Emergency Arbitrator Procedure and Open-List Arbitrator Appointment Under the New China (Shanghai) Pilot Free Trade Zone Arbitration Rules: Dawn of a New Era?

Rui Bu[1]

[1] Rui Bu is currently a Faculty Research Fellow of the University of Georgia School of Law. He received his J.D. in May 2014 from the University of Georgia School of Law, and his LL.B. in June 2011 from East China University of Political Science and Law (Shanghai, China).

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I. INTRODUCTION

On September 29, 2013, the China (Shanghai) Pilot Free Trade Zone (Shanghai FTZ) officially opened.[2] The Shanghai FTZ offers a number of special rules and potential advantages as a location in mainland China for investments from foreign enterprises.[3] In October 2013, in conjunction with the establishment of the Shanghai FTZ, the Shanghai International Arbitration Center [4] (SHIAC) set up the China (Shanghai) Pilot Free Trade Zone Court of Arbitration (FTZ Arbitration Court) to resolve disputes in the Shanghai FTZ that relate to investment, trade, finance, intellectual property and real estate.[5] The FTZ Arbitration Court was established in the hopes that it will play a role in attracting foreign investment into the Shanghai FTZ, as arbitration is seen as a more desirable dispute resolution option than Chinese domestic courts.[6]

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[2] *See* Associated Press in Beijing, *China opens Shanghai free-trade zone*, THE GUARDIAN (Sept. 29, 2013, 7:40 AM EDT), http://www.theguardian.com/world/2013/sep/29/china-shanghai-free-trade-zone/.

[3] *See China (Shanghai) Pilot Free Trade Zone - A new era of opening up and reform in China*, PWC CN (Nov. 2013), http://www.pwccn.com/home/eng/sh_pftz_paper_nov2013.html.

[4] Upon the approval by the Shanghai Municipal Government and with the agreement of the Shanghai Commission for Public Sector Reform, the China International Economic and Trade Arbitration Commission Shanghai Sub-commission (CIETAC Shanghai) officially became the Shanghai International Arbitration Center (SHIAC) in 2013. SHIAC currently has a panel of more than 600 arbitrators, of which almost 200 are from foreign countries. *See Introduction*, SHIAC, http://www.shiac.org/English/About.aspx?tid=2 (last visited Dec. 1, 2014).

[5] *See Announcement of The China (Shanghai) Pilot Free Trade Zone Court of Arbitration*, SHIAC (Oct. 30, 2013) *available at* http://www.shiac.org/English/Announcement.aspx?nid=573 (announcing the establishment of the China (Shanghai) Pilot Free Trade Zone Court of Aribtration as open for operations).

[6] *See* Zhou Wenting, *Shanghai FTZ tribunal opens to boost trade*, CHINA DAILY (last updated Nov. 6, 2013, 12:33 AM), http://usa.chinadaily.com.cn/business/2013-11/06/content_17083787.htm (reporting the opening of the Shanghai Free Trade Zone tribunal which will provide judicial services to investors in the zone.).

On April 8, 2014, SHIAC published a new set of arbitration rules, the China (Shanghai) Pilot Free Trade Zone Arbitration Rules (FTZ Arbitration Rules),[7] effective on May 1, 2014.[8] The FTZ Arbitration Rules are intended to apply to contractual and other disputes over rights and interests in property whether or not they are related to the Shanghai FTZ.[9] Moreover, the FTZ Arbitration Rules' expedited arbitration mechanism introduces several distinctive reforms favorable to foreign businesses operating in China and should come as welcome news to businesses eager to avoid drawn-out legal battles.[10]

The FTZ Arbitration Rules will apply where (a) the parties have agreed to refer their disputes to SHIAC and have opted for the FTZ Arbitration Rules to apply to the parties, legal facts, or subject matter of the dispute concerning the Shanghai FTZ, unless the parties agree otherwise; or (b) the parties have agreed to refer disputes to the FTZ Arbitration Court or have referred disputes to SHIAC to be conducted by the FTZ Arbitration Court, unless the parties agree otherwise.[11]

There are a number of differences between the FTZ Arbitration Rules and other institutional arbitration rules in China.[12] The main differences are that the FTZ Arbitration Rules contain:
Broader provisions for interim relief, including pre-arbitration interim relief;

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[7] Zhongguo (Shanghai) Ziyou Maoyi Shiyanqu Zhongcai Guize (中国（上海）自由贸易试验区仲裁规则) [China（Shanghai）Pilot Free Trade Zone Arbitration Rules] (promulgated by SHIAC, effective May 1, 2014) http://www.shiac.org/ENGLISH/Guide.aspx?tid=12&nid=616 [hereinafter FTZ Arbitration Rules].

[8] *See* Zhou Wenting, *FTZ arbitration rules published*, CHINA DAILY (Apr. 9, 2014, 07:15AM), http://www.chinadaily.com.cn/business/2014-04/09/content_17417152.htm.

[9] *See* Jelita Pandjaitan & Justin Tang, *Shanghai Free Trade Zone implements modern arbitration rules,* KLUWER ARBITRATION BLOG (July 2, 2014), http://kluwerarbitrationblog.com/blog/2014/07/02/shanghai-free-trade-zone-implements-modern-arbitration-rules.

[10] *See* Matthew J. Zito, *Shanghai FTZ Paves the Way for Arbitration Reform in China,* CHINA BRIEFING (June 20, 2014), http://www.china-briefing.com/news/2014/06/20/shanghai-ftz-paves-way-arbitration-reform-china.html.

[11] Pandjaitan & Tang, *supra* note 9.

[12] Other institutional arbitration rules in China include: China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules, SHIAC Arbitration Rules, and Shenzhen Court of International Arbitration (SCIA) Arbitration Rules.

Provisions for the appointment of an emergency arbitrator to rule on applications for urgent interim relief before the constitution of the tribunal in the main proceedings (Emergency Arbitrator Procedure);

More substantive provisions regarding the appointment of arbitrators from outside SHIAC's panel of arbitrators (Open-List Arbitrator Appointment);

Expanded provisions for the consolidation of arbitrations and joinder of parties;

Express provisions for mediation to be conducted by a mediator, as an alternative to the tribunal conducting the mediation, and the establishment, by SHIAC, of a panel of mediators; and

A *de minimis* threshold of RMB 100,000 for the summary procedure to apply under which the dispute will be determined by a sole arbitrator and an award rendered within 3 months (rather than within 6 months under the standard procedure)[13], and a small claims procedure for claims that do not exceed RMB 100,000.[14]

This paper focuses on two of the new features of the FTZ Arbitration Rules mentioned above: emergency arbitrator procedure and open-list arbitrator appointment. This paper examines these two new features in detail through a particular lens, a comparative analysis of how various sets of institutional arbitration rules in the world, including the FTZ Arbitration Rules, address the issues associated with emergency arbitrator procedure and open-list arbitrator appointment.

Section I.A will establish the conceptual ground for emergency arbitrator procedure with a particular focus on the fundamental principles transcending different institutional arbitration rules. Section I.B will explore in detail how three major arbitration institutions' rules govern emergency arbitrator procedure, namely the International Chamber of Commerce Rules (ICC Rules), the International Centre for Dispute Resolution Rules (ICDR Rules), and the Singapore International Arbitration Centre Rules (SIAC

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[13] *See* Pandjaitan & Tang, *supra* note 9 (parenthetical needed) .

[14] *See* Friven Yeoh, et al., *Arbitrating Under SHIAC's New China (Shanghai) Pilot Free Trade Zone Arbitration Rules*, O'MELVENY & MYERS (Jun. 16, 2014), http://www.omm.com/arbitrating-under-shiac-new-china-shanghai-pilot-free-trade-zone-arbitration-rules/ (highlighting key features under the new FTZ Rules).

Rules).[15] Section I.C will discuss the provisions in the FTZ Arbitration Rules governing emergency arbitrator procedure, while comparing these provisions to the relevant provisions in ICC Rules, ICDR Rules, and SIAC Rules. Section I.D will conclude with a few suggestions for further refinement of the provisions regarding emergency arbitrator procedure under the FTZ Arbitration Rules. Section II.A will introduce two basic party-appointed methods of arbitrator appointment in institutional arbitration practice, namely closed-list arbitrator appointment and open-list arbitrator appointment. Section II.B will assess the pros and cons of each method of arbitrator appointment and compare them with each other. Section II.C will demonstrate Chinese arbitration institutions' long-time practice of using closed-list arbitrator appointment. Section II.D will discuss the new provisions in the FTZ Arbitration Rules that have adopted open-list arbitrator appointment for the first time among all Chinese arbitration institutions and will make recommendations for refinement.

