of different regions of China, the legal expertise of different BPCs varies to a great extent. For some small provincial people's courts, it is quite possible that they do not possess necessary knowledge to deal with foreign-related cases, because these are rarely encountered in their routine work. For this reason the IPCs, which generally excel their first instance counterparts in terms of both legal expertise and facilities, came to be the proper venue.

However, as a fundamental principle of the WTO multilateral agreements, national treatment requires giving citizens of other states the same treatment as one's own nationals.⁵⁶ A distinction of competent venues in ordering interim measure between domestic and foreign-related cases apparently is contrary to this principle and create nursery for local protectionism, especially in domestic cases.⁵⁷ So despite of the good intention of such double designation, it shall only serve as a temporary resolution. The national treatment needs to be respected finally in the Arbitration Law as a permanent cure for the current situation, which shall to a large extent depend on the overall improvement of professionalism of the judges.

d) Pre-arbitration Evidence Preservation

If evidence is in the risk of being destroyed or altered before the commencement of arbitral proceedings, it is natural for the aggrieved party to turn to local courts. As it can take months to set up an arbitral tribunal, it is also necessary for the competent local courts to have jurisdiction to order interim measures to preserve such evidence.⁵⁸ In French law, for example, applications before the courts can be made on the basis of two different provisions, the first of which allows a party to arbitration to apply directly to the courts for evidence preservation.⁵⁹ This provision will no longer be applicable once the case has been submitted to the tribunal, which then becomes the proper venue to decide on the "legitimate reason to preserve".⁶⁰

Although the Arbitration Law remains silent as to the pre-arbitration evidence preservation, some courts have already permitted pre-arbitration preservation by analogy.⁶¹ Moreover, some lately promulgated or amended statutes of different legal fields also coincide in allowing for pre-litigation and pre-arbitration evidence preservation, showing a general trend towards recognition of this issue in the Chinese legislature. For example, the Special Maritime Procedure Law of People's Republic of China (Special Maritime Procedure Law) allows parties to apply for preservation of maritime

⁵² Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, para 31.

⁵³ s. 56 of the Swedish Arbitration Act.

⁵⁴ In fact, the IPCs are particularly designated as the proper venue as long as there are foreign elements related.

⁵⁵ *Lars Heuman*, supra note 30, p. 699.

⁵⁶ For the concept of national treatment, please visit http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (visited April 28th, 2005)

⁵⁷ *GAO Fei*, supra note 22.

⁵⁸ *Alan Redfern/Martin Hunter*, supra note 1, section 7-12.

⁵⁹ Art.145 of the New Code of Civil Procedure, available at: http://www.legifrance.gouv.fr/html/codes_traduits/ncpcatext.htm (visited April 28th, 2005)

⁶⁰ *Emmanuel Gaillard/John Savage*, supra note 1, Part 4, Chapter III, Section II, B.

⁶¹ *WANG Shengchang*, supra note 47, p. 105.

evidence before commencing litigation.⁶² The CMAC Rules⁶³ also provide that if a party applies for preservation of maritime evidence before the commencement of arbitration proceedings, the party shall submit its application directly to the maritime court at the place where the evidence to be preserved is located. In terms of substantive law, some recent flurries of amendments made to intellectual property laws after China's entry into the WTO also clearly set out practicable procedures for pre-litigation evidence preservation.⁶⁴ These procedures are respected by the courts under the authority of the Civil Evidence Rules.⁶⁵ So provided, there should not be anything significant that actually prevents a similar mode to be adopted in commercial arbitration during the upcoming amendment of the Arbitration Law.⁶⁶

e) Liability and Damages

If the ordered measure for evidence preservation turns out to be unjustified to the detriment of the party against whom it is directed, the question of liability comes into play. Under the current legal regime of China, as will be discussed below, it is not clear who will be liable for the caused damages – arbitral power, judicial power or the requesting party.

aa) Liability of Arbitral Tribunal/Arbitration Commission

An arbitrator is generally regarded as enjoying immunity from liability for negligence in the carrying out of his or her functions.⁶⁷ It is the parties who have agreed to submit their dispute to a quasi-judicial tribunal consisting of arbitrator(s) for a decision; therefore they should be prepared to bear the consequence. A party cannot sue arbitrators for damages just because they have wrongly held the case. Otherwise, there will be little security for the finality of arbitration and nobody would like to accept the mandate to become an arbitrator for the

fear of being brought to suit by one party.⁶⁸ But since the arbitrators in China do not have the power to order interim measures to preserve evidence, there is in fact no such question about their liability.

