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A Comparative Analysis of the Chinese Arbitration System and the UNCITRAL Model Law From the Perspective of Arbitration Agreement

Jiawen Cui

School of international law, China university of political science and law, Beijing 100088, China.
cuijiawen_zj@yeah.net

ABSTRACT. *The UNCITRAL Model Law is regarded as the "platform" or "foundation" of arbitration. Among the amount of legislations, the Arbitration law plays a fundamental role as it has changed the nature of domestic arbitration. The aim of this article is to analyze the differences between the existing Chinese arbitration system and the Model Law, discovering the current arbitration related problems in Chinese arbitration system, finding out possible methods to better the Chinese arbitration system.*

KEYWORDS: *UNCITRAL Model Law, Chinese Arbitration System, Arbitration Agreement, Form Validity, Substantial validity.*

1. Introduction

During the period from the beginning of July to the middle of November 1953, Chinese livestock Production Company concluded a contract with British Oil Company by telegram. According to the contract, the Chinese company would sell 10 tons of wool to British Oil Company. The British company posted the confirmation letter to the Chinese company. In accordance with the confirmation letter, any disputes caused by the contract should be submitted to the UK Commercial Arbitration Commission. [1] The Chinese company was deeply disturbed by the contract; however, there was no other choice as there were not any arbitration commissions during that time in mainland China. It was a common situation which could be found in the field of international commercial transactions during that period of China.

Historically, conciliation and mediation are regarded as the most favored ways of disputes resolution. [2] Nonetheless, in the past several decades, increasing multinational companies chose China as their investment destination. As a

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consequence, foreign investors have to turn to legal action to extricate themselves from the investments.

On August 31st, 1994, the Standing Committee of the National People's Congress of China enacted the first Arbitration Act (CAL) in the history of the People's Republic of China. The arbitration law came into force on the 1st of September 1995.

Before the enactment of the Arbitration Law, there were differences of the adoption of arbitration related legislation between domestic and international arbitration law in China Foreign-related disputes were governed by International Economic and Trade Arbitration Commission (CIETAC) and the Maritime Arbitration Commission (CMAC). Meanwhile, the domestic arbitration is governed by Chinese Civil Procedure law. After the enactment of Arbitration Law, both the domestic and the foreign-related cases are adjusted by the same legislation.

The Arbitration Law, Civil Procedure Law of the People's Republic of China (CPL), the Law of the People's Republic of China on Sino-Foreign Contractual Joint Ventures, Law of the People's Republic of China on Chinese –foreign Equity Joint Ventures as well as the various unilateral and multilateral treaties constitute the Chinese arbitration system. Apart from the resources above, legislators also referred to the international treaties, such as United Nations Commission on International Trade Law (UNCITRAL/Model Law) and New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1985. The People's Court also plays a vital part in instructing the adoption of arbitration related legislation. The judicial interpretation from the Supreme People's Court and the leading cases of higher courts which have issued more than a dozen of judicial interpretations concerning international arbitration have been deemed as important reference in legal practice, too.[3]

Among the amount of legislations, the Arbitration law plays a fundamental role as it has changed the nature of domestic arbitration. It separated domestic arbitration body from the governmental system since the arbitration body should enjoy independence without the interference from the government. [4]

Despite that China is a membership of the New York Convention; many problems have arisen in applying the Convention. It has been said, the best reform to regime established by the New York Convention is through great promotion and possible amendment of the UNCITAL Model Law. The UNCITRAL Model Law is regarded as the "platform" or "foundation" of arbitration. [5]

UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law on 21 June 1985 and was amended by the United Nations Commission on International Trade Law on 7 July 2006.[6] The origin purpose of the Model Law was to provide assistance to states in order to reform and modernize their legislations on arbitral procedure so that they could adopt the particular features and needs of international commercial arbitration into their domestic arbitration system, as the Model law reflects the

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principles of arbitration from the perspective of global standard. Eight chapters and thirty-six Articles compose the Model Law. [7]

The Model Law has been regarded as a guideline in many countries. It is also highly referred by International Arbitral tribunals when giving arbitral awards. According to the recommendation of the assembly in the Resolution of the General Assembly, in terms of the desirability of uniformity of the law of arbitral procedures as well as the specific needs of international commercial arbitration practice, all States should give due consideration to the Model Law on International Commercial Arbitration. [8]

Although the Model Law has served as a guideline when enacting the Chinese Arbitration Law, nonetheless, significant differences still exist. Moreover, there is still no plan for China to adopt it into its national law at the moment. In another word, adopting the New York Convention solely and singly treats the UNCITRAL Model Law as reference are not adequate to establish a comprehensive arbitration system in China.