II. EMERGENCY ARBITRATOR PROCEDURE

A. Conceptual Background for Emergency Arbitrator Procedures

International arbitration has grown significantly in the last 50 years as commercial parties seek to minimize the potential uncertainties of local litigation procedures.[16] Unlike traditional litigation, international arbitration is completely voluntary.[17] The arbitral tribunal's power over the parties derives directly from the

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[15] Arbitration Rules (promulgated by the International Chamber of Commerce (ICC), effective Jan. 1, 2012) http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/, art. 29, app. V [hereinafter ICC Rules]; Arbitration Rules (promulgated by the Singapore International Arbitration Center (SIAC), effective Apr. 1, 2013) http://www.siac.org.sg/our-rules, art. 26, sched.1 [hereinafter SIAC Rules]; International Arbitration Rules (promulgated by the International Centre for Dispute Resolution (ICDR), effective May 1, 2006) https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037, art. 37 [hereinafter ICDR Rules].

[16] *See* Frank M. Young, III, *International Commercial Arbitration, Southern Style*, 74 ALA. LAW. 119, 119 (2013).

[17] *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 1 (2008).

parties' arbitration agreement.[18] Moreover, international arbitration is a private dispute resolution system and parties to an international arbitration agreement have control over many different procedural elements that are invariably beyond their control when litigating a dispute in court.[19] These elements include control over the number of arbitrators, the choice of the arbitrators (or at least the manner in which they will be chosen),[20] whether the arbitration will take place through an arbitration institution or be conducted *ad hoc*,[21] where the arbitration will take place,[22] and the language in which the arbitration will be conducted.[23] Arbitration ensures that neither party has a "home court advantage," thereby creating a more neutral forum than a court in either party's country could offer.[24]

Although international arbitration in general has many advantages over resolving conflicts through litigation, the international arbitration process does have some shortcomings, including the inability of parties to appeal decisions, limited discovery, and the limited power an arbitrator has to force compliance with deadlines and other requests.[25] In addition to these disadvantages, arbitration institutions historically did not offer a remedy in cases where emergency relief was necessary prior to the formation of the tribunal—a process that can take months.[26] This can be a dangerous position to be caught in as it is at this crucial point that a party will likely be most desperate to obtain interim relief. This creates the most significant interim relief problem in international arbitration.[27] If a party has already applied to begin an arbitration proceeding but an arbitral tribunal has not been appointed, the party faces two challenges before obtaining any type of relief. First, a tribunal has to be appointed and second, the actual

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[18] *Id.* at 2.
[19] *Id.* at 1.
[20] *Id.* at 42–3.
[21] *Id.* at 9.
[22] *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 1 (2008) at 43.
[23] *Id.* at 43–4.
[24] *Id.* at 1.
[25] *Id.* at 4–5. For a discussion regarding the advantages and disadvantages of international arbitration, *see also* RICHARD GARNETT ET AL., A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION (2000).
[26] *See* William Wang, Note, *International Arbitration: the Need for Uniform Interim Measures of Relief*, 28 BROOK. J. INT'L L. 1059, 1080 (2003).
[27] *Id.*

arbitration proceedings must take place.[28] These challenges tend not to bode well for a party seeking emergency relief before the arbitration proceedings.[29]

"If a party cannot obtain pre-tribunal emergency relief through arbitration, [the party] is forced to turn back to the courts,"[30] an option with many drawbacks. For example, the relief sought may not be available; court proceedings may be public, lengthy, and costly, and may veer in unexpected directions; furthermore, a foreign party may fear that a national court will be biased in favor of its nationals.[31] Therefore, as the demand for interim relief escalates, many arbitration institutions have recently begun to offer a solution to protect the rights of the parties during the critical period between filing a case and constituting the tribunal.[32] In general, arbitration institutions have developed two procedures to address this situation: (1) expediting the formation of the tribunal; and (2) appointing an emergency arbitrator specifically authorized to hear the application before the tribunal is formed.[33] While both procedures are viable solutions, most arbitration institutions prefer the use of emergency arbitrator procedure to determine applications for interim relief before the arbitral tribunal is constituted. As a result, most major arbitration institutions have revised their rules accordingly to incorporate procedures for the appointment of emergency arbitrators.[34]

Emergency arbitrator procedure enables parties to seek interim relief prior to the formation of the tribunal, without having to resort to national courts.[35] As emergency arbitrator procedure has

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[28] *See* Erin Collins, *Pre-Tribunal Emergency Relief in International Commercial Arbitration*, 10 LOY. U. CHI. INT'L L. REV. 105, 108 (2012).
[29] *Id.*
[30] *Id.*
[31] *See* Guillaume Lemenez & Paul Quigley, *The ICDR's Emergency Arbitrator Procedure In Action*, *Part I: A Look at the Empirical Data*, 63-OCT DISP. RESOL. J. 60, 62 (2008).
[32] *See* Martin Davies, *Court-Ordered Interim Measures in Aid of International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 299, 300–3 (2006) (exp paren); *see also* Collins, *supra* note 27, at 108.
[33] *See* Peter J.W. Sherwin & Douglas C. Rennie, *Interim Relief Under International Arbitration Rules and Guidelines: A Comparative Analysis*, 20 AM. REV. INT'L ARB. 317, 321–2 (2009).
[34] *See* Grégoire Marchac, *Interim Measures in International Commercial Arbitration Under the ICC, AAA, LCIA and UNCITRAL Rules*, 10 AM. REV. INT'L ARB. 123, 126 (1999).
[35] *Id.*

become an increasingly popular tool, it is worthwhile to highlight some fundamental concepts embedded in various institutional arbitration rules. First, most arbitration institutions apply the provisions of the emergency arbitrator only to parties that are either signatories of the arbitration agreement that is relied upon or successors to such signatories.[36] "This rule was designed to exclude investment treaty arbitrations and to prevent possible abuse by third parties."[37] Notably, most emergency arbitrator provisions will not apply by default to every arbitration.[38] Rather, most emergency arbitrator provisions only apply if a number of other conditions exist. In particular, the emergency arbitrator provisions will not apply when the parties agreed to opt out of the respective provisions, or when the parties agreed on some other emergency relief procedure.[39] Second, emergency arbitrator or other type of interim relief is usually sought by a party who,

> [B]elieves it will suffer imminent harm due to an irreparable alteration of the status quo. Examples include the adversary's continued violation of copyright or patent rights or misappropriation of trade secrets; danger to party property in the custody of the adversary; and danger that the adversary will dispose of its own property, leaving the party without a meaningful chance of recovery in arbitration.[40]

Third, another issue of interest is the impact of emergency arbitrator procedure on the concurrent jurisdiction of a competent court or the arbitral tribunal. As for court proceedings, emergency arbitrator procedure is not envisaged to represent an exclusive remedy and, in general, the option of (or indeed submission to) those proceedings does not operate as a waiver of judicial authority over the matter.[41] In respect to the arbitral tribunal, jurisdiction is

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[36] *See e.g.,* ICC Rules, *supra* note 15, art. 29(5).
[37] *See* Dieter A. Hofmann, *New Rules on International Arbitration*, FOR THE DEFENSE 12, 14–5 (May 2012).
[38] *Id.*
[39] *See e.g.,* ICC Rules, *supra* note 15, art. 29(6).
[40] *See* Ira. M. Schwartz, *Interim and Emergency Relief in Arbitration Proceedings*, 63-APR DISP. RESOL. J. 56, 58 (2008).
[41] *See* Richard Allan Horning*, Interim Measures of Protection, Security for Claims and Costs*; *Commentary on the WIPO Emergency Relief Rules (In Toto)*, 9 AM. REV. INT'L ARB. 155, 163–4 (1998); *see also* Sheppard& Townsend, *Holding the Fort Until the Arbitrators*

entirely protected. Most institutional arbitration rules are clear that orders or awards of emergency arbitrators do not bind the subsequently constituted arbitral tribunal, and that those tribunals are empowered to reconsider, modify, terminate or annul the order or award of an emergency arbitrator.[42]

Finally, assuming that a party is awarded the relief it seeks, the next key issue that arises is enforcement. Questions remain regarding the applicability of national arbitration laws to pre-arbitral procedures and the extent to which courts will enforce orders or awards made by emergency arbitrators.[43] None of the many arbitral rules limit arbitrators to the traditional remedies provided in the procedural law of the place of arbitration. However, it should be noted that the enforcement of innovative measures could prove difficult if the state where enforcement is sought is not familiar with these kinds of interim measures.[44] Ultimately, this will likely turn upon whether emergency arbitrators are deemed to be "arbitrators," for the purposes of arbitration legislation, granting relief in the course of "proceedings."[45] Alternatively, there is a purposive approach, which recognizes that the primary purpose of arbitration legislation is to respect the parties' agreement to arbitrate their disputes, and this would appear to lend support in favor of the enforcement of emergency arbitrators' orders and awards.[46]

B. Emergency Arbitrator Procedure Under ICC, SIAC and ICDR Rules

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Are Appointed: The New ICDR International Emergency Rule, 61-JUL DISP. RESOL. J. 74, 76 (2006).