Generally, the arbitration institution is not liable to any party for any act or omission in connection with the arbitration either,⁶⁹ while exceptions for "wilful misconduct or gross negligence" of the institution are made in some arbitration rules.⁷⁰ Although the CIETAC Rules do not expressly contain a liability exclusion clause, the same principle shall still apply. And as the only function of an arbitration commission in respect of evidence preservation is to submit application documents for the requesting party to a competent people's court, the only scenario it can be held liable for is the failure to fulfil this duty. Imaginably, such situation is rare in practice.

bb) Liability of the Requesting Party

There is barely any direct authority in legal texts concerning the liability of the party requesting evidence preservation in arbitration in China. Art. 28 para. 3 Arbitration Law only provides for the requesting party's liability to compensate for wrongful property preservation.⁷¹ Civil Procedure Law vests the people's court in the discretion to call for a deposit of a security before granting interim measures for preservation of property,⁷² while remaining silent on security for evidence preservation. This ignorance to the preservation of evidence is cured in the Civil Evidence Rules,⁷³ where if the decision to evidence preservation by a people's court during litigation finally turns out to have been wrongfully made and causes damages to the other party, the judges will be able to order compensation based on the security deposited beforehand accordingly.⁷⁴

⁶² Special Maritime Procedure Law of People's Republic of China (中华人民共和国海事诉讼特别程序法), December 25th, 1999, (最新中华人民共和国常用法律法规全书), Beijing 2003, pp. 1417-1426. Art. 63 and 64 Special Maritime Procedure Law.

⁶³ Art.23 para. 1 CMAC Rules.

⁶⁴ For example, Art. 50 Copyright Law of the People's Republic of China (中华人民共和国著作权法), October 27th, 2001, (最新中华人民共和国常用法律法规全书), Beijing 2003, pp. 172-178 and Art. 58 Trademark Law of the People's Republic of China (中华人民共和国商标法), October 27th, 2001, (最新中华人民共和国常用法律法规全书), Beijing 2003, pp. 181-186 both touch upon this concern.

⁶⁵ Art.23 para. 3 Civil Evidence Rules: The competent people's court will handle pre-litigation evidence preservation as sets out by relevant laws or judicial interpretations.

⁶⁶ GAO Fei, supra note 22.

⁶⁷ Alan Redfern and Martin Hunter, supra note 1, section 1-66.

⁶⁸ Susan D. Franck, The Liability Of International Arbitrators: A Comparative Analysis And Proposal For Qualified Immunity, New York Law School J of International and Comparative Law, No. 20, pp. 28.

⁶⁹ Art.34 of Arbitration Rules of International Chamber of Commerce (ICC Rules).

⁷⁰ Art.42 of Arbitration Rules of Stockholm Chamber of Commerce (SCC Rules) and art.31 (1) of Arbitration Rules of London Court of International Arbitration (LCIA Rules).

⁷¹ The text reads: "When the application is faulty, the applicant shall compensate the aggrieved party for the losses incurred from the protection of property."

⁷² In deciding to take measures for property preservation, the people's court may order the applicant to provide security; where he refuses to do so, his application shall be rejected. Art.92 (2) of Civil Procedure Law.

⁷³ Art. 22 para. 2 Civil Evidence Rules.

⁷⁴ For a format of order to post security for preservation of evidence, please visit <http://www.dffy.com/law/ys17.htm> (visited April 28th, 2005).

It is true that the Civil Evidence Rules are applicable for people's courts when ordering preservation of evidence in aid of arbitration. However, their applicability needs to be backed up by an explicit consent in the Arbitration Law to the liability in damages of the requesting party to the party suffering from wrongful preservation. Otherwise, if the competent people's court has exercised its discretion in not requiring the requesting party to deposit a security, the only relief for the party who aggrieved from wrongful preservation shall be seeking state compensation from the ordering people's court.

cc) Liability of Competent People's Court

In China, as the judicial organ representing the public power of the state, the people's courts shall be liable for compensation in some cases unless the damages are brought about by wrongful application of the requesting party.⁷⁵ Art. 31 of the Law of State Compensation of the People's Republic of China (Law of State Compensation) provides:⁷⁶ "Where a people's court, in the course of a civil or administrative procedure, illegally undertakes compulsory measures against impairment of action, preservative measures or wrongfully executes the judgment or award or other legal effective documents and where this causes damage, the provisions of this Law concerning the procedures of criminal compensation shall apply to the claim of compensation brought forward."