Although the whole arbitration system has made great promotion in the past two decades, however, since it is still far from the universally accepted standards, it is the right time to move forward.

The aim of this article is to analyze the differences between the existing Chinese arbitration system and the Model Law, discovering the current arbitration related problems in Chinese arbitration system, finding out possible methods to better the Chinese arbitration system. The paper would mainly focus on the fundamental stone of arbitration---the arbitration agreement. In this part, special, however, extremely strict requirements for a valid arbitration agreement under CAL would be discussed. The jurisdiction of the arbitral tribunal on confirming the validity of arbitration contracts would also be focused on in this paper

2. Arbitration Agreement.

As Dr Redfern and Hunter said, arbitration agreement is the foundation stone of international commercial arbitration[9] and it is of foundational importance to the legitimacy of the arbitration procedure.[10] On one hand, arbitration agreement represents the evidence of party consensus that they agree to submit the contact-caused disputes to arbitration; on the other hand, the jurisdiction of the arbitral tribunal origins from the valid arbitration agreement.

2.1 The Validity of Arbitration Agreement

According to the definition of Article 7(2) of the 2006 amended UNCITRAL Model Law, “Arbitration agreement” shall be in writing, electronic communication could also be regarded as valid arbitration agreement if the information contained therein is accessible for subsequent reference. [11] “Electronic communication” is defined as “any communication…but not limited to, electronic data interchange

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(EDI), electronic mail, telegram, telex or telecopy"[12]. In a word, there is no other requirement for a valid arbitration agreement besides the formation of the agreement and parties' intention to arbitrate. The UNCITRAL Model Law gives a broad interpretation of "arbitration agreement" compared with the New York Convention [13], leaving more space to the contractual parties.

2.1.1 Form Validity

Different requirements could be found in Article 16 of CAL: "An arbitration agreement shall include the arbitration clause in the contract and any other written form of agreement concluded before or after the disputes submitting to arbitration". [14]

Arbitration agreement shall be in written form is globally accepted since the similar requirement could also be found in other arbitration legislations such as the Model Law, the New York Convention, the Washington Convention 1965 and the European Convention of 1961. In accordance with the Opinion of the Supreme People's Court on Certain Questions Concerning the Implementation of the Arbitration Law. [15] Same interpretation of "written form" has been taken as the stipulation of New York Convention. However, when recognizing an arbitration agreement concluded in other written forms, taking email exchange for example, how to make sure that all the emails are signed is still questionable. [16] Moreover, how to judge one party has accepted the contract or whether the email is an invitation to contract or an offer has not been defined, either. The requirements have become an obstacle which needs to be concerned by international arbitral legislation.

2.1.2 Substantial validity

Actually, the most apparent element distinguishes the Chinese arbitration system from other states' legislation is the signature requirement under Art 6 of Chinese Arbitration Law. Different from the requirement of the Model Law, Article 16 of CAL enacts several specific requirements of a valid arbitration agreement. [17] In accordance with the CAL, a valid arbitration agreement contains a designated arbitration institution. According to the definition of "arbitration commission", it requires the arbitration commission should not be any random arbitration commission, but rather commissions registered in China.[18] The result of the requirement is foreign-related/international arbitration institutions are erased from the list of available arbitration institutions that could be sought by the parties in China.[19] The requirement has drawn great criticisms from the international arbitration community.[20]

Particularly, a valid arbitration agreement must be sufficiently specific regards the place where arbitration would be held and a detail formation of the arbitration panel. [21] Failing to do so would result in the invalidity of the arbitration agreement. In spite of this, Article 17 has listed various situations that would cause the invalidity of the arbitration agreement. [22]