[42] *See* Horning, *supra* note 41, at 165.

[43] *See* Marianne Roth, *Interim Measures*, 2012 J. DISP. RESOL. 425, 425 (2012); *see also* Marchac, *supra* note 34, at 128.

[44] *See* Marchac, *supra* note 34, at 128.

[45] Generally, arbitrators have

> [W]ide discretion in deciding whether the requested measure is appropriate or necessary. The recent trend of arbitral rules and national arbitration acts is to vest the arbitrators with express powers to order interim awards. As an exception to this general tendency, however, some national laws still accord exclusive jurisdiction to order interim measures to their domestic courts, such as Finland, Greece, Italy, and Thailand . . . ."

Marchac, *supra* note 34, at 129. *See also* ICC Rules, *supra* note 15, art. 28(1) (2012); ICDR Rules, *supra* note 15, art. 21(1) (2006)..

[46] *See* MARTIN DOMKE ET AL., DOMKE ON COM. ARB. § 24:6 (2014).

As emergency arbitrator procedure has developed as a common practical alternative, many arbitration institutions have adopted some type of rules to address a party's need for emergency relief.[47] These rules vary in comprehensiveness and in strategy. The emergency arbitrator rules of the International Chamber of Commerce International Court of Arbitration (ICC), the Singapore International Arbitration Centre (SIAC), and the American Arbitration Association International Center for Dispute Resolution (ICDR), are discussed below.

The International Chamber of Commerce International Court of Arbitration

In 1990, the ICC launched its "Pre-Arbitral Referee Procedure"—arguably the first attempt by a major arbitration institution to provide emergency relief procedure prior to the constitution of the tribunal.[48] While the 1998 revision of the ICC Rules added provisions allowing applications for urgent measures to be made directly to courts, the ICC's most recent amendments provide the ICC Rules with an internal mechanism for dealing with emergency arbitrator procedure.[49]

On January 1, 2012 these latest amendments became effective. The ICC's emergency arbitrator (ICC's EA) rules are found in Article 29 of ICC Rules and supplemented by Appendix V[50]. Article 29, contains some general rules about when emergency arbitration procedure is appropriate, but refers to Appendix V for specific information on the procedure for an application for an emergency arbitrator.[51] This new set of rules contains the most comprehensive set of emergency relief procedures of all institutional arbitration rules.[52]

The ICC's EA rules are extremely detailed. First, ICC's EA rules apply automatically to parties that have opted to arbitrate their dispute under the ICC Rules with specific requirements to be met: (a) the application is submitted prior to the transmission of the file

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[47] *See* Wang, *supra* note 26, at 1075.
[48] *See* Hofmann, *supra* note 37, at 12.
[49] *See* Shai Wade et al., *The Revised ICC Arbitration Rules: Seeking Greater Efficiency and Transparency*, 28 No. 1 CORP COUNS QUARTERLY ART 1 (2012).
[50] ICC Rules, *supra* note 15, art. 29, app.V.
[51] *Id*.
[52] *See* Collins, *supra* note 28, at 115.

to the arbitral tribunal; (b) the arbitration agreement was concluded after January 1, 2012; and (c) there is no agreement of the parties to opt-out of emergency arbitrator procedure.[53] Second, ICC's EA rules are not intended to prohibit any party from seeking urgent interim or conservatory measures from a competent judicial authority.[54] Third, in order to avoid misuse of ICC's EA rules, the application of the rules has been narrowed to situations where a party seeks relief that truly cannot wait for the constitution of an arbitral tribunal.[55] Fourth, only signatories to the arbitration agreement or their successors can invoke ICC's EA rules,[56] which provides the responding party with a certain degree of protection. Finally, Appendix V dictates that the appointment of an emergency arbitrator should take place as soon as possible, normally within two days of receipt of the application.[57] If a party wishes to challenge an appointment, it must do so within three days of receipt of the appointment.[58] After the appointment is made, the emergency arbitrator must establish a procedural timetable for the proceedings as soon as possible, normally within two days of getting the file.[59] Under the ICC's EA rules, an emergency arbitrator's decision is rendered in the form of an order,[60] which is binding on the parties and which the parties must undertake to comply with.[61] Since the ICC's EA rules are silent on the enforcebility of an order issued by emergency arbitrors, it is unclear whether such orders have the same legal effect as an order for interim measures rendered by an arbitral tribunal.

The Singapore International Arbitration Center

The SIAC was established in 1991.[62] The rules the SIAC is currently using went into force on April 1, 2013.[63] Under the SIAC Rules, the parties may seek interim relief prior to the constitution of

[53] ICC Rules, *supra* note 15, art. 29(56).
[54] *Id*. art. 29(7).
[55] *Id.* art. 29(1).
[56] *Id.* art. 29(5).
[57] *Id.* app. V, art. 2(1).
[58] *Id*. app. V, art. 3.
[59] ICC Rules, *supra* note 15, app. V, art. 5(1).
[60] ICC Rules, *supra* note 15, art. 29(2); *Id.* app.V, art. 6(1).
[61] ICC Rules, *supra* note 15, art. 29(2); *Id.* app.V, art. 6(6).
[62] *See About Us*, SIAC, http://www.siac.org.sg/2014-11-03-13-33-43/about-us (last visited Apr. 23, 2014).
[63] *See Our Rules*, SIAC, http://www.siac.org.sg/our-rules (last visited Apr. 23, 2014) (exp).

the tribunal.[64] Schedule 1 to the SIAC Rules provide that a party in need of relief may make an application for emergency interim relief prior to the constitution of the arbitral tribunal, provided it is done concurrently with or following the filing of a Notice of Arbitration.[65] It should be noted from the outset that these procedures apply to the relevant arbitration agreements by default, meaning that there is no requirement for the parties to opt in to their availability.[66]

The Chairman of SIAC must appoint an emergency arbitrator within one business day of receipt of the application.[67] The emergency arbitrator then must, within two business days of appointment, establish a schedule for considering the application.[68] The emergency arbitrator has the "power to order or award any interim relief that he deems necessary."[69] He also has the power to "modify or vacate an interim award or order for good cause shown,"[70] but has no more power after the tribunal is constituted.[71] Although the SIAC Rules provides an emergency arbitrator with broad discretionary powers to award any interim relief deemed necessary, the emergency arbitrator has no power to act after the tribunal is constituted, and any relief granted by the emergency arbitrator expires and ceases to be binding after 90 days if the tribunal is not constituted.[72] Additional jurisdictional protection is afforded to the subsequently-constituted tribunal, as it is not bound by any determination made by the emergency arbitrator. The tribunal can reconsider, modify or vacate any interim award or relief issued by the emergency arbitrator.[73] The expiration of the order or award rendered by the emergency arbitrator is unique under the SIAC's rules.

In terms of uncertainties over whether orders and awards made by emergency arbitrators are enforceable or not, the Singapore Parliament introduced amendments to the International Arbitration

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[64] *SIAC Rules*, *supra* note 15, sched. 1.
[65] *SIAC Rules*, *supra* note 15, sched. 1(1).
[66] *See* Collins, *supra* note 28, at 111-2.
[67] *SIAC Rules*, *supra* note 15, sched. 1(2).
[68] *SIAC Rules*, *supra* note 15, sched. 1(5).
[69] *SIAC Rules*, *supra* note 15, sched. 1(6).
[70] *Id.*
[71] *SIAC Rules*, *supra* note 15, sched. 1(7).
[72] *Id*.
[73] *Id.*

Act ("IAA") on April 9, 2012.[74] The amendments make clear that awards and orders given by emergency arbitrators are enforceable in Singapore.[75] The amendments have accorded emergency arbitrators the same legal status as that of a regularly-constituted arbitral tribunal. This legislative amendment distinguishes Singapore from other jurisdictions as it provides clarity that is otherwise unavailable in most other jurisdictions.[76] It should be noted, however, that uncertainty remains as to the enforceability of orders and awards outside Singapore.[77]

The American Arbitration Association International Center for Dispute Resolution

The ICDR was founded by the American Arbitration Association ("AAA") in 1996 to provide international access to the mediation and arbitration services provided by the AAA.[78] The ICDR administers all of the AAA's international matters and the ICDR Rules apply whenever the parties' agreement calls for AAA arbitration but does not choose a particular set of AAA rules.[79]

The ICDR provides a pre-tribunal emergency arbitrator procedure whereby parties may, in urgent situations, apply to the ICDR to seek relief prior to the formation of the tribunal.[80] This emergency arbitrator procedure is outlined in Article 37 of the ICDR Rules.[81] Article 37(a) states that it applies to all arbitrations under the ICDR Rules that are "conducted under arbitration clauses

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[74] *See* Subramanian Pillai & Kaushalya Rajathurai, *Singapore: Recent Amendments to the International Arbitration Act*, MONDAQ, http://www.mondaq.com/x/179938/International+Courts+Tribunals/Recent+Amendments+to+the+International+Arbitration+Act/(last updated June 3, 2012).