The Law of State Compensation only applies when a state organ or a member of its personnel, when exercising functions and powers in violation of the law, infringes upon the lawful rights and interests of a citizen, legal person or other organization and causes damages. At first sight ordering evidence preservation in the help of arbitral proceedings seems to fall within the scope of "exercising functions and powers". However, it is a common understanding that this Law primarily aims at the people's courts' illegality in litigation only.

Even if the Law does apply, it is not easy to find out under what circumstances a people's court shall

be liable.⁷⁷ As the arbitral tribunal is the proper venue for solving the disputes between the parties, the people's court should not be held liable simply for ordering evidence preservation wrongfully or illegally.⁷⁸ After all, the people's court is not as familiar with the merits of the case as the arbitral tribunal and it is very hard to determine to what extent it has committed the alleged wrong negligently or in good faith. The only likely scenario for the people's court to be liable results from an application of the improper methods of preservation which leads to the evidence being damaged or losing its probative value.⁷⁹

It is a far-fetched point to discuss liability of people's courts in the question of evidence preservation in arbitration, but as there is no direct authority on the requesting party's liability, the Law on State Compensation becomes the only source where the aggrieved party may seek for relief if the requesting party has not deposited any security. As seen above, nothing seems clear enough to count as a resolution. This reinforces the need for an explicit provision for party's liability in the Arbitration Law, which will be the primary form of liability in regard to evidence preservation, thus rendering any possible recourse to the people's court's liability unnecessary. Without such authority, the liability regime for evidence preservation of China is hardly complete and effective.

f) Enforcement of Evidence Preservation Measures

There is no integrated enforcement regime for interim measures of protection in China. Dealing with arbitration and judicial assistance respectively Chapter XXVIII and XXIX of the Civil Procedure Law contain most of the enforcement-related provisions, which have to be read together with some supplementary ones in the Arbitration Law.⁸⁰ In the following the issue of enforceability of interim measures for evidence preservation will be examined from both directions: first, how does China enforce the measures made abroad; secondly how are the measures made in China enforced abroad.

⁷⁵ Art. 7 para. 1 Judicial Interpretations of Supreme People's Court on State Compensation in Civil and Administrative Procedures (最高人民法院于民事、行政诉讼中司法赔偿若干问题的解释), September 16th, 2000, available at http://www.law-lib.com/law/law_view.asp?id=155 (visited April 25th, 2005).

⁷⁶ Law of State Compensation of the People's Republic of China (中华人民共和国国家赔偿法), May 12th, 1994, 最新中华人民共和国常用法律法规全书, Beijing 2003, pp. 109-112; English translation available at <http://law.hotoa.com.cn/lawv2/1/3-1/4C37CFCC-9BB4-49BC-8F0A-6B9DE3675741.html> (visited April 25th, 2005).

⁷⁷ Art. 3 Judicial Interpretations on State Compensation. This article explains the circumstances where a people's court illegally undertakes preservative measures.

⁷⁸ Id., Art. 3 para. 1: where a people's court illegally orders or cancels a preservative measure; Art. 3 para. 3: where the preservative measures obviously exceed the number or scope of what the party requests.

⁷⁹ Art. 3 para. 4 Judicial Interpretations on State Compensation: where a people's court is responsible for keeping a good shape of what has been sealed or confiscated and causes damage; and Art. 3 para. 6: other circumstances.

⁸⁰ Art.71 and 72.

aa) Enforcement of Measures Made Abroad in China

When seeking enforcement, the requesting party shall direct its application to a competent IPC, usually the one where the Chinese party is domiciled or has assets. Only “a legally effective judgment or ruling made by a foreign court” and “an award rendered by a foreign arbitration organization” will be recognized and enforced.⁸¹ Theoretically speaking, it is suggested from such wording that two possibilities exist for enforcing an interim measure to preserve evidence: it has to be a verdict issued by a foreign court or it has to take the form of an award.

Practically speaking, however, a sceptic attitude has to be taken towards the first possibility of the enforcement of such verdicts or orders. As noted, “an applicant wishing to obtain an interim measure has cause to approach the court in a country where the opposing party has assets”.⁸² If the party needing to preserve a piece of evidence located in China is reluctant to go to the competent people’s court due to the concerns that his application might be rejected, merely obtaining a positive verdict from a foreign court is not likely to help him because the question of whether interim measures for evidence preservation maybe ordered is subject to Chinese law.⁸³ A foreign court has no power to order its Chinese counterpart, and the people’s court shall have discretion on whether to recognize and enforce such verdicts or orders.