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In 1995, a contract-caused dispute was submitted to Haikou Intermediate People' Court. The contract was signed by a Chinese company and a Swiss company. According to the contract, "all disputes arising out of the performance of, or relate to, this contract" should be solved in terms of the rules of International Chamber of Commerce (ICC), and the place holding the arbitration should be in London. The Intermediate Court deemed the arbitration clause to be void, giving the reason that there was no specific arbitration commission contained in the contract. Meanwhile, the ICC rules were not only used by ICC only since there were other arbitral tribunals allied of these rules. In terms of Art 6 of CAL, the contract was invalid. The award surprised legal world a lot. Commentators have pointed "there is significant shortage for the court to interpret the validity of the contract according to the China Arbitration Law". [23]

Under other circumstances where the appointed commission does not exist or the appointed commission does not function as arbitral tribunal, the arbitration agreement is deemed void, too. In another word, even there is an arbitral intention of the parties, failing to contract the specific arbitration commission; the arbitration agreement is still invalid.

Same situation has been treated totally different in Hong Kong in the case Lasy Company where there was an adoption of the Model Law. The CAL tried to make certain remedy. Article 18 of China Arbitration Law has provided if in the arbitration agreement, there is no agreement on the arbitration matters or the arbitration commission, or, if the relevant provisions are not accurate, the party could choose to supplement the agreement, otherwise, the arbitration shall be invalid.[24] In spite of this, it has practical problem to reach consensus in practice when disputes has occurred and the contractual parties decide to submit their disputes to the arbitral tribunals.

It should be concluded an uncontroversial central point of arbitration agreement is parties' intent to arbitrate.[25] Commentators have stated, compared with the Model Law, stipulations of CAL is far from soft.[26] The rigid provisions would decrease the opportunity that parties choose arbitration as their disputes resolution methods.[27] Additionally, it has provided legal support to the party that intends to dismiss the arbitration agreement that has been submitted to the arbitral tribunal already. Adopting the related provision of the Model Law and abandoning the current over-strict definition would help decrease the number of parties' intentional action.

2.2 Ad Hoc Arbitration

Ad hoc Arbitration is an arbitral preceding that allows parties to make their own arrangements of selecting arbitrators instead of being administered by the arbitral commissions. Parties enjoy great discretion to choose the applicable law, the designation of rules, the procedures as well as the administrative support. On one hand, the proceeding under ad hoc arbitration is more flexible, cheaper and faster than the administered proceeding; on the other hand, the absence of administrative

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fees makes ad hoc arbitration a more popular choice for the contractual parties. [28] However, this well-established form of arbitration, which appeared even earlier than the institutional arbitration, cannot be recognized in China.

The case of People's Insurance Co of China, Guangzhou Branch v Guangdong Guanghe Power Co Ltd shows the trends that China will insist non-ad hoc arbitration. According to the award rendered by the Supreme People's Court, ad hoc arbitrations are not allowed in mainland China. [29]

Another leading case illustrates the attitude of the Chinese arbitration system was in 2004 when the Chinese Supreme People's Court instructed the lower court to refuse recognition of an arbitration clause. The arbitration clause displayed that ICC Rules, Shanghai shall apply The given reason was the arbitration clause did not express the arbitration commission accurately. [30]

Ad hoc arbitration plays an increasingly important role in the field of international arbitration. From the perspective of legislations of other countries, most countries have shown their attitude to accept and recognize ad hoc arbitration. Ad hoc arbitration could be found in the laws of Austria, Belgium, Germany, the United States, Denmark, Finland, France, England, Italy, Holland Sweden, and Norway, Hong Kong and, etc.[31] Similar stipulation could also be found in New York Convention, European treaties on international commercial arbitration, [32] Inter-American convention on international commercial arbitration, [33] particularly the Model Law [34] which is mainly used for ad hoc arbitration.