[75] *Id.* (extending the scope of the definition of "arbitral tribunal" will be extended to expressly include Emergency Arbitrators appointed subject to, and in compliance with, the rules of arbitration agreed. This serves to clarify that any interim measures ordered by an Emergency Arbitrator will be enforceable by the High Court.)

[76] *See* Julian Wallace & Glen Rosen, *Recent Amendment to the International Arbitration Act and Their Influence on the Insurance Industry*, SIAC, http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/199-recent-amendments-to-the-international-arbitration-act-and-their-influence-on-the-insurance-industry (last visited Dec. 2, 2014).

[77] *Id.*

[78] *See About The American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)*, AMERICAN ARBITRATION ASSOCIATION, http://www.adr.org/about_aaa (last visited Nov. 6, 2014).

[79] *Id.*

[80] *See* Guillaume Lemenez & Paul Quigley, *The ICDR's Emergency Arbitrator Procedure in Action, Part II: Enforcing Emergency Arbitrator Decisions,* 63-NOV DISP. RESOL. J. 66, 66 (2008).

[81] ICDR Rules, *supra* note 15, art. 37.

or agreements entered on or after May 1, 2006."[82] For all agreements entered prior to May 1, 2006, the parties must specifically agree to Article 37's emergency arbitrator procedure in order for it to apply[83]. For all agreements entered on or after May 1, 2006, Article 37 applies unless the parties opt out of it in their arbitration agreement.[84] Some have suggested that this feature "favorably distinguishes" the ICDR procedure "from other opt-in mechanisms for obtaining interim relief, which are seldom used."[85]

Article 37 of the ICDR Rules also applies when the parties' agreement provides for arbitration before the ICDR, whether or not they have designated the ICDR Rules.[86] In addition, these rules apply to international arbitrations whenever the parties' agreement calls for AAA arbitration but does not choose a particular set of AAA rules.[87] The ICDR does not define what constitutes an international arbitration.[88] Given the broad scope of international arbitration, ICDR Rules and Article 37, as a practical matter, can possibly apply to disputes involving parties from different countries, or touch upon international issues, whether they are legal or factual. When a party applies through the emergency arbitrator provisions under the administration of the ICDR, a party must initially submit a written emergency relief application to the ICDR specifying the type of emergency relief that it is seeking, why that relief is necessary, and why the party is entitled to that relief.[89] After the application, a single emergency arbitrator from a special panel of emergency arbitrators designated to rule on emergency applications will be appointed within one business day.[90] Should a party wish to object to that appointment, it must notify all parties involved in the proceedings of the reasons for its objection.[91] The emergency arbitrator will then, within two business days of appointment,

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[82] *Id.*
[83] ICDR Rules, *supra* note 15, art. 37(a).
[84] *See* Peter Sherwin & Douglas Campbell Rennie, *Interim Relief Under International Arbitration Rules and Guidlines: A Comparative Analysis*, 20 AM. REV. INT'L ARB. 340, 340-2 (2009).
[85] *See* Mark Friedman et al., *International Arbitration*, 41 INT'L LAW. 251, 286–7 (2007).
[86] *See* Sherwin & Rennie, *supra* note 84, at 341; *see also* Lemenez & Quigley, *supra* note 80, at 64.
[87] *See* Sherwin & Rennie, *supra* note 84, at 340.
[88] *See* ICDR Rules, *supra* note 15.
[89] *Id.* art. 37(b).
[90] *Id.* art. 37(c).
[91] *Id.*

establish a schedule for consideration of the application for emergency relief.[92] The ICDR Rules do not set any time limit for the emergency arbitrator to decide the application.

Similar to the authority of the tribunal, the emergency arbitrator may award any interim or conservatory measures that the emergency arbitrator "deems necessary."[93] These measures may come in the form of an order or an award, "including injunctive relief and measures for the protection or conservation of property."[94] The emergency arbitrator also has the power to "modify or vacate the interim award or order for good cause shown."[95] Article 37 also explicitly provides that the parties may apply to a national court for interim relief.[96]

Once the tribunal has been constituted, however, the emergency arbitrator has no further power.[97] The tribunal "may reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator."[98] The emergency arbitrator also may not serve as a member of the tribunal unless the parties agree otherwise.[99] Article 37 has had success in producing emergency relief since its implementation in May of 2006.[100] As of October 2008, Article 37 emergency arbitrators have been appointed in six ICDR cases.[101]

C. Emergency Arbitrator Procedures Under the China (Shanghai) Pilot Free Trade Zone Arbitration Rules

Timing of Application for Emergency Arbitrator Procedures

Under the FTZ Arbitration Rules, during the period between the acceptance of a case and the constitution of the tribunal, a party may submit a written application to seek interim relief from an

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[92] *Id.* art. 37(d).
[93] *See* ICDR Rules, *supra* note 15, at art. 37(e)
[94] *Id.*
[95] *Id.*
[96] *Id*. art. 37(h).
[97] *See* ICDR Rules, *supra* note 15, at art. 37(f)
[98] *Id.*
[99] *Id.*
[100] Lemenez & Quigley, *supra* note 31, at 69.
[101] *See* Grant Hanessian & Lawrence W. Newman, *International Arbitration Checklists,* p.63 (2th ed. 2009).

emergency arbitrator.[102] The acceptance of a case is defined under the FTZ Arbitration Rules as the completion of all the formalities of an Application for Arbitration requested by SHIAC.[103]

Subsequently, the Secretariat will send a Notice of Acceptance to the claimant within five days after the completion of formalities of an Application for Arbitration. The Secretariat has the duty to send Notice of Arbitration to the respondent within five days after the Notice of Acceptance is sent[104]. Similarly, the ICC Rules allow parties to file an application for emergency arbitrator procedure even prior to the filing of a Notice of Arbitration, so long as that Notice of Arbitration is filed within ten days of the application for emergency arbitrator procedures.[105] The ICC Rules are more flexible than the SIAC Rules, which otherwise only provide that an application may be submitted concurrent with or after the commencement of the arbitration.[106] However, the FTZ Arbitration Rules are not as flexible as the ICDR Rules, which provide that an application for emergency arbitrator procedure may be submitted any time prior to the constitution of the tribunal, and does not force parties to wait until the formal acceptance of arbitration to file an application for emergency arbitrator procedure.[107]

Timeframes for Appointment of an Emergency Arbitrator and Issuance of Decision

First, the FTZ Arbitration Rules provide that the Chairman of SHIAC may appoint an emergency arbitrator from the Panel of Arbitrators to constitute the emergency tribunal within three days upon the completion of formalities.[108] However, the ICC, SIAC and ICDR Rules have imposed even shorter deadlines, requiring appointment within one or two days.[109]

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[102] *See* FTZ Arbitration Rules, *supra* note 7, art. 21(1).
[103] *Id.* at art. 12(2).
[104] *Id.*
[105] ICC Rules, *supra* note 15, app. V, art. 1(1)(6).
[106] SIAC Rules, *supra* note 15, sched. 1(1).
[107] ICDR Rules, *supra* note 15, art. 37(b).
[108] FTZ Arbitration Rules, *supra* note 7, art. 21(2).
[109] SIAC Rules, *supra* note 15, sched. 1(2) (allowing one day to appoint emergency arbitrator); ICDR Rules, *supra* note 15, art. 37(3) (allowing one day to appoint emergency arbitrator); ICC Rules, *supra* note 15, app. V, art. 2(1) (granting two days to appoint emergency arbitrator).

Second, the FTZ Rules have expedited the timeframe to challenge the appointment of the emergency arbitrator, allowing parties five days to challenge the appointment of an emergency arbitrator.[110] This is still not in accordance with the ICC, SIAC, or ICDR Rules, which generally have given parties either one or three days to challenge the appointment of an emergency arbitrator.[111] Additionally, the FTZ Rules have not specified the timeframe for SHIAC to decide on the challenge.[112]

Furthermore, the SIAC, ICC, and ICDR Rules go one step further, and require that an emergency arbitrator establish a schedule for considering the application for emergency relief within two days of appointment.[113] However, the FTZ Arbitration Rules do not contain such a requirement.

Finally, the FTZ Arbitration Rules provide that the emergency arbitrator must issue an emergency decision within twenty days of its appointment, or by the tribunal within twenty days of its receipt of the application for interim measures.[114] This is generally in accordance with the ICC Rules, which impose a fifteen-day deadline for emergency decisions,[115] and is much clearer than the ICDR and SIAC Rules, which impose no concrete deadline at all.

In summary, the FTZ Arbitration Rules set out relatively quick timelines for the appointment of an emergency arbitrator and the rendering of a decision, so that the parties can obtain interim relief as quickly as possible.