Neither is it likely that China will recognize and enforce an interim arbitral award to preserve evidence. As a contracting state of the New York Convention, China has the obligation to recognize and enforce upon the application of a party those awards coming under its definition. So the precondition here is that interim measures taking the form of arbitral awards can be considered as New Convention awards. However, this is very doubtful because such awards are essentially interlocutory and “modifiable by the arbitral tribunal in accordance with changes of circumstances”,⁸⁴ while New York Convention awards should dispose of one or more issues in dispute between the parties and be final.⁸⁵ To say the least, even if a competent people’s court could enforce such an award and preserve the evidence as requested regardless of its finality, it is unfair for it

to reject another similar interim measure just because it takes the form of a procedural order. A similar kind of argument was sustained by the UNCITRAL Working Group II (Working Group) in designing the legal framework for recognition and enforcement of interim measures of protection.⁸⁶

bb) Enforcement of Measures Made in China Abroad

If the evidence that needs to be preserved is located outside of China, it is suggested that the applicant shall, directly or through the arbitration commission, request a competent foreign court to order and execute evidence preservation,⁸⁷ drawing analogy from Art. 266 Civil Procedure Law. The applicant does not have to obtain a verdict for preservation from a competent people’s court and try to enforce it abroad, following the rationale mentioned above. As Chinese law does not empower the arbitral tribunal to order preservation of evidence, there is no question about enforcing such orders abroad at all.

5. Disadvantages of China’s Current Regime

Summarizing the discussions above, it has to be concluded, although quite reluctantly, that China’s current regime of evidence preservation in arbitration is far from satisfactory. The most eminent disadvantages are as follows:

a) Lack of Efficiency

One outstanding advantage of arbitration compared to litigation is that the former resolves disputes in a more efficient way, especially in the fast-changing international commercial arbitration.⁸⁸ Since in China not only the arbitral tribunal is precluded from ordering evidence preservation, but also the application to the court shall only be made through the arbitration commission, which, as analyzed above, hardly makes any sense and harms the timeliness of arbitration.

b) Waste of Judicial Resources

In China, only the people’s court has the power to issue interim measures in order to preserve evidence in aid of arbitration. Since the proper venue for the dispute is the arbitral tribunal, the people’s court has relatively limited knowledge

⁸¹ Art. 267 and 269 Civil Procedure Law.

⁸² *Lars Heuman*, supra note 30, p. 698-699.

⁸³ *Id.*

⁸⁴ *W. Laurence Craig, William Park and Jan Paulsson*, supra note 1, p. 465.

⁸⁵ *Alan Redfern and Martin Hunter*, supra note 1, section 8-32.

⁸⁶ Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-second Session (New York, 10-14 January 2005) A/CN.9/573, pp. 9.

⁸⁷ *James Kwan*, supra note 49, pp. 191.

⁸⁸ *Lars Heuman*, supra note 30, p.10-11.

regarding the merits of the case. Therefore, it is quite possible that the people's court may order to preserve evidence inappropriately. Normally, when this happens and damage to the responding party is caused, it is reasonable to expect the liability of the requesting party. However, as analyzed above, because of the silence of the Arbitration Law on such issue, the people's court might become the only one who could be liable for the wrongful preservation. This would be unfair since the competent people's court is only called upon to act in response to the requesting party's application and would result in judicial resources being wasted.

c) Undermining the Intention of Parties

It is already admitted that, in agreeing to arbitration, parties can be reasonably assumed to expect implicitly that the arbitration may not be fruitless, and that the arbitrator's authority to make meaningful relief through interim orders would be proper.⁸⁹ As matters presently stand, the question of whether arbitral interim measures are a matter of fact or just a fiction of the parties depends, to a large extent, on the governing law of the arbitration.⁹⁰ As indicated above, because of the mandatory character of Art. 68 Arbitration Law, the ability of an arbitral tribunal to order preservation of evidence is largely a fiction, even when the parties have incorporated rules that expressly authorize the arbitrators to do so. Put plainly, Chinese law trumps the arbitration agreement and the parties' intention is therefore undermined.