Nevertheless, according to Art 16 of China arbitration law, failing to contain an accurate arbitration commission in the arbitration clause will result in the invalidity of the arbitration agreement. Consequently, all the arbitrations are institutional arbitrations in China. Disputing parties have to submit the contract caused matters to permanent arbitration institution which has its own administrative office, regulations and its own list of arbitrators for selection. [35]

The absence of ad hoc arbitration in China is due to several reasons: firstly, the whole Chinese arbitration system took the East European institutional arbitration as model rather than the West European ad hoc arbitration; Secondly, the political atmosphere decides the administrative interference to the whole arbitration system is serious. The result of the interference is the emphasis of the role of organizations instead of the individuals; thirdly, the State-owned companies which have significant effect on the Chinese economy prefer institutional arbitration as they could get administrative protection from the government-instructed panel. Their preference impacts the legislative tendency to certain extent, etc... [36]

Even though ad hoc arbitration awards rendered in foreign countries can still be recognized and enforced in China through applying the New York Convention[37] or special jurisdictions such as Hong Kong where a bilateral arrangement with mainland China has been signed, the absence of ad hoc arbitration has still caused difficulties both theoretically and practically. [38]

Failing to recognize ad hoc arbitration in mainland China may cause inequality between the Chinese and the foreign party. It would also result in inequality between

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different reigns. Additionally, when the only choice left for the contractual parties is to submit their disputes to the institution, the freedom of the parties to autonomy to choose other methods resolving disputes is limited. [39]

Moreover, transparency might be another problem. All arbitration procedures are conducted by the government-support bodies under current situation and the only formation of arbitration is operated by the bureaucratic and inadequately transparent arbitral institutions. The usage of arbitration fee is not open to the parties, as well.

It could be summarized that there is an urgent demand for China to change the situation of absence of ad hoc arbitration. The CAL could be revised follow the rules of Model Law as the Model Law is mainly used for ad hoc arbitration. [40]

According to Article 7 of the Model Law, which could be interpreted by Article 6 of the UNCITRAL Arbitration Rules, a party might at any time propose the name or names of one or more institution or persons …unless the parties have already agreed …an appointing authority. [41]

Article 16 of the China Arbitration Law should be revised as it is so rigid. The over-detail provisions limit the parties' autonomy and cause the above problems.

Following the instruction of Model Law, recognizing ad hoc arbitration will integrate Chinese arbitration system since ad hoc arbitration is another significant form of arbitration. No longer forbidding ad hoc arbitration could be regarded a signal to move forward as China is a membership of New York Convention and the WTO. With the development of the globalization, the absence of ad hoc arbitration would certainly cause delay and failure of enforcing arbitration awards which might cause doubts of other member states on the equity and transparency of Chinese arbitration system. Bringing ad hoc arbitration to China would change the status of institutional arbitration, forcing the arbitration institutions to make promotion of their services, lowering the administrate fees, decreasing the governmental interference of the arbitral proceeding.

2.3 Competence-Competence—the Jurisdiction on Recognizing the Validity of Arbitration Agreement

The conflicts of jurisdictions between courts and arbitral tribunals constitute not a purely theoretical issue, instead, growing to an increasingly apparent problem in legal practice. [42] A hot debated topic in the literature on the international arbitration is the distribution of the power between courts and arbitrations on determining the validity and the subject matter scope of an arbitration agreement. [43] The traditional attitude of the judges towards arbitration is of considerable hostility. It might be reasoned from the view arbitration agreement may "oust" court jurisdiction over parties, commercial disputes, as well as the fear of the ignorance of the enforcement of the law. Meanwhile, the increase of the number of arbitrations would make courts' revenues at stake. [44]

The content of the jurisdiction of international commercial arbitration is comprised of two parts: arbitral tribunal's authority to seize and hear cases in

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disputes and the determination of a jurisdiction.[45] However, in legal practice, especially when the tribunals start exercising its jurisdiction, it is not merely seen the situation that one party challenges the jurisdiction of the arbitral tribunal.[46]

The challenges could falls into two categories: partial challenge which alleging the arbitral tribunal exceeds its jurisdiction; and total challenge in which the validity of the arbitration agreement is in stake.[47] The latter situation could be seen normally in China as approximate 15% among the total cases submitted to China International Economic and Trade Arbitration Commission involves challenges to the arbitral jurisdiction in recent years.[48]

As the development of modern arbitration and showing the respect to arbitral tribunals, the relationship between courts and arbitration institutions has mitigated a lot since the principle "competence-competence" has been accepted widely. The aim of the principle is to balance the relationship between the courts and the arbitral tribunals. The doctrine of competence-competence is that the arbitral tribunal has power to view and decide the validity of an arbitration agreement and the jurisdiction of the arbitral tribunal, emphasizing the independence and competence of the arbitral tribunal. [49]

International conventions on international arbitration recognize the "competence-competence" principle and many national arbitration legislations treat it as a fundamental principle.[50] Art 16 of the UNCITRAL Model Law stipulates that: "the arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement".[51]

It is believed that Chinese laws recognize the "competence-competence" principle in order to sustain arbitral tribunals both internationally and domestically.[52] China is a membership of York Convention, according to the provision of Article 41 of the convention, arbitral tribunals shall be the judge of its own jurisdiction and whether the dispute is within its jurisdiction of the center or not. [53] China has the responsibility to obey the York Convention rules.