Powers of the Emergency Arbitrator

The FTZ Arbitration Rules are silent about whether or not an emergency arbitrator has the authority to conduct proceedings in

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[110] FTZ Arbitration Rules, *supra* note 7, art. 32(1).
[111] ICDR Rules, *supra* note 15, art. 37(3) (providing for one day to challenge appointment); SIAC Rules, *supra* note 15, sched. 1(3) (providing, similarly, for one day's time to challenge appointment); ICC Rules, *supra* note 15, app.V, at art. 3(1) (permitting up to three days to challenge an appointment).
[112] FTZ Arbitration Rules, *supra* note 7, art. 32(1).
[113] SIAC Rules, *supra* note 15, sched. 1(5) (2013); ICC Rules, *supra* note 15, app.V, art. 5(1); ICDR Rules, *supra* note 15, art. 37(4).
[114] FTZ Arbitration Rules, *supra* note 7, art. 22(3).
[115] ICC Rules, *supra* note 15, app.V, art. 6(4).

any manner he considers appropriate, whereas other arbitration institutions have given the emergency arbitrator maximum flexibility over procedural matters.[116] Although explicitly requiring the decision to be rendered in writing and in the required format,[117] the FTZ Arbitration Rules are silent regarding the type of relief an emergency arbitrator is authorized to grant. This approach is similar to the ICC Rules, which are also silent on this issue, but differs from the ICDR and SIAC Rules, which both explicitly provide that the emergency arbitrator shall have the power to award any interim relief he or she deems necessary or appropriate.[118]

However, the FTZ Arbitration Rules give emergency arbitrators the power to order that the party seeking emergency relief post an appropriate security,[119] which aligns with international best practices, as evidenced by the rules of the ICC, SIAC and ICDR.[120]

Enforcement of Emergency Decisions

The FTZ Arbitration Rules are silent on whether: (1) an interim measure rendered by an emergency arbitrator has the same effect as an interim measure ordered by an arbitral tribunal, (2) whether the emergency decision is binding on the parties when rendered, and (3) whether the parties must undertake to comply with it. However, it can be inferred that an interim measure rendered by an emergency arbitrator is equally enforceable, binding, and requires compliance from the fact that the FTZ Arbitration Rules do not actually distinguish pre-tribunal interim measures from interim measures granted by the tribunal. Thus, the approach taken by the FTZ Arbitration Rules is very different from that taken by the ICC and SIAC Rules, which explicitly provide that a decision rendered

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[116] *Id.* at app. V, art. 5(2) (granting broad discretionary powers to conduct proceedings as the arbitrator sees fit).
[117] FTZ Arbitration Rules, *supra* note 7, art. 22(1).
[118] ICDR Rules, *supra* note 15, art. 37(5) ("The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property."); SIAC Rules, *supra* note 15, sched. 1(6) ("The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary.").
[119] FTZ Arbitration Rules, *supra* note 7, art. 22(2).
[120] ICC Rules, *supra* note 15, app.V, art. 6(7) (2012); SIAC Rules, *supra* note 15, sched. 1(8); ICDR Rules, *supra* note 15, art. 37(7).

by the emergency arbitrator is binding on the parties, who then must undertake to comply without delay.[121]

Effect of an Emergency Decision After Constitution of Tribunal

Under the FTZ Arbitration Rules, the emergency arbitrator has the discretion to decide whether his emergency decisions should be modified, suspended, or withdrawn.[122] This conforms with the ICC, SIAC, and ICDR Rules, which also provide that the emergency arbitrator may modify his own decision.[123]

The FTZ Arbitration Rules also provide that decisions made by an emergency arbitrator may be modified, suspended, or withdrawn by the arbitral tribunal.[124] Again, this conforms with the ICC, SIAC, and ICDR Rules, which contain similar provisions that confer the arbitral tribunal with the discretion to modify, suspend, or withdraw the emergency arbitrator's decision.[125] However, other institutional arbitration rules go slightly further than the FTZ Arbitration Rules by explicitly providing in their rules that the emergency arbitrator's findings do not bind the tribunal. For example, the ICC Rules provide that the "emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order."[126] Similarly, the SIAC Rules provide that "the Tribunal is not bound by the reasons given by the Emergency Arbitrator."[127] In contrast, the FTZ Arbitration Rules do not explicitly state that the tribunal is not bound by the emergency arbitrator's decisions, though this principle is implicit in the rules granting the arbitral tribunal power to modify, suspend, or terminate the emergency arbitrator's decision.[128] The FTZ Arbitration Rules also state that an emergency decision made by an emergency arbitrator is subject to objection by the respondent on the condition that the respondent files a written objection with SHIAC

[121] ICC Rules, *supra* note 15, art. 29(2); SIAC Rules, *supra* note 15, sched. 1(9).
[122] FTZ Arbitration Rules, *supra* note 7, art. 23(3).
[123] ICC Rules, *supra* note 15, app.V, art. 6(8); SIAC Rules, *supra* note 15, sched. 1(6); ICDR Rules, *supra* note 15, art. 37(5).
[124] FTZ Arbitration Rules, *supra* note 7, art. 23(4).
[125] ICC Rules, *supra* note 15, app.V, art.6(8); SIAC Rules, *supra* note 15, sched.1(6); ICDR Rules, *supra* note 15, art. 37(5).
[126] ICC Rules, *supra* note 15, art. 29(3).
[127] SIAC Rules, *supra* note 15, sched. 1(7).
[128] FTZ Arbitration Rules, *supra* note 7, art. 23(3).

within three days of the respondent's receipt of the decision.[129] The emergency tribunal, in rendering such decision on an interim measure, has the discretion to decide whether to accept the objection.[130] Even after the emergency tribunal rendering such a decision on an interim measure has dissolved, however, the tribunal that is subsequently constituted shall have the same discretion.[131].

Status of the Emergency Arbitrator After Constitution of Tribunal

Under the FTZ Arbitration Rules, an emergency arbitrator's power ceases once the tribunal has been constitutedand the emergency arbitrator should hand over all materials of the dispute to the tribunal.[132] Similarly, the SIAC and ICDR Rules provide that the emergency arbitrator has no further power once the tribunal has been constituted.[133] Furthermore, the FTZ Arbitration Rules explicitly uphold the superiority of arbitration over the emergency arbitrator procedure by requiring that the emergency procedure should not affect the continuation of the arbitration proceedings in the future.[134]

The FTZ Arbitration Rules also clearly provide that an emergency arbitrator should not act as an arbitrator in an arbitration relating to the dispute that gave rise to the emergency appointment.[135] This resembles the rules of the ICC, SIAC, and ICDR, all of which contain similar provisions.[136]

D. Suggestions for Refinement of Emergency Arbitrator Procedures Under the China (Shanghai) Pilot Free Trade Zone Arbitration Rules

[129] *Id.* art. 23(1).
[130] *Id.*
[131] *Id.*
[132] FTZ Arbitration Rules, *supra* note 7, art. 21(5).
[133] SIAC Rules, *supra* note 15, sched. 1(7) (2013); ICDR Rules, *supra* note 15, art. 37(6).
[134] FTZ Arbitration Rules, *supra* note 7, art. 21(7).
[135] *Id*. art. 21(6).
[136] ICC Rules, *supra* note 15, app.V, art. 2(6); SIAC Rules, *supra* note 15, sched. 1(4); ICDR Rules, *supra* note 15, art. 37(6).

As shown above, the new FTZ Arbitration Rules governing the emergency arbitrator procedure clearly adopt many of the best practices utilized at other major international arbitration institutions. Nevertheless, there are still a number of revisions that could be made to further clarify the emergency arbitrator procedure under the FTZ Arbitration Rules.

Timing of Application for an Emergency Arbitrator

Because emergency arbitrator procedure is intended to address situations of extreme urgency, it makes little sense to force parties to wait until the formal acceptance of arbitration to seek interim relief through that procedure. Such a formalistic restriction does not seem to serve any practical purpose, and any concerns regarding abuse of the emergency arbitrator process could be addressed by adding a caveat, similar to that included in the ICC Rules, where an application for an emergency arbitrator is only valid if a Notice of Arbitration is served shortly thereafter.[137] As such, it may be advisable to revise the FTZ Arbitration Rules to permit the filing of applications for emergency arbitrators prior to the formal acceptance of arbitration and after an Application of Arbitration is filed, so long as the Application of Arbitration is duly accepted and a Notice of Arbitration is filed shortly afterwards.

This revision would make the emergency arbitrator procedure better able to address situations of extreme urgency, instead of forcing parties to apply to local courts just because an Application of Arbitration has not yet been accepted.

Timeframes for Appointment of an Emergency Arbitrator and Issuance of Decision

While an improvement over the SHIAC Rules, the FTZ Arbitration Rules's provisions regarding timeframes for the appointment of emergency arbitrators and issuance of decisions still have room for improvement. Due to the urgent nature of emergency relief, it may be necessary to explicitly require in the FTZ

[137] ICC Rules, *supra* note 15, app.V, at art.1(6) ("The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat's receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary.").