6. Legislative Improvement

a) Introduction

On December 11th, 2001, China became the 143rd member of the World Trade Organization. This entry into the WTO marked the beginning of a new phase of China's Opening-up Policy. During the past three years, China has stuck to its WTO commitments and been able to embrace more opportunities to accelerate its economic developments in international cooperation. The increase in the international trade volume and foreign investments in China in turn calls for specialized services to resolve the disputes that arise in China, among which arbitration plays a very important part. According to some relevant resources,⁹¹ China does

not impose restrictions on market access in terms of both cross-border supply and consumption abroad. As to the commercial presence, there are only restrictions on legal services provided by foreign law firms,⁹² whereas there are no provisions on the services of foreign arbitral institutions. Therefore, if these institutions provide arbitral services, there will hardly be any explicit restriction on their market access. In other words, this is a commitment of China to open up its arbitration market.

This fact is itself a significant improvement. Parties, who arbitrate in China, should be able to have reasonable expectations about the proceedings they are going through, irrespective whether resorting to a Chinese or foreign arbitration institution, no matter whether embarking on institutional or *ad hoc* arbitration. Yet the current situation is still not so developed as to fulfil these expectations. Although China did not make a specific promise to amend the Arbitration Law, for the sake of creating an efficient and fair environment for dispute resolution, such amendments shall be given a high priority and put into a whole scenario of a reform aimed at creating a well functioning arbitration environment in China.

b) Inadequacy of MAL

It is submitted that the power of arbitral tribunals shall be affirmed and recognized, and the concurrent jurisdiction of both the arbitral tribunal and court recognized by the UNCITRAL Model Law on International Commercial Arbitration (MAL) becomes a popular preposition.⁹³ The reasons that the Arbitration Law has been drafted basing on the MAL and since the MAL has already engendered a rich case law, a lot of useful experience could be drawn from.

⁹² Business scope of foreign representative offices is only as follows: (a) to provide clients with consultancy on the legislation of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international conventions and practices; (b) to handle, when entrusted by clients or Chinese law firms, legal affairs of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work; (c) to entrust, on behalf of foreign clients, Chinese law firms to deal with the Chinese legal affairs; (d) to enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs; and (e) to provide information on the impact of the Chinese legal environment. Entrustment allows the foreign representative office to directly instruct lawyers in the entrusted Chinese law firm, as agreed between both parties. WT/ACC/CHN/49/Add.2, II A (a), column "Limitation on market access".

⁹³ GAO Fei, *supra* note 22 and WANG Feihong (王斐弘), Another Look into the Reform of the Arbitration Law of China after the Entry into WTO - discussing with Mr. Xiao Yongping and Mr. Hu Yongqing (也谈加入 WTO 与我国仲裁法律制度改革——兼与肖永平 胡永庆先生商榷), in: Arbitration in China (中国仲裁) 2001, No. 6, available at <http://translaw.whu.edu.cn/cn/salonacademic/20040722/114020.php> (visited April 26th, 2005).

⁸⁹ *Charles Construction Company v. Derderian* 586 N.E.2d 992 (Mass.1992). See Gary B. Born, *supra* note 16.

⁹⁰ Raymond J. Werbicki, Arbitral Interim Measures: Fact or Fiction?, in: Dispute Resolution Journal, No. 57, pp. 64.

⁹¹ Schedule of Specific Commitments on Services of Addendum 9 of Report of the Working Party on the Accession of China.

Although the MAL concedes the concurrent power of both national courts and arbitral tribunals to order interim measures of protection, its language is quite general. It does not deal with the enforcement of interim relief.⁹⁴ And unlike some relevant national laws,⁹⁵ it does not resolve the question as to whether an application shall firstly be made to the court or to the tribunal,⁹⁶ which closely relates to the issue of concurrent jurisdiction. Therefore, in order to design a comprehensive regime for the preservation of evidence, the simple proposal that the concurrent jurisdiction of MAL shall be adopted is not enough. Prospective amendments to the Arbitration Law need to be made in a more detailed way.