When referring to the domestic legislation, Article 20 of the CAL stipulates if the parties take exception to the validity of the arbitration agreement, they may require the arbitration commission make a decision or submit it to the people's court. In this provision, arbitral tribunal is put in the first place when rendering arbitral jurisdiction.

However, simultaneously, the CAL provides in its Article 20 that if one litigant requires the arbitral commission make a decision while the other party requires the People's Court to pass the judgment, the People's Court shall pass such judgment.[54] Additionally, Reply to Several Problems on the Affirmation of the Validity of the Arbitration Agreements made an explanation the division of the competence between arbitral tribunals and courts, reading that if one litigant takes exception to the validity of an arbitration agreement and have submitted it to the arbitral tribunal while the other party requires a People's Court to deny its validity, if during this phase, the arbitral tribunal has not taken a decision before a court, the

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court shall seize and hear the case while the arbitration commission shall terminate its arbitration procedure.

Briefly, despite that Article 5 and Article 20 of the CAL and Article 257 of the Civil Procedure Law has established arbitral tribunal's primary jurisdiction with the respect to disputes arising under arbitration agreements, the whole legal system does not fully recognize arbitral tribunal's autonomy to decide the validity of the arbitration agreement. Two obvious issues could be concluded from the Chinese arbitral system: on one hand, is the courts' interference to the arbitral proceedings prior to the beginning of arbitration proceedings and the exercise of superior authority over arbitral tribunal's competence; on the other hand, in China, the principle of "competence-competence" only covers authority of arbitral institutions, not the arbitral tribunals.[55]

Currently, a tendency of premature interference with arbitral proceedings could be seen in the legal practice of Chinese Court, and the result of this interference is the delay of the whole arbitral proceedings. Under certain circumstances, courts would acquire the power to decide the jurisdiction prior to arbitral tribunals, for instance, property rights and contractual cases. Moreover, once the courts has examined the validity of an arbitration agreement, arbitration institutions have to suspend their proceedings until the courts have made a final judgment, unless the institutions have exercised their power over a case prior to the judgment of the court and have made a decision on it. [56] Consequently, the litigants might use the drawbacks to delay the arbitration proceedings.

Another salient characteristic of the interference of the courts is the allocation of authority to decide the validity of arbitration agreement between courts and arbitral tribunals is not accurate, or even which could be said, obscure.[57] The stipulation of Article 20 of CAL is that the courts and the arbitral tribunals both have the jurisdiction to make a decision of the validity of the arbitration agreement, nonetheless, when the authority is incompatible, the courts have the priority to make a decision.

Simultaneously, another problem is also caused by the CAL. Consistent with current Chinese legislation, if the arbitration institution rendered that an arbitration is invalid, in another word, when the arbitration institution denies arbitral tribunal's jurisdiction, the people's court have no power to review the negative decision made by the arbitral institution.[58]

No rules could be found here whether the decision of the arbitral tribunal on the validity of the arbitration agreement is a final judgment. The aim of the "competence-competence" principle is to show respect to the arbitral tribunals' authority to determine their jurisdiction, preventing the parties' intentional delay of the arbitral proceedings. From this point of view, the awards made by the arbitral tribunals should be final.

However, participants could submit applications to the People's Court to confirm or deny the validity of arbitration agreement in order to see the revocation of an arbitral award.[59] Commentators have said that decisions made by the arbitral

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commissions are not final and litigants could still require courts to review the validity of an arbitration agreement when they apply for revocation.[60] The result of this provision is that litigation might still appeal to the court even the arbitration award has been rendered and the revocation of validity of arbitration agreement makes the whole prior arbitral proceedings a waste of time.