Arbitration Rules that the emergency arbitrator sets up a schedule for considering the application for emergency relief within a certain period of time after the appointment so that the process will be expedited.

Powers of Emergency Arbitrators

The FTZ Arbitration Rules already seem to imply that the emergency arbitrator is authorized to grant any interim relief he or she deems appropriate, but it may be worth making this broad grant of authority explicit in the Rules to avoid ambiguities. Moreover, it may be worth adding provisions to limit the power of emergency arbitrators under certain circumstances. For example, the ICC Rules explicitly state that the emergency arbitrator procedure applies only to signatories to the arbitration agreement or their successors.[138] In other words, the emergency arbitrator does not have the power to grant interim orders over third parties to the arbitral proceedings. It may be advisable to add a similar provision to the FTZ Arbitration Rules, to limit clearly the jurisdiction of emergency arbitrators.

Enforcement of Emergency Decisions

By not distinguishing an emergency arbitrator's interim measures or decisions from the tribunal's interim measures or decisions, the FTZ Arbitration Rules seem to imply that an interim measure ordered by an emergency arbitrator has the same effect as an interim measure ordered by an arbitral tribunal: the emergency decision is binding on the parties when rendered, and the parties undertake to comply with it. However, it also may be worth making this broad grant of authority explicit in the Rules to avoid ambiguities.

Effect of Emergency Decisions After Constitution of the Arbitration Tribunal

The FTZ Arbitration Rules do not explicitly state that the tribunal is not bound by the emergency arbitrator's decisions, though this principle is implicit in the rules granting the arbitral tribunal power to modify, suspend, or terminate the emergency

[138] ICC Rules, *supra* note 15, art.29(5).

arbitrator's decision. It may nevertheless be worth making this principle explicit in the FTZ Arbitration Rules, especially with regard to making it clear that the arbitral tribunal is bound by neither the decisions nor the reasons given by the emergency arbitrator.

III. OPEN-LIST ARBITRATOR APPOINTMENTS

A. Arbitrator Appointment Methods in Institutional Arbitration

One of international arbitration's most crucial stages concerns the appointment of the arbitrators.[139] While the ability of the parties to select their arbitrators is recognized as one of arbitration's most desirable features, the selection phase can be challenging.[140]

There are two forms of arbitration: *ad hoc* arbitration and institutional arbitration. Both forms have a separate mechanism for the appointment of arbitrators.[141] In *ad hoc* arbitration, parties make their own arrangements for the selection of arbitrators and for the designation of rules, applicable law, procedures, and administrative support.[142] In contrast, in institutional arbitration, an arbitration institution administers the arbitral process according to its institutional rules.[143] Although most arbitration institutions firmly uphold the parties' rights to choose their arbitrators, their arbitrator appointment procedures vary at least to the scope of the pool from which parties can choose their arbitrators[144]. Some arbitration institutions, ICDR for example, allow the parties to select their arbitrators freely as the default rule; and if the parties should fail, the parties are required to select the arbitrators from ICDR's previously designated panel of arbitrators comprised of experts drawn from different parts of the world (Open-List Method).[145]

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[139] *See* Moses, *supra* note 17, at 116.
[140] *Id*. at 128–130.
[141] *See* THOMAS L. GRAVELLE & MARY A. BEDIKIAN, 8A MICH. PL. & PR., § 62C:136 (2nd ed. 2013).
[142] *Id*.
[143] *Id*.
[144] *See e.g.* ICDR Rules*, supra* note *15, art. 12, 13;* SIAC Rules, *supra* note 15, § 6,7,8; Arbitration Rules (promulgated by the China International Economic and Trade Arbitration Commission (CIETAC), effective Jan. 1, 2015), http://www.cietac.org/index.cms, art. 26 [hereinafter CIETAC Rules].
[145] ICDR Rules, *supra* note 15, art. 12, 13.

Other arbitration institutions, such as CIETAC, use a more restricted approach under which the arbitrator appointment is controlled under a closed panel system where, as the default rule, the parties are only allowed to appoint arbitrators from a panel previously designated by the relevant arbitration institution (Closed-List Method).[146]

B. A Comparison of Open-List Method and Closed-List Method

Pros and Cons of Open-List Method

The Open-List Method in recent years has been the subject of great debate. At the outset, it is undeniable that the principle of party autonomy is at the heart of international arbitration.[147] An arbitral tribunal exists because the parties have consented to arbitrate certain disputes, rather than litigate those disputes in a court as they otherwise have the right to do, and in principle, parties are free to agree on how they want to appoint a tribunal.[148] Many parties view the right to choose their own arbitrators as one of the key attractions of international arbitration.[149] The proponents of Open-List Method argue that it is consistent with the principle of party autonomy and, as arbitration awards are final and not subject to appeal unless the award is vacated, parties must have a high level of trust and confidence in the arbitrators they nominate.[150] The Open-List Method maximizes party autonomy by allowing parties to freely choose their arbitrators and build trust and confidence in them.[151]

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[146] *See* Weixia Gu, *The China-Style Closed Panel System in Arbitral Tribunal Formation – Analysis of Chinese Adaptation to Globalization*, 25 J. INT'L ARB. 121, 131 (2008).
[147] *See* Karl-Heinz Bockstiegel, *The Role of Party Autonomy in International Arbitration*, 52 SUM DISP. RESOL. J. 24, 25 (1997).
[148] *See* William W. Park, *National Legal Systems and Private Dispute Resolution*, 82 AM. J. INT'L L. 616, 629 (1988) (book review).
[149] *See* Bockstiegel, *supra* note 147.
[150] *See* Alexis Mourre, et.al, *Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration*, KLUWER ARBITRATION BLOG (Oct. 5, 2010), http://kluwerarbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson%e2%80%99s-moral-hazard-in-international-arbitration////.
[151] *See* Henry Gabriel & Anjanette H. Raymond, *Ethics for Commercial Arbitrators: Basic Principles and Emerging Standard*, 5 WYO. L. REV. 452, 467 (2005).

Moreover, the level of complexity in many of today's international arbitrations requires arbitrators with extensive subject matter expertise, cultural sensitivity, and a strong foundation in the conduct of an international arbitration proceeding. Although the panel under Closed-List Method is often comprised of experts in a specific area, the Open-List Method brings to the parties a greater possibility of finding their ideal arbitrators.[152] Nevertheless, opponents of the Open-List Method have cited the inexperience of the parties and their inability to make rational decisions regarding arbitrator appointment as the basis for supporting the Closed List Method.[153]

Lastly, the parties always have the expectation that their nominated arbitrator will see the case their way and will also be able to sway the other members of the arbitral tribunal.[154] Regardless of the accuracy of this widely shared understanding, under the Open-List Method there is a greater likelihood for the parties to find the arbitrators who share their view and will zealously advocate for them in the arbitration process.

However, that is unfortunately where the opponents of Open-List Method have identified potential problems that may arise, as it is the norm in international arbitration that all arbitrators be impartial and independent.[155] Some open-list arbitrators may have the mistaken belief that they have an obligation to the party that appointed them, which will impede their ability to be impartial, encourage dilatory tactics or, as some scholars have suggested, encourage them to draft a dissenting opinion in support of their parties' position.[156]

Pros and Cons of Closed-List Method

Proponents may argue that the Closed-List Method can avoid appointment bias of the open-list arbitrators in favor of the appointing party because the Closed-List Method creates an

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[152] *See* Weixia Gu, *supra* note 146, at 138 (exp).
[153] *See* Weixia Gu, *supra* note 146, at 140.
[154] *See* Gabriel & Raymond, *supra* note 151 (exp).
[155] *Id*, at 457- 458.
[156] *See* Jan Paulsson, *Moral Hazard in International Law Dispute Resolution*, Lecture, Univ. of Miami School of Law, 11–2 (Apr. 29, 2010) (transcript available at http://icsidreview.oxfordjournals.org/content/25/2/339.full.pdf).

important buffer between the arbitrators and the parties, thus removing the potential for the partiality and bias problems.[157] However, a criticism of this view is that requiring parties to appoint arbitrators from a closed list would not eliminate or significantly reduce any bias usually seen in open-list arbitrator selection. Appointment bias arises because an arbitrator believes that reappointment, by the same party or by others, depends on how much he or she favors the party that appointed him or her.[158] It is hard to see how inclusion on a closed list would provide such assurances to arbitrators that they would not consider the effect of their decisions on future appointments, unless the lists were so limited as to virtually guarantee appointments. Having a list that is small enough effectively to eliminate the parties' freedom of choice cannot be the objective.[159].