The suggestions below will generally follow the sequence adopted above in discussing the operational and practical problems of the evidence preservation in China's arbitration – starting with the allocation and interplay of different powers and ending with enforcement. Moreover, *ex parte* preservation of evidence will also be touched upon considering the attention it have enjoyed in the effort of the Working Group for a revised draft of Article 17 of the MAL.

c) Concurrent Jurisdiction of Arbitral Tribunal and the Competent People's Court

The very first step to be taken when amending the Arbitration Law is to recognize that the arbitral tribunal shall have power to order interim measures to preserve evidence, as long as the parties do not exercise their autonomy to exclude such power by their agreement. Such jurisdiction of the arbitral tribunal may not extend to non-parties of arbitra-

tion, nor may their orders have binding force,⁹⁷ but the arbitral tribunal may draw adverse inference from the party's non-compliance.⁹⁸ As to the role of the arbitration commission, it would be possible to use the word "may" to replace the word "shall" in Art. 68 Arbitration Law, thus rendering the intervention of arbitration commission discretionary. This is in consistency with the nature of the arbitration commission, which is the administering body of arbitration and may be engaged in assisting parties with some practical matters, including submitting documents to the people's courts, as the case may be.

The jurisdiction of the people's courts to order evidence preservation will exist concurrently with that of the arbitral tribunal. Only the people's court where the evidence is located should be the competent venue for evidence preservation, regardless of whether the case is domestic or foreign-related.⁹⁹ Since arbitrators are the decision-makers on the merits of the case, the requesting party shall first submit their application to the tribunal. Only when there is urgency showing that the arbitral tribunal lacks the power or cannot ensure an effective result shall the competent people's court act upon the direct application from the requesting party, drawing inspiration from the 1996 English Arbitration Act,¹⁰⁰ whose approach is considered to be "sufficiently clear to be workable in practice".¹⁰¹

When a people's court is to make a decision for preservation of evidence, no matter for what reason as listed above, it should always attach importance to the opinions of the arbitral tribunal – just as what the Nantong IPC had done in the Yingrui case – if such opinions are already available.¹⁰² After all,

⁹⁴ Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, para 26.

⁹⁵ Given the trend of national arbitration legislation towards permitting arbitrators to grant provisional relief, the extent to which the availability of provisional relief is left to the parties' arbitration agreement and the existence of any presumptions where the parties' agreement is not clear differs among national arbitration laws. See *Gary B. Born*, supra note 16. The Swedish Arbitration Act, for example, follows the wording of MAL closely in terms of interim measures (s. 25), yet under the authority of the Chap. 15 of the Swedish Code of Judicial Procedure, the court is not empowered to order measures to secure evidence and only in case of extreme urgency is it possible that a District Court would offer assistance. See *Lars Heuman*, supra note 30, p. 332. The Swiss Private International Law only allows court intervention when the party concerned does not comply voluntarily, upon the application of arbitral tribunal (Art.183). The English 1996 Act not only acknowledges the preservation of evidence as one of the "general powers exercisable by the tribunal" (s.38) but also, quite rarely allows agreements excluding court powers exercisable in support of arbitral proceedings, including the preservation of evidence. In general, the Act sets forth that in any case, the court will only act if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively (s.44 (5)).

⁹⁶ *Alan Redfern and Martin Hunter*, supra note 1, section 7-14.

⁹⁷ These are basically the ideas contained in the MAL as to the power of arbitral tribunal to order interim measures. See Art. 17.

⁹⁸ *W. Laurence Craig/William Park/Jan Paulsson*, supra note 1, p. 460 and *Lars Heuman*, supra note 30, p. 333.

⁹⁹ It is hard to decide which instance shall be the more appropriate forum – BPC or IPC. Normally, the BPC should be the proper venue, since the national treatment requires foreigners to be treated in the same way as nationals, and to direct all cases to IPCs will considerably increase the caseload of them. However, as already stated, the legal expertise in BPCs varies to a great extent and this is basically the reason for designate the IPCs as the competent venue. Perhaps a practicable resolution can be using some regions as experimental units. Such regions shall be relatively more open to the outside, and the BPCs there generally have satisfactory expertise and experiences in dealing with foreign cases. Examples could include Beijing, Shanghai, Guangzhou and Shenzhen, as well as some coastal cities. Such experimental units can be designated through a judicial interpretation. The scope of them can be expanded step by step, and finally the only venue shall be the BPC where the evidence is located.

¹⁰⁰ s.44 (5) of 1996 English Arbitration Act.

¹⁰¹ *Raymond J. Werbicki*, *Arbitral Interim Measures: Fact Or Fiction?*, in: *Dispute Resolution Journal*, 57, pp. 69.

¹⁰² This needs not to be expressly written in the amended Arbitration Law. It is just a suggestion for the people's courts to respect. If China

being the proper venue for the arbitration dispute, the arbitral tribunal knows the overall situation of the case better than the people's court.