Even passing the cases to the courts is in a line with the international practice that a court normally has the jurisdiction to review and rule the validity of an arbitration agreement, the special circumstances in China is the People's court has the strong desire to enlarge its jurisdiction by implementing the arbitration law strictly.

The relationship between the arbitral tribunals and the arbitration institutions makes the situation even worse. In china, arbitration institutions do no deal with specific cases but administrative fairs. However, the administrative institutions have the power to tackle jurisdictional challenges instead of the arbitral tribunals. The abnormal situation is that the assignment of the arbitral tribunals is taking decision and rendering awards on substantive legal issues, while the commissions take the responsibility to determining arbitral tribunal's competence. This artificial division leads to the substantive hearing issues and the jurisdiction issues are in different organs' hands which would increase the risk of incompatibility of the jurisdictional decisions. [61] Since the substantive disputes and the jurisdictional disputes could not be totally separated, the current Chinese situation will make the arbitration less flexible and efficient. The "competence-competence" principle still needs to be improved.

Suggestions could be given in terms of the provisions of model law. The UNCITRAL Model Law has adopted the system of concurrent control. [62]

First is about article five of CAL, the conflicts between the courts and the arbitral tribunals on their authority. Under current provision of CAL, both the arbitral tribunal and the People's Court have the jurisdiction of the validity of the arbitration agreement. Nonetheless, the authority of the arbitral tribunal will be deprived when another litigant submits the disputes to the People's court when the other pass it to the arbitral tribunal during the stage that the tribunal does not start to exercise its jurisdiction. Such provision neglects the power of the arbitral tribunal and violates the principle of "competence-competence". It could be solved by the adoption of Article 16 of the UNCITRAL Model Law which works quite well. According to the stipulation of Article 16, if there is an arbitration agreement between the parties that the contract caused disputes should be solved by arbitration, when one litigant appeal to the court, the court should not accept the appeal, instead, the court should require the litigant turn it to the arbitral tribunal.[63] The provision confirms the priority of arbitral tribunal's authority on its jurisdiction and would solve the current conflicts of allocation of authority.

As mentioned, according to Article 5 of CAL, once the arbitral tribunal has made a decision on its jurisdiction, even the litigant has objections; they could not pass it to the People's Court. Under this provision, litigant could only appeal to seek the revocation of the arbitration award or prohibits enforcement through proposing the

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arbitration agreement is invalid or the arbitral tribunal has no jurisdiction. Once the court supports the litigant's request, the former arbitral proceeding would be a waste of time and money.

The promise to solve the problem is that if there are objections of the litigant on the jurisdiction of the arbitral tribunal, it needs to appeal to the courts immediately, before the start of the rest arbitral proceedings. Once the courts have confirmed the jurisdiction of the arbitral tribunal, the litigants could not appeal to the court any more after the whole arbitration proceeding has finished—that the arbitral tribunal has rendered an award.

CAL could be revised in accordance with Article 16(3) of the UNCITRAL Model law, which reads that if a arbitral tribunal rules as a preliminary question that it does have the competence , any party may require, within 30 days after having received noticed of the ruling…which decision shall be subject to no appeal.[64] The provision on one hand changes the situation that once the arbitral tribunal makes a decision on its jurisdiction the parties could not appeal to the court any more, on the other hand, it decrease the situation that litigants seek the revocation of an arbitration award greatly, showing the respect of the authority of the arbitral tribunals.

3. Conclusion

The relationship between arbitration institutions and arbitral tribunals is subtle in China. The role of the arbitral tribunal is more like a performer rather than an instructor. The arbitral tribunal's authority is largely taken by the arbitration institution which normally ought to commit itself to the role of administration and management.[65] The separate of substantive hearing and jurisdiction issues is the result of the interference of the arbitration institution to the arbitral tribunals and such interference has caused the interruption of the arbitral proceedings and the decrease of the flexibility and efficiency of the arbitration. As it could be seen from the rules of UNCITRAL Model Law, the arbitral tribunal enjoys highly authority on both the substantive and judicial issues while the arbitration institution exercises the administrative fairs. To make an improvement, the Chinese arbitration system ought to clarify the authority of the different organs and decrease the administrative interference from the arbitration constitution to a minimum extent.

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