Furthermore, the Closed-List Method prevents the *ex parte* contact between the parties and the arbitrators and any confusion over their role or responsibilities towards the party that selected them.[160] This can be a significant advantage in an international arbitration, especially during enforcement proceedings where these contacts may later be used to establish the foundation for possible bias or partiality during an action to vacate an arbitral award.[161] Finally, proponents for the Closed-List Method have argued that it promotes greater coherence in decisionmaking and provides parties with the ability to access potential arbitrators quickly.[162]

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[157] *See* Jan Paulsson, *Are Unilateral Appointments Defensible?*, KLUWER ARBITRATION BLOG (Apr. 2, 2009), http://kluwerarbitrationblog.com/blog/2009/04/02/are-unilateral-appointments-defensible////.

[158] *See* Daniel R. Karon, Note, *Kicking Our Gift Horse in the Mouth - Arbitration and Arbitrator Bias: Its Sources, Symptoms, and Solutions*, 7 OHIO ST. J. ON DISP. RESOL. 315, 329 (1992).

[159] *See* Ank A. Santens, *The Move Away from Closed-List Arbitrator Appointments: Happy Ending or a Trend to Be Reversed?*, KLUWER ARBITRATION BLOG (Jun. 28, 2011), http://kluwerarbitrationblog.com/blog/2011/06/28/the-move-away-from-closed-list-arbitrator-appointments-happy-ending-or-a-trend-to-be-reversed/.

[160] *See* Hans Smit, *The Pernicious Institution of the Party Appointed Arbitrator*, COLUM. FDI PERSPECTIVES, No.33 at 2 (2010) *available at* http://academiccommons.columbia.edu/catalog/ac%3A134503.

[161] *See* Ann Ryan Robertson, *International Arbitration in the U.S.*, 45-OCT Hous. Law. 22, 22 (2007).

[162] *See* Tribunal Fédérale [TF][Federal Supreme Court] May 27, 2003, 129 ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [ATF] III 445 (Switz.).

However, there seem to be more drawbacks in connection with the Closed-List Method. The Closed-List Method can make finding a suitable arbitrator extremely difficult. Finding a suitable arbitrator among only about several hundred candidates can be difficult after one takes into account the diverse nature of disputes even within a specialized field, the avoidance of repeat appointments, and other conflicts of interest, availability, and desired qualifications in terms of technical expertise, nationality, personality, case management skills, and familiarity with the relevant legal systems.[163] While the Closed-List Method provides the parties with a readily available list of arbitrators, they still might not be the arbitrators that the parties are contemplating.
The Closed-List Method also gives the arbitration institutions too much discretion in choosing the closed panel.[164] It is very likely that some arbitration institutions would abuse such discretion to influence the outcome of the arbitration or simply serve their own interest.[165] The Closed-List Method also arguably poses a hurdle to new entrants who need to convince an arbitration institution to include them on their list before being able to receive an appointment from the arbitration institution or parties arbitrating before it.

Lastly, internal bodies at arbitration institutions are simply not in a good position to understand the issues and parties in a particular case. Institutional staffs are not as well placed to assess these aspects of an arbitrator's performance and, in considering who to appoint, they may prioritize qualities that are helpful from an administrative and institutional perspective, but may be very different from the qualities valued by parties and their counsels.

The Closed-List Method Versus Open-List Method of Aribtrator Appointment

The Closed-List Method is a practice that the legal community should continue to move away from, rather than move back to. First, it is necessary to address the bias issue that the

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[163] *See* Moses, *supra* note 17, at 116-128.
[164] *See* Michael I. Kaplan, *Solving the Pitfalls of Impartiality When Arbitrating in China: How the Lessons of the Soviet Union and Iran Can Provide Solutions to Western Parties Arbitrating in China*, 110 PENN. ST. L. REV. 769, 784 (2006).
[165] *Id.* at 785.

current party appointment system raises, but at the same time, the Closed-List Method is not the solution. It is questionable that using a closed list of arbitrators would reduce bias in party-appointed arbitrators. Any bias-reducing effect that a closed list may have is likely to be largely offset by the problems that it creates. On the other hand, the positive effects of the Closed-List Method can also be accomplished in the Open-List Method with the use of a well-maintained reference list by which the parties are not confined to. A reference list, instead of a closed list, would provide a huge convenience to the parties as well as easy access to qualified candidates, while showing more respect for party autonomy.

Second, the Open-List Method serves a broader purpose than the Closed-List Method. By appointing an arbitrator from an open pool, the parties get a sense of proximity with the arbitral process. The Open-List Method gives the parties the perception that they, not the arbitration institution, control the arbitration, which is an important difference between arbitration and litigation. But the parties' trust in the arbitral process is more than just each individual party's own trust in its own appointee.

> The parties' trust in the arbitral process is not the arithmetical addition of each individual party's own trust in its own appointee; it is more a matter of collective trust in the system as a whole, a trust which rests on a variety of factors, among which the perception of proximity and control is an important one.[166]

Third, the Closed-List Method could create a distance between the arbitrators and the users of arbitration. Closed-list arbitrators tend to pay more attention to the arbitration institutions, which all have their own degree of bureaucracy, rather than the parties. The risk would exist that arbitrators would progressively move from their current culture of services providers, close to the needs and requirements of the users, to a culture of arbitral public servants or, even worse, of arbitral politicians.[167]

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[166] Mourre et.al., *supra* note 150, at 12.
[167] *Id.* at 14.

C. Closed-List Arbitration Appointment in China

One of the most attractive advantages of arbitration is that parties can choose their own arbitrators. In the Chinese context, however, the appointment of arbitrators is controlled under a closed-panel system where parties are only allowed to appoint arbitrators listed on a closed panel that is previously appointed by the relevant arbitration institutions,[168] which is deemed a quintessential application of the Closed-List Method.

A closed-panel system is not legally compulsory, as the Arbitration Law of the People's Republic of China (CAL)[169] does not expressly provide for a closed panel system. However, upon closer examination, the closed-panel system may be inferred from Articles 11 and 13 of the CAL.[170] The last paragraph of Article 13 states that an arbitration commission must have a registered panel list of arbitrators.[171] This corresponds to Section 4 of Article 11, which requires that a Chinese arbitration commission must have its own appointed arbitrators listed on the panels to be formulated.[172] Therefore, the names on the panel lists become a pool for the parties' appointment of arbitrators when forming the tribunal in an individual case.[173] Despite the above inference, since the CAL does not provide explicitly that arbitrators must be appointed from the listed panels of the particular commission, the arbitration institutions in China still have the discretion of not only controlling the qualification of arbitrators but also the procedure of arbitrator appointment.

Generally speaking, China's closed-panel system has three distinct features. First, Chinese arbitration institutions tend to appoint their own staff members as closed-list arbitrators and these staff-arbitrators are engaged in both administrative and professional roles.[174] Such practice originates from Article 13(1) of the CAL,

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[168] Gu, *supra* note 146, at 120.
[169] Zhonghua Renmin Gongheguo Zhong Cai Fa (中华人民共和国仲裁法) [Arbitration Law of the People's Republic of China] (promulgated by Standing Committee of the Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995) http://www.jus.uio.no/lm/china.arbitration.law.1994 [hereinafter China Arbitration Law].
[170] Gu, *supra* note 146, at 128.
[171] China Arbitration Law, *supra* note 169, art.13.
[172] *Id*. at art.11(4).
[173] Gu, *supra* note 146, at 130.
[174] *Id.* at 146.

which articulates that having previous experience in arbitration work can be a basis for qualifying as an arbitrator in China.[175] And, this is regarded as an effective means to ensure the standard of its arbitrators as well as useful to control the quality of arbitration within the arbitration commission concerned.[176] Notably, these staff arbitrators are usually the powerholders and decisionmakers within an arbitration institution. Therefore, considering the powerful role of these staff arbitrators and their special relationship with the arbitration commission, non-staff arbitrators may be hesitant to dissent from the opinions of their staff counterparts to avoid breaking the harmonious relationship within the tribunal[177]

Second, besides staff arbitrators, many of the panel members are government officials or retired officials from administrative authorities[178]. The arbitration institutions usually appoint officials to the panel in order to establish good relations with the administrative authorities to better carry out their work.[179] Because government officials are substantially involved,"[the] interdependent relationship is established between the arbitration institution and the official arbitrators appointed to the commission's panel list"[180] is merely illusory.

Third, "following the dual-track legislative distinction under the CAL, separate panels are maintained for the appointment of arbitrators from domestic and foreign nationals."[181] As a result, "[t]he overwhelming understanding therefore is that preferential treatment has been reserved for parties in foreign-related arbitration."[182] Moreover, "[t]he dual-track criteria for arbitrators' appointments were aimed at internationalizing China's foreign-related arbitrations, and expediting and expanding China's economic and trade relations with other countries."[183]

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[175] China Arbitration Law, *supra* note 169, art.13(1).
[176] Gu, *supra* note 146, at 140.
[177] *Id*. at 142.
[178] *See* Hongsong Wang, *The Detriments of and Measures Against the Administrative Influence on Arbitration (2007)*, 62 BEJING ARBITRATION, 14-22.
[179] *See* Weixia Gu & Xianchu Zhang, *The China-Style Commission-Oriented Competence on Arbitral Jurisdiction: Analysis of Chinese Adaptation into Globalization*, 9 INT'L ARB. L. REV. 185, 193 (2006) (exp paren).
[180] Gu, *supra* note 146, at 141.
[181] *Id.* at 125.
[182] *Id.* at 123.
[183] *Id.*

Recently, a few institutional arbitration rules in China, which previously only permitted persons listed with a particular arbitration institution to act as arbitrators in the arbitral proceedings conducted by that same institution, have began to allow parties to pick arbitrators off the list, pending confirmation of the chairman of the arbitration institution involved. For instance, the CIETAC Rules, after the 2012 update, provide that "[w]here the parties have agreed to nominate arbitrators outside CIETAC's panel, an arbitrator so nominated by the parties or nominated according to the agreement of the parties may act as arbitrator subject to the confirmation by the Chairman of CIETAC in accordance with the law."[184]

Few institutional rules require that the arbitrator must appear on a list maintained by the institution.[185] China is perhaps one of the few jurisdictions in the world that restrict the parties' choice of arbitrators to a fixed panel maintained by the arbitration institutions. In summary, the Chinese practice of closed-list arbitrator appointment gives a strong impression of state control. It is also noteworthy that state control has been extended and stressed through the practice of institutional control by arbitration institutions.

D. Open-List Method Under the China (Shanghai) Pilot Free Trade Zone Arbitration Rules and Recommendation for Refinements

The FTZ Arbitration Rules provides a dual mechanism model for arbitrator appointment, allowing the parties to choose their arbitrators either from or outside a list of arbitrators provided by SHIAC. Pursuant to Article 27 of the FTZ Arbitration Rules, parties "may either appoint arbitrators from the Panel of Arbitrators or recommend persons from outside the Panel of Arbitrators as the

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[184] Zhongguo Guo Ji Jing Ji Mao Yi Zhong Cai Wei Yuan Zhong Cai Gui Ze (中国国际经济贸易仲裁委员会仲裁规则) [China Int'l Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules] (promulgated by CIETAC, Feb. 3, 2012, effective May 1, 2012) http://cn.cietac.org/Rules/rules.pdf, art. 24 [hereinafter CIETAC Arbitration Rules].

[185] *See* JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 234–5 (Kluwer Law Int'l, 2003) .

arbitrator."[186] Parties "may also reach an agreement on jointly recommending a person from outside the Panel of Arbitrators as the presiding/sole arbitrator."[187] This literally means that the parties will no longer be bound by a closed list of arbitrators provided by SHIAC, despite the existence of some ambiguities as to (1) whether further approval from the Chairman of SHIAC is necessary under some circumstances and (2) if such approval is necessary, what the appropriate scope of the Chairman of SHIAC's review is.

Approval From the Chairman of SHIAC

It is notable that Article 27 uses "recommend" rather than "appoint" or "nominate." Arguably recommendations always come with subsequent ratification or approval actions. However, as opposed to the CIETAC Rules that explicitly provide that any nomination of arbitrators outside its panel is subject to the Chairman of CIETAC's confirmation,[188] the FTZ Arbitration Rules were silent in Article 27 as to whether the parties' recommendation is subject to further approval from SHIAC.[189] By contrast, Article 28 of the FTZ Arbitration Rules prescribe that, in a three-arbitrator tribunal:

> [I]f either party has recommended a person from outside the Panel of Arbitrators to act as arbitrator, the party shall submit the information regarding this person to the Secretariat and the relevant person may act as an arbitrator only when the Chairman of SHIAC confirms that this is in accordance with laws.[190]

Given that only in the situation of a three-arbitrator tribunal do the FTZ Arbitration Rules explicitly require the Chairman of SHIAC to approve a party-recommended outside arbitrator and given their silence about such approval requirement in Article 27, a more general arbitrator appointment provision, it can be reasonably inferred from the relevant provisions that other than the appointment of a three-arbitrator tribunal, the Chairman of SHIAC's

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[186] FTZ Arbitration Rules, *supra* note 7, art. 27.
[187] *Id.*
[188] CIETAC Arbitration Rules, *supra* note 184.
[189] FTZ Arbitration Rules, *supra* note 7, art. 27.
[190] *Id.* at art. 28.

approval is not necessary and the parties thus can make their own choices.

The Scope of Review

Even though in a three-arbitrator tribunal scenario, the parties are still obligated to submit their recommendations of outside arbitrators to the Chairman of SHIAC for approval, while the scope of the Chairman's review is very narrow. Pursuant to Article 28, the Chairman of SHIAC only has the authority to confirm that recommendations of outside arbitrator are in accordance with the law.[191] Under such an objective standard, under no condition except that a recommendation is unlawful can the Chairman of SHIAC reject a recommendation of an outside arbitrator. Other Chinese institutional arbitration rules however, such as the CIETAC Rules, generally confer the chairman with a discretionary confirmation authority as long as he exercises it in accordance with law.[192]

The FTZ Arbitration Rules have only became effective recently, in May 2014, and could be interpreted in many different ways in the future. However, the language in the FTZ Arbitration Rules certainly reveals the intention of SHIAC to at least move away from Closed-List Method toward a more liberalized procedure of arbitrator appointment.

The FTZ Arbitration Rules are capable of going further with their liberalization initiatives. Also the apparent ambiguities need to be eliminated. Accordingly, the following are recommendations for refinement of the current FTZ Arbitration Rules with regard to arbitrator appointments.

First, the dual mechanism model is redundant. By allowing the parties to choose their own arbitrators, the FTZ Arbitration Rules have rendered SHIAC's closed list of arbitrators meaningless. The better way is to include a reference list that includes all SHIAC-appointed arbitrators as suggestions for the parties to consider and to state that the parties are free to select other arbitrators not on the

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[191] *Id.*
[192] CIETAC Arbitration Rules, *supra* note 184, art. 24.

list. The Hong Kong International Arbitration Centre (HKIAC), for example, has established a panel of arbitrators selected for high expertise and professionalism.[193] Besides the panel members published on its website, the HKIAC also maintains a database of other arbitrators who, although not meeting the Panel Selection Committee's criteria for inclusion on the panel, may yet be suggested to parties in suitable cases requiring specialist expertise.[194]

As such, parties may have a larger pool from which they can draw their prospective arbitrators. Most significantly, however, the parties are allowed to appoint arbitrators from outside the institution's panels and databases.[195] Thus, the principle of party autonomy is both observed and balanced against an institutional culture of maintaining a pool of high-standard arbitrators available for the parties to select from.

In addition, the FTZ Arbitration Rules need to be revised to explain the meaning of a "recommendation" and to make clear whether further approval from the Chairman of SHIAC is required. It matters because the existence of an approval requirement in the FTZ Arbitration Rules will certainly discount the function of the Open-List Method.

Lastly, as the Open-List Method is relatively new to the parties conducting institutional arbitration in China, it would help the inexperienced parties to properly appoint their arbitrators if the FTZ Arbitration Rules included detailed guidelines of the qualifications that a competent arbitrator should possess in order to produce a fair judgment for both parties. This would not only promote the principle of party autonomy, but would also help the arbitration institutions in China to better perform their administrative duties.

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[193] *See Guidelines on Inclusion on the HKIAC Panel of Arbitrators*, HONG KONG INTERNATIONAL ARBITRATION CENTER, http://www.hkiac.org/en/arbitration/arbitrators/guidelines-for-inclusion-on-hkiac-panel-and-list-of-arbitrators.

[194] *List of Arbitrators*, HONG KONG INTERNATIONAL ARBITRATION CENTER, http://www.hkiac.org/en/arbitration/arbitrators/list-of-arbitrators (last visited Dec. 3, 2014).

[195] *Id.*

IV. CONCLUSION

The implications of both emergency arbitrator procedure and open-list arbitrator appointment included in the FTZ Arbitration Rules are groundbreaking. One implication is that it is the first time that an arbitration institution in China has ever used the Open-List Method in its arbitrator appointment rules, suggesting a possible trend of more arbitration institutions in China to follow suit. Another implication is that emergency arbitrator procedure and open-list arbitrator appointment appear to be just two outstanding examples of several breakthroughs SHIAC has made in the FTZ Arbitration Rules, nearly all of which were carefully made based on generally accepted international arbitration practice and principles. To some extent, this illustrates the fact that SHIAC is working hard to accommodate the expectations of foreign investors to have a modern, consistent, and fair dispute resolution system in Shanghai FTZ with a more diversified pool of arbitrators and thereby strengthen confidence in investing in Shanghai FTZ.