It shall further be clarified in the Arbitration Law that the jurisdiction of the people's court does not rule out the possibility of arbitrators to decide on the evidence preservation measures in the last resort. Where a conflict between provisional measures ordered by the arbitral tribunal and the local court arises, the decision of the arbitral tribunal shall prevail.¹⁰³ Suppose the arbitral tribunal of the Yingrui Case, after fully reviewing the case, found that instead of keeping the evidence from being destroyed or hidden, the real intention of the Respondent in requesting the evidence preservation was to access the business secrets contained in the account books of the Joint Venture.¹⁰⁴ Therefore, the temporary restraining order to seal up the account books and vouchers of the Joint Venture granted by the IPC based on affidavits and other summary materials was improper. The arbitrators then should be allowed by the Arbitration Law to cure the decision of the IPC. Of course, the arbitral tribunal may not directly order a people's court to perform a particular act,¹⁰⁵ as its power is conferred by the arbitration agreement and thus is effective between the parties only. Instead, the arbitral tribunal may suggest the people's court reverse its decision, and such suggestion shall be respected by the court.

d) *Ex Parte* Preservation of Evidence

Once the jurisdiction of the arbitral tribunal to issue evidence preservation is recognized, the proposal that the Arbitration Law shall also allow for doing so on an *ex parte* basis, i.e., the arbitrators may act without a hearing or other proceedings in which all parties are permitted to be heard to grant such a measure, may sound reasonable and appealing. However, it is obvious that when arbitrators act *ex parte*, they tend to raise due process issues. It is also likely that they may undermine parties' reasonable expectations and common intentions in the arbitral process and make arbitration a less attractive means of resolving disputes. Even where the arbitrators are allowed to act on an *ex parte* basis, it is noted that in international

will have systematic case-law soon, this is better to be tested in real cases.

¹⁰³ Emmanuel Gaillard and John Savage, *supra* note 1, section II, §1, A.

¹⁰⁴ In fact, the Claimant raised similar points in its response to the evidence preservation application that the Respondent, being its same-business competitor, wanted to illegally acquire the business secrets of the Joint Venture. However, as the Claimant failed to further develop this contention with persuasive evidence, the Nantong IPC did not give much credit to it.

¹⁰⁵ Lars Heuman, *supra* note 30, p. 702.

arbitration it might be difficult to obtain judicial recognition and enforcement of an *ex parte* award under the New York Convention.¹⁰⁶ So although in some cases, especially in extremely urgent ones,¹⁰⁷ *ex parte* evidence preservation may indeed better protect the interests of the requesting party; given the supremacy of equal treatment of parties to grant arbitrators the power to order evidence preservation in such a manner is still too bold to be acceptable as an amendment to the Arbitration Law. Moreover, in order to stress the importance of equal treatment of parties at a statutory level, it would be far better to add a provision like Art.18 of the MAL to the Arbitration Law in its Chapter 1 (General Provisions).¹⁰⁸

e) Liability of the Requesting Party

The provision in the Civil Evidence Rules is not sufficiently authoritative to grant arbitrators the power to ask for a deposit of a security by the requesting party. Such power shall be explicitly set forth in the Arbitration Law, together with the discretion of arbitral tribunal to dismiss the application if the requesting party refuses to do so. Following this amendment, the primary liability for the damage of the requesting party "caused by" evidence preservation shall also be established,¹⁰⁹ which as a principle is widely recognized by different national legislations as well as the texts of some international organizations in the world.¹¹⁰

f) Other Problems

As to the enforcement of interim measures for evidence preservation, the application of relevant

¹⁰⁶ Richard Allan Horning, *Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (In Toto)*, in: *American Review of International Arbitration*, No. 9, pp.174. Under art.V (1)(b) of the Convention, a court may refuse to enforce an award, at the request of the party against whom it is invoked, if "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."

¹⁰⁷ According to the latest achievement made by the Working Group on interim measures of protection, the circumstance where the arbitral tribunal may rule *ex parte* is "if it considers that there is a reasonable basis for concern that the purpose of the requested interim measure will be frustrated before all parties can be heard." See Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-second Session (New York, 10-14 January 2005) A/CN.9/573, pp. 9.

¹⁰⁸ Art.18 of the MAL reads: "The parties shall be treated with equality and each party shall be given full opportunity of presenting his case."

¹⁰⁹ Damage be "caused by" the measure already limited their scope. It was also suggested that the requirement that made liability dependent on the final disposition of the claims on the merits might be inappropriate. See Report of the Working Group on Arbitration and Conciliation on the Work of its thirty-ninth Session (New York, 14 June-2 July 2004), A/CN.9/545, pp. 20.

¹¹⁰ Settlement of commercial disputes - Interim measures of protection - Liability regime - Note by the Secretariat (New York, 23-27 February 2004), A/CN.9/WG.II/WP.127.

provisions in Civil Procedure Law by analogy currently suffices. In the future, however, it will be better for the issue of enforcement to be integrated into the regime of interim measures of protection in arbitration, which provide a set of rules for the allocation of judicial and arbitral power, the circumstances where they come into play, the types of different interim measures and finally the recognition and enforcement of such measures shall all be its components. Since China's image as the most important destination for international investment all over the world is getting more and more eminent, it can be foreseen with certainty that the establishment of such a regime will become a must in the Arbitration Law amendment.¹¹¹ Above all, as Prof. William Park has advanced when reporting on the reform of the Federal Arbitration Act, any amendment "must take account of home-grown arbitration concerns and precedents".¹¹² This is definitely an instructive track for China to follow.

g) Short-term Resolution

The amendments suggested above shall be implemented step by step, and a short-term transition might serve as a good start. This is to facilitate the power allocation between arbitral institutions and the courts through a judicial interpretation of the SPC. Under such interpretation, parties shall file their applications for evidence preservation to the arbitral tribunal (not the arbitration commission), which shall in turn conduct an initial examination and provide its comment before the arbitration commission submits this application to the competent people's court. Within its comment, the arbitral tribunal shall determine the "admissibility, relevance, materiality and weight of the evidence",¹¹³ and the people's court, with both the application of the requesting party and the comment from the arbitral tribunal, shall conduct further examinations and make the final decision on whether evidence preservation shall be granted. The whole amendments may be completed in five to eight years and by the year 2010, when a

comprehensive legal framework with Chinese characteristics will be instituted.¹¹⁴

IV. Conclusion

At present, all applications for preservation of evidence in arbitration are directed to the competent people's court by the arbitration commission in China. This has led to several problems in practice. Judges are faced with a dilemma when ordering preservation of evidence and the duty of the arbitration commission to refer the party's application to the people's court does not have practical value. Moreover, under the present liability regime it is not clear who will be responsible for wrongful preservation. Taken into consideration all these problems, the current provisions for preservation of evidence in arbitration in the Arbitration Law are not satisfactory, among which the most serious disadvantages are the lack of efficiency, the waste of judicial resources and the frustration of the parties' intention for arbitration.

In order to fulfil the parties' expectations of arbitrating in China, the Arbitration Law should be improved. The concurrent jurisdiction of both the people's courts and the arbitral tribunal should be recognized. Parties should be entitled to get interim measures of evidence protection from the arbitral tribunal in order to ensure the smoothness of the arbitral proceedings. As the authority of arbitrators is nevertheless limited by virtue of the private nature of arbitration in solving disputes, the choice of arbitration does not totally exclude any recourse to the people's courts, which are entitled to grant effective measures when the arbitral tribunal is not sufficient.

The practices of many arbitration commissions in China lack professionalism and depart from international standards. This has been the primary reason for the legislative denial of granting arbitral power to order preservation of evidence. However, this is no reason not to amend the law. Great effort must be put into reinforcing the regulation on these arbitration commissions and improve their competence for dispute resolution. Only this can guarantee for a successful reform. It can be predicted that, in the future, a greater harmonization of rules applicable to interim measures would allow for a greater extent of certainty and security in the resolution of international commercial disputes in China.

¹¹¹ China does not have such a regime at present. The only two forms of interim measures of protection set forth in the Arbitration Law are preservation of property and preservation of evidence. Obviously, interim relief of protection shall by no means only consist of these two measures and the current provisions in Arbitration Law are too limited in scope. Therefore, the author advances that an integrated regime generally dealing with interim measures of protection has to be established.

¹¹² William W. Park, Amending The Federal Arbitration Act, *William W. Park, Amending The Federal Arbitration Act*, in *American Review of International Arbitration*, 13, pp. 77.

¹¹³ Art.25 (6) of the UNCITRAL Arbitration Rules.

¹¹⁴ This was advanced in 1997 at the 15th National Congress of the CPC, where the rule of law was explicitly incorporated as a basic guiding principle in the Party's official document, and elaborated as a separate subject in the plan for the reform of the political